sented by Lord Justice BRETT in *Phillips* v. *Railway Co.*, at pages 237, 238, 49 Law J. Q. B., and at pages 291, 293, 5 C. P. Div., and this practice and the reasoning of Lord Justice BRETT in support of it are commended and approved by the supreme court in *Railway Co.* v. *Putnam*, 118 U. S., at pages 554, 555, 7 Sup. Ct. Rep. 1, and by the supreme court of Arkansas in *Fordyce* v. *McCants*, 51 Ark. 514, 11 S. W. Rep. 694.

The judgment below is reversed, with costs, and the cause remanded, with instructions to dismiss the action unless within a reasonable time, to be fixed by the court below, the half-brother named in the complaint be made a party to the action, and in that event to grant a new trial.

RICHMOND RAILWAY & ELECTRIC CO. *v.* DICK *et al.*

(Circuit Court of Appeals, Fourth Circuit. October 11, 1892.

No. 17.

1. APPEALABLE ORDERS—CONTINUANCE.
   A motion for a continuance is addressed to the discretion of the court, and its action thereon is not reviewable by the circuit court of appeals.
2. SAME—NEW TRIAL.
   The action of a federal court in disposing of a motion for a new trial is not reviewable in the circuit court of appeals.
3. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—NOTICE.
   A manufacturing corporation received negotiable notes for property sold. The notes were discounted by a banking firm, in which the president of the corporation was a partner, but he had no actual knowledge as to the consideration for the notes, or of the transaction in which they were given. *Held*, that the mere fact of his connection with the two concerns was not sufficient to affect the banking firm with constructive notice of the consideration for the notes and of an alleged failure thereof.

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

Action by J. R. Dick & Co. against the Richmond Railway & Electric Company on certain promissory notes. Verdict and judgment for plaintiffs. New trial denied. Defendant brings error. Affirmed.

Statement by SIMONTON, District Judge:

The record discloses these facts: The defendant contracted to purchase two engines from the Phœnix Iron Works Company. The engines were to be delivered at Richmond, Va., to be paid for on arrival, one fourth in cash, remainder in notes. They were delivered at Richmond, the cash was paid, and three negotiable promissory notes were executed, payable to order of the Phœnix Company, and delivered to them. These notes bore dates and were in the amounts following: One for $1,500, dated 23d June, 1891; one for $1,687.50, dated 1st July, 1891; one for $1,500, dated 15th July, 1891,—all at four months. The Phœnix Iron Company indorsed before maturity and delivered these notes to plaintiffs, who are a banking firm at Meadville, Pa. One of

them, (S. B. Dick,) at the date of the contract and of the execution and discount of the notes, was president of the Phœnix Company. The notes were not paid. J. R. Dick & Co., indorsees, brought this action against the maker. The pleas were *nil debet* and failure of consideration. At the trial the defendant produced a telegram sent two days before to the plaintiffs at Meadville, directing them to bring to the trial books showing the state of the account with Phœnix Iron Works at and before the time of delivery and indorsement of the note of the Richmond Company and to commencement of suit. "Do this to avoid delay." The telegram was signed by attorneys of plaintiffs and defendant. The books were not produced. Defendant then moved for a continuance until the evidence from the books could be produced. The motion was refused, and defendant excepted. The trial proceeding, defendant called S. B. Dick, who admitted that he was president of the Phœnix Company at the date of the contract, and at the time the notes were delivered and discounted. He denied any knowledge of any part of the transaction until this suit was brought. Defendant then offered to prove the contract made between it and one Henry Church, manager of the Phœnix Company, and in its behalf, and to show that the consideration for these notes given under this contract had failed. The court below withdrew all evidence from the jury on this point. It also refused to instruct the jury, as requested, "that, from his position as president, S. B. Dick must be presumed to have such notice of the defect in the notes as to destroy their negotiability in the hands of his firm; that actual notice was not necessary; that it was enough to show that plaintiffs had opportunities of knowledge, such as would put a prudent man on his guard." The defendant makes this refusal of the court the ground for his second and third exceptions. The jury found for the plaintiffs. Defendant moved for a new trial, which was refused. He makes this the ground of his fourth and last exception.

Wyndham R. Meredith, for plaintiff in error.

Legh R. Page, for defendants in error.

Before BOND, Circuit Judge, and SIMONTON, District Judge.

SIMONTON, District Judge. A motion for continuance is addressed to the discretion of the court below. Its action thereon is not reversible here. *Woods* v. *Young*, 4 Cranch, 237; *Sims* v. *Hundley*, 6 How. 1. In Banks' Edition of the Supreme Court Reports all the cases are quoted in a note to this case. The first exception is overruled.

Nor will this court entertain an exception because of the refusal of the court below to grant a new trial. This is wholly within its discretion. *Parsons* v. *Bedford*, 3 Pet. 433; *Insurance Co.* v. *Folsom*, 18 Wall. 237; *Railroad Co.* v. *Fraloff*, 100 U. S. 24; *Cattle Co.* v. *Mann*, 130 U. S. 75, 9 Sup. Ct. Rep. 458; *Railroad Co.* v. *Winter*, 143 U. S. 75, 12 Sup. Ct. Rep. 356. The fourth exception is overruled.

