WESTERN UNION TEL. CO. v. ERWIN.

(*Supreme Court of Texas.* May 31, 1892.)

TELEGRAPH COMPANIES — DELAY IN DELIVERY OF MESSAGE—MENTAL SUFFERING.

Where the complaint against a telegraph company shows that because of the delay in delivering a message plaintiff and his wife were prevented from being present to aid in directing the funeral of the latter's father, it presents an action for injury to feelings and mental suffering.

Commissioners' decision. Section B. Appeal from district court, Collin county; H. O. HEAD, Judge.

Action in tort by J. C. Erwin against the Western Union Telegraph Company. Plaintiff had judgment, and defendant appeals. Affirmed.

Stemmons & Field, for appellant. *M. H. Garnett* and *Muse & Mangum*, for appellee.

FISHER, J. This suit was brought by appellee against appellant to recover damages for delay and failure to deliver a telegram directed to appellee, announcing the death of the father of appellee's wife. He claims that by reason of the delay he and his wife were prevented from being with the family of deceased before the funeral, and from directing the funeral and burial, which they desired to do. If reasonable diligence had been used in the delivery of the message, he and his wife would have taken passage on a train, and would have reached the home of deceased long before the burial; but, owing to such failure to deliver the message, they could not and did not reach their destination by train, but reached there by private conveyance, which they had to take in order to get to the home of deceased in time for the funeral. That they reached there only in time to meet the burial procession. That the extra expense incurred in traveling by private conveyance was $15. That, when plaintiff and wife did learn of the death of her father, he contracted with defendant to send a telegraphic message to those in charge of the corpse, announcing that plaintiff and wife would arrive at 3 o'clock. That defendant was informed at the time that the object was to delay the burial, so that plaintiff and wife could arrive in time to give directions as to the funeral. That defendant failed to deliver this message; the result being that the burial was not postponed. That by reason of the negligence of appellant in failing to deliver said messages he sustained damages in the extra sum paid out by him for private conveyance, $15; and that by reason of having to travel by such private conveyance his wife received physical injuries, and he and his wife have suffered mental anguish by reason of the facts resulting from a failuree to deliver such messages. The amount sued for is $3,600. Appellant filed a general demurrer and general denial. Judgment was rendered in favor of appellee against appellant for $200. No action of the court was had on the demurrer, nor is there a statement of facts in the record. Appellant seeks a reversal of the judgment for the alleged reason that it is for an amount beyond the actual damages sustained, in that the object for which the telegram was sent was accomplished by appellee and his wife reaching the burial in time, and that the increased expense to which appellee was put would be the measure of damages, and that injuries to feelings were not recoverable in this case. There being no statement of facts, we can only look to the cause of action as stated in the petition, in order to ascertain if it presents a case of damages that would support the judgment. The averments of the petition show that the failure of appellee to reach the place of burial earlier, so that he and his wife could be present to aid in directing the funeral and burial, was attributable to the negligent delay of appellant in delivering the messages. The increased expense in reaching the place of burial was occasioned by appellant's failure to deliver the telegram announcing the death of the father of appellee's wife. This expense would have been obviated if the message had been delivered in time for appellee and wife to have taken passage on the trains running to his destination. For this amount the appellant admits its liability, but contends that the facts do not show a case in which injury to feelings or mental suffering is recoverable. It was a right of the appellee and his wife to be present before the funeral of the deceased, and to aid and direct the funeral and the burial of the body. The negligent failure of appellant to deliver the telegrams was the direct cause why appellee and wife were deprived of these privileges. The injuries to the feelings and mental suffering sustained by appellee and wife in being deprived of these rights is but the effect occasioned by the wrongful failure of appellant to perform its duty, and for damages resulting therefrom we think the appellant liable. We are of the opinion, in this respect, the averments of the petition show a case in which such damages are recoverable. We conclude the judgment should be affirmed, and so report.

Adopted by supreme court, May 31, 1892.

MAGEE v. MERRIMAN.

(*Supreme Court of Texas.* May 31, 1892.)

DESTROYED RECORDS — FAILURE TO RE-RECORD—BONA FIDE PURCHASERS—CONSTITUTIONAL LAWS.

1. Under Rev. St. art. 4293, requiring that where county records are destroyed deeds which are preserved shall be re-recorded within four years in order that the first record shall be effective, where such deeds are not so re recorded after the destruction of the records the first record does not constitute notice as against a *bona fide* purchaser.

2. Under this statute an original deed will be presumed to have been preserved until the contrary is proved.

3. Acts of 1874 and 1876, whose titles show th they relate to supplying lost records, are not unc stitutional because they provide both for supp ing and re-recording them.

Commissioners' decision. Section B. Appeal from district court, Falls county; J. R. DICKINSON, Judge.

Action of trespass to try title by J. F. Merriman against Leonard Magee. Judgment for plaintiff, and defendant appeals. Reversed.

