2. EVIDENCE—DECLARATIONS OF SERVANTS—CONCLUSIVENESS ON MASTER.

Declarations of a railroad conductor as to the killing of an animal on the track of the railroad, not made until two days after the animal was killed, are not admissible to establish the railroad's liability for the killing.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 910, 912.]

3. DAMAGES—INJURY TO PROPERTY—ABSENCE OF MARKET VALUE.

Where an animal for whose death damages are sought had no market value, its extrinsic value may be shown, and recovery may be had on the basis of that value.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 269.]

Appeal from District Court, La Salle County; E. A. Stevens, Judge.

Action by Orville Carr, by his next friend, J. T. Carr, against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

N. A. Stedman, John M. King, and C. C. Thomas, for appellant. W. A. H. Miller, for appellee.

FLY, J. Orville Carr, a minor, through his next friend, J. T. Carr, sued appellant to recover damages for a jack killed on the track of appellant. The suit was brought in a justice's court, and appellee recovered $30. The cause was then appealed to the district court, where appellee recovered a verdict and judgment for $35.

The evidence tended to show that the jack was struck on an uninclosed portion of appellant's road between two cattle guards, and was dragged across a cattle guard into the inclosed portion of the railroad, where his dead body was thrown from the track. If the animal was struck at a public crossing, as the facts tended to show, the mere fact of the killing would not be sufficient to render appellant liable, but the burden rested upon appellee to prove that the animal was negligently struck and killed. There was no evidence whatever of negligence upon the part of appellant, unless it was contained in certain declarations made by a conductor of a freight train, which might have led the jury to believe that the animal was chased by the train until it ran him down and killed him. We do not think that the declarations of the conductor showed negligence in such a way as to justify a verdict, had the declarations been admissible, but it was the only evidence that even squinted at negligence. The declarations of the conductor, however, were not admissible in evidence, as they were made at least two days after the animal was killed. The rule as to evidence of declarations or admissions of an agent as against the principal is that they must have been made at the time of the occurrence, and must have been within the scope of his authority. As said in Railway v. Ragsdale, 67 Tex. 24, 2 S. W. 515: "The rule is that the declarations of the agent are only admissible as to matters within the scope of his authority, and only as to transactions going on, and not as to past events." That rule is the universal one.

It is contended by appellee that there was sufficient evidence to sustain the verdict independent of the declarations, but we do not think so. Even with the declarations to supplement the other testimony the verdict could not be sustained. The evidence offered by appellee showed that the animal must have been struck in a space between two cattle guards, which had been left unfenced for a public road, and the court might, under the state of facts, have assumed that the animal was struck at the place mentioned, and should have instructed the jury to return a verdict for appellant in the absence of proof of negligence. The charge as to the burden of proving that the road was fenced or that the animal was killed at a place that could not be fenced was therefore unappropriate and calculated to mislead the jury. If the animal had no market value, it was permissible to prove his intrinsic value, and the court did not err in informing the jury that they could, in the event of the animal having no market value, find for his fair and reasonable value as shown by the evidence. If appellant desired any amplification of the charge, it should have asked it.

There was not sufficient evidence to justify a submission of the case to the jury, and this court would reverse and render for appellant, but that it is apparent that appellee was led by the action of the court into the belief that further testimony was not necessary, and he may be able to fully develop the case on another trial.

The judgment is reversed, and the cause remanded.

MANSFIELD et al. v. WARDLOW.*

(Court of Civil Appeals of Texas. Dec. 20, 1905. Rehearing Denied Jan. 31, 1906.)

1. TRUSTS—MANAGEMENT OF TRUST ESTATE—POWER OF SALE IN INSTRUMENT CREATING TRUST.

Where the conditions on which a trustee may sell the trust estate are designated in the instrument creating the trust, the trustee can convey the estate only in the manner prescribed.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 243.]

2. SAME—RIGHT TO MORTGAGE.

A mortgage executed by a trustee under power to sell and convey only is void.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 283, 284.]

3. SAME—INSTRUMENT CREATING TRUST—POWER OF TRUSTEE TO MORTGAGE.

A holder of land certificates executed an instrument which recited that a third person had furnished money with which to buy the land and which stipulated that the patents should issue in the name of the holder, and that when the land had been sold on terms acceptable to the third person the holder should execute a deed and deliver it to the third person, who should collect the money on the sale and

*Writ of error denied by Supreme Court.

reimburse himself for the amount advanced. *Held*, that the holder of the certificates on receiving patents to the land in his own name had no authority to mortgage the same as against the rights of the third person, for the limitation on the right to sell was valid, and if invalid the third person, as cestui que trust, was entitled to the actual possession of the property.

