

BERMAN *v.* SHELBY.

Opinion delivered January 3, 1910.

1. APPEAL AND ERROR—INVITED ERROR.—Where appellant requested the court to submit a certain issue to the jury, he cannot complain because the jury determined that issue. (Page 478.)
2. LANDLORD AND TENANT—MUTUALITY OF LEASE.—Where the terms of a lease bind the landlord to put a water heater in the bath room, and bind the tenant to pay rent, upon a failure of the landlord to supply the water heater the tenant may refuse to pay rent and vacate the premises. (Page 478.)
3. PRINCIPAL AND SURETY—ALTERATION.—A surety is discharged by any material and unauthorized alteration of his contract. (Page 478.)

Appeal from Sebastian Circuit Court, Fort Smith District;  
*Daniel Hon*, Judge; affirmed.

## STATEMENT BY THE COURT.

Appellant rented to D. H. and A. L. Shelby by written contract a ten-room house in Fort Smith, together with certain furniture and fixtures therein. A list of the furniture was attached to the lease. The lease contained mutual covenants, on the part of the lessees, that they would pay the rents as specified in the contract, would pay all charges for water, gas and electricity as they came due, would not make alterations in the premises, would not sublet without the consent of the lessor, would keep premises in proper sanitary condition, and surrender same in as good repair as they were then or as they should thereafter be put and other covenants as to boarding certain parties. On the part of the lessor, that he would paint the house and paint the bath tub, that he would leave certain articles of furniture for the use of lessees, among which were one mirror, oil cloth on floor, one machine, one couch, carpet for one room and moulding about

windows, and that he would "put a water heater in the bath room."

The lease was for two years, beginning April 15, 1905. The consideration was \$900 per annum, payable in monthly instalments of \$75 each. Some days after the lease was executed appellee Boone guarantied the payment of the rent in writing which, after reciting the terms of the lease, is as follows:

"Now, in consideration of said lease to the said Mr. and Mrs. D. H. Shelby and on compliance of the said P. Berman, his heirs and assigns, with the conditions of said lease, I hereby guaranty the payment of the said rent to the said P. Berman or his heirs or assigns." This instrument was attached by appellant's agent to the lease after the lease was executed. The Shelbys occupied the premises until the 1st of August, 1905, when they rented the same to Mrs. Alberfield, who occupied same until the 1st of October, 1905, and on October 4, 1905, the Shelbys gave appellant notice that they considered the lease at an end and declared same cancelled for the following reasons:

"First. You have failed to repair and put in proper sanitary condition the bath tub and bath room on said premises.

"Second. You have removed from said premises, without our knowledge or consent, certain furniture and fixtures which under the terms of said lease were to remain in the building on said premises.

"Third. You have failed to put and keep in proper sanitary condition the cellar underneath said building and also the plumbing, piping, etc., in said cellar.

"Fourth. That you failed to keep in proper sanitary condition by failure to properly construct or to properly repair the sewer on said premises.

"On account of the conditions as set out in third and fourth specifications above, a stench, almost unbearable at times, is emitted, and the building rendered unfit for the purposes for which it was leased by us."

In answer to this appellant notified appellees in writing that he declined to accept any surrender or cancellation of the lease, and that they could continue to occupy the premises under the lease, otherwise he would take charge of same and rent for the remainder of the term to the best advantage, and for the benefit

of those whom it might concern, but that he would hold appellee, and especially Boone, as guarantor, for the rent of the full term of the lease.

After appellees had abandoned the premises, appellant rented same to other parties, and collected the sum of \$899 for rents, which he deducted from the amount he claimed to be due from appellee under the lease contract, leaving a balance of \$526.90, for which this suit was brought.

The complaint set up the lease contract with the Shelbys, and the guaranty of the rent by Boone, alleged a breach of the contract by the Shelbys in abandoning the premises and failure to pay the rents, and that by reason of such breach the above amount was due him from the Shelbys and Boone.

Boone answered, denying all the material allegations of the complaint, and for affirmative defense set up "that plaintiff had failed and refused to comply with his contract of lease," and breach of the contract on the part of appellant as per the notice above set forth, and also alleged that he had been released from his contract on account of the act of appellant in modifying said contract, and in making new contracts with the Shelbys.

