Boardman Vs. Lessees of Reed and Ford

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Appellant : Boardman

Respondent : Lessees of Reed and Ford

Judgement :

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Boardman v. Lessees of Reed and Ford

31 U.S. (6 Pet.) 328

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF VIRGINIA

SYLLABUS

In an ejectment, a witness was called to prove that a peon who was dead had, at a former trial between the plaintiff and some the defendants to recover the land in

controversy, sworn that an anciently marked corner tree was found by him at a particular point of a different kind of timber from that called for in a patent to one Young. No part of the survey of Young was involved in the controversy in this suit, and with several other surveys it was only laid down by the surveyor as by showing certain connections, it might conduce to identify the land claimed by the plaintiffs. As the evidence was not given between the same parties, this testimony could only be received as hearsay, and was not admissible.

That boundaries may be proved by hearsay testimony is a rule well settled and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there is none as to its legal force.

Landmarks are frequently found of perishable materials which pass away with the generation in which they are made. By the improvement of the country and from other causes, they are often destroyed. It is therefore important in many cases that hearsay or reputation should be received to establish ancient boundaries. But such testimony must be pertinent and material to the issue between the parties. If it have no relation to the subject or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted.

In an ejectment for land in the State of Virginia, the District Court for the Western District of Virginia instructed the jury

"That the grant to the plaintiffs which was given in evidence was a complete appropriation of the land therein described, and vested in the patentee the title, and that any defects in the preliminary steps by which it was acquired were cured by the grant."

By the court:

"There can be no doubt of the correctness of this instruction. This Court has repeatedly decided that no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud, but the defect of an entry or survey cannot be taken advantage of at law. The patent appropriates the land and gives the legal title to the patentee. "

Titles acquired under sales for taxes depend upon different principles: where an individual claims land under a tax sale, he must show that the substantial requisites of the law have been observed. But this is never necessary where the claim rests on a patent from the commonwealth. The preliminary steps may be investigated in chancery when an elder equitable right is asserted, but this cannot be done at law.

If the grant appropriates the land, it is only necessary for the person who claims under it to identify the land called for. Whether the entry was made in legal form or the survey was executed agreeably to the calls of the entry are not matters which can be examined at law. When, from the evidence, the existence of a certain fact may be doubtful, either from want of certainty in the

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proof or by reason of conflicting evidence, a court may be called upon to give instructions in reference to supposable facts. But this a court is never bound to do where the facts are clear and uncontradicted.

That certain calls in a patent may be explained, or controlled by other calls was settled by this Court in the case of *Stringer's Lessee v. Young,* 3 Pet. 320. If the point had not been so adjudged, it would he too clear on general principles to admit of serious doubt.

The entire description of the patent must be taken and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call which by the other calls of the patent clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void.

The meaning of the parties to written instruments must be ascertained by the tenor of the writing, and not by looking at a part of it, and if a latent ambiguity arises from the language used, it may be explained by parol.

An entry of land in a county which is afterwards divided does not, after the division, authorize a survey in the original county if the land falls within the new county.

This was an ejectment brought in the District Court of the United States for the Western District of Virginia by the defendants in error against the plaintiffs in error for the recovery of eight thousand acres of land in the now County of Lewis, within the said district. The premises in question are parcel of a large connection of surveys made together for Reed and Ford for Thomas Laidley and John Young and others -- some in the name of one and some in the names of others of the owners. The whole connection of surveys is represented by the connected diagram made out and reported by the surveyor of Harrison County pursuant to an order made in the cause and appearing in the record. On that diagram the premises in question are particularly represented.

The plaintiffs below counted on a number of separate demises from the defendants in error; all of which were stated on the record as having been made by citizens of Pennsylvania, on 1 January, 1820.

