til November 1st, and not a November delivery. Again, on the same day, they say, "We are at a loss to understand upon what grounds you could construe an inquiry to mean November delivery." It appears that plaintiffs gave as early notice of the chartering of a vessel as could be demanded, and we find no unreasonable or injurious delay on the part of the plaintiffs in endeavoring to correct any misunderstanding of their intent in the minds of the defendants, and consider the court below erred in finding plaintiffs had no cause of action, and directing a verdict for defendants; and it is ordered that the judgment be reversed, and the cause remanded for a new trial.

COYLE v. FRANKLIN et al.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 31.

ADVERSE POSSESSION—WHAT CONSTITUTES—POSSESSION BY TENANT.

Possession by a lessee is continuous, peaceable, adverse possession, in favor of the lessor, as against third persons, within Rev. St. Tex. art. 3193, making such possession for five years a bar to recovery of real estate, although the lessee repudiates the tenancy, and attorns to a third party, where the lessor institutes suit against the lessee, and recovers possession therein.

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

Action of trespass to try title by W. M. Coyle against Joseph Franklin and others. Judgment for defendant Franklin. Plaintiff brings error. Affirmed.

E. B. Kruttschnitt, (Francis B. Lee, on the brief,) for plaintiff in error.

S. W. Jones, for defendants in error.

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

PARDEE, Circuit Judge. The plaintiff in error brought an action of trespass to try title in the circuit court for the eastern district of Texas, against Joseph Franklin, the defendant in error, Joseph Courant, and Albert P. Bush, assignee of the Alabama Gold Life Insurance Company, to recover a certain tract or parcel of land situated on Galveston island, state of Texas. Albert P. Bush entered a formal disclaimer. The suit was dismissed as to Joseph Courant. Franklin, defendant in error, pleaded (1) not guilty; (2) the statute of limitations of three years; (3) the statute of limitations of five years. The parties, by written stipulation, waived trial by jury, and the case was submitted to the court. The court found the following conclusions of fact and law:

"The court finds that by and through regular and legal chain of transfer, from and under the sovereignty of the soil, the plaintiff, W. M. Coyle, was at the date of the institution of this suit, September 1, 1890, the owner of the land in controversy, to wit, lot number seventy-five, in section number one, of

Galveston island, according to the map and plan and survey of said island, and containing about 14½ acres of land, unless the defendant Joseph Franklin is entitled to judgment under his plea of five years' limitation, concerning which the court finds as follows: The said defendant Joseph Franklin claimed title to said property under said plea of five years' limitation, under a tax collector's deed to said Joseph Franklin, fully described in the bill of exceptions taken by plaintiff, said deed being dated July 11, 1878, and filed for record and duly recorded in Book 27, page 514, of the Records of Deeds for Galveston County, which deed the court finds to be a deed duly recorded, within the meaning of the statutes of Texas, for the purpose of said plea of limitation, but not as vesting title by its own force and effect. In May, 1884, said Joseph Franklin engaged one Juneman to fence said property, and Juneman accordingly fenced it, completing the fence in June, 1884. Franklin leased the property to Juneman by written lease, described also in said bill of exceptions, and Juneman occupied the premises under the lease until July 1, 1885, when, failing to make arrangements with Franklin for a continuation of the lease, and having heard that Waul & Walker claimed to own or represent the owner of the lot, Juneman took a lease from them, (Waul & Walker,) and notified Franklin that he (Juneman) declined to recognize him as landlord any longer, but never vacated the premises until after termination of suit in supreme court of Texas, as hereinafter stated. On August 19, 1885, Franklin sued Juneman to recover possession of the lot, the suit being in the district court of Galveston county, and the proceedings being as shown in said bill of exceptions. In said suit a writ of sequestration was sued out by Franklin, and was levied by the sheriff of Galveston county, who allowed Juneman to remain in possession as keeper under the sheriff, until the termination of the suit. After the suit was determined, Juneman remained in possession until September or August, 1887. The suit in the district court of Galveston county, after judgment by that court, was carried by appeal to the supreme court of Texas, where the judgment was affirmed February 18, 1887. 67 Tex. 415, 3 S. W. Rep. 562. After Juneman quit the premises, September or August, 1887, Franklin took and held continuous possession by other tenants until the institution of this suit. When Juneman left premises, he left in charge of the premises one Peterson, who also had charge of Juneman's horses and cattle. Peterson turned over possession to Appell, a tenant of Franklin, who remained in possession to the time of filing suit. Franklin paid all taxes on the property in controversy for the years 1884, 1885, 1886, 1887, 1888, 1889, 1890, and all other taxes thereon. Juneman was a dairyman, and used the lot, while in possession of it, for grazing his cows and horses. Franklin's other tenants used it for the same purpose.