Appellant's testimony in chief tended to show that appellees vacated the premises he had leased them and had failed to pay the rents for the remainder of the term, that after appellees vacated he had leased to other parties, making the best contracts he could, had given appellees credit for the rents collected under these contracts, and that appellees were still due him, after making these deductions, the amount for which he sued. On cross-examination, among other things, he testified: "The heater was put in the kitchen; everybody got hot water in the tub in the bath room." "He did not put a hot water heater in the bath room. He put it in the kitchen. All a boarder had to do to get hot water for a bath in the bath room was to light the gas in the kitchen and get hot water. The kitchen was in the end of the house down stairs, and the bath room was up stairs. It was a mistake by putting that word (a water heater in the bath room) in there. The heater belonged to the kitchen and boiler. The boiler and heater was one piece of machinery." In regard to this provision of the lease appellee D. H. Shelby testified: "Mr. Berman refused to put the hot water heater in the bath

room. We selected a heater for that purpose, but Mr. Berman decided to put in a cheaper one and put it in the kitchen. I told him at the time that this did not comply with the contract, and I told him the reason why I did not want it in the kitchen. It was a gas heater, and I wanted it in the bath room, so that the boarders could turn on the heat whenever they desired to take a bath. With the heater in the kitchen, the boarders had to go through the kitchen every time they wanted a bath. The kitchen was down stairs, and the farthest room away from the bath room, which was up stairs. It was not desirable to have boarders come down stairs and go through the kitchen to light the heater to get hot water for their baths. They would come in at any time during the night, and we would have to get up to fix the water for them. They would come in from 9 o'clock to 11 o'clock at night, and would want baths."

Mrs. Shelby testified as to this as follows: "The condition of the bath tub and the failure of Berman to put a heater in the bath room had a bad effect upon our business. Prospective roomers would always want to know about the bath, and I would have to show them the conditions, which were not satisfactory; and when we got boarders, they would often go down town to get their baths. I heard Mr. Shelby protest to Mr. Berman about these conditions."

Among other instructions the court gave the following on its own motion:

"1. Before the defendants would be authorized to abandon the house and refuse to pay the rent, it must appear from the evidence that the premises became untenable as a boarding house by reason of plaintiff's failure to comply with his agreement to repair; and if the jury find from the evidence that plaintiff agreed to make certain repairs, and failed and refused to make them, and defendants, after requesting that repairs be made as agreed to by plaintiff, and he failed and refused to make them, and, by reason of his failure to make same, the property became untenable as a boarding house, your verdict should be for the defendant. By untenable as a boarding house, the court tells you is meant unsuitable and not adapted to the purpose of keeping boarders."

And at the request of appellee the following among other prayers:

"8. If you believe from the evidence that there were any material alterations in the contract or lease, or that plaintiff failed to comply with any of the terms of said lease, without the consent of the defendant, T. W. M. Boone, then your verdict must be for the defendant, Boone."

"10. If you believe from the evidence that any material change was made in said contract of lease between the plaintiff and the Shelbys, or that any new agreements were entered into between the said plaintiff and said Shelbys, without the consent of the defendant Boone, then the defendant Boone is released, and your verdict must be for him."

"11. You are further instructed that if any material changes or alterations were made in said contract without the consent of said Boone, this would release the said Boone, even though said changes or alterations might be for the benefit of said Boone."

And at the request of appellant the following:

"8. The defendants set up certain breaches of the lease with plaintiff. You are instructed that the burden is upon the defendants to establish, by a fair preponderance of the evidence, the said breaches upon the part of the plaintiff alleged in the answer, and that for these reasons they canceled same, and if they failed to do so, you should find for the plaintiff."

"11. If plaintiff, instead of putting a water heater in the bath room, put a gas heater with boiler attachment in the kitchen, and defendants, after this hot water attachment was put in, continued to use the premises for several months, and then rented it in this condition to Mrs. Alberfield, who occupied it for several months, and, after she vacated it, defendants attempted to cancel the lease and did cancel it by notice to plaintiff, but such cancellation or attempted cancellation was not on account of failure of plaintiff to put a water heater in the bath room, but for other reasons, then this was waiver of his right to cancel for this reason."