4. SAME—VIOLATION OF DUTY BY TRUSTEE—LIABILITY OF PERSON RECEIVING TRUST PROPERTY.

One receiving property with knowledge that it is subject to a trust, and that it has been transferred in violation of the duty of the trustee, takes it subject to the rights not only of the cestui que trust, but also of the trustee to reclaim possession.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 529.]

5. SAME—CONSTRUCTIVE NOTICE OF TRUST.

The record of an instrument creating a trust is constructive notice of the existence of the instrument, and of its contents, together with rights created by it.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 547.]

6. SAME—POWER TO MORTGAGE—NOTICE OF TRUSTEE'S POWER.

A holder of land certificates executed an instrument which recited that a third person had furnished money with which to buy the land and which stipulated that the patents should issue in the name of the holder and that when the land had been sold on terms acceptable to the third person, the holder should execute a deed and deliver it to the third person who should collect the money on the sale and reimburse himself for the amount advanced. The instrument was recorded. *Held*, that one claiming the land under a mortgage executed by the holder after receiving patents to the land, took with notice of the invalidity of the mortgage, and his title was inferior to the title of one claiming under deeds subsequently executed by the holder and the third person.

7. APPEAL—PRESUMPTIONS.

In the absence of proof that the third person had been reimbursed for the money advanced, so that the holder might mortgage or sell regardless of the stipulation in the instrument, the court on appeal would, in support of the judgment adjudging the mortgage invalid, determine the rights of the third person only from the instrument.

Appeal from District Court, Pecos County; B. C. Thomas, Judge.

Action by Dudley Wardlow against W. H. Mansfield and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Eugene Williams, J. F. McKenzie, and Fiset & McClendon, for appellants. Walter Gillis, for appellee.

NEILL, J. We adopt the following statement of the nature and result of this suit from appellants' brief: "Appellee, plaintiff below, sued appellant W. H. Mansfield, in trespass to try title for three sections of land in Pecos county. Appellant Mansfield impleaded as his immediate warrantors appellants India Myrtle Ellis Harrell and David Harrell, who in turn impleaded their immediate warrantors appellants Amanda M., C. G., Emmette A., and Leigh Ellis. There was a trial before the court resulting in a judgment in favor of appellee for the land, and in favor of appellant Mansfield against appellants Harrells for $1,250, and in favor of appellants Harrells against appellants Ellises for $1,250, said money judgments being upon warranties. Upon application of appellants the court filed conclusions of law and fact. Exceptions were taken by appellants both to the judgment of the court and the conclusions of law and fact and notice of appeal given to this court. No exceptions, however, were taken to so much of the judgment as found in favor of defendants against codefendants upon warranties and no objection to that part of the judgment is made, it being admitted by all parties that if plaintiff is entitled to recover, then defendants are liable on their warranties to the extent of 50 cents per acre and interest."

Conclusions of Fact.

The land in controversy, consisting of three sections in Pecos County, Texas, described as follows:

Abstract No.	Survey No.	Block No.	Cert. No.	Original Grantee.
3,052	37	R-3	4,398	G. C. & S. F. Ry. Co.
2,958	43	R-3	4,401	G. C. & S. F. Ry. Co.
2,959	45	R-3	4,402	G. C. & S. F. Ry. Co.

—was patented to J. S. Daugherty in April, 1884, by virtue of certain railroad certificates issued on September 28, 1881, which had been transferred by the original grantee to said Daugherty by instrument executed in November, 1881, and filed in the general land office in April, 1882. On April 11, 1883, after the location of the land in controversy, but prior to the issuance of patents, J. S. Daugherty executed the following instrument, which was duly acknowledged, and on the 29th day of December, 1884, duly recorded in Pecos county records:

"State of Texas, County of Dallas. Know all men by these presents: That, whereas, William H. Thomas, of the aforesaid county and state, has heretofore furnished to J. S. Daugherty of the same place from time to time money with which to buy and pay surveying and filing fees on 199 alternate sections of land scrip for 640 acres each, described as follows, to wit: Nos. 1,629 to 1,728, issued to the East Line & Red River Railroad Company by the Commissioner of the general land office on the 6th day of May, 1881; also G. C. & S. F. Ry. Co. scrip Nos. 4,194 to 4,206, and Nos. 4,213 to 4,230, and Nos. 4,378 to 4,393, all issued by said commissioner to said company October 26, 1881; also Nos. 3,887 to 3,893, issued by said commissioner to the G. C. & S. F. Ry. Co., September 30, 1881; also Nos. 4,394 to 4,432, issued by said commissioner to the G. C. & S. F. Ry. Co. November 21, 1881. The sum of money heretofore furnished by the said Thomas for this purpose amounting to $9,950, and the said Thomas is yet to furnish the sum of $1,194 with which to pay the patent fees; and, whereas, the said Daugherty has superintended the location of said land scrip and has returned it, together with the field notes, to the general

