

could not reasonably have found to the contrary. The notes as executed and delivered were not drawn in accordance with the terms of the agreement that is disclosed by the correspondence, while there was no direct evidence that the plaintiff company consented to a modification of the terms of that agreement at the time they were delivered. We think, therefore, that it was the province of the jury to infer and find, from all the circumstances attending the transaction, whether the notes and draft were in fact accepted by the plaintiff company with the understanding that the guaranty should be thereafter retained only as a security for their payment, and not as a security for future purchases.

But, even if we are mistaken in this view of the case, and if the trial court was right in holding, as matter of law, that the plaintiff accepted the notes and drafts in question under the terms of the agreement evidenced by the correspondence, and that it thereby acknowledged that that agreement had been fully executed, yet it is nevertheless true, we think, that there was some evidence before the jury which tended to show that the defendants, subsequent to June 5, 1895, consented to the further use of the guaranty as security for future purchases. As has been stated heretofore, one witness for the plaintiff testified without objection that in June, 1895, Charles C. Peters, the president of the Supply Company, represented to the plaintiff company that the guarantors had consented to let the guaranty stand as security for future purchases, and that all goods thereafter sold to the Supply Company were sold on the credit of the guaranty. Neither of the defendants testified that they did not give such consent to the use of the guaranty as a means of obtaining credit, subsequent to June 5, 1895; and, even if they had done so, the issue concerning such consent should have been submitted to the jury under proper instruction. It results from these views that the judgment below must be reversed, and the cause remanded for a new trial. It is so ordered.

HARRIMAN v. PULLMAN PALACE-CAR CO.¹

(Circuit Court of Appeals, Eighth Circuit. February 7, 1898.)

No. 875.

1. ACTION FOR NEGLIGENCE OF SERVANT—EVIDENCE OF REPUTATION AND GENERAL CONDUCT.

In an action for injury caused by the careless act of a servant, where incompetence is not charged, evidence that the servant is a person of good repute, or that he had always theretofore displayed the requisite skill and care, is not competent.

2. GENERAL CONDUCT OF SERVANT—CHALLENGE BY PLAINTIFF.

Testimony of a single witness for plaintiff that, shortly before the accident, she had noticed the servant doing his work, and that he did not seem to be in a pleasant state of mind, but worked quick, and "jerked himself about like a boy who did not like to do his chores," does not justify the introduction of evidence of the general conduct of such servant.

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

¹ Rehearing pending.

John W. Beebe for plaintiff in error.

Samuel W. Moore (Gardiner Lathrop, Thomas R. Morrow, and John M. Fox, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Maggie M. Harriman, the plaintiff in error, against the Pullman Palace-Car Company, the defendant in error, to recover damages which she claimed to have sustained while a passenger on one of the defendant's sleeping cars, by reason of the carelessness of the porter who had charge of the car. Her complaint was, in substance, and some evidence was offered which tended to show, that, while she was sitting in the berth or seat to which she had been assigned in the car, she was struck a severe blow on the back of her head by a movable partition between the berths, which was at the time being handled by the porter in the discharge of his customary duties, and that the blow was solely attributable to the careless manner in which it was handled.

The sole question for consideration on the present record is whether prejudicial error was committed by the trial court in permitting the defendant company to introduce testimony tending to show that the porter, through whose fault the injury complained of was alleged to have been sustained, was usually careful, competent, courteous, and attentive. Such testimony was admitted during the progress of the trial, over the plaintiff's objection, and to its admission counsel for the plaintiff duly excepted. The rule is well established by many authorities that an employer, when sued by one who has sustained an injury in consequence of a particular negligent act on the part of his servant, is not at liberty to disprove the charge by evidence tending to show that the servant was a person of general good repute, who, in the discharge of his duties, had always theretofore displayed the requisite skill and caution, because such evidence is not relevant to the issue, and is only admissible in those cases where the master is accused of having knowingly employed an incompetent servant. Persons sometimes fail to exercise ordinary care, although as a rule they are careful, and for this reason proof that one is generally prudent and cautious has no necessary tendency to show that on a particular occasion he was not negligent. Besides, the practice of establishing the quality of one's act in a given instance by his conduct at other times, or by his general line of conduct, would have an inevitable tendency to create collateral issues. When, therefore, a complaint does not charge incompetency, but simply alleges that an employé acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue. *Thompson v. Bowie*, 4 Wall. 463; *McDonald v. Inhabitants*, 110 Mass. 49; *Towle v. Improvement Co.*, 98 Cal. 342, 33 Pac. 207; *Adams v. Railway Co. (Iowa)* 61 N. W. 1059; *Connors v. Morton*, 160 Mass. 333, 335, 35 N. E. 860; 2 *Thomp. Neg. p.* 804; *Deer. Neg. §* 5407; *Jones, Ev. §* 162.

