The Central Law Journal.

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## CURRENT TOPICS.

In another column we print a communication from a distinguished jurist and law writer, approving the views which we have recently expressed on the subject of journalistic criticism of judicial acts. Though our opinion on the subject is too thoroughly fixed to need confirmation, yet such backing is a gratification to our self-esteem.

As a further illustration of our views, we add here a communication from a correspondent in Indiana, which seems to us to be just and temperate, and at the same time quite severe:

*To the Editor of the Central Law Journal:*

The opinion of the Texas Court of Appeals in the case of Wooldridge v. State, appears in full in the last number of the CENTRAL LAW JOURNAL. We surmise it was so inserted for the purpose of calling attention to the fallacies and unsound reasoning sometimes indulged in by appellate courts, when they attempt to justify the reversal of judgments of *nisi prius* courts for trivial causes. The opinion in the case alluded to is a forcible illustration of this vicious practice, which occurs too frequently, and is tending to educate the public to distrust and ridicule judicial methods, and to increase the jurisdiction and victims of "lynch law."

The learned judge who delivered the opinion of the court in the case, argues many points that do not enter into a fair consideration of the point involved upon which the judgment of reversal is predicated. A false question is assumed as being the vital one involved, and reasons are advanced and authorities cited to demonstrate that this false issue is untenable. The opinion labors to show that under "statutory and legal rules," a verdict finding a person guilty of murder, without also finding the degree, is insufficient. This "man of straw" which the court sets up for the purpose of "knocking down," was not the real question presented for decision. The real question was, did the verdict in question find the degree of guilt? What is said about the requisites of a verdict is correct, but not being directly involved, only serve to stretch out the opinion to an unnecessary length.

The three requisites of a verdict, as stated, 1st, that it must declare the issues; 2d, must be in writing; 3d, and must be concurred in by all the jurymen, will not be controverted, and no argument or citation of authorities was necessary in support of it. The verdict in question complied with all these requisites. The issue was guilty or not guilty, and it was properly declared; it was in writing, and all the jurymen concurred in it. But it is stated that the statute declares, "if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree." The verdict in question was not void in view of this statute, and only needed the aid of a little "common sense" to make it clear. The degree was found, and a word was only mis-spelled. The learned judge says "that neither bad spelling nor ungrammatical findings of a jury will vitiate a verdict when the sense is clear." Five cases decided by his own court are cited in support of this. Now in this case, the sense and meaning of the jury was perfectly clear and the verdict subject to criticism only in consequence of the misspelling of a word. The learned judge says that this presents "a most serious question and no case directly in point has been found in our own or the decision of other courts of the country." This showing is creditable to his own and the other courts. But again he says "we must determine it by a fair and proper construction of our statutes, relating to the subject matter by analogies drawn from well settled principles of the law." If this be so, why not be governed by "*stare decisis*" that bad spelling will not vitiate a verdict, according to the authorties cited. A misspelled word was all that hurt this verdict. It is also stated in the opinion that "it was evidently read '*first degree*' by the clerk and assented to by the jury as read." The trial court had passed upon this question, and every presumption of law and fact was in favor of the sufficiency of the verdict and only a misspelled word against it, which did not obscure the sense of the jury or nullify it according to the authorities cited. To nullify this verdict it was necessary for the appellate court to ignore the fact that it was read by the clerk, in proper form, assented to by all the jurymen as read and acted upon by the court below, and still more to torture and construe into nonsense the verdict of a jury, harmonious in all its parts, with the exception of a misspelled word. But the Appellate Court did all this and nullified the verdict. This is not the way constitutions, statutes or any kind of instrument is dealt with by courts and the analogies of the law appealed to by the learned judge do not sustain him in thus dealing with the verdict of a jury. It is to be regretted that appellate courts are so prone to interfere with the judgment of the trial courts upon mere technicalities that are as baseless as "the fabric of a vision."

H. S. C.

Vincennes, Ind., April 20, 1883.