land office, and is to use his best efforts to sell the land so located for as high a price as possible: Now, therefore, it is agreed by and between the said Thomas and Daugherty that in order to facilitate the sale of said lands, that the patents from the state of Texas shall issue in the name of said Daugherty, and that when either or both can succeed in making a sale of all or a portion of said lands at such a price, and on such terms, as will be acceptable to both; that the said Daugherty shall execute to the purchaser a satisfactory deed to the land and deliver it to the said Thomas, who shall collect the money on the sale and out of the proceeds thereof shall first reimburse himself in the amount which he has furnished the said Daugherty for the purpose aforesaid, and the remainder, after deducting the amount so expended for the scrip, surveying, filing and patent fees (which will amount to $56 per scrip), shall be divided equally between them, one-half to the said Thomas or his legal representatives and one-half to the said Daugherty or his legal representatives; and it is understood by and between the parties to this agreement that if the said Daugherty should be indebted to the said Thomas in any sum when they realize from the sale of said lands that the said Thomas shall appropriate out of the interest of the said Daugherty in said sale as shall appear from this contract so much thereof as may be necessary to pay the said Thomas the amount due him by the said Daugherty. Witness my hand this 11th day of April, A. D. 1883. J. S. Daugherty."

Plaintiff claimed title to the land under the following conveyances: J. S. Daugherty, on the 19th day of April, 1889, by a warranty deed duly executed, acknowledged, and delivered by him, conveyed to Dudley Wardlow, the plaintiff herein, said survey No. 37, said deed being filed for record in the office of the county clerk of Pecos county, Tex., February 19, 1891. J. S. Daugherty on May 15, 1889, by a warranty deed duly executed, acknowledged, and delivered by him, conveyed to John B. Cox said surveys 43 and 45, said deed being filed for record in the office of the county clerk of Pecos county, Tex., January 4, 1890. Plaintiff proved up a regular chain of title by deeds and inheritance from John B. Cox to said surveys 43 and 45, vesting plaintiff with all the title of said John B. Cox to said surveys 43 and 45. On April 27, 1891, said W. H. Thomas, by a deed duly executed, acknowledged, and delivered by him, conveyed to Addison Wardlow said surveys Nos. 37, 43, and 45, said deed being filed for record in the office of the county clerk of Pecos county, Tex., on the 25th day of May, 1891. And plaintiff proved up a regular chain of title by deeds and inheritance from said Addison Wardlow to said three surveys, vesting in plaintiff all the title to said Addison Wardlow in said three surveys.

Defendants proved up a deed of trust executed by J. S. Daugherty on July 28, 1885, and recorded in Pecos county deed records August 3, 1885, conveying the land to S. Robertson, as trustee, to secure the payment of a promissory note of said Daugherty, payable to the order of Nelson & Noel three years after date for the principal sum of $10,000, besides interest notes. This deed of trust provided for the sale of the property by the trustee in Dallas county, and also for the appointment of a substitute trustee. Default was made in the payment of the notes at maturity, and a substitute trustee regularly appointed, and the land was sold at two sales by said trustee to W. O. Ellis, the first of said sales being made in Pecos county on September 3, 1889, the deed being duly recorded in Pecos county on October 23, 1889, and the second sale being made in Dallas county on May 11, 1891, and the deed recorded in Pecos county May 29, 1891. All the proceedings in connection with said sales were conceded to be regular with this exception; that plaintiff did not admit the right of the trustee to make sale in Pecos county. Defendant Mansfield proved up a regular chain of title to all the land in question from said W. O. Ellis. A. Wardlow and his family moved to Pecos county and established their residence on section 20, block R-3 about 300 varas from the east line of survey 20, same being about six miles southwest from section 37, about seven miles in same direction from section 43 and about eight miles southwest from section 45 in controversy. He continued to reside with his family at that place up to about June, 1891, when he died and was buried on section 20, and soon after his death his family moved away from Pecos county and has never resided there since. During the time of such residence on the section, Wardlow was engaged in ranching, owning cattle, horses, and sheep, which grazed on the land in controversy, when there was water on it or adjoining lands. During the time of his residence up to the time of removal of his family, none of the land in controversy was fenced.

