

7 of the act of assembly of February 24, 1819, and conveyed the legal title to the land to the grantee, and not an equitable interest only, as contended by the defendant. The contention of counsel for the defendant that these deeds were not properly executed, because the seals do not appear attached to the signatures of the grantors, the attesting witnesses, and the justices before whom acknowledged, cannot be sustained. We must remember that at the time these deeds were executed the usual way of affixing a seal was by an impression in wax. The scroll, as used now, had not come into general use. The seals, being of wax, were liable to be effaced or broken off; hence the necessity of having witnesses to the signing and sealing. If, at this remote day from the execution of these ancient documents, we are at liberty to ignore their sanctity as sealed instruments, because the impression in wax is not to be found on them, or the scroll, its legally authorized substitute, in its stead, though we have the highest record evidence that the seals were attached to the documents at the time of their execution and delivery, it would go very far towards converting into equitable, what have been for a century regarded as legal, titles.

"A deed executed in Boston in December, 1798, by parties living there conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution by the subscribing witnesses before the court of Suffolk county, signed by a person describing himself as clerk of the court, though no seal is attached to it." *Smith v. Chapman*, 10 Grat. 445. The instructions asking the court to construe these deeds as conveying only equitable interests must be refused.

### TEXAS & P. RY. CO. v. LUDLAM.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1892.)

No. 86.

#### CARRIERS—EJECTION OF PASSENGER—MEASURE OF DAMAGES.

In an action by a passenger against a railroad for being put off at K., nine miles from her destination, because, under the rules of the company, the train did not stop at the latter place, the court, without objection, gave an instruction which substantially declared the company's liability; and further stated that the measure of damages was the price of the ticket she purchased next morning from K. to her destination, and the increased damage suffered by reason of being left at K., instead of at some earlier place, provided that the conductor, by promptly informing her that the train did not stop at her destination, would have enabled her to stop at some other station, where she would have suffered less than she suffered at K. *Held*, that the rule as to the measure of damages was favorable to the company, as authorizing a lessening of the actual damages suffered, and the instruction was not objectionable as stating a conjectural or hypothetical case.

In Error to the Circuit Court of the United States for the Eastern District of Texas. Affirmed.

*W. W. Howe*, (*R. S. Lovett* and *F. H. Prendergast*, on the brief,) for plaintiff in error.

*J. A. Armistead*, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This is a suit instituted in the circuit court by Emma Ludlam to recover damages from the Texas & Pacific Railway Company for violation of contract. From an adverse judgment the railway company prosecutes this writ of error.

The case is sufficiently stated in the following bill of exceptions, taken on the trial, to wit:

"Be it remembered, that on the trial of the above cause on February 9, 1892, the following facts were proven: Emma Ludlam, the plaintiff, an unmarried female, 21 years old, was traveling from Arkansas to Louisiana, her home, and desired to stop at Stalls, a station on the Texas & Pacific Railway, 53 miles south of Texarkana, to visit her brother. She had with her four small children under seven years old, and she had no other company or escort. On the evening of February 24, 1890, just after her arrival at Texarkana, a few minutes before the departure of the train to Stalls, she bought a ticket over the Texas & Pacific Railway from Texarkana to Stalls, and boarded the night train which leaves Texarkana at nine o'clock at night, and arrived at Stalls at eleven o'clock at night. Soon after leaving Texarkana, the conductor took up her ticket, and kept it. Just before the train arrived at Kildare, a station between Texarkana and Stalls, and nine miles from Stalls, the conductor informed her that his train did not stop at Stalls, and that she would have to get off at Kildare. She offered to pay the conductor to allow her to allow her to go on to Stalls. The conductor told her that he could not stop at Stalls; that, if he stopped there, somebody would be cutting up about it. She then asked him to take her to Lodi, a station between Kildare and Stalls. The conductor said he could not stop at Lodi either. The conductor put the plaintiff and children off at Kildare. She remained in the depot until next morning, and then took the next train, and went to Stalls, paying twenty-five cents for her ticket, and arrived at Stalls twelve hours later than she would if she had gone on the former train. Stalls is only a way station,—a side track. There is no depot or house there, the nearest house being one half mile, where plaintiff's brother lived; but her brother was to meet her at Stalls, and was there to receive her if she had come, and lived a half mile from the station at Stalls. There was a depot at Kildare, and an hotel within thirty or forty steps of the depot. Atlanta is a station between Kildare and Texarkana, and is a town of about 3,000 inhabitants, and has hotels and depot. Plaintiff was a stranger, and unacquainted in that part of the country. Plaintiff did not know that the night train did not stop at Stalls. She suffered from cold at Kildare. There was no fire in the depot, and it was a cold night. Plaintiff further proved that it was dark at Kildare. There was no light at the station at Kildare, and no one there at the depot to tell her where any hotel was; and, on account of the four small children being asleep, she could not leave them to hunt an hotel. Defendant proved that the night train that passed Stalls at eleven o'clock at night was a through fast train, and carried sleeping cars from St. Louis to El Paso; and by a rule and regulation of the company that train was not to stop at Stalls, but the day train did stop at Stalls. Plaintiff then proved that the night train did sometimes stop at Stalls to receive and put off passengers. Thereupon the court charged the jury as follows: 'The railway company had the right to run through trains that did not stop at Stalls, and it was the duty of plaintiff to inquire if the train on which she was about to take passage stopped at Stalls; but after she had boarded the train by mistake it was the duty of the conductor to act promptly, and inform her of her mistake, and give her an opportunity to get off at any station between Texarkana and Kildare. Now, it appears that the plaintiff was put off at Kildare. The measure of damages is the twenty-five cents she paid for the ticket at Kildare from there to Stalls, and also the damage she