On the trial, the defendants below tendered the following bill of exceptions:

"Upon the trial of this cause, a draft and report returned by a surveyor in obedience to an order of survey made in this cause, was given in evidence to the jury, which draft and

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report are in the words following, *viz.,* [setting out the same]. The plaintiff, in order to show the title of the lessors to the land in controversy, represented by the red lines on said draft, gave in evidence the patent under which they claim, in these words, *viz.,* [setting out the same]. This patent is dated 9 May, 1786. It was issued to Messrs 'Reed and Ford,' and describes the lands thus, *i.e.,* "

"a certain tract or parcel of land containing eight thousand acres, by survey bearing date 23 December, 1784, lying and being in the County of Monongalia, near a large branch of French Creek adjoining lands of George Jackson on the

south side and bounded as follows, to-wit: beginning at a maple, and running thence S. 10 E. one thousand poles to a poplar; S. 80 W. one thousand two hundred and eighty poles to a W. oak; No. 10 E. one thousand poles to two white oaks; N. 80 S. one thousand two hundred and eighty poles to the beginning."

The bill of exceptions then states that the plaintiffs, for the purpose of showing the identity of the land in controversy with the land granted by said patent, gave in evidence a copy of the plat and certificate of survey on which the said patent is founded, and the plats and certificates of survey of the various other tracts represented on said draft. After the plat and certificates had been given in evidence, the copies of the entries on which the said surveys were founded, were also given in evidence.

It appeared from the parol evidence introduced in order to identify the land in controversy that the same, at the date of the patent under which the lessors claim, and at the date of the said plat and certificate of survey on which the said patent is founded, was situate in the County of Harrison, and not in the County of Monongalia, as stated in the patent and certificate of survey, but that the said land, at the date of the entry on which the survey was founded, was in the County of Monongalia, and became part of the County of Harrison by virtue of the act of assembly establishing the County of Harrison. The act of assembly is dated 8 May, 1784, and took effect 20 July of the same year.

The bill of exceptions further states that evidence was relied on on the part of the defendants for the purpose of proving that the various marked lines represented by the said draft and report of the surveyor and claimed by the plaintiff to be lines

of the land in controversy and of various other tracts designated on the said draft were not actually run or marked as lines of the land in controversy, and of the other tracts aforesaid, but had been run and marked by Henry Fink, a deputy surveyor of Monongalia, but who then resided in the County of Harrison, with a view of laying off the greater part of the country represented on said draft into

surveys of about one thousand acres each; that he was employed and paid for that purpose by the persons for whom the said plats and certificates of survey were afterwards made; that after said lines had been so marked and run, the said plats and certificates were made out by protraction, not by the said Henry Fink, but by some other person or persons not authorized by law; that said plats and certificates of survey were never recorded in the surveyor's office of Monongalia County nor there filed, but were surreptitiously returned to the register's office and patents obtained thereon. It was contended on the part of the defendants that the marked lines represented on said draft as lines of the lands in controversy were not the lines thereof, and that the evidence in the cause did not justify the jury in regarding them as such in preference to other marked lines represented on said draft. Evidence was given on the part of the plaintiffs that the marked lines aforesaid were actually run and marked by said Fink as lines of the said eight thousand acres and of the various other tracts represented upon said draft, and that plats and certificates of survey were made out by him in conformity with the lines so run and marked and were by him delivered to the agent of the patentees, who gave them to the principal surveyor to be recorded, who afterwards delivered the same to the patentees, who returned them to the land office, on which plats and certificates so returned patents issued, and copies of which are before recited. It was further contended on the part of the defendants that the land in controversy was not embraced within the calls of the patent under which the lessors claim; that the natural objects, lines, and adjacent lands called for in said patent were not those represented on said draft, in designating thereupon the land in controversy, and that the marked lines represented on said draft as the lines, of the land in controversy, were, in fact, the lines, not of the plat and certificate of survey on which the plaintiffs' patent issued, but of other plats and

certificates of survey, and that there are no calls in said patent justifying the locating said patent on the lands in controversy, as contended for by the plaintiffs. For the purpose of identifying the said land in controversy with that granted by the said patent, parol and other evidence was introduced by the plaintiffs, in order to