In support of the defendants' title the following facts were admitted to be true: Said J. S. Daugherty on July 28, 1885, executed a deed of trust (which was duly recorded in the Pecos county deed records on August 3, 1885), conveying all the lands described in plaintiff's petition to S. Robertson, as trustee, to secure the payment of a certain promissory note of said date executed by said J. S. Daugherty, and payable to the order of Nelson & Noel three years after date, for the principal sum of $10,000, besides interest notes. Said deed of trust provided for sale of said property by the trustee in Dallas county, Tex., upon default in the payment of said notes, and for the appointment of a substitute trustee by the holder of said notes at the time of such default, in case of refusal of said trustee to act. Default was made in the payment of said notes at

maturity, the holder of said notes at the date of such default being Daniel R. Sortwell, who, after said default, transferred said notes to W. O. Ellis. Subsequent to said default and said transfer to said W. O. Ellis, demand was made by said Sortwell and said Ellis upon said S. Robertson to sell said land as provided in said deed of trust; said S. Robertson refused to act as trustee, and thereafter by instrument in writing duly executed by said W. O. Ellis and Daniel R. Sortwell, G. H. Pendarvis was duly appointed substitute trustee to all the rights, duties, and powers of said S. Robertson, by virtue of said trust deed. On September 3, 1889, G. H. Pendarvis, as such substitute trustee, made sale of all the property sued for herein, such sale being made in Pecos county, Tex., to W. O. Ellis, and deed was executed by said subtrustee to said W. O. Ellis on said date, conveying all of said land; and said deed was duly acknowledged and recorded in the records of Pecos county on October 23, 1889; thereafter said G. H. Pendarvis made another sale of all said land under said trust deed, said sale being made in Dallas county, Tex., on May 11, 1891, to said W. O. Ellis, and on the same date G. H. Pendarvis, as such subtrustee executed to said W. O. Ellis deed for all said lands, which deed was fully acknowledged and recorded on May 29, 1891, in Pecos county, Tex. The refusal of said S. Robertson to act as such trustee, the appointment of the said G. H. Pendarvis as such substitute trustee, the sale of said property by said substitute trustee, both in Pecos and in Dallas counties, and said conveyances thereunder by said subtrustee, were admitted to be regular and in full compliance of all particulars with the said deed of trust, saving and excepting that plaintiff did not admit the right of said substitute trustee to make a sale of said property in Pecos county. The defendants by deeds and inheritance showed a regular chain of title from W. O. Ellis to the defendants, of all the title of said W. O. Ellis in all the land sued for herein.

Plaintiff's suit was filed 1902. It was admitted that the judgment of the court herein as to recovery of damages and also as to recoveries among the defendants upon warranties was supported by the evidence.

Upon these undisputed facts the trial court filed the following:

Conclusions of Law.

"1. When the patent to the land in controversy issued to J. S. Daugherty he acquired the legal title to the land, but he held the same in trust for Thomas to the extent of Thomas' interest in the land.

"2. I am inclined to think that by the terms of the agreement between Thomas and Daugherty of the date April 11, 1883, Thomas had the equitable title to the whole of the land in controversy, and that Daugherty only had the right to one-half of what remained of the proceeds of the sale of the land after deducting the amount of money expended by Thomas as stated in the agreement.

"3. The agreement between Thomas and Daugherty places the following restrictions upon Daugherty's right to alienate the land: (1) That Daugherty cannot sell the land, except at such a price and upon such terms as are acceptable to both Daugherty and Thomas. (2) That, when the land or any part of it is sold, Daugherty shall execute a deed to the land and deliver it to Thomas, who shall collect the money on the sale and apply the money in the manner stated in the agreement. (3) In my opinion Daugherty had no power under this agreement to mortgage the land, but could only mortgage his interest in the proceeds of the land. I think all these restrictions upon Daugherty's right to alienate the land are valid in law.

"4. If I am correct in my interpretation of the agreement between Thomas and Daugherty; Daugherty had no power, by executing a deed of trust to Sawnie Robertson, to affect Thomas' interest in the land, and consequently W. O. Ellis (under whom W. H. Mansfield claims title) did not acquire title to the land by his purchase at the foreclosure sales under said deed of trust, but at most only acquired the interest of Daugherty, which was an interest in the proceeds of the land.

"5. But for the said agreement of April 11, 1883, I would hold that W. H. Mansfield has a valid title to the lands in controversy. In the absence of that agreement Daugherty would have had a fee simple title to the land free from any equitable interest in Thomas, and his deed of trust to Robertson, trustee, would have been valid, and W. O. Ellis would have acquired a fee simple title to the land by his purchase at foreclosure sale, and Mansfield now has the same title that Ellis had, but I hold that under the terms of said agreement Daugherty had no authority to execute the deed of trust to Robertson, and that no rights were acquired under said deed of trust.