## THE RIGHT OF A BONA FIDE OCCUPANT OF LAND TO COMPENSATION FOR HIS IMPROVEMENTS.

It may be observed, in the first place, that the civil law afforded protection to the *bona fide* occupant of land, who had made useful or permanent improvements on the land, believing himself to be the true owner. The civil law never permitted one who was in the possession of land in good faith, to be turned out of his possession by the rightful owner, without any compensation for the additional value he has given to the soil by the improvements he had made; but it allowed him to offset the value of his improvements to the extent, at least, of the rents and profits claimed.[1] He was not entitled to compensation for all his expenditures upon the estate,

[1] Sandar's Justinian (Hammond's ed.) 175.

but only for such as had enhanced its value.[2] This principle, too, was adopted into the law of those modern nations whose jurisprudence was derived from the Roman law: into that of France,[3] and Spain,[4] and Scotland. [5]

At the common law, however, the rule was different. The policy of that law was averse to making any allowance to the *bona fide* occupant of land for the improvements he might have made upon the land; and this was upon the theory that the true owner was under no legal or moral obligation to pay for improvements which he had never authorized to be made, and which originated in wrongful occupancy. Accordingly, the improvements were considered as annexed to the freehold, and as passing with it. Consequently, when the owner recovered in ejectment, he was not subjected to the condition of paying for any improvements which might have been made upon the land by the occupant. And it was immaterial that the occupant was in possession in good faith, under color of title, believing himself to have the title to the land. As against the true owner, he was an intruder, a wrong-doer, who was not entitled to any compensation whatever for his improvements, which passed with the land to the owner upon a recovery in ejectment. [6]

It was well settled, however, that in case the true owner of an estate, after a recovery thereof at law from a *bona fide* purchaser for a valuable consideration without notice, sought an account in equity, as plaintiff, against such possessor, for the rents and profits, the possessor so sued might recoup from the rents and profits the full amount of all the meliorations and improvements which he had beneficially made upon the estate. So, where one held merely the equitable title, and sought the aid of the equity court to enforce it, it was settled that the court would administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements.[7] But an entirely different question was presented when the *bona fide* purchaser himself came into equity asking for affirmative relief against the true owner, after he had recovered the premises at law. The right to grant such affirmative relief was considered by Chancellor Walworth in the New York Court of Chancery in 1837. It was disposed of as follows: "I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle in its application to future cases might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this State, for the purpose of giving the *bona fide* possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery suit in all such cases." [8]

Four years afterwards the question again came up, and this time in the Circuit Court of the United States for the first circuit, Mr. Justice Story presiding. After alluding to the opinion of Chancellor Walworth, and to his admission that he could find no case in England or America where the point had been decided either way, Mr. Justice Story said;

2 Dig., lib. 20, tit. 1, l. 29, sec. 2; Dig., lib. 6, tit. 1, l. 65; Id., l. 38. See 2 Story's Eq. Jur., sec. 1237; Putnam v. Ritchie, 6 Paige's Ch. (N. Y.) 390, 403, 404; Bright v. Boyd, 1 Story (U. S.), 478.