Goodrich & Clarkson, for appellant. *J. A. Martin*, for appellee.

FISHER, J. On September 29, 1888, appellee instituted in the district court of Falls county his suit of trespass to try title against appellant for the George Davis 160-acre survey in Falls county, and on July 9, 1889, recovered a verdict and judgment for the land, with an allowance to appellant for improvements. The land was patented September 4, 1847, to Jacob de Cordova, assignee of Davis, under whom both parties claim, the appellee under the elder deed. Magee appeals. There is but one assignment of error, which is as follows: "The law is that the holder of a deed, whose record has been destroyed, must re-record the original within four years, or a purchaser from the vendor of such holder, who buys in good faith without notice, and pays the purchase money, is protected as a purchaser in good faith; and the court erred in instructing a finding for the plaintiff without regard to this proposition, and in refusing the special charge asked by the defendant, presenting the substance of this proposition." The facts are: (1) The land sued for was patented to Jacob de Cordova, September 4, 1847. The patent was filed for record in Falls county, June 19, 1885. (2) Jacob de Cordova conveyed said land to William R. Baker by his deed of date December 20, 1848, which deed was recorded in the record of deeds of Milam county, Tex., May 28, 1850, after having been duly proved for record December 21, 1848. This deed was recorded in Bosque county, April 21, 1874, (other land, lying in Bosque county, was conveyed by the same,) and in Falls county, November 30, 1888. W. R. Baker, on the 4th day of December, 1849, conveyed to F. H. Merriman said land by his deed of that date, which was then proved for record December 4, 1849, and filed for record in Milam county and recorded in said county the 29th of May, 1850, and recorded in Bosque, (it conveying also Bosque county land,) April 21, 1874, and filed for record and recorded in Falls county, June 19, 1885. (3) It was admitted that the plaintiff is the son and sole heir at law of F. H. Merriman. (4) That by virtue of an order of sale and an order of confirmation of sale, made in the county court of Bosque county, in the estate of Jacob de Cordova, the administrator of said estate, by his deed dated March 22, 1882, in consideration of $80, conveyed said land to J. C. Frazier, which deed was duly recorded in the records of deeds of Falls county, April 27, 1882. J. C. Frazier, by his deed of special warranty of title, dated October 23, 1883, conveyed said lands to J. Jinkins, which deed was duly recorded in the records of deeds of Falls county, June 13, 1884. Jinkins paid a consideration of $80. (5) J. Jinkins, by his deed dated October 25, 1883, conveyed said land to defendant. This deed contains a general warranty of title, and was duly recorded in Falls county, June 13, 1884. The defendant paid a consideration of $800 for said land, and he testified that he had no actual notice of plaintiff's title when he bought and paid for the land. (6) That part of Falls county in which the land lies was created out of Milam county by an act of the legislature of January, 1850, and Falls was organized in 1850. On the 9th day of April, 1874, the record of deeds of Milam county, Tex., including the record of the above-mentioned deeds, the line of plaintiff's title, (which are recorded in Milam,) was destroyed by fire. The court below in effect instructed the jury to find in plaintiff's favor as to the land, and refused a charge asked by appellant, presenting his rights as an innocent purchaser. Appellant, as seen by his assignment of error, contends that he is entitled to be protected as an innocent purchaser, because he purchased the land for a valuable consideration, without actual notice of the elder deed from Jacob de Cordova, after four years from the time of the destruction of the records of Milam county, and before the re-registration of the original deed. We think this the correct view of the question, and for the error of the court below in this respect we reverse and remand the case. The acts of the legislature of 1874 and 1876, that require the re-registration of the original deeds when the records thereof have been destroyed, have been construed by this court in the cases of O'Neal v. Pettus, 79 Tex. 254, 14 S. W. Rep. 1065; Salmon v. Huff, 80 Tex. 133, 15 S. W. Rep. 257, 1047; and Barcus v. Brigham, 19 S. W. Rep. 703, (decided at the present term.) These cases hold that if the original be not re-recorded within the time required by the statute, a subsequent purchaser for value without notice will be protected, and he will not be charged with constructive notice by reason of the fact that the deed was once recorded, the record of which has been destroyed.

Appellee contends that the acts of 1874 and 1876 are unconstitutional, because they are obnoxious to the constitutional provision that no bill shall contain more than one subject, which shall be expressed in its title; that to regard these acts statutes of registration would be to include a subject not embraced in the title. The title of the act of 1874 is as follows: "An act to provide for supplying lost records in the several counties of this state." That of 1876 is amendatory of that of 1874, and reads: "An act to amend an act entitled 'An act to provide for the supplying of lost records in the several counties of this state,' approved April 14, 1874." We think the act providing for supplying lost and destroyed records necessarily includes within its terms, as the same subject, the re-registration of such records when supplied and the effect they should have when so recorded. We believe the statutes constitutional. Appellee further contends that it is not shown by the facts that the original deed was preserved or in existence after the destruction of the records of Milam county, and that as appellant seeks the benefit of the statute, and it only requires the record to be made when the original is preserved or in existence, he must show that such original was preserved or existed. It is shown by the facts that a record of the former deed was made in Falls county after the land was purchased by appellant; but it does not appear whether the record was made