establish several marked trees as corners of other tracts represented on said draft -- the boundaries of which tracts, it was contended, tended to establish the identity of the lands in controversy, with that granted by said patent. For the purpose of showing that one of said marked trees was not a corner of one of said tracts; that is to say, was not the corner on the said draft represented by the letter A, as a corner of John Young's four thousand acres; the counsel of the defendants offered to introduce a witness to prove, that on the trial of a former action of ejectment, brought by the present lessors of the plaintiff against some of the present defendants, to recover the lands now in controversy, a witness, who is since dead, swore that an ancient marked corner tree was found by him at said point A, of a different kind of timber form that called for in Young's patent, but the evidence aforesaid was rejected by the court as inadmissible.

After the evidence had been closed and the cause had been argued before the jury, the plaintiffs' counsel moved the court to give the following instructions to the jury, to-wit, that the grant aforesaid was a complete appropriation of the land therein described, and vested in the patentee the title; and that any defects in the preliminary steps by which it was acquired, were cured by the emanation of the said patent. The said counsel further moved the court to instruct the jury that the said grant is a title from its date, and is conclusive against all the world, except those deriving title under a previous grant; and further, that it does not affect the validity of the patent, if it should appear that the entry on which the plaintiffs' survey was made, contained other or different lands from that actually surveyed.

After the above instructions had been moved for by the plaintiffs' counsel, the counsel for the defendants moved the court to give to the jury the following instructions, to-wit:

"1. The name of the county being mentioned in the plaintiffs' patent, as that in which the lands thereby granted were

situated, the plaintiff is not at liberty to prove by parol that the land was, in fact, in a different county."

"2. As the patent states the lands to lie in the County of Monongalia, the patentees and those claiming title under them, can only recover lands in that county, and cannot, by force of the other terms of description contained in the patent, recover lands lying in the County of Harrison at the date of the patent."

"3. It appearing from the plat and certificate of survey on which the patent is founded, that the survey thereby evidenced was made in the County of Monongalia, and it appearing, from the evidence introduced on the part of the plaintiffs to identify the said land, that it was situated, at the time of the survey, in the County of Harrison; the patent is void because the survey was made without lawful authority."

"4. If various marked lines are found corresponding with the same calls in the patent, the mere coincidence of anyone of those marked lines with the calls of the patent, does not establish that line as one of the lines called for in the patent."

"5. If there are no calls in the patent, justifying the location of the land granted, as contended for by the plaintiffs, they cannot succeed in establishing their claim by relying upon extrinsic evidence."

"6. Proof that the land claimed in this action was surveyed for the patentees, by evidence contradicting the calls of the patent, does not establish the right of the patentees and of those claiming under them to the lands claimed as aforesaid."

"7. An entry in a county which is afterwards divided, does not, after the division, authorize a survey in the original county, if the land falls into the new county."

The parties respectively objected to the instructions moved for. The instructions moved for by the plaintiffs, were given by the court. All those required by the defendants were refused, except the first, which was modified by the court and delivered to the jury in the following terms:

"If a land warrant be entered in the office of the surveyor of a particular county, and before the same be surveyed, the territory in which the land located lies, shall be erected into a new county, and the survey and grant afterwards affected, describe the lands to be situated in the former county, the grant is not void and the plaintiffs may show by parol evidence extrinsic of the grant,

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and not inconsistent with its other descriptive calls, that the land lies within the new county."

The exceptions were taken to the rejection of the testimony offered respecting the corner at A, and to the instructions given as moved for by the plaintiffs, and the rejection of those moved for the defendants.