3 Code Napoleon, arts. 552, 555; *Pothier de la Propriete*, n. 343, 353.

4 Asa & Manuel's Inst. of Laws of Spain, 102.

5 Bell's Com. on Law of Scotland, p. 139, sec. 538; Ersk. Inst., b. 3, tit. 1, sec. 11.

6 Reed v. Reed, 68 Me. 568; Clark v. Hornthal, 47 Miss. 434, 476; Blanchard v. Ware, 43 Iowa, 530; Newland v. Baker, 26 Kan. 341, 344; Barton v. Land Co., 27 Kan. 634, 637; Pugh v. Bell, 2 Mon. (Ky.) 129; Clausen v. Rayburn, 14 Iowa, 136, 140; Webster v. Stewart, 6 Iowa, 401; Lunqueet v. Ten Eyck, 40 Iowa, 213; McCoy v. Grandy, 3 Ohio St. 463, 466; Wilson v. Red Wing School District, 22 Minn. 488, 491; McMinn v. Mayes, 4 Cal. 209; Ford v. Holton, 5 Cal. 319; Chesround v. Cunningham, 3 Blackf. (Ind.) 82, 84; Westerfield v. Williams, 59 Ind. 221, 224; Graham v. Connersville, etc. R. Co., 36 Ind. 463, 470; Rainer v. Huddleston, 51 Tenn. 223, 225; Townsend v. Shipp, Cooke (Tenn.), 294; Nelson v. Allen, 1 Yerg. (Tenn.) 360; Bonner v. Wiggins, 52 Tex. 125; Russell v. Blake, 2 Pick. (Mass.) 507.

7 See 2 Story's Eq. Jur., sec. 799, a, b.

8 Putnam v. Ritchie, 6 Paige's Ch. 405.

"Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." And after a careful consideration of the subject, he laid down the broad doctrine that so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, had, by his improvements and meliorations, added to the permanent value of the estate, he was entitled to a full remuneration, and that such increase of value was a lien and charge on the estate, which the absolute owner was bound to discharge before he could be restored to his original rights in the land.[9] On the coming in of the Master's report, two years afterwards, this conclusion was adhered to. "It has," said Mr. Justice Story, "the most persuasive equity, and, I may add, common sense and common justice for its foundation."[10] The cases of Henry v. Polland,[11] and Matthews v. Davis,[12] decided in Tennessee, soon followed, and were to the same effect, being based on Judge Story's decision, and it was announced that affirmative relief would be granted to one who went into possession under a parol contract of sale, and made improvements on the land prior to eviction by the vendor. There are cases to the same effect in North Carolina.[13]

This opinion of Mr. Justice Story has been recognized and adopted elsewhere,[14] but has rarely had occasion to be reviewed in this country, owing to statutory regulation of the question, and the opinion has been expressed in a recent case, that in consequence it is difficult to say whether or not it can be regarded as the established law.[15] It can not be denied that where one has gone into the possession of land in good faith, believing himself to be the owner, and has expended money in making permanent improvements which have increased the value of the property, he has a strong natural equity, growing out of his own mistake and the neglect of the true owner, which would seem to entitle him to remuneration to the extent that his improvements have augmented the value of the land. In recognition of this equity, many of the States have adopted what are known as betterment or occupying claimant's acts. These statutes generally provide that after recovery in ejectment, the defendant, being a *bona fide* occupant, shall be entitled to recover of the plaintiff the full value of the improvements made upon the land, which value is to be assessed by a jury, or by commissioners, and to the extent that it is in excess of the *mesne* profits, is made a lien on the land, the payment of which constitutes a condition precedent to a recovery of the possession. The plaintiff has the option of taking possession, by paying the lien, or of receiving in lieu of the land, the sum which may be ascertained to be equitably due him. The constitutionality of these acts has been sustained in a number of decisions, which seem to effectually preclude any further doubt of their legality.[16]

In sustaining the constitutionality of one of these statutes, the court of Vermont so well explained the principle of betterment laws in general, that its repetition, in this connection, is of interest. "The action for betterments, as they are now termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the de-