"6. I hold that under the agreement of April 11, 1883, Thomas had an equitable interest in the land in controversy, and not merely a lien on the land, nor an interest in the proceeds of the land, and that the agreement of 1883 placed certain restrictions (those stated in my third conclusion of law) upon Daugherty's power to alienate the land. Those restrictions were valid, and therefore Daugherty had no power to execute such deed of trust to Sawnie Robertson as would interfere with the carrying out of said agreement, and, notwithstanding said deed of trust was executed which purports to convey the land, the title to the land remained as if the deed of trust had never been executed. By the execution of the deeds from J. S. Daugherty to Dudley Wardlow [plaintiff], and John B. Cox, and from Thomas to A. Wardlow (plaintiff having acquired all their

interest), plaintiff acquired title to the land in controversy, and I base this conclusion upon the following and other reasons: (1) Daugherty had authority to sell and convey this land under certain conditions, and in the absence of proof to the contrary, it will be presumed that the conditions existed which authorized him to make the conveyance which he did make, and especially do I think this presumption should be indulged since the execution of the deed by Thomas to A. Wardlow. (2) If my second conclusion of law is correct, then the deed from Thomas to A. Wardlow alone would have conveyed the equitable title to the land.

"7. I am of the opinion that Thomas had the equitable title to all the land in controversy. I am further of the opinion that he was not required to assert his title to said land within 10 years; that laches, or the defense of stale demand will not defeat his title; but that he can assert his title at any time until barred by the statutes of limitation.

"8. Plaintiff has title to the land sued for and is entitled to recover the same under the pleadings and evidence in this suit."

Under our view of this case, we deem it unnecessary to pass upon all the questions involved in the conclusions of law enunciated by the trial court. For in our opinion the pivotal question in the case is did Daugherty have authority to mortgage the land in controversy? If he did not, then, regardless of what may have been the character of title or interest he or W. H. Thomas may have had in the premises, appellants acquired no title under the mortgage or deed of trust of July 28, 1885, from J. S. Daugherty to Sawnie Robertson. As is observed by counsel for appellants in their argument: "It is clear that Daugherty held the legal title to the land, impressed with an express trust, evidenced by an instrument in writing, duly executed and placed upon record, the terms of which were clearly defined." This trust was expressed by the instrument of April 11, 1883, and only empowered Daugherty, the trustee, when either he or Thomas should succeed in making sale of all or a portion of the lands on terms acceptable to both, to execute to the purchaser a satisfactory deed to the land and deliver it to said Thomas, who should collect the money on the sale, and out of the proceeds thereof first reimburse himself, etc. When there is a designation of the conditions upon which a trust estate is to be sold, the trustee is not authorized to convey any title except in the manner provided for in the trust instrument; e. g., if the trust instrument authorizes a sale upon consent of the beneficiary, that consent is essential to the validity of a sale to a party with notice. Chapter "Express Trusts and Powers." § 184. It is, however, a general rule that a power to sell and convey real estate does not confer a power to execute a mortgage, and that a mortgage executed under a power to sell and convey only is void. Jones on Mort. § 129; O'Brien v. Flint, 74 Conn. 503, 51 Atl. 547; Freeman v. Bristol Sav. Bank (Conn.) 56 Atl. 527; Kissam v. Dierkes, 49 N. Y. 602; O'Connor v. Waldo, 83 Hun, 489, 31 N. Y. Supp. 1105; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Loring v. Brodie, 134 Mass. 453. From the instrument, the restrictions announced by the trial court in its conclusions of law upon Daugherty's right to alienate the land are as clearly shown as if they had been indubitably expressed. That this limitation on his authority is valid we have not the slightest doubt. If, however, it were not, we fail to perceive how it would aid appellants' cause. In such event the consequence would be to show, as held by the trial court, that Thomas was the equitable owner of the land, and Daugherty a naked trustee without power, holding the legal title for him. For the agreement would show that the land was purchased with Thomas' money and, if the power to sell with the limitation upon it were invalid, the purpose for which it was given would fail with it, the residuum being a simple or dry trust which would entitle Thomas, as the cestui que trust, to the actual possession and enjoyment of the property, with the right to dispose of, or to require Daugherty, as the trustee, to execute such conveyance of the legal title as he should direct. And of this, the record of the instrument would furnish every one with constructive notice.

Any person who receives property knowing that it is subject to a trust, and that it has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the cestui que trust, but also of the trustee, to reclaim possession of the property. 1 Story, Eq. Jur. (13 Ed.) § 400, p. 406; Williamson v. Brown, 15 N. Y. 354; Baker v. Bliss, 39 N. Y. 70; Bank v. Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139. A person who purchases an estate, although for a valuable consideration, with notice of a prior equitable right, makes himself a mala fide purchaser, and will himself even be held a trustee for the benefit of the person whose right he sought to defeat. Pom. Eq. Jur. § 659. The record of the instrument of April 11, 1883, was constructive notice to appellants and those under whom they claim, not only of the existence of such instrument, "but of its contents, and of all estates, rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions." Pom. Eq. Jur. § 655. When these principles are applied to the facts of the case under consideration, it follows that the deed of trust from Daugherty to Sawnie Robertson was, as to the rights of Thomas, absolutely void; that appellants, whose only claim of title to the premises is through such