The court among others refused the following prayer of appellant:

"3. If the plaintiff did not paint the bath tub, and did not put hot water attachment to the bath tub, defendant could not for these reasons abandon the contract if the evidence shows

they could have had the bath tub painted, and the hot water attachment put in, as provided by the contract, out of the rents. It was their duty to request compliance with the contract, and, if plaintiff failed to do so, then have the work done and take the cost of same out of the rent, if the rent was sufficient to meet this expense."

There was evidence on behalf of appellees tending to show that appellant had breached his contract of lease in other particulars. But there was a conflict in the evidence as to these. The court gave and refused other prayers bearing upon the issues of fact about which there was a conflict, the correctness of which rulings appellant challenged, but in our view of the case it is unnecessary to notice these.

From a verdict and judgment in favor of appellees this appeal has been duly prosecuted.

*Ira D. Oglesby*, for appellant.

1. There was no testimony on which to base instructions 10 and 11 given at defendants' request. No change of the lease contract is alleged nor proved, neither was there any new agreement entered into between plaintiff and the Shelbys. The lease provided for subletting with the plaintiff's consent, and none except him can complain if the lessee sub-rents without his consent. 59 Tenn. 374; 12 N. Y. St. Rep. 632.

2. Boone is not discharged as surety unless there was a new contract substituted for the original, without his consent, or some alteration in the original in some point so material as, in effect, to amount to a substitution of a new contract. 23 How. (U. S.) 149; 181 Pa. St. 251; 59 Tenn. 374; 7 Hun 244; 161 Pa. 87; 1 Denio 516; 67 Mich. 139.

*Hill, Brizzolara & Fitzhugh* and *A. A. McDonald*, for appellees.

1. The obligations of this contract were mutual, and, the appellant having failed to comply with his part of it, appellees were justified in rescinding it. 65 Ark. 320; 73 Mich. 577; Jones on Landlord and Tenant, § 673.

2. Boone was a surety for the tenant merely; his obligation having been executed separately from that of the tenant, and showing on its face that it was executed in consideration that the landlord would comply with the terms and conditions

of the lease. Any violation of the contract by the landlord, or any material alteration of the contract between the landlord and tenants, without the surety's consent, discharged him. 65 Ark. 550; 77 Ark. 128; 73 Ark. 473; 74 Ark. 600; 72 Ark. 80.

WOOD, J., (after stating the facts). Appellant, in his prayer for instruction number 11, asked the court to submit to the jury the question as to whether or not appellees had waived the right to cancel the lease because of any failure that might have been on the part of appellant to put the water heater in the bath room. Appellant therefore cannot complain of the finding of the jury that there was no such waiver. The case then, as we view it, is as follows: In consideration of the covenants on the part of appellees to pay rents, etc., appellant also covenanted on his part that he would do certain things mentioned in the lease, one of them being that he would "put a water heater in the bath room." The uncontroverted evidence shows that appellant failed to comply with his contract in the above particular, and appellees have not waived compliance with this provision of the contract.

The only question, therefore, is, can appellant compel appellees to comply with their covenants to pay rent when he has failed to comply with his covenant to "put the water heater in the bath room?"

The principles of law decisive of this question have been announced by this court in some very recent cases. *Harris v. Wheeler Lumber Co.*, 88 Ark. 491; *Ino. A. Gauger & Co. v. Sawyer & Austin Co.*, 88 Ark. 422, and cases cited. In the latter of the above cases we cite *Missouri Pacific Railway Co. v. Yarnell*, 65 Ark. 320, where we said: "The obligations of the contract were mutual; and if the appellee failed to comply with it, he could not hold the appellant to a compliance. This is too plain to require argument or authorities. The failure of one party to a contract to comply with its terms releases the other party from compliance with it." The above doctrine furnishes appellees D. H. and H. L. Shelby a complete defense to appellant's claim.

As appellee Boone was a mere guarantor or surety for the Shelbys, the defense that was complete as to his principals of course discharges him. Being a surety, he would have been dis-

charged upon the uncontradicted evidence, even if