Counsel for the defendant do not appear to question the rule of evidence last stated, nor its applicability to the case in hand. They seek

to justify the admission of the evidence, however, on the ground that the plaintiff herself had challenged the general habits of the porter for caution and urbanity, and, by so doing, had made that one of the relevant issues in the case. We do not find, however, that this contention is supported by the evidence. The claim is based entirely on the ground that, in the course of the trial, one witness for the plaintiff testified, in substance, that, shortly prior to the injuries complained of, she noticed the porter doing his work, and that he did not seem to be in a pleasant frame of mind, but worked quick, and "jerked himself about like a boy who did not want to do his chores." It is no doubt true that the defendant company was entitled to rebut this statement of the witness by showing that the porter was not in the frame of mind, and did not act on the occasion in question in the manner, described by the witness; but the evidence was not of such character as to make testimony touching the general conduct of the porter either relevant or competent. We are satisfied that the evidence complained of was improperly admitted, the same not being relevant to the issue involved in the case; and, as it may have been prejudicial to the plaintiff, the judgment will be reversed, and the cause remanded for a new trial.

HOGE et al. v. MAGNES.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1898.)

No. 948.

1. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTE.

The construction by the highest judicial tribunal of a state of its constitution and statutes, relative to the titles and conveyances of real estate situated therein, establishes a rule of property which is controlling authority in the federal courts, if no question of right under the constitution or laws of the nation, and no question of general or commercial law, is involved.

2. PLEADING—EVIDENCE—DEED—VARIANCE.

Where a tax deed offered in evidence at a trial corresponds with that pleaded in the answer in respect to the parties, the year for which the tax upon which it is based was levied, and the date of the sale, minor variances in reference to the first date of publication of notice, and similar matters, such as could not have caused surprise upon the introduction of the deed in evidence, do not warrant its rejection.

3. TAX SALES—SUBSTANTIAL REGULARITY—PRESUMPTION.

Where a statute requires a tax sale to be made at the office of a specified county officer, the fact that a given deed, reciting that the sale was made in substantial conformity with the statute, also recites that the sale was made at the office of a different county officer, does not warrant a presumption that the sale was therefore irregular and void, in the absence of evidence that the two places were not substantially the same.

4. SAME—IRREGULARITY—COLOR OF TITLE.

Although Sess. Laws Colo. 1870, p. 97, § 37, and page 105, § 63, require each lot or tract of land sold for taxes to be valued, assessed, and sold separately, a deed reciting that the sale upon which it is based was of several distinct and widely separated tracts of land for a single gross sum nevertheless constitutes color of title under which one who acquires it in good faith, and who holds possession of the lands it describes, and pays taxes thereon for five successive years, may thereby acquire the absolute title, under Mills' Ann. St. Colo. § 2023

5. APPEAL—BRIEF OF ARGUMENT—RULE 24.

Under rule 24 of the circuit court of appeals (21 C. C. A. cxxii., 78 Fed. cxxii.), if counsel for a plaintiff in error considers the errors he assigns too trivial to warrant him in finding and citing the pages of the record which present them, the court will not deem them of sufficient importance to require it to search for them.

6. SAME—SUFFICIENCY OF EVIDENCE.

Where a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court.

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

S. L. Carpenter, for plaintiffs in error.

Hugh Butler, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. John Hoge and Norman S. Pettit, the plaintiffs in error, who had acquired the title from the patentee of the United States to a lot in the state of Colorado, brought an action in the nature of ejectment against Peter Magnes, the defendant in error, who was in possession of the property under a tax title. There is a statute in the state of Colorado to the effect that every person who under claim and color of title made in good faith holds possession and pays all taxes legally assessed upon land for five successive years shall be adjudged to be the legal owner thereof, according to the purport of his paper title. Mills' Ann. St. Colo. § 2923. The defendant in error pleaded as his sixth defense that on the 25th day of July, 1877, the treasurer of the county of Arapahoe, in which county the land was situated, conveyed the premises to him pursuant to a sale thereof for delinquent taxes; that on that day he took possession of the lot in good faith, under claim and color of title; and that he held possession thereof, and paid all the taxes legally assessed thereon, for the term of five successive years thereafter. There were other defenses pleaded, and the averments in the plea of this defense were denied. The case was tried by the court, without a jury. A general finding was made, to the effect that the defendant in error had sustained this sixth defense, and judgment was entered in his favor upon that ground. The writ of error was sued out to reverse this judgment.