[9] Bright v. Boyd, 1 Story, 478.
[10] 2 Story, 607.
[11] 4 Humph. (Tenn.) 362.
[12] 6 Humph. (Tenn.) 324.
[13] Albea v. Griffin, 2 Dev. & Bat. (N. C.) Eq. 9; Wetherell v. Gorman, 74 N. C. 603; Hill v. Brower, 76 N. C. 124; Smith v. Stewart, 83 N. C. 406; Wharton v. Moore, 84 N. C. 479, 483.
[14] Hatcher v. Briggs, 6 Oregon 31; Union Hall v. Morrison, 39 Md. 281; Thomas v. Thomas, Ex'r., 16 B. Monr. (Ky.) 421; Bell's Heirs v. Barnett, 2 S. & Mar. (Ky.) 516; Valle's Heirs v. Fleming's Heirs, 29 Mo. 152.
[15] Griswold v. Bragg, 48 Conn. 577, 581.
[16] Griswold v. Bragg, 48 Conn. 577; Ross v. Irving, 14 Ill. 171; Claypoole v. King, 21 Kans. 602, 612; Scott v. Mather, 14 Texas 235; Burke v. Mechanics' Savings Bank, 12 R. I. 513, 515; Whitney v. Richardson, 31 Vt. 306; Pacquett v. Pickness, 19 Wis. 219; Saunders v. Wilson, 19 Texas 194; Hunt's Lessee v. McMahan, 5 Ohio 132; Longworth v. Wolfington, 6 Ohio 10; Fowler v. Halbert, 4 Bibb. (Ky.) 54; Wilson v. Red Wing School District, 22 Minn. 488; Childs v. Shower, 18 Iowa 261; Lessee of Davis v. Powell, 13 Ohio 308; Bodley v. Gaither, 3 Mon. (Ky.) 58; Armstrong v. Jackson, 1 Blackf. (Ind.) 374; Bacon v. Callender, 6 Mass. 303.

fendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been had no labor been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice, if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken from the civil law, where ample provision was made for reimbursing the *bona fide* possessor the expense of his improvements if he was removed from his possession by the legal owner. It gives to the possessor, not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterment thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it and the value if no improvement had been made. If the owner takes the land, together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."[17] Such laws may be unconstitutional, however, by reason of some special and unusual provision, by means of which private rights of property are violated, and the limitations of legislative power are not duly observed. For instance, a provision in such a law requiring repayment to the occupant of the purchase money paid by him for the land, with interest on the same, can not possibly be sustained. It is impossible to support it on the ground upon which reimbursement for improvements rests.[18]

[17] Brown v. Storm, 4 Vt. 37. See too, Cooley's Constitutional Limitations, 485, where this passage is also given.

[18] Madland v. Benland, 24 Minn. 372.

So where the statute confers on the occupying claimant the option, after recovery of the judgment against him for the land, to demand payment from the successful claimant of the full value of his permanent improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. Such an option may be granted to the successful claimant, but can not be upheld when conferred on the occupying claimant,[19] and in no case can the legislature constitutionally make the value of the improvements a personal charge against the owner of the land and authorize a personal judgment against him.[20]

It is doubtful whether a betterment act, such as we have been considering, can constitutionally be made to apply to improvements made before its passage. If such improvements by the common law belong to the owner of the soil at the time they are made, his rights thereto would seem to be such a vested right of property as falls within the protection afforded by the constitution. In Society, etc. v. Wheeler,[21] Mr. Justice Story held that such a law could not constitutionally be made applicable to improvements made before its passage. Mr. Justice Cooley, on the other hand, in his Constitutional Limitations,[22] points out that this decision was made under the New Hampshire constitution, which forbade retrospective laws, and adds: "The principles of equity, upon which such legislation is sustained, would seem not to depend upon the time when the improvements were made.[23] But in Burke v. Mechanics' Savings Bank,[24] the above passage from Mr. Justice Cooley's Limitations is quoted, and the court says: "We can not assent to the reasoning. Morally, it may be as wrong for the owner of the land to become the owner of the improvements before as after the law; but before the law it is legally his right to become its owner, and therefore to make him pay for it by re-

[19] McCoy v. Grandy, 3 Ohio St. 463, 467; Childs v. Shower, 18 Iowa 261.

[20] Childs v. Shower, 18 Iowa 261. "Such a law is unprecedented. It has neither reason, necessity, nor precedent to support it. It tramples under foot the constitutional rights of property and of the citizen." Per Dillon, J.

[21] 2 Gall. (U. S.) 105.

[22] p. 486 (4th ed).

[23] See Davis v. Powell, 13 Ohio 308.

[24] 12 R. I. 513, 515.

trospective legislation is to make him pay another for his own property, and thus in effect to deprive him of his own property without due process of law."