suffered by reason of being left at Kildare, instead of being left at some other place between Kildare and Texarkana; that is, that if the conductor, by promptly informing plaintiff that his train did not stop at Stalls, would have enabled her to have stopped at some other station before reaching Kildare, where she would have suffered less than she suffered at Kildare, then she can recover the increased damage she suffered at Kildare over what she would have suffered at some other place." The defendant, at the time said charge was given, excepted to that part of the above charge which gives the plaintiff the right to recover for the additional suffering caused by her being left at Kildare, instead of some other station between Kildare and Texarkana, (1) because there is no pleading raising such an issue, or justifying a recovery on above ground; (2) and because there was no evidence that there was any place between Kildare and Texarkana where plaintiff would have suffered less than she suffered at Kildare; (3) and because there was no evidence that she would have stopped at any station before reaching Kildare if the conductor had promptly informed her that the train did not stop at Stalls. The court held the exceptions not well taken, and submitted the cause to the jury. The jury returned a verdict for plaintiff for \$200.25, and the court rendered judgment accordingly."

There are two grounds of complaint assigned as errors. The first is to part of the charge of the court to the jury in the following language:

"After she [plaintiff] had boarded the train by mistake, it was the duty of the conductor to act promptly and inform her of her mistake, and give her an opportunity to get off at any station between Texarkana and Kildare."

The record does not show that any exception was taken to the part of the charge quoted at the time it was delivered, nor to the charge as a whole; and it follows that, whether erroneous or not, it cannot be considered here. The only exception to the charge, or to a part thereof, taken in season, is the one referred to in the second assignment of errors, which relates entirely to the measure of damages, and is as follows:

"The measure of damages is the twenty-five cents (25c.) she paid for the ticket at Kildare from there to Stalls, and also the damage she suffered by reason of being left at Kildare, instead of being left at some other place between Kildare and Texarkana; that is, that if the conductor, by promptly informing plaintiff that his train did not stop at Stalls, would have enabled her to have stopped at some other station before reaching Kildare, where she would have suffered less, then she can recover the increased damage she suffered at Kildare over what she would have suffered at some other place."

It is urged that this was erroneous, because it is said there was no pleading in the case raising such an issue, or justifying a recovery on such grounds; that there was no evidence that there was any place between Kildare and Texarkana where plaintiff, if put off there, would have suffered less than she suffered at Kildare; and that there was no evidence that she would have stopped at any station before reaching Kildare, if the conductor had promptly informed her that the train did not stop at Stalls station; and it is said that the rule of damages thus given was on a supposed or conjectural state of facts in regard to which no evidence had been offered. In *U. S. v. Breitling*, 20 How. 252-255, it is declared:

"It is clearly error to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes

that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and, if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

An examination of the record shows that the plaintiff sued for violation of a contract of carriage as a passenger from Texarkana to Stalls, and the damages she claims are for not being carried through to her destination, and for being put off at Kildare, an intermediate station; all in violation of the contract. The defense was substantially that the plaintiff had taken a train of the defendant which, under the rules of the company, did not stop at Stalls; and that, as the conductor put the plaintiff off at the nearest stopping station to Stalls, there could be no recovery.