mortgage, were charged with notice of its invalidity; that appellants took the property subject to the rights of Thomas expressed in the instrument declaring the trust and the right of Thomas, as well as of Daugherty, the trustee, to reclaim it; that appellants having taken subject to such rights, Daugherty, in the exercise of such right, by his deed of April 19, 1889 to Dudley Wardlow invested him with full title, legal and equitable, to surveys 43 and 45 of the lands in controversy, and W. H. Thomas, in the exercise of such rights, by his deed of April 29, 1891, to Addison Wardlow invested him with the equitable title to surveys 37, 43, and 45, comprising all the lands in controversy; that as appellee holds under a regular chain of title from such deeds down to himself his title is superior, both in law and equity, to appellants' and entitles him to recover the premises from them.

In view of these consequences, we cannot perceive that the doctrine of laches or stale demand has any application. If, after Thomas had been reimbursed the money referred to in the agreement as paid by him, Daugherty would have had an interest in the lands which he could mortgage or sell regardless of the stipulations in the agreement, appellants should have alleged and proved such matters as would show such interest. In the absence of such allegations and proof, it should be presumed in favor of the judgment that such interest did not exist; and that the validity of the mortgage to Robertson, and the rights of those claiming under it, should be tested by the agreement alone, regardless of extraneous facts, though they may have occurred, neither alleged nor proven.

There is no error in the judgment, and it is affirmed.

FLYNT et al. v. TAYLOR et al. *

(Court of Civil Appeals of Texas. Dec. 16, 1905. Rehearing Denied Jan. 20, 1906.)

1. EVIDENCE — CERTIFIED COPIES—PROOF OF ORIGINAL—NECESSITY.

Rev. St. 1895, art. 2308, requiring the Commissioner of the General Land Office to furnish any person with a certified copy of any paper or document in his office, and providing that such certified copy shall be received in evidence in all cases in which the original would be evidence, does not make certified copies of letters written to the Commissioner competent evidence in the absence of proof that the letter from which the copy is made was written by the person by whom it purports to have been written.

2. NEW TRIAL—GROUNDS—SURPRISE.

Where a party is surprised at the exclusion of evidence offered by him, he should apply for a continuance, and, failing to do so, is not entitled to a new trial on the ground of such surprise.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 178.]

3. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of evidence tending to show the authority of an agent is not a material error, where such authority is otherwise undisputably established.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194–4199.]

4. TRIAL — VERDICT— IMPEACHMENT—AFFIDAVITS OF JURORS.

The verdict of a jury in a civil case cannot be disputed by affidavits of jurymen as to what took place during their deliberations.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 813.]

5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE —IMPEACHMENT OF WITNESSES.

Where a cause has been pending for several years and has been tried several times, a new trial will not be granted on the ground of alleged newly discovered evidence, showing that the reputation for truth of a party who testified on previous trials is bad.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 221–223.]

6. SEQUESTRATION—LIABILITY ON BONDS—RENTS.

Where a party takes possession of land under sequestration process, and judgment is subsequently rendered against him, the principal and sureties on his replevy bond are liable for rents collected by him after taking possession.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sequestration, §§ 43, 47.]

7. PRINCIPAL AND AGENT—NOTICE TO AGENT —CONCLUSIVENESS ON PRINCIPAL.

Knowledge of a local agent for a loan company, whose business is to take applications for loans, to personally inspect the security offered and report on the same, of the fictitious character of a loan transaction reported by him is notice to the company.

Appeal from District Court, Wilbarger County; S. P. Huff, Judge.

Action by W. Q. Flynt and others against A. Jones Taylor and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

At the September term of the district court of Wilbarger county, 1898, the appellant, W. Q. Flynt, instituted this suit against A. Jones Taylor, T. H. Wellsford, and B. P. McFarland. The object of the suit was to recover the title and possession of a tract of land containing 130 acres, situated in Wilbarger county, Tex., and being a part of survey No. 14, block 12 of the H. & T. C. R. R. Co.'s surveys, certificate No. 607; said land being specifically described by metes and bounds. The Texas Loan Agency was vouched into the suit as a warrantor of the appellant, W. Q. Flynt, and on August 29, 1899, it filed its answer.

Frost & Neblett and J. R. Tolbert, for appellants. H. Snodgrass, for appellees.