The jury found a verdict for the plaintiffs, for the lands in the declaration mentioned and described in the plat and report of Thomas Haymond, made in pursuance of an order of court made in the cause. On this verdict, judgment was rendered for the plaintiffs below, defendants in error, and this writ of error is brought to reverse that judgment.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

An action of ejectment was brought by McCall and others against Boardman and others, in the district Court of the United States for the Western District of Virginia, to recover eight thousand acres of land. On the trial, certain exceptions were taken to points adjudged by the court in behalf of the plaintiffs, and against the defendants; and these points are now brought before this Court by writ of error.

The first exception taken by the plaintiffs in error is found in the following statement in the bill of exceptions.

"For the purpose of showing that one of said marked trees was not a corner of one of said tracts, that is to say, was not the corner represented on the said draft by the letter A as a corner of John Young's four thousand acres, the defendants' counsel offered to introduce a witness to prove that on the trial of a former action of ejectment, brought by the present lessors of the plaintiffs, against some of the defendants in the present action, to recover the land now in controversy; a witness examined on that trial, who is since dead, swore that an anciently marked corner tree was found by him at said point A of a different kind of timber from that called for in Young's patent,

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but the evidence, as offered, was rejected by the court as inadmissible."

No part of the survey of Young is involved in the present controversy, and with several other surveys, it was only laid down by the surveyor, as by showing certain connections, it might conduce to identify the land claimed by the plaintiffs.

As the testimony of the witness referred to was not given between the same parties, his statement, if admissible, could only be received as hearsay.

That boundaries may be proved by hearsay testimony, is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force.

Landmarks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important in many cases that hearsay or reputation should be received to establish ancient boundaries, but such testimony must be pertinent and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted.

In the present case, the plaintiffs supposed that by exhibiting the plat of Young's survey in connection with others, it might tend in some degree to identify the land claimed by them, and the corner designated on the plat by the letter A is one of the corners of Young's survey. The official return of the surveyor, in which the corner trees were specified and the lines with which the corner is connected were laid down, being before the jury, was relied on by the plaintiffs to establish this as the corner called for in Young's survey.

The hearsay testimony was offered, not to contradict any fact stated in the return of the surveyor, but to prove that on a certain occasion, a person, in his lifetime, but deceased at the trial, had said that he found an anciently marked corner tree at the point A of a different kind of timber from that called for in Young's patent. This individual did not say that he was acquainted with the lines claimed as Young's survey, nor that this was his corner.

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If the fact as to this tree had been admitted, what effect could it have had in the cause. It did not disprove a single fact relied on to establish the corner. How near this tree stood to the trees found by the surveyor does not appear. It may have been marked as pointing to the corner, as is often done by surveyors, or it may have been a corner to an adjoining or conflicting survey. The existence of this marked tree may be accounted for in various ways, and its existence is in no respect, so far as appears from the bill of exceptions, incompatible with the facts proved by the plaintiffs. How then can the fact be considered as material. It sheds no light on the matter in controversy. Disconnected as the mere fact of a marked tree not called for in Young's patent at the point A seems to have been with the testimony in the cause; it is not perceived how it could have tended to influence the verdict of the jury. From the isolated fact, the jury could have drawn no inferences against the facts proved by the plaintiffs. There was therefore no error in the rejection of the evidence offered.

The court instructed the jury that the grant to the plaintiffs, which was given in evidence, was a complete appropriation of the land therein described and vested in the patentee the title; and that any defects in the preliminary steps by which it was acquired, were cured by the grant.

There can be no doubt of the correctness of this instruction. This Court have repeatedly decided that at law, no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud, but the defects in an entry or survey cannot be taken advantage of at law. The patent appropriates the land and gives the legal title to the patentee. The district court said nothing more than this, and it was justified in giving the instruction by the uniform decisions of this Court.

Titles acquired under sales for taxes, depend upon different principles, and these are the titles to which some of the authorities cited in the argument refer. Where an individual claims land under a tax sale, he must show that the substantial requisites of the law have been observed; but this is never necessary when the claim rests on a patent from the commonwealth. The preliminary steps may be investigated in chancery, where

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an elder equitable right is asserted, but this cannot be done at law.

