

The result is that we have been constrained to hold that the payment of taxes pursuant to the provisions of section 2187 for a period of more than five years, under color of title made in good faith, was a good and sufficient defense to the present suit.

Wherefore, the judgment of the circuit court must be, in all things, affirmed.

McCAULEY v. HAZLEWOOD.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 228.

UNLAWFUL DETAINER—WHEN ACTION LIES.

The vendee of a leasehold term cannot maintain an action of unlawful detainer in the Indian Territory, under Mansf. Dig. Ark. § 3348, to recover possession from his vendor, who refuses to surrender the premises at the time agreed.

In Error to the United States Court in the Indian Territory.

At Law. Action of unlawful detainer, brought by Collett E. McCauley against J. M. Hazlewood. The court directed a verdict for defendant, and plaintiff brings error. Affirmed.

George B. Denison and N. B. Maxey, for plaintiff in error.

S. O. Hinds and W. T. Hutchings, for defendant in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. The only question that arises upon the present record is whether a vendee of a leasehold term can maintain an action of unlawful detainer against his vendor, if the latter refuses to surrender possession of the premises at the time stipulated in the contract of sale. This question is to be determined with reference to the Arkansas statute concerning unlawful detainer, which has been extended over the Indian Territory, and is as follows:

"Sec. 3348. When any person shall wilfully and with force hold over any lands, tenements or other possessions after the determination of the time for which they were demised or left to him, or shall lawfully and peaceably obtain possession, but shall hold the same unlawfully and by force, or shall fail or refuse to pay the rent therefor when due and after demand made in writing for the delivery of possession thereof by the person having the right to such possession, his agent or attorney, shall refuse to quit such possession, such person shall be deemed guilty of an unlawful detainer." Mansf. Dig. p. 703.

The facts out of which the controversy arises are these: The defendant, Hazlewood, was in possession of certain lands situated in the Cherokee Nation, in the Indian Territory, under a lease which was to expire January 1, 1894. About the 1st day of June, 1890, he agreed with the plaintiff, McCauley, to exchange his leasehold for a race horse belonging to McCauley. The horse was delivered to Hazlewood when the trade was made, but it was agreed that possession of the leasehold premises should not be surrendered to McCauley until Hazlewood had gathered his growing crops,

but that McCauley should, in any event, have possession of the premises by the 1st of January, 1891. After the 1st of January, 1891, the defendant refused to surrender possession of the premises, as he had agreed to do, on the ground that the plaintiff had made certain fraudulent representations with respect to the breed and quality of the race horse. Thereupon, the plaintiff made a formal demand for the possession of the premises, and afterwards brought the present action of unlawful detainer. The section of the statute above quoted must receive the same interpretation in the Indian Territory that had been given to it by the court of last resort in the state of Arkansas before it was imported into the territory, and it seems to have been the well-settled rule in that state that an action of unlawful detainer would not lie, unless the relation of landlord and tenant had been created between the parties, either by express contract or by a clear implication of law. In *Dortch v. Robinson*, 31 Ark. 296, 298, it was held that the action could not be maintained by a purchaser at an execution sale against the tenants of the defendant in the execution. The court said that a mere right of possession in the plaintiff was insufficient to support the action; that the relation of landlord and tenant, either express or implied, must be shown to exist between the plaintiff and the defendant. In *Necklace v. West*, 33 Ark. 682, the same doctrine was reaffirmed, and it was ruled that the purchaser at a mortgage sale could not maintain an action of unlawful detainer against the mortgagor. To the same effect are the subsequent cases of *Johnson v. West*, 41 Ark. 535, 540, and *Mason v. Delancy*, 44 Ark. 444. In the former case it was said that:

"Unlawful detainer is a remedy provided by statute for the benefit of landlords against tenants who hold over after the expiration of their terms. It is founded upon the breach of a contract implied by law, if not expressed, that the tenant shall restore a permissive possession to the hands from which it was received."

And in the latter case (*Mason v. Delancy*) it was held that a vendor of lands could not maintain an action of unlawful detainer against his vendee, who had gone into possession under a parol contract of sale, but had paid nothing on account of his purchase. We are of the opinion that these cases clearly show that the present action of unlawful detainer was erroneously brought, and that it cannot be maintained. The proof offered at the trial was sufficient to show a right of possession in the plaintiff, which might possibly entitle him to maintain a suit in ejectment against Hazlewood; but it had no tendency to establish the relation of landlord and tenant, either express or implied, such as is essential to support the action. The plaintiff, it seems, never had possession of the premises in controversy; and as the defendant did not acquire possession thereof under or by virtue of any license, contract or agreement with the plaintiff, it is impossible to concede that any such relation existed between the parties as will suffice to support the present action under the Arkansas statute. The result is that the trial court properly directed the jury to return a verdict in favor of the defendant, and its action in that behalf, and in rendering a judgment in favor of the defendant, is hereby affirmed.

CENTRAL VERMONT R. CO. v. SOPER et al.

(Circuit Court of Appeals, First Circuit. January 12, 1894.)

No. 75.

1. ACTIONS—JOINDER OF CAUSES.

Under the Massachusetts practice acts, a count on a bill of lading may be united in the same declaration with a count in tort for negligence in the loss of the goods shipped.

2. PLEADING—CONDITIONS SUBSEQUENT—WAIVER.

The defense to an action against a carrier for loss of goods shipped, that the claim was not made nor the suit brought within the time stipulated in the contract of shipment, must be specially pleaded; but, if the objection that the answer fails to set up such defense is not taken at the trial, it will be considered waived.

3. APPEAL—REVIEW—BILL OF EXCEPTIONS.

On questions of admissibility of evidence, not involving any substantial error contrary to the law and justice of the case, the court will not look outside the bill of exceptions, although the bill assumes to make all the evidence and proceedings in the court below a part of it.

4. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to testimony as irrelevant, where such testimony is admitted on the understanding that it is to be connected, to be available, must be renewed after the failure to connect it.

5. EVIDENCE—COMPETENCY—OPERATION OF MACHINERY.

On the question of the origin of a fire in an elevator, testimony of witnesses is admissible to show the tendency of the bearings of the machinery to become heated, and of the inflammable character of the dust collecting around such bearings, and that a previous fire was caused by such heated bearings.

6. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where an instruction is strictly in accordance with law, but, by the way in which some expressions were emphasized, might possibly mislead the jury, and the party does not object to any specific expressions, nor ask the court to give any additional instructions, an exception thereto is unavailing.

7. BILL OF LADING—STIPULATION AS TO TIME FOR MAKING CLAIM FOR LOSS OR DAMAGE.

A stipulation in a bill of lading which requires a written claim for loss or damage to be made within 30 days after the loss or damage occurs, where the entire transit may not unreasonably consume the whole of such time, is unreasonable and void.

8. SAME—LIMITATION OF ACTION FOR LOSS OR DAMAGE—WANT OF KNOWLEDGE.

A stipulation in a bill of lading—appearing to be in common and public use, with general acquiescence, and agreed to by the parties without protest—requiring an action for loss or damage to be brought within three months after it occurs, will not, with reference to the particular transit in this case and the circumstances shown, be held unreasonable and void; and it cannot be controlled by want of knowledge of loss or damage, where such want of knowledge is not due to extraordinary circumstances.

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

At Law. Action by John E. Soper and others against the Central Vermont Railroad Company for the loss of 3,600 bushels of grain. Verdict and judgment for plaintiffs. Defendant brings error. Reversed.

The bill of exceptions was as follows:

This was an action for the loss of certain grain. The plaintiffs' declaration was in six counts. The defendant, by its answer, denied generally the