The second and third exceptions have been earnestly pressed. They will be considered together. The position taken is this: S. B. Dick, one of the plaintiffs, being president of the Phœnix Company, had con-

structive notice of the consideration for which the notes were given, and of its failure. Notwithstanding that in fact he had no knowledge whatever of the transaction, still his position afforded him the means of knowledge. This affected him and his firm with such notice as to take away from them the protection afforded to *bona fide* holders of negotiable paper, and to subject them to the plea of failure of consideration. The record shows that the plaintiffs are holders of commercial paper. They are presumed, as such holders, to have taken it before maturity for value, and without notice of any objection to which it may be liable. This presumption stands until overcome by proof. *Swift* v. *Tyson*, 16 Pet. 1; *Lexington* v. *Butler*, 14 Wall. 282; *Pana* v. *Bowler*, 107 U. S. 541, 542, 2 Sup. Ct. Rep. 704. There is no evidence whatever tending to show that the notes were not acquired before maturity, and for value. The sole contention is that defendant had notice through S. B. Dick. He denies all actual knowledge of the transaction, and the sole inquiry is, did his position as president give him such notice, and put such means of knowledge in his power, as to defeat the title of his firm? The title of a holder of negotiable paper for value before maturity can only be defeated by showing bad faith in him which implies guilty knowledge or willful ignorance of the facts impairing the title. *Hotchkiss* v. *Bank*, 21 Wall. 354; *Murray* v. *Lardner*, 2 Wall. 110. In this case there is nothing in the record which charges, and nothing in the evidence which proves or tends to prove, fraud or bad faith on the part of the Phœnix Company. The only thing charged is its failure to perform the contract to the satisfaction of defendant,—an occurrence of any day, an occurrence of every day, with honest contractors. Were we to assume that S. B. Dick, as president, was affected with knowledge of all the transactions of the Phœnix Company, nothing appears showing bad faith or guilty knowledge. The most that can be said is that he knew that the notes were given for two engines. The last note was dated 15th July. The first complaint was made 3d August. There is no testimony showing that any of the notes were discounted after that last date. It would be an alarming doctrine were it to be established that a bank discounting the business paper of a well-known customer took the paper subject to any defense which the maker of the note could set up, showing that the goods for which the paper was given were deficient in quantity or quality or both. "When a person," says the supreme court in *Wilson* v. *Wall*, 6 Wall. 91, "has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence." These exceptions are overruled, and the judgment of the circuit court in every respect affirmed, with interest and costs.

SPURLOCK *et al.* v. STATE OF WEST VIRGINIA, to Use of SOCIETY FOR SAVINGS.

(*Circuit Court of Appeals, Fourth Circuit.* October 11, 1892.)

No. 9.

COUNTIES—LIABILITY OF SHERIFF—PAYMENT OF WARRANTS.

Under Code W. Va. c. 39, §§ 38, 39, a sheriff who refuses either to pay an order properly issued by the county court, or, in the absence of funds, to indorse thereon, "Presented for payment," and sign the same, is liable on his official bond for the amount of the order.

In Error to the Circuit Court of the United States for the District of West Virginia.

Action by the state of West Virginia, to the use of the Society for Savings, against Sanders Spurlock and his sureties upon his official bond as sheriff of Wayne county. Jury waived, and cause submitted on an agreed statement of facts. Judgment for plaintiff. Defendants bring error. Affirmed.

Malcolm Jackson, for plaintiffs in error.

F. B. Enslow, for defendant in error.

Before FULLER, Circuit Justice, and BOND and GOFF, Circuit Judges.

BOND, Circuit Judge. It appears from the agreed statement of facts in this case that the county court of Wayne county, in the state of West Virginia, on the 11th day of March, 1881, entered an order on its records, which recited that it appeared from a report of a special commissioner appointed by a preceding county court that there was an indebtedness which was created by the late county court of Wayne county in accordance with the provisions of the road laws of West Virginia, then due and unpaid. It further recited that the levies for the then coming year would not be sufficient to pay such indebtedness and other expenses for like purposes. It then directed bonds of the county for $12,000, with interest at the rate of 6 per cent., payable semiannually, to be issued, and that these bonds and interest coupons should be a charge upon the road levies of the respective districts of the county where the money derived from the sale of the bonds was expended, for a term of 10 years, when the bonds were to become due. On the 11th day of August, 1882, the county court issued another order, similar to the above, except that it authorized the issue of bonds to the value of $19,500. The defendant in error, the Society for Savings, bought these bonds for their face value. The county court of Wayne county has paid the interest thereon up to September, 1889, and one bond of $500. In payment of this interest the county court issued the orders sued on in this case, and delivered the same to the plaintiff below, who notified the sheriff of Wayne county that it held them, and presented the same for payment to him in the summer of 1889, again January 4, 1890, and again on May 16, 1890. The sheriff refused to pay the same in obedience to the order