At the request of the plaintiffs, the court also instructed the jury,

"that a grant is a title from its date, and conclusive against all claimants whose rights are not derived under a previous grant to that of the lessors of the plaintiffs, . . . and that it does not affect the validity of said grant, if it appears that the entry, on which the survey upon which the grant purports to have been issued, contained other or different land from that actually surveyed."

This instruction involves the same principle as the one which precedes it. If the grant appropriate the land, it is only necessary for the person who claims under it to identify the land called for.

Whether the entry was made in legal form, or the survey was executed agreeably to the calls of the entry, is not a matter which can be examined at law. Had the defendants relied on the statute of limitations, this instruction would have been erroneous, but no such defense was set up by them.

The defendants' counsel requested the court to give the following instructions:

"1. The name of the county being mentioned in the aforesaid patent, as that in which the land thereby granted was situated, the plaintiffs are not at liberty to prove by parol that the land lies in a different county."

"2. As the said patent states the land granted to lie in the County of Monongalia, the patentees, and those deriving title from them, can only recover land in that county; and cannot, by force of the other terms of description used in the patent, recover land in the County of Harrison at the date of the patent."

"3. It appearing from said plat and certificate of survey, upon which the patent is founded, that the survey was made in the County of Monongalia, and it appearing from the evidence introduced on the part of the plaintiffs to identify the land, that it did lie, at the time of the survey, in the County of Harrison; the patent is void, because the survey was made without authority."

"4. If various marked lines are found corresponding with the same call of the patent, the mere coincidence of anyone

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of those marked lines with the call of the patent, does not establish that line, as a line called for in the patent."

The points raised by these instructions, having been substantially decided by this Court in the case of *Stringer's Lessee v. Young,* 3 Pet. 320, they are abandoned by the counsel for the plaintiffs in error. In that case, these questions were fully investigated, and they need not be again examined.

The following instructions were also requested of the court by the defendants' counsel, and refused.

"5. If there are no calls in the patent justifying the location of the land granted, as contended for by the plaintiffs, they cannot succeed in establishing their claim, by relying on extrinsic evidence."

This instruction was refused, and this Court think rightfully. It asked the court below to presume against the facts in the case, and to found an instruction upon the presumption thus raised. The calls of the patent, and the official survey and report of the surveyor were before the jury. By these it appears, that corner trees were called for, and the land was stated to lie near a large branch of French Creek, and to adjoin lands of George Jackson on the south. The course and distance from corner to corner were also laid down on the plat, and the trees called for as corners. Was the district court, then, bound, in opposition to these facts, to instruct the jury; hypothetically, that "if there were no calls in the said patent, justifying the location of the land granted,", &c.; There were such calls in the patent, and it was in evidence before the jury; any instruction, therefore, hypothecated on the absence of such calls, could only tend to confuse or mislead the jury, and the court committed no error in refusing it.

Where, from the evidence, the existence of certain facts may be doubtful, either from want of certainty in the proof, or by reason of conflicting evidence, a court may be called to give instructions, in reference to a supposed state of facts. But this a court is never bound to do, where the facts are clear and uncontradicted.

"6. Proof that the land claimed in this action was surveyed for the patentees, by evidence contradicting the calls of the patent, does not establish the right of the patentees, and of those claiming under them. "

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This instruction, taken as an abstract proposition, may be true; and yet the court did not err in refusing to give it. The contradiction supposed was in the admission of proof that the land covered by the patent is in the County of Harrison, when the

patent calls for it to lie in the County of Monongalia.

That certain calls in a patent may be explained or controlled by other calls was settled, and in reference to this very point, by this Court, in the case of *Stringer's Lessee v. Young,* before referred to. If the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt.