STEPHENS, J. This case has been before this court a number of times already; the previous appeals, however, having been by those who are now appellees. See 59 S. W. 1126, 67 S. W. 347, and 77 S. W. 964. The ground of recovery so often asserted unsuccessfully by appellees, but which finally prevailed in the judgment appealed from, may be briefly stated thus: The appellees applied for a loan on a tract of land in Wilbarger county to appellant Texas Loan Agency

*Writ of error granted by Supreme Court.

through its local agent at Vernon, F. S. Kerr, who had authority to take applications from parties desiring loans and send them in to the home office at Corsicana, and whose duty it was to personally inspect the security offered, and send in his report on the same with the application and abstract of title. This agent at first refused to make the loan on account of the homestead exemption to which the appellees were thought to be entitled and the existence of which the verdict, upon sufficient evidence, establishes. In order to remove this obstacle, the agent suggested that the appellees make a transfer to R. S. Taylor, the father of A. Jones Taylor, and that the loan be applied for in his name, which was done; all parties acting in good faith, but in the mistaken belief that this method of making the loan would be legal and valid. The loan company, however, had no notice of the real facts, except through their agent, Mr. Kerr, and made the loan in the belief that the land really belonged to R. S. Taylor. The appeal has been submitted to us on numerous assignments of error, presented in a brief of over 100 printed pages, bringing before us in various forms the questions passed upon in former appeals, and also some additional questions. These assignments have all been carefully examined, and we have reached the conclusion that none of them should be sustained, those raising again the questions heretofore passed on, for the reasons given in former opinions, and the others, or such of them as seem to require notice, on grounds now to be stated.

Appellants contended on the trial that R. S. Taylor was the real owner of the land mortgaged, and in support of this contention offered in evidence certified copies from the Commissioner of the General Land Office of letters purporting to have been written by R. S. Taylor to the Land Commissioner, both before and after the date of the application for the loan, in furtherance of an effort on his part to have the land patented; but these certified copies were excluded on the objection that no proof had been offered that R. S. Taylor had written the letters, which objection we think was properly sustained. The statute relied on as authority for the admissibility of these certified copies (art. 2308, Rev. St. 1895) was never intended to make a copy of a letter finding its way into the land office evidence against the person whose name is signed to it, on the mere certificate of the commissioner that such letter is on file in his office, when the original itself, if offered, would not be admissible without proof, by circumstances or otherwise, that it had been written by the person whose name it bears.

In the motion for new trial, appellants for the first time pleaded surprise at the ruling above complained of, which came too late. To avail themselves of this principle, they must have taken steps to continue the case instead of taking chances on the result of a trial.

There was no material error in excluding the letters written from the home office of the loan company to its local agent at Vernon, which were offered by appellants mainly for the purpose of showing the extent of the local agent's authority, since such authority as he undisputedly had, indicated by the statement above made, made his knowledge notice to the company, acting, as he evidently did, in good faith towards the company.

In the motion for a new trial, appellants made an attack on the verdict of the jury by affidavits of some of the jurymen as to what took place in their deliberations, but we regard the rule forbidding the impeachment of verdicts in civil cases in this manner to be too well settled to require discussion. This case was tried before the enactment of our present statute on that subject.

An effort was also made to obtain a new trial on the ground of newly discovered evidence, consisting of numerous affidavits of citizens of Wilbarger county, tending to show that the reputation of A. Jones Taylor for truth was bad, but we think this case had been too often tried to excuse appellants for not discovering evidence of this character sooner.

Considerable stress is laid in appellants' brief on the objection to the charge, that, in submitting the issue of Kerr's knowledge of the simulated character of the transfer from A. Jones Taylor and wife to R. S. Taylor, the use of the word "notice" submitted an issue not raised by the pleadings; but we think that nothing short of a strained construction of the charge would warrant the inference that the court meant to submit constructive knowledge on the part of Kerr as a distinct issue in the case. Construed naturally, the charge used "knew" or "had notice" interchangeably. Certainly the charge was not misleading in this respect when applied to the facts of this case. Besides, the allegations of the petition seem to have been broad enough to cover the issue.

The charge of the court instructing the jury what would or would not constitute a homestead is criticised, and possibly may not be entirely free from objection, but in view of the decisions of our Supreme Court on that subject and the testimony developed on the trial, we find nothing in the charge to warrant a reversal of the judgment.

Error is also assigned to the charge of the court instructing the jury to find against the principal and sureties on the replevy bond the amount of the rents collected by appellant Flynt after he obtained possession of the land under the sequestration process. But this was in accordance with the statute on that subject.

The loan company sought to be subrogated to the rights of the state and others because of the fact that the land, which was school land, had been paid for out of the proceeds

of the loan, but the court held against this contention, on the ground of limitation, and we are not prepared to condemn the ruling. It is not denied that sufficient time had elapsed to bar the claim, but the contention is that the loan company should have been excused for not sooner discovering the fictitious character of the loan transaction. The answer to this is, however, that through its agent, Mr. Kerr, it had notice from the date of the loan. Besides, the facts of this case would seem not to warrant the claim of subrogation.

