

void, we cannot preclude her present motion by saying that it was merged in the new judgment. There was nothing which could become merged. This is not a case of error in a judgment. There was no error, as the facts disclosed nothing. It is like a judgment against one dead when suit began,—a nullity. "A judgment which is a nullity on account of being rendered against a corporation that does not exist will be vacated, and, as a general rule, all void judgments will be so treated." Freem. Judgm. § 98. It may be that the intervention of the second judgment is a grave difficulty. But the wrong of enforcing a contract like this, and of compelling the widow to suffer for an act void *ab initio*, and incapable of confirmation by mere acknowledgment, (see 14 Amer. & Eng. Enc. Law, 619,) is too monstrous to be entertained. Let the judgment and all proceedings under it be vacated.

COMITEZ *v.* PARKERSON *et al.*

(Circuit Court, E. D. Louisiana. April 23, 1892.)

1. DEATH BY WRONGFUL ACT—PLEADING—NEWSPAPER ACCOUNTS.

In an action by a widow to recover damages for the killing of her husband by a mob, when the petition fully sets out her cause of action, it is improper to annex thereto an account of the affair as published in a newspaper on the day following the killing.

2. SAME—PARTIES.

As all the parties in any way concerned in the tort are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing.

At Law. Action by Annie Comitez against W. S. Parkerson, the city of New Orleans, and others, to recover damages for the killing of her husband. Heard on exceptions to the petition. Sustained in part and overruled in part.

John Q. Flynn, for plaintiff.

Henry C. Miller and *Chas. F. Buck*, for defendants.

BILLINGS, District Judge. This is a suit brought by the widow of Loreto Comitez for damages for the killing of her husband. The cause is submitted on two exceptions to the petition filed by all the defendants except the city of New Orleans. It is objected that an article from the Times-Democrat has been made a part of the petition. The article is not properly an exhibit, to be considered in connection with the petition in the statement of the plaintiff's complaint. The averments of the plaintiff are made without this article, and then follows the averment as follows:

"To more particularly set forth the facts of this case as herein charged, and detailing more particularly the events which transpired on the morning of said memorable March 14, 1891, petitioner annexes hereto copies of the

Times-Democrat of March 15, 1891, which contains a full and complete account of the transactions of the day previous, the 14th March, 1891, and makes same part of this petition."

I think the journalistic account is superfluous, when considered in connection with the averments of the petition, which contains, without this article, the complete statement of the plaintiff's case. It could not be read to the jury without producing an effect distinct from and in addition to the mere statement of the case which the plaintiff intends to offer proofs in support of. It would produce an effect which should come from proofs adduced in the manner which the law directs, viz., from witnesses giving their testimony under oath, and liable to cross-examination. It is therefore not only superfluous, but unauthorized, and the exception to it is maintained.

The other exception urges the improper joinder of the exceptors with the city of New Orleans as joint defendants in the same action. The individuals are sued for the killing, and the city for not preventing the killing. At the common law, in a trespass all are principals, and all and each of the trespassers are liable for all the injury done. 5 U. S. Dig. p. 537, tit. "Trespass," 159. Among those who must make reparation for a trespass are "all who contributed to the action either by doing what he ought not, or by omitting what he ought to have done," (3 Puff. Law Nat. par. 4, p. 216;) and when several persons have been jointly concerned in the commission of the wrongful act, they may all be made defendants, and charged as principals, or the plaintiff may sue one or more of them, at his election, (Add. Torts, p. 67; 1 Chit. Pl. 86.) Our own Code provides (Rev. Civil Code, art. 2315) that every act whatever of man which causes damages obliges him by whose fault it happened to repair it. Article 2316: That every person is responsible for the damage he occasions, not merely by his act, but by his negligence, etc.; and in the concluding article on offenses and *quasi* offenses, (article 2324,) there is the provision as to solidary liability of wrongdoers as follows: "He who causes another to do an unlawful act, or assists or encourages in the commission of it, is responsible *in solido* with that person for the damages caused by such act." While it is possible that the strict meaning of the words "causes," "assists," or "encourages" might not, if employed under other circumstances, include failure or omission to prevent, it is also clear that it was the intention of the legislature in article 2324 to make all who were liable for an unlawful act liable *in solido*. In *Vredenburg v. Behan*, 33 La. Ann. 627, where the suit was against the members of a club whose agent had been guilty of negligence, the court affirmed a judgment given *in solido*.

The city of New Orleans is sued along with the individual defendants for damages for an unlawful killing. It is averred in the plaintiff's petition that the individuals committed the unlawful act, and that the city contributed to it by an antecedent default, in that it did not prevent it. The damages are for an act in which all the defendants in law, according to the pleadings, joined. They are therefore, according to the general rules of pleading, as well as by the provisions of the Civil Code,

properly joined as defendants in this action. The exception as to the newspaper article is therefore maintained. The exception of misjoinder is overruled, and the defendants have 10 days in which to answer the plaintiff's petition.

LAPSLEY *v.* UNION PAC. R. Co.

(Circuit Court, N. D. Iowa. October 10, 1891.)

1. ACCIDENTS AT RAILWAY CROSSINGS—RINGING BELL.

Under the statutes of Iowa, in cities the employes of a railway company, operating its trains are required to commence to ring the bells 60 rods before reaching the crossing, and to continue to ring it until the crossing is reached, and the omission to comply with this statute is negligence.

2. SAME—RATE OF SPEED AT CROSSING.

There being no statute regulating the rate of speed at crossings, the common-law rule applies, which is that the duty and obligation rests at all times upon the railroad company to use ordinary care and prudence in the management of its trains in approaching crossings, so that no unnecessary risk or hazard shall be cast upon the public, who have the right to pass over said crossing, taking into consideration their location and surroundings.

3. SAME—FLAGMAN AND GATES AT CROSSINGS.

The question of whether the railroad company should have flagmen or gates at crossings, in the absence of statutes, depends likewise on the circumstances, such as the amount of travel over the crossing, the obstructions, etc., and is a matter of fact to be determined by the jury.

4. SAME—IMPUTED NEGLIGENCE.

Where a woman is riding on the back seat of a two-seated spring wagon, which is driven by her brother, who owns the team and wagon, and over which she has no control, and she is injured in a collision at a crossing by a railway train, if the negligence of the brother in driving upon the crossing contributes to said injury, *held*, that said contributory negligence cannot, as a matter of law, be imputed to her.

At Law. Action by James J. Lapsley, administrator of the estate of Eliza J. Lapsley, against the Union Pacific Railroad Company, to recover damages for causing the death of his intestate. Verdict and judgment for plaintiff in the sum of \$1,000.

A. S. Wilson and *S. H. Marsh*, for plaintiff.

Wright & Hubbard and *Wright & Baldwin*, for defendant.

SHIRAS, District Judge, (*charging jury*.) In this case the plaintiff, as administrator of the estate of Eliza J. Lapsley, seeks to recover against the defendant company for the amount of damages it is claimed was caused to the estate of Eliza J. Lapsley by reason of the fact that in November a year ago Miss Lapsley was killed by an accident happening upon the track of the defendant company. In order to entitle the plaintiff to recover under circumstances of this kind, it is not sufficient simply to show that an accident has happened, and that injury or death has resulted therefrom, the accident being caused by a collision with the train of the defendant upon the road of the defendant company. The burden is upon the plaintiff of going further, and showing, in the first instance, by a fair preponderance of the credible testimony in the case, that the accident was caused by negligence upon the part of the railway company. In other words, this action is one that is