OIL FIELDS CORPORATION *v.* CUBAGE.

Opinion delivered February 3, 1930.

1. APPEAL AND ERROR—MATTERS CONSIDERED ON APPEAL.—Where a case was tried on oral evidence not brought into the record by bill of exceptions or otherwise, and no motion for new trial was filed, the Supreme Court can consider only errors apparent from the face of the record.

2. JUDGMENT—NOTWITHSTANDING VERDICT.—Judgment notwithstanding verdict can be entered only when made after the verdict and before entry of judgment thereon.
3. JUDGMENT — NOTWITHSTANDING VERDICT. — Under Crawford & Moses' Dig., § 6273, judgment notwithstanding verdict is authorized only when the pleadings entitle to judgment the party against whom the verdict is rendered.
4. JUDGMENT—NOTWITHSTANDING VERDICT.—Allegations of the complaint that defendant agreed to finance the procuring of oil leases and to pay the living and traveling expenses of plaintiffs in securing additional acreage and a commission for procuring each lease, and that defendant broke such contract by failing to supply expense money, and to pay the agreed sums of money on procuring each lease, *held* not so deficient in stating the grounds of recovery as to entitle defendants to a judgment notwithstanding verdict.
5. APPEAL AND ERROR—PRESUMPTION FROM ABSENCE OF MOTION FOR NEW TRIAL.—In the absence of a motion for new trial, the Supreme Court must indulge the presumption that the evidence was legally sufficient to support the verdict.

Appeal from Union Circuit Court, Second Division; *W. A. Speer,* Judge; affirmed.

STATEMENT OF FACTS.

Appellees sued appellant to recover damages in the sum of $2,960 for the breach of a contract.

According to the allegations of the complaint, on January 6, 1926, appellees, Fitzwater and Thielman, entered into an escrow agreement with P. F. Coleman for blocking approximately 4,000 acres of land for the purpose of drilling wells thereon to discover oil or gas. Thielman and Fitzwater transferred an undivided one-third interest in their contract and lease to J. G. Cubage. Before June 1, 1926, appellees secured from P. F. Coleman and other landowners oil and gas leases on approximately 2,800 acres, and said leases were deposited in escrow with Coleman.

Shortly prior to June 1, 1926, appellees became financially embarrassed, so that they were not able to bear the necessary expenses in securing an additional amount of leases to make the 4,000 acres or more provided for in the original agreement. They made an agreement with

appellant, through its president, to finance them in securing the additional acreage. Appellant agreed to advance to appellees a sufficient sum of money to pay the actual expense of securing the balance of the leases to make out the 4,000 acreage. In addition, appellant agreed to reconvey to each of appellees 320 acres of land out of the lands embraced in the block of 4,000 acres. In addition to paying the living and traveling expenses of appellees in securing the additional acreage, appellant agreed to pay them two dollars for each lease. Appellant agreed to secure something like 1,000 acres of said leases from the Fordyce Lumber Company, but wholly failed and refused to complete its contract with the Fordyce Lumber Company for the lease on 1,000 acres of land, and by its action in failing to complete said lease prevented appellees from securing a lease on said 1,000 acres from the Fordyce Lumber Company. Appellant failed and refused to pay the living and traveling expenses of appellees while securing the additional acreage, and failed and refused to pay them two dollars per lease as it had agreed to do.

Appellant answered, denying the allegations of the complaint, and the case was tried before a jury on oral evidence. There was a verdict in favor of appellees in the sum of $500, and about ten days thereafter judgment was rendered in favor of appellees against appellants on the verdict.

After the verdict was returned and judgment entered upon it, appellant filed a motion for judgment in its favor against appellees, notwithstanding the verdict. As a ground therefor, it alleged that the pleading clearly shows that appellees had placed 2,800 acres of leases in escrow under the Coleman contract prior to June 1, 1926, and that they could have secured 1,000 additional acres from the Fordyce Lumber Company, and that they could have completed the block of 4,000 acres at any time, and have commenced the drilling of test wells and secured oil and gas leases largely in excess of the $2,960 sued for. As a second ground for its motion, appellant alleges that its answer discloses the fact that it had abandoned all claims

to any of said oil or gas leases. As a third ground of its motion, appellant alleges that appellees are in control of oil and gas leases largely in excess of the amount sued for.