by recording the original deed, or a certified copy, which could have been done under the law. Without deciding the question whether the law requires the registration of the original only, and does not relate to the registration of a certified copy, we nevertheless think that appellee's position is untenable. The original deed is presumed to exist until the contrary appears, and the law assumes that it is in possession and control of the party who asserts title under it. There is another principle of law that excludes the idea that the appellant must show that the deed was preserved. The appellee, holding under the elder deed, is presumed to have it in possession, and to have knowledge of its existence and preservation, or destruction if it is destroyed. These are facts peculiarly within his knowledge, and about which the appellant is not supposed to know, as he has no concern with this deed. The evidence of the loss or preservation of the deed should come from the appellee, as he is better enabled to furnish such information than any one else, and until such proof is made it will be presumed that the original was preserved. We cannot assume that the original deed was destroyed when the record thereof was destroyed, because the deed is simply in the possession of the clerk, and deposited in his office, so long only as is required to record it. It then ceases to be an archive of his office. It is a private paper of the owner, which he can control at will. There is an agreement in the record that if there is reversible error in the case it shall be remanded. Otherwise we would reverse and render. We conclude the judgment should be reversed and remanded, and so report.

Adopted by supreme court May 31, 1892.

Degener v. O'Leary.

(Supreme Court of Texas. June 7, 1892.)

Appeal—Motion for New Trial — Sufficiency.

A motion for a new trial, which only stated that "the verdict is contrary to and not supported by the evidence," is too general, and the evidence will not be reviewed on appeal. Clark v. Pearce, 15 S. W. Rep. 787, 80 Tex. 150, followed.

Commissioners' decision. Section B. Appeal from district court, Bexar county; George H. Noonan, Judge.

Action to recover money by J. P. O'Leary against H. L. Degener. Plaintiff had judgment, and defendant appeals. Affirmed.

Upson & Bergstrom, for appellant. *T. F. Shields*, for appellee.

Fisher, J. The appellee, J. P. O'Leary, brought this suit in the district court of Bexar county to recover of the appellant, Hans L. Degener, the sum of $268.80 for labor performed and material furnished in plastering a house for L. J. Gempler, which had been contracted to be performed by one Richter, who had executed a bond for its performance with appellant as surety. The contractor having failed to complete the same, appellant undertook to do so. Appellant alleges that he authorized one Schatz to employ some one to complete the work for a sum not exceeding $76; that appellee was employed, and did the work, and appellant was ready and willing to pay to appellee said sum of $76, and paid the same into court. The cause was tried April 5, 1889, by jury, and a verdict rendered in favor of appellee for $268.80, with interest from January 27, 1887, at the rate of 8 per cent. per annum, upon which verdict the court entered judgment, and from which judgment the appellant, after the order overruling his motion for a new trial, appeals to this court upon the following assignment of error: "The judgment is contrary to the law and the evidence in this: That the evidence shows that the defendant had never employed the plaintiff to do any work for him, but that he had authorized one Schatz to employ some one for the sum of not exceeding $76 to do the work, and that the plaintiff was employed by the said Schatz; and judgment is rendered for the plaintiff against this defendant for a sum largely in excess of the amount the said Schatz was authorized to pay, and which the defendant had never contracted to pay therefor." Appellee raises the point that the questions presented by the assignment of error ought not to be considered in this court, because the matters therein complained of were not presented and called to the attention of the court below by a motion for a new trial. The motion for a new trial simply states that "the verdict is contrary to and not supported by the evidence." Calling the court's attention to the insufficiency of the evidence in this general way has often been held insufficient, and too general to be considered for any purpose. The case of Clark v. Pearce, 80 Tex. 150, 15 S. W. Rep. 787, is decisive of this question. There it is held that the matter to be considered in this court must be, by a motion for new trial, called to the attention of the trial court; that the effort to correct the error must first be directed in that court. We conclude the judgment should be affirmed, and so report.

Adopted by supreme court, June 7, 1892.

Leavell *et ux.* v. Lapowski.

(Supreme Court of Texas. June 7, 1892.)

Business Homestead—What Constitutes.

Where plaintiff's business house occupied a portion of several lots, and plaintiff regarded the unoccupied portion of such lots as part of his business homestead, and never rented the lots to any one, or permitted any use thereof, except to a keeper of an hotel adjoining the lots to put firewood thereon, and that he used the lots for piling thereon goods sold by him in his business, it cannot be said that the part of the lots not covered by the business house is not exempt as a business homestead because put to a use foreign to plaintiff's business.

Commissioners' decision. Section B. Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by S. H. and S. K. Leavell against Sam Lapowski. Judgment for defendant. Plaintiffs appeal. Reversed.