The alleged error relied upon in this case is that the tax deed of July 25, 1877, was improperly received in evidence, because it was not the deed described in the sixth defense, and because it was void on its face, and constituted no color of title. The first objection is based upon the fact that the answer pleads a deed made pursuant to a notice of sale on July 19, 1875, first published on June 12, 1875, while the deed purports to be made pursuant to a sale on July 19, 1875, "at [an adjourned sale] the sale begun and publicly held on the twenty-fourth day of May, A. D. 1875." The objection is unworthy of consideration. The parties to the deed, the year for which the tax upon which it is based was levied, and the date of the sale in the answer and in the deed correspond, and the plaintiffs in error could not have been surprised by the introduction of the deed in evidence.

The principal objection to the deed, however, is that it was void on its face, and constituted no color of title, because (1) the statute required the tax sale to be made at the office of the county clerk, while this deed recites that the sale upon which it rests was made at the office of the county treasurer, and (2) because the statute under which the sale was made required each lot or tract of land to be valued, assessed, and sold separately, while this deed recites that the sale upon which it is based was of three distinct and widely separated tracts of land for a single gross sum. Sess. Laws Colo. 1870, p. 97, § 37; Id. p. 105, § 63. The suggestion that the deed is void because the sale was made at the office of the county treasurer, instead of at the office of the county clerk, is deserving of no discussion, because (1) no such objection was made when the deed was offered in evidence, and the question it raises is therefore not here for determination, and (2) if it were, there is no evidence that the office of the county clerk was not also the office of the county treasurer. The deed recites that the treasurer exposed the land at public sale "in substantial conformity with the requirements of the statute in such case made and provided," and no court would be authorized to presume the sale to be irregular and void because it was made at the county treasurer's office instead of at the county clerk's office, in the absence of evidence that the two places were not substantially the same.

The objection that the deed discloses the sale of several distinct parcels of land for one gross sum would be worthy of serious consideration if we were considering whether or not the deed conveyed a perfect title. The question is, however, whether or not this deed notwithstanding the fact that it discloses a sale unauthorized by the statute, gives color of title, under section 2923, Mills' Ann. St. Colo. These are by no means the same questions, and, upon an examination of the decisions of the supreme court of the state of Colorado, we discover that the latter is not open for our consideration. That court has expressly held that a tax deed which recites the sale and conveyance of several separate parcels of land, although void on its face, constitutes color of title under which one who acquires it in good faith, and who holds possession of the lands it describes, and pays taxes thereon for five successive years, may acquire the absolute title under the statute upon which the successful defense in this action was based. *Waddingham v. Dickson*, 17 Colo. 223, 229, 29 Pac. 177; *De Foresta v. Gast*, 20 Colo. 307, 312, 38 Pac. 244; *Beaver v. Taylor*, 1 Wall. 637, 641; *Cameron v. U. S.*, 148 U. S. 301, 307, 13 Sup. Ct. 595. It is not material that, under a similar statute, the supreme court of Kansas and courts of other states have arrived at a different conclusion. In construing state statutes relative to the titles to land, the federal courts follow the decisions of the highest judicial tribunals of the respective states in which the lands are situated. The construction by such a tribunal of a state, of its constitution and statutes, relative to the titles and conveyances of real estate, establishes a rule of property which is controlling authority in the courts of the United States, where no question of right under the constitution or laws of the nation, and no question of general or commercial law, is involved. *Bank v. Glass*, 49 U. S. App. 228, 232, 25 C. C. A. 151, 153, 154, and 79 Fed. 706, 708, and cases there cited; *Christy v. Pridgeon*, 4 Wall. 196, 203. Under the decisions of the

supreme court of Colorado to which we have adverted, the tax deed was therefore properly received in evidence.

There are several other assignments of error relative to the admission and rejection of evidence in the record, but we assume that counsel for plaintiffs in error has abandoned them, because he has not pointed out in his brief the pages in the record where the questions they might present are raised. Rule 24 (21 C. C. A. cxxii, 78 Fed. cxxii.) of this court provides that the plaintiff in error shall furnish a brief of the argument exhibiting a clear statement of the points of law or fact to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point. Where counsel for plaintiff in error considers the errors he assigns too trivial to warrant him in finding and citing the pages of the record which present them, the court will not deem them of sufficient importance to require it to search for them. *City of Lincoln v. Sun-Vapor Street-Light Co.*, 19 U. S. App. 431, 436, 8 C. C. A. 253, 255, and 59 Fed. 756, 759; *National Bank of Commerce v. First National Bank*, 27 U. S. App. 88, 92, 10 C. C. A. 87, 89, 61 Fed. 809, 811; *Shoe Co. v. Needles*, 32 U. S. App. 410, 417, 15 C. C. A. 142, 147, 67 Fed. 990, 994; *Haldane v. U. S.*, 32 U. S. App. 607, 610, 16 C. C. A. 447, 448, and 69 Fed. 819, 821.