The facts recited in the bill of exceptions, as proven on the trial of the case, are not sufficiently full for this court to determine, even if the matter were open to inquiry, whether the plaintiff had made a case which would entitle her to go the jury upon the issues as made up in the pleadings. It does not appear that there were any public instructions posted at Texarkana as to whether the night train, or any other train of defendant, did or did not stop at Stalls station. It does not appear whether the plaintiff was or was not advised by any official of the company at Texarkana as to what train she should take to go to Stalls, other than the inference which can be drawn from the fact that a few minutes before the departure of the train the ticket agent of defendant sold the plaintiff a ticket from Texarkana to Stalls. Nor does the record show at what time—whether in first taking up her ticket or later—the conductor of the train informed the plaintiff she was on a through train, which would not stop at Stalls; and, finally, there is nothing in the record to show whether the defendant railway company operated any train from Texarkana which stopped at Stalls, although there is a statement that a train did stop at Stalls, but from where it started does not appear. We infer, from the absence of exception to the charge of the court as given, that there was no objection on either side to the law as given by the judge, "that the railway company had the right to run through trains that did not stop at Stalls; and it was the duty of plaintiff to inquire if the train on which she was about to take passage stopped at Stalls; but, after she had boarded the train by mistake, it was the duty of the conductor to act promptly, and inform her of her mistake, and give her an opportunity to get off at any station between Texarkana and Kildare." In other words, there seems to have been no objection on either side to the charge of the court substantially that the defendant was in fault, and for that fault plaintiff was entitled to recover; and this part of the charge, as we have said before, cannot be reviewed by this court.

As the plaintiff had sued for damages for being wrongfully put off at Kildare, and as, under the obligations of the defendant, as declared by the court without objection, she had the right to recover for such dam-

ages, it would seem that the charge complained of, which gives the rule of damages on account of plaintiff's being put off at Kildare, is not open to the charge of being hypothetical or conjectural. If the court was right in the proposition of law declared as to the liability of the defendant, and as to the right of the plaintiff to recover damages for being put off at Kildare, then it seems clear that the rule of damages given by the court was favorable to the defendant, as authorizing a lessening of the actual damages suffered by the plaintiff in being put off at Kildare, and gives plaintiff in error no ground for complaint in this court. On the record, as brought to this court, we see no other course than to affirm the judgment, and it is so ordered.

**BANK OF EDGEFIELD v. FARMERS' CO-OPERATIVE MANUF'G CO.**

(Circuit Court of Appeals, Fifth Circuit. June 13, 1892.)

No. 27.

**1. PLEADINGS—AMENDMENT—VERIFICATION.**

In a suit in a federal court on certain notes, pleas filed alleging want of consideration, which are verified by an officer authorized under Code Ga. § 3450, to administer oaths, to wit, a justice of the peace, and afterwards sworn to at the trial before the clerk of the court and by the direction of the court, are sufficiently verified to make an issuable defense; and such verification before a clerk at the trial is allowable under Code Ga. § 3479 *et seq.*, as well as by Rev. St. U. S. § 954, providing that the court "may at any time permit either party to amend any defect in process or pleading" on certain conditions.

**2. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—NOTICE OF EQUITIES.**

Where a bank takes three negotiable notes before maturity as collateral for money loaned, together with three other past-due protested notes by the same makers and indorsers, there being nothing on the face of the notes to indicate that they were given for the same consideration or formed part of one transaction, mere knowledge of the dishonor of the past-due notes will not operate as notice to the bank that the three notes not yet due were tainted by defective consideration, or of any equities existing between the original parties thereto, and the bank is entitled to recover the whole of the indebtedness of the borrower to it in a suit on such notes.

**3. SAME—COMMERCIAL LAW—STATE DECISIONS.**

When a bank advances money on certain negotiable notes, some of which are past due, the question of notice of any equities existing between the original parties, arising from knowledge on part of the bank of such overdue notes, is not a question of the construction of a contract, which is usually determined by the *locus contractus*, but is governed by the rule of commercial law which affects subsequent holders in the matter of notice of prior equities, and not by the statutes, rules, or decisions of the particular state where such notes were executed.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Action by the Bank of Edgefield against the Farmers' Co-operative Manufacturing Company on three promissory notes held as collateral security for a loan of \$1,239.77. Verdict and judgment for \$475.65 for plaintiff, who brings error. Reversed.

Statement by PARDEE, Circuit Judge:

The plaintiff in error filed a suit on the common-law side of the circuit court of the United States for the northern district of Georgia against the defendant in error, being an action upon three promissory notes, ag-