The court overruled the motion of appellant for judgment in its favor, notwithstanding the verdict. Appellant did not preserve the evidence upon which the case was tried by bill of exceptions or otherwise, and did not file a motion for a new trial. The case is here on appeal.

Albert L. Wilson and *Mark T. Wilson,* for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellees.

HART, C. J., (after stating the facts). In the first place, it may be stated that where a case is tried on oral evidence, and such evidence is not brought into the record by bill of exceptions or otherwise, and no motion for a new trial is filed, this court can only consider on appeal errors apparent from the face of the record. *Buchanan* v. *Halpin,* 176 Ark. 822, 4 S. W. (2d) 510; *Tuggle* v. *Tribble,* 177 Ark. 296, 6 S. W. (2d) 312. In the application of the rule to the present appeal, we must indulge the presumption that the evidence introduced warranted the jury in returning a verdict for appellees in the sum of $500.

Counsel for appellant recognizes this rule, but rely for a reversal of the judgment on the ground that the court erred in not sustaining appellant's motion for judgment notwithstanding the verdict. They rely upon § 6273 of Crawford & Moses' Digest, which provides that where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, although a verdict has been found against such party.

In the first place, it may be said that judgment notwithstanding the verdict can be entered only when motion is made after the verdict, and before the entry of judgment thereon. Freeman on Judgments (5th ed.), vol. 1, § 10; 15 R. C. L. 608; and 33 C. J. 1187, at paragraph 117.

While the common law has been relaxed to the extent that a defendant may have a judgment notwithstanding the verdict in a proper case, still such a judgment can be

rendered only when the pleadings entitled the party against whom the verdict is rendered to a judgment. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d) 49; and 33 C. J. 1180, at § 112. See also *Collier* v. *Newport Water, Light & Power Co.,* 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 458, and *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141.

Even if appellant had filed its motion before the entry of judgment, it cannot be said that there was no statement in the complaint to justify the court in entering a judgment in favor of the appellees, who were the plaintiffs below. They allege in their complaint that the appellant committed a breach of the contract by failing to supply them with living and traveling expenses while securing the additional acreage as it had agreed to do. They also allege that it had failed and refused to pay appellees two dollars per lease as it had agreed to do. Both these matters constituted, under the allegations of the complaint, a violation of the contract between the appellant and appellees, and we must indulge the presumption that the proof showed that the amount of damage was $500. In any event, it was some substantial amount, and the court could not have entered a judgment in favor of the defendant notwithstanding the jury had found a verdict in favor of the plaintiff. As above stated, there being no motion for a new trial, we must indulge the presumption that the evidence was legally sufficient to support the verdict.

Again, it is insisted that the motion should have been granted, because appellees could have secured the 1,000 additional acreage from the Fordyce Lumber Company, and that this, together with the 2,800 acres of leases in escrow, would have made up the 4,000 acres which they required. The complaint, however, alleges that appellant failed and refused to enter into a contract with the Fordyce Lumber Company for leases on its 1,000 acres of land, and that, on this account, appellees failed to secure the leases from the Fordyce Lumber Company. Again, they stated that appellees were not damaged, be-

cause they were in control of oil and gas leases largely in excess of the amount which appellant agreed to secure from them. This would not make any difference. Under the allegations of their complaint, appellees were entitled to recover damages against appellant for breach of contract. One of the grounds for the breach of the contract was that appellant had failed and refused to pay them their living expenses and traveling expenses in securing the additional leases, and had also refused to pay them for certain additional leases. No matter how much appellees might have made from the contract, they were entitled to recover whatever damages they may have suffered by reason of the breach of it on the part of appellant.

We find no prejudicial error in the record, and the judgment will therefore be affirmed.