As to the assignments raising questions considered on the former appeals, it is sufficient to state that we approve the charge submitting the issues, and the court's action in refusing to give special charges, and we also approve the verdict finding in favor of the appellees on such issues; there being evidence to sustain the verdict.

The judgment is therefore affirmed.

(41 Tex. Cv. A. 139)

HARRIS v. CAIN et al.

(Court of Civil Appeals of Texas. Dec. 11, 1905.)

1. BILLS AND NOTES—ACTION—EVIDENCE.

On the issue whether plaintiff purchased notes from defendant without notice that he was selling them as the agent of a third person, evidence examined, and *held* to support a finding that plaintiff purchased the notes from defendant in his individual capacity, making him personally liable for any misrepresentations inducing the purchase.

2. SAME—JOINDER OF CAUSES OF ACTION.

A person purchasing a note on the representations of the transferror that the same was secured by a vendor's lien may, in an action on the note, insist on the lien and assert that, in the event the court finds that no lien existed, he may have judgment against the transferror for the amount paid him for the note on the faith of his representations that the same was secured by a lien, the cause of action against the transferror being connected with, and growing out of, the cause of action asserted against the maker so that both may be asserted at the same time and in the same pleading.

3. SAME — PETITION — LIABILITY OF TRANSFERROR.

The petition in an action on a note, by a purchaser thereof, against the maker and the transferror alleged that plaintiff purchased the note from the transferror without notice of the facts showing that it had been paid, and a vendor's lien securing it discharged, that the transferror warranted the genuineness of the note and of the vendor's lien securing it and prayed for judgment against the transferror if the note had been paid and the lien satisfied. *Held*, that the transferror was primarily liable to plaintiff for the consideration paid for the note, in the event that his representation that it was secured by a vendor's lien was not true, and an allegation of the insolvency of the maker was not necessary.

4. SAME—PARTIES.

In an action on a note the petition prayed for a recovery against the maker, with foreclosure of a vendor's lien against him. The answer alleged that the note had been paid and the lien discharged before it was sold to a third person who sold it to plaintiff. Plaintiff filed a supplemental bill denying the allegations of the answer, and alleged that he purchased the note from the third person without notice of the facts averred and that the third person warranted the note and the lien, and prayed for judgment against him on the facts averred in the answer being found true, and prayed that he be made a party to the suit. *Held*, that the third person was properly made a party defendant.

5. ACTION—JOINDER.

Two causes of action connected with each other, or growing out of the same transaction, may be properly joined and all the parties against whom plaintiff asserts a common or an alternative liability may be joined as defendants.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 490–510.]

6. LIMITATION OF ACTIONS — FRAUD AS GROUND FOR RELIEF—DISCOVERY OF FRAUD.

Limitations will not begin to run against an action for false representations until the falsity of the representations is discovered, or should have been discovered by the use of ordinary diligence.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 480–493.]

7. JUDGMENT—CONFORMITY TO PLEADINGS.

A note was originally secured by a vendor's lien. It was paid and the lien satisfied. It was subsequently transferred to a third person who sold it to plaintiff, representing that the note and lien were genuine. Plaintiff sued the maker and third person praying for judgment against the third person, on the court finding that no lien existed. The third person did not, in his pleadings, seek a foreclosure of an equitable lien against the interest of the maker in the property subject to the vendor's lien. *Held*, that the third person could not complain that such relief was not given him, even if the facts were sufficient to establish the lien.

8. APPEAL — REVIEW—PERSONS ENTITLED TO RAISE QUESTIONS.

As plaintiff did not appeal from the judgment denying him a lien the question of the sufficiency of the pleadings, and evidence to entitle him to a lien could not be raised on the third person's appeal.

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by W. G. Cain against J. T. Harris and others. There was a judgment for defendant Augusta Schuh, and for plaintiff against defendants A. Olfenbuttel and J. T. Harris and for defendant J. T. Harris against defendant A. Olfenbuttel, and defendant J. T. Harris appeals. Affirmed.

Rehearing denied.

T. B. Butler, for appellant. Cain & Knox, for appellees.

PLEASANTS, J. Appellee brought this suit against A. Olfenbuttel and Mrs. Augusta Olfenbuttel upon three promissory notes for the sum of $1,000 each, executed by said A. Olfenbuttel in favor of T. R. and J. H. Bonner. These notes were given in part payment of the purchase money of a lot and improvements thereon situate in the city of Tyler. They were endorsed by the Bonners in blank, and had passed through the hands of several owners before coming into the possession of appellee and a renewal and novation of the contract as to the time and manner of payment had been indorsed thereon by the maker. The petition alleges