

Rock Bank. At the trial a verdict was directed for the defendants. On writ of error sued out by plaintiff, the judgment entered by the circuit court was reversed, and the case remanded, with directions to award a new trial. 64 Fed. 985. Defendants move for a rehearing.

William C. Ratcliffe, for plaintiff in error.

Sterling R. Cockrill, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion for a rehearing has been filed in this case. In support of the motion it is urged that the defendants in error asked an instruction in the nature of a demurrer to the testimony, which raised the question of the adequacy of the proof offered to fix the liability of the defendant bank as an indorser, and that this court in its decision overlooked the fact that such an instruction had been asked, and therefore erred in holding that the defendant bank waived or abandoned the defense of a want of proper demand and notice. It is only necessary to say that counsel are themselves mistaken in supposing that the record lodged in this court shows that such an instruction was asked. The record shows that at the conclusion of all of the evidence the plaintiff in error asked 10 instructions, all of which were refused, and that "the court, of its own motion," gave the instruction which is quoted in full in the opinion. 64 Fed. 985. It nowhere appears in the record that the defendant bank asked any instructions, or that it attempted, by instructions or otherwise, to avail itself of the defense that a proper demand was not made upon the makers of the several notes in suit to fix its liability as an indorser. That is a defense we think, that was neither considered nor determined by the trial court. We must adhere, therefore, to the conclusion announced in the opinion that the supposed defect in the proceedings taken to fix the liability of the defendant bank as an indorser is, upon the record now before us, insufficient to support the judgment.

The other points urged in support of the motion for a rehearing were sufficiently considered in the opinion now on file, and we find nothing in the argument of counsel that is adequate to alter the views heretofore expressed.

GULF, C. & S. F. RY. CO. v. CURB et al.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 425.

PRACTICE—REMARKS OF COUNSEL IN ARGUING TO JURY—NEW TRIAL.

A new trial will not be granted on the ground of improper argument to the jury because plaintiff's counsel, in an action against a railroad company for personal injuries, said to the jury: "J. tells you that this woman is suffering from common female troubles. If J. believes this, why did he not have Dr. B. examine this woman?"—though the defendant had no

right to require the plaintiff to submit to an examination; nor because such counsel stated in his argument that the defendant's counsel had outraged decency, and purposely humiliated the plaintiff and her husband by inquiring into their marital relations, especially when the cross-examination of the plaintiff has been carried beyond the bounds of propriety, if not of decency.

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

J. W. Terry, P. L. Soper, and C. L. Jackson filed brief for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States court in the Indian Territory by W. R. Curb and Rosella Curb, husband and wife, against the Gulf, Colorado & Santa Fé Railway Company, to recover damages for a personal injury received by Mrs. Curb while a passenger on one of the defendant's trains. The plaintiff recovered a judgment below, and the defendant sued out this writ of error. But two errors are assigned, and they both relate to remarks of plaintiff's counsel in addressing the jury. In the course of his argument, plaintiff's counsel said to the jury: "Cliff Jackson tells you that this woman is suffering from common female troubles. If Cliff Jackson believes this, why did he not have Dr. Booth and Dr. Bogie examine this woman?" Exception was taken to this remark, and the court asked to inform the jury that they should not consider it, because the defendant had no right to require the plaintiff to submit to an examination at the hands of its physicians. To this request the court replied that it was legitimate argument in answer to the argument of the defendant's counsel, but could not be considered as evidence. The other remark to which exception is taken is thus stated in the bill of exceptions: "Counsel for plaintiff, Mr. Cruce, in his closing argument, stated that, not only had this railroad company injured Mrs. Curb, but that their attorney had outraged decency, and purposely humiliated this woman and her husband before the jury by inquiring into their personal and marital relations." Defendant's counsel objected to this remark, which objection was by the court overruled. In reference to the last exception, we remark that the cross-examination of Mrs. Curb was carried much further than was necessary to a full elucidation of the facts about which she was examined, and, in our opinion, beyond the bounds of propriety, if not of decency, and merited the criticism passed upon it by plaintiff's counsel.

In recent years the reversal of cases for supposed improper remarks of counsel has sometimes been carried to very extravagant lengths. The grounds upon which such rulings are supported are: First, that it is the duty of the court, by such discipline, to compel lawyers to conform to a high and elevated standard in the advocacy of their clients' causes; and, second, that juries are composed of ignorant and credulous men, who will believe every false, fallacious, or extravagant statement of counsel, unless they are admonished by the court not to do so. An elevated standard of advocacy on the