"Conclusions of law by the court on the foregoing findings of fact: The court holds that the defendant Franklin had continuous adverse possession of the property, by and through Juneman, and the other tenants after Juneman, from July 1, 1884, to September 1, 1890, notwithstanding the repudiation by Juneman of his tenancy under Franklin in June, 1885, and the suit by Franklin to recover possession, pending from August, 1886, to February 18, 1887, because Juneman, having gone into possession under Franklin, could not lawfully hold against Franklin, and the possession of Juneman was in law that of Franklin, after, as well as before, the expiration of the lease from Franklin to Juneman, notwithstanding the repudiation by Juneman of his tenancy under Franklin. And the possession and claim of Franklin under the tax collector's deed, and his paying the taxes on said property, complied fully with the condition of the statutes of limitation of five years, as pleaded by Franklin; and he is entitled to judgment accordingly against the plaintiff, which will be so entered."

Judgment being entered in favor of the defendant Franklin, Coyle, the plaintiff, brought the case to this court for review.

The errors assigned present but two questions: (1) Is the tax collector's deed to Joseph Franklin, the defendant in error, for the property in controversy, such a deed as will, under article 3193 of the Revised Statutes of Texas, support the plea of five years' limitation?

(2) Was the attempted attornment by Franklin's tenant to another after the expiration of his lease, July 1885, and the litigation between Franklin and his tenant for the possession of the property, which shortly followed, and which resulted in favor of Franklin, an interruption of the continuity of Franklin's possession, begun in June, 1884, so as to defeat his plea of five years' limitation under the statute in this action, brought by a third party against him for the recovery of the land?

The sufficiency of Franklin's deed to support the plea of five years' limitation is admitted by counsel for plaintiff in error in his oral argument, and it is fully shown by the principles declared in the following adjudged cases: Wofford v. McKinna, 23 Tex. 43; Flanagan v. Boggess, 46 Tex. 335; Fry v. Baker, 59 Tex. 405; House v. Stone, 64 Tex. 678; Seemuller v. Thornton, 77 Tex. 156, 13 S. W. Rep. 846.

On the second question we agree with the learned judge of the circuit court, that the defendant Franklin had continuous adverse possession of the property by and through his tenant Juneman, and the other tenants after Juneman, from July 1, 1884, to September, 1890, notwithstanding the repudiation by Juneman of his tenancy in June, 1885. As Juneman went into the possession of the premises as a tenant of Franklin, and neither vacated them nor surrendered them to Franklin, the possession, notwithstanding Juneman's attornment to another, and the litigation which followed between Juneman and Franklin, continued to be Franklin's possession. The controversy between Franklin and Juneman was merely an unsuccessful attempt on the part of the tenant to deny his landlord's title. As the litigation, though lasting some time, was instituted without unnecessary delay after the tenant's denial, and resulted in favor of Franklin, recognizing his possession and ownership from the beginning, his possession was not interrupted thereby, and must be considered as continuous, peaceable, and adverse. The following authorities sustain this position: Peyton v. Stith, 5 Pet. 490; Flanagan v. Pearson, 61 Tex. 306; Scott v. Rhea, 21 Tex. 708; Whitehead v. Foley, 28 Tex. 15; Elliott v. Mitchell, 47 Tex. 445; Blue v. Sayre, 2 Dana, 213; Pleak v. Chambers, 5 Dana, 60; Ferguson v. Bartholomew, 67 Mo. 212; Cary v. Edmonds, 71 Mo. 523. There is no error in the judgment of the circuit court, and the same is affirmed, with costs.

MANN BOUDOIR CAR CO. v. DUPRE.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1893.)

No. 99.

1. SLEEPING CARS—EJECTMENT OF PASSENGER FROM BERTH—DAMAGES.
Where an unlawful expulsion from a berth of a sleeping car is the proximate cause of a married woman's miscarriage, the sleeping-car company is liable for such injury, although its servants were ignorant of the woman's condition when they expelled her.

2. SAME.
Where a sleeping-car company has reserved certain berths for passengers getting on at a certain station, and before the train reaches the sta-

tion its conductor erroneously sells one of the berths so reserved, the conductor may, a reasonable time before reaching such station, notify the passenger of his error, and tender another berth equal in accommodation, and the passenger has no cause of action if she refuses to accept this, and voluntarily leaves the car.

3. SAME—PAROL EVIDENCE TO CONTRADICT "BERTH CHECK."
In an action against a sleeping-car company to recover damages for being unlawfully ejected from a berth, the plaintiff may contradict by parol evidence the recital on his "berth check" as to the berth bought by him.

4. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE.
To save an error in the refusal to give a proper special charge, such special charge must not be asked in the aggregate with other charges in any one of which there is anything objectionable.

5. SAME.
Although a feature of the case may rightfully call for a proper special charge, still if the charge asked for is too broad, the court may rightfully refuse to give such charge.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

Action by Florence C. Dupre against the Mann Boudoir Car Company to recover damages for illegal expulsion from the berth of a sleeping car. The circuit court gave judgment for plaintiff. Defendant brings error. Reversed.

Percy Roberts, (Nugent & McWillie, of counsel, also filed a separate brief,) for plaintiff in error.

Frank Johnston and M. Green, (Calhoon & Green, on the brief,) for defendant in error.

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

McCORMICK, Circuit Judge. On the 7th August, 1890, Mrs. Florence C. Dupre, the defendant in error, accompanied by her husband, got on the Meridian train of the Alabama & Vicksburg Railway, a part of the Cincinnati, New Orleans & Texas Pacific Railway Company's system, at Jackson, Miss., to go to Akron, Ala. They first entered the day coach, but as Mrs. Dupre was enceinte, about two months advanced, and had experienced one miscarriage, they concluded to take the sleeper, and went back to it, where they were met by the porter, seated, and told they would have to wait until the conductor came around. This was about 5:30 P. M., and the train on schedule time would arrive at Akron about 1:30 A. M. following.

On May 27, 1891, to the June term of the circuit court for the state of Mississippi, Hinds county, first district of the circuit court, Mrs. Dupre, the defendant in error, brought her action against the plaintiff in error, the Mann Boudoir Car Company, alleging that, on the occasion mentioned, she, accompanied by her husband, went into the sleeping car, and asked for a lower berth in said sleeper. That then and there the conductor sold her a lower berth for two dollars, which her husband paid the conductor, and the conductor assigned her a particular berth as the one designated and selected for her, and shortly after, the berth, by the conductor's direction, was properly arranged so that she could retire, which she accordingly did, it having been explained to the conductor that she was unwell and deli-

cate, as a reason why it was desired that her berth should be made down at an early hour. That when the train reached Meridian, about 11 o'clock that night, the conductor came to her compartment, and informed her and her husband that she must vacate and leave her berth at once, as it, with other berths, were needed for certain commercial travelers who came aboard the train at Meridian. It was protested that the conductor had no right to eject her, but he in a rude and offensive manner ordered her to leave the berth, and insultingly pulled back the curtain that draped her berth, and declared in a loud tone that she must get out. That the conductor insultingly refused to open the forward sleeper that they might walk through it to the day coach. That he curtly refused to permit the porter to carry her hand baggage to the day coach, and declined to assist in removing her hand baggage from the sleeper, or help her to descend from the platform. Thereupon, protesting against this denial of her legal and just rights, she, with her husband's assistance, descended from the platform, and with great pain and discomfort walked, greatly hurried and agitated, to the day coach, about the moment the train was getting into motion, and sat up during the remainder of the night. That she had suffered alarm, agitation, and distress, from the offensive manner, language, and conduct of the conductor, which produced or contributed greatly to produce an illness of a serious and perilous character, from which she suffered great bodily pain and apprehension and distress of mind, for all of which she claims damages in the sum of $10,000. To which action the sleeping-car company, on June 1, 1891, pleaded not guilty; and the same day, by proper petition and bond, moved the case to the United States circuit court for the southern district of Mississippi. The testimony of the defendant in error and of her husband tended to prove all the material allegations of the declaration, and the testimony of a Dr. Hunter, who attended her as a physician, tended to prove that her fright, agitation, distress, and discomfort that night, if as she and her husband represented it to have been, would tend to produce, and might have caused, the miscarriage which she suffered on the 31st of August, 1890. For the defense there was proof tending to show that by a regulation of the railroad company the whole compartment in which was the berth occupied by Mrs. Dupre was reserved from sale by the conductor until after the train should pass Meridian, when, if the berths in it were not sold at Meridian, or taken by persons getting on there, the conductor could dispose of them, but not before; that this regulation was fully explained to the husband of Mrs. Dupre in her presence, and they were told they could occupy it until the train reached Meridian, but would have to surrender it then if it had been sold at Meridian; that some time before reaching Meridian the conductor learned that the compartment had been sold at Meridian, and told the husband of Mrs. Dupre that she would have to take the upper berth in another compartment, for which the conductor had given said husband a berth check when he sold him a berth; that said husband then became violent, and said they would not leave the berth Mrs. Dupre was in; that the conductor had no lower berth which he could let her have, except the lower