It is to be noted in conclusion, that an Indian owner of lands, holding the same under a treaty with the government of the United States, in regard to Indian lands within the State, can not be compelled to pay for improvements in accordance with the provisions of a betterment act enacted by the State.[25] And this is upon the principle that where there is a conflict between the law of the State and a treaty of the United States, the former must give way. But this immunity of the Indian owner is adjudged to be a personal privilege, and the grantee of such owner succeeds only to the title to the land, and is regarded as having no better right to improvements made by an occupying claimant than any other owner of the land would have.[26]

HENRY WADE ROGERS.

25 Maynes v. Veale, 20 Kans. 374.
26 Krause v. Means, 12 Kans. 335.

## RIGHT OF A PARTY WHEN HIS OWN WITNESS HAS MADE PREVIOUS CONTRADICTORY STATEMENTS.

If in his testimony a witness contradicts statements made by him before he takes the stand, what is the right of the party producing him?

In considering the question, regard must be had to the well-settled rule, that one can not impeach his own witness,[1] and its exception, that a party may prove his case, although the evidence incidentally contradict and impeach a witness whom he produced.[2]

First. May the previous contradictory statements be proved?

*The English Rule.*—There was much contrariety of opinion when the question was first presented to the courts of England, and judges and counsel debated the proposition at length. In Ewer v. Ambrose,[3] a witness having been called by the defendant to prove a partnership between himself and defendant, and, having denied that fact, an answer of the witness in chancery, wherein he admitted himself to be the defendant's partner, was offered in evidence by the latter, and admitted. The court charged the jury to determine the issue in the case according to the credit they might give witness' answer in chancery or his testimony in court. The jury having found for the defendant, the Court of King's Bench directed a new trial, for the reason that the evidence could not be received to substantiate a fact, but, if admissible at all, only to contradict the witness. As to the latter proposition, one of the judges held in the negative, a second refrained from expressing any opinion, and the third intimated that the witness' answer in chancery would be proper evidence to destroy his credit as to the particular fact to which he swore. In Bernasconi v. Fairbrother,[4] Lord Denman, C. J., permitted one of the parties to prove that his witness, immediately before the trial, had made a statement quite opposite to his testimony. The same judge allowed the prior opposing declarations of a witness to be shown by the party who called him in Wright v. Beckett,[5] with the modification that they were not to be considered by the jury as substantive evidence in the case, but only as neutralizing the effect of the testimony the witness had unexpectedly given in court. But on motion for new trial, Lord Denman, C. J., and Bolland, B., considered the question and delivered their judgments at length; the former retaining his first opinion, and the latter holding adversely. The same ruling was made by Lord Denman, C. J., in Dunn v. Aslett.[6] In King v. Oldroyd,[7] the twelve judges unanimously held it proper to prove that a witness in a murder trial had made statements before the coroner contrary to her testimony at the trial.

But the principle affirmed by the cases cited was disapproved. In Holdsworth v. Mayor of Dartmouth,[8] Parke, B., refused to

1 2 Phil. Ev. (10th ed.) 982; 2 Best Ev. (Morgan's ed.), sec. 645; 1 Greenl. Ev. (Redf. ed.), sec. 442; 1 Whart. Ev. (2d ed.) 549.
2 Richardson v. Allen, 2 Stark. 334; Bradley v. Ricando, 8 Bing. 57; Wright v. Beckett, 1 Mo. & R. 414; Brown v. Bellows, 4 Pick. 178; People v. Safford, 5 Denio, 112; Rockwood v. Poundstone, 38 Ill. 199; Skipper v. State, 59 Ga. 63; United States v. Watkins, 3 Cranch C. C. 441; Brown v. Wood, 19 Mo. 475.
3 B., B. & C., 749.
4 1 Mood. & R. 427.
5 1 Mood. & R. 414.
6 2 Mo. & R. 122.
7 R. & R., C. C. R. 88.
8 2 Mo. & R. 153.