part of the bar is certainly desirable, but, if any one is to be punished for falling below the ideal standard, it should be the lawyer, and not his client. By the time the questionable arts of the advocate, which are practiced to persuade and delude the judge as well as the jury, are eliminated from the profession, there will be little use for lawyers; the millennium will have come. The assumption of the courts that jurors are so weak, ignorant, and inexperienced as to fall an easy prey to the arts of the unscrupulous counsel is a grave error. They are as little liable to be played upon by false logic and misrepresentations of the evidence as the judge on the bench. There is no occasion "for a refining machine at their elbow" to sift the false from the true in the evidence, or to detect chicanery, falsehood, or fallacy in the argument of counsel. The jurors are quite as able to protect themselves from such influences on the facts of the case as the court is on the law, and every ruling which proceeds upon the idea that juries are destitute of common sense, unacquainted with the affairs of the world, and ignorant of the arts and methods of lawyers, is unsupported by fact or experience. A trial has relation to a dispute between the parties to the suit, growing out of their acts or contracts. It commonly concerns the ordinary affairs of life. It should not, therefore, be a mysterious or refined proceeding. It ought to be a very practical thing, and within the comprehension of men possessed of common sense and practical knowledge of the affairs of life; and, when properly conducted, it is so. Whenever a trial is conducted on any other theory, there is apt to be a miscarriage of justice. A verdict ought not to be set aside because the winning party did not have an ideal lawyer to argue his cause, or on the false assumption that the jury was destitute of common sense, and had such slight knowledge of the methods of lawyers as to fall an easy prey to their fallacious or false suggestions. But, however this may be, the trial judge, who hears and sees all that occurs at the trial, is in a much better position than the appellate court to determine whether he should interfere because of alleged improper acts or remarks of counsel. It is a matter relating to the decent and orderly conduct of the trial, and as such within the sound discretion of the trial court; and it is only when such discretion has clearly been abused, to the prejudice of the complaining party, that the appellate court will interfere. *Huckshold v. Railway Co.*, 90 Mo. 548, 2 S. W. 794. "It will not, in any case, be presumed that the discretion over this subject, committed to the trial court, has been abused." *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793, 798. The judgment of the court below is affirmed.

LITTLE ROCK GRANITE CO. v. DALLAS COUNTY.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 311.

EVIDENCE—BOOKS OF ACCOUNT.

For the purpose of proving the amount expended by a county in remedying defects in material supplied to it by a contractor, the county introduced in evidence a ledger or time book, kept by one S., and purporting to show the time during which laborers worked and the sums paid them, supplemented by the evidence of one T., the deputy clerk of the county court, to the effect that S. was in charge of the laborers, and it was his duty to keep such book; that S. was a careful bookkeeper, and kept correct books; and that S. was living in another state. *Held*, that the admission of the book, without the evidence of S. as to the correctness of the entries, was error.

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

This action was brought in the circuit court by the Little Rock Granite Company against Dallas county, in the state of Texas, to recover the balance of price of certain stone furnished by the granite company, and used by the county in the erection of a courthouse. The first amended original petition contains two counts, one to recover the balance of the contract price for certain granite furnished under a contract originally entered into between the granite company and one R. L. James, which, after partial performance, on the insolvency of James, was assumed by Dallas county; and the other to recover the value of certain stone furnished Dallas county at its special instance and request. Dallas county answered—First, by a general denial; second, by pleading a contract between the county and R. L. James to furnish all the material and erect a courthouse, a contract between the granite company and James to furnish all the granite for the building in accordance with plans and specifications, the partial compliance of the granite company with its contract with James, the abandonment by James of the contract to build the courthouse, and the assumption by the county of the contract between James and the granite company, with an understanding between the parties that at the time of the assumption there was only the sum of \$22,000 due the granite company; which sum was to be credited with certain payments, whereby the county, in fact, assumed only the sum of \$6,669.75, which amount the county averred it had overpaid to the extent of \$1,280.05; third, that the granite furnished by the granite company was not properly cut, and to cut and finish the same the county paid the sum of \$2,214.10, as per an itemized statement attached, and also the further sum of \$624.12 for sharpening tools used by the stone cutters in finishing the granite; fourth, that under the contract between the granite company and James, which was assumed by the county, the granite company was required to furnish certain archivolt, which said company failed and refused to furnish, and for which the county was compelled to and did expend the sum of \$5,000; and, fifth, that by reason of the neglect and refusal of the granite company to furnish the archivolt, which neglect and refusal continued for more than 100 days thereafter, the granite company, under and by virtue of its contract with said James and assumed by Dallas county, had forfeited, and was obligated to pay, to the defendant county the sum of \$50 per day, amounting to the sum of \$5,000. For all of the sums, to wit: Overpayment, \$1,280.05; cost of sharpening tools, \$624.12; cost of cutting granite, \$2,614.10; failure to furnish archivolt, \$5,000; and forfeiture for delay, \$5,000.—Dallas county prayed judgment in re-convention.

The trial of the case resulted in a verdict in favor of the county for \$281.42, from which judgment the granite company prosecutes this writ of error, assigning errors as follows: "First. The court erred in refusing the first special instruction requested by the plaintiff, for the reason that said instruction was demanded by the testimony in the case. Second. The court erred in refusing