There are five alleged errors assigned with reference to the sufficiency of the evidence to support the judgment of the court, and these are discussed at length in the brief of the plaintiffs in error, and pages of the record are cited to show that the court below was not warranted in coming to the conclusion that the defendant in error made his claim of title in good faith, and that he continued in possession of the premises under it, and paid the taxes legally assessed thereon, for the term of five successive years, as alleged in his answer. These questions, however, are not before us. The case was tried by the court below without a jury. It made a general finding to the effect that all the allegations set forth in the sixth defense were true. This finding was based upon evidence which covers many pages of the record, and upon an agreed statement relative to a part only of the facts. It is conclusive of every fact necessary to sustain the judgment, which was well pleaded in the answer. When a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court. *Stanley v. Supervisors*, 121 U. S. 535, 547, 7 Sup. Ct. 1234; *Wile v. Bank*, 36 U. S. App. 165, 167, 17 C. C. A. 25, 26, and 70 Fed. 138; *Smiley v. Barker*, 83 Fed. 684, 688; *Insurance Co. of North America v. International Trust Co.*, 36 U. S. App. 291, 303, 17 C. C. A. 616, 618, and 71 Fed. 88, 90; *Searcy Co. v. Thompson*, 27 U. S. App. 715, 13 C. C. A. 349, and 66 Fed. 92. The judgment below must be affirmed, with costs, and it is so ordered.

BARTHOLOMEW v. CITY OF AUSTIN, TEX.

(Circuit Court of Appeals, Fifth Circuit. February 1, 1898.)

No. 576.

1. MONOPOLIES—PRIVILEGES GRANTED WATER COMPANY.

An ordinance granting to a water company the privilege, not in terms exclusive, of constructing and operating a system of waterworks in a city, for supplying the corporation and its citizens with water, on certain terms and conditions, for a period of 25 years, is not a grant of an obnoxious, exclusive privilege, or the creation of a monopoly, inhibited by public policy or the constitution of Texas, which provides that "perpetuities and monopolies are contrary to the genius of free government and should never be allowed."

2. FEDERAL COURTS—STATE LAWS AS RULE OF DECISION—DECISIONS NOT BINDING.

Where contracts or transactions have been entered into, and rights have accrued thereunder, before state laws applicable to them have been construed by the state courts, the federal courts will place their own interpretation on such laws, though the state courts have since adopted a different construction.

3. EXEMPTION FROM TAXATION—WATER COMPANY—FREE WATER IN LIEU OF TAXES.

Exempting from municipal taxation the property of a water company, in consideration of the free use of water for municipal purposes, is not in violation of a constitutional provision declaring the property of corporations subject to taxation the same as that of individuals.

4. CONTRACT—EXEMPTING FROM TAXATION—REMEDY OF PROPERTY OWNER.

Where a city undertakes to exempt from taxation the property of a water company in consideration of water furnished the city, for certain purposes, if such exemption proves to be void, the company can recover for water furnished under the arrangement.

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

This action was instituted to recover from the city of Austin the sum of \$16,900.83 for water supplied and rental of hydrants on a contract entered into between the City Water Company and the city of Austin on the 13th day of April, 1882, which contract was attached to and made a part of the petition, and of which the following is a copy:

"City Water Company Contract with the City of Austin.

"An Ordinance.

"Contract between the City Water Company and the City of Austin.

"This contract, made and entered into this thirteenth day of April, A. D. 1882, by and between the City Water Company, a corporation of the city of Austin, in the county of Travis and state of Texas, party of the first part, and the city of Austin, a body corporate of the county of Travis in the state of Texas, party of the second part, witnesseth:

"Whereas, the city council of the city of Austin deem it necessary to provide for a more effective protection of the property of taxpayers of the said city from fire; and for the further purposes of extending such protection to a larger number of taxpayers, and also to secure to the citizens of the said city a supply of water suitable for domestic purposes, and for the further benefits of the city of Austin, hereinafter mentioned; and, in accordance with the seventh and twentieth paragraphs of section 1 of article six (6) of the charter of the city of Austin, together with the other powers contained in said article six (6):

"Therefore, be it ordained by the city council of the city of Austin:

"Section 1. That there is hereby given and granted to the City Water Company the right and privilege for the term of twenty years from the date of the