The entire description in the patent must be taken and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which by the other calls in the patent clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void. This, however, was not the case of the patent under consideration. Its calls are specific, and, taking them all together, no doubt can exist as to the land appropriated by it. The call for the county may be explained, either by showing that it was made through mistake, or that, under the circumstances which existed at the time of the survey, it was not inconsistent with the other calls of the patent.

This would not be going behind the patent to establish it, for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies, under some circumstances, to the construction of all written instruments. The meaning of the parties must be ascertained by the tenor of the writing, and not by looking at a part of it, and if a latent ambiguity arise from the language used, it may be explained by parol.

"7. An entry in a county which is afterward divided, does not, after the division, authorize a survey in the original county, if the land falls in the new county."

If this instruction laid down the law correctly, yet it does not show that the plaintiffs below had no legal right to recover. The point raised by it is behind the patent, and that, as before stated, cannot be investigated in an action of ejectment. To

entitle the plaintiffs to a recovery in the action of ejectment, they had nothing to do but to identify the land called for in their patent. This being done, it is not competent for the defendants, by way of invalidating the plaintiffs' legal right, to show irregularity in the entry or survey on which the patent was issued. In the case of *Stringer's Lessee v. Young,* the entry and survey were made as stated in this instruction, and yet this Court sustained the patent.

The court below, it seems, did instruct the jury that

"If a land warrant be entered in the office of the surveyor of a particular county, and, before the same be surveyed, the territory in which the land located lies shall be erected into a new county, and the survey and grant afterwards effected describe the lands to be situated in the former county, the grant is not void; and the plaintiffs may show by parol evidence, extrinsic of the grant, and not inconsistent with its other descriptive calls, that the land lies within the new county."

This instruction is sustained substantially in the principles laid down by this Court in the case above cited. There are indeed very few points raised in this cause which were not decided in the case of *Stringer's Lessee v. Young.* The questions in that cause arose under Young's patent, which was issued under precisely the same circumstances as the one under which the plaintiffs claim.

But if this point had not been settled in the case referred to, all doubt would be removed by a reference to an act of the Virginia legislature, passed in 1785, entitled an "act concerning the location of certain warrants upon waste and unappropriated lands in the Counties of Greenbriar, Harrison and Monongalia."

In this act it is provided by the third section

"That all surveys heretofore made in either of the aforesaid counties, by virtue of the first location, shall be good and valid, any act to the contrary notwithstanding."

In the bill of exceptions it is stated that evidence was relied on by the defendants to

"prove that the various marked lines, represented by the draft and report of the surveyor, and claimed by the plaintiffs to be lines of the land in controversy, and of various other tracts designated on the draft, were not actually run or marked as lines of the land in controversy, and

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of the other tracts laid down, but had been run and marked by Henry Fink, a deputy surveyor of Monongalia, who then resided in the County of Harrison, with the view of laying off the greater part of the country represented on the plat into surveys of about one thousand acres each, and that he was employed and paid for that purpose by the persons for whom the said plats and certificates of survey were afterwards made; that after the said lines had been so marked and seen, the said plats and certificates were made out by protraction; not by the said Henry Fink, but by some other person or persons not authorized by law; that said plats and certificates of survey were never recorded in the surveyor's office of Monongalia County, nor there filed, but were surreptitiously returned to the register's office and patents obtained thereon."

It does not appear from the bill of exceptions, that any evidence was offered by the defendants which was rejected by the court, to sustain this allegation of fraud. Nor does it appear that any specific instructions were asked of the court on any evidence before the jury, conducing to prove the facts here alleged. The statement can only be understood to refer to the course of argument which the defendants' counsel in the court below deemed it their duty to pursue, before the jury, and which forms no part of the case now before the court. Other parts of the bill of exceptions contain a statement of various grounds taken in the defense below, but as no instructions to the jury were requested on the points thus made, they form no ground for a revision of the proceedings by a writ of error.

On a careful consideration of the points made in the bill of exceptions, this Court is of opinion that there is no error in the judgment of the court below, and that the judgment must therefore be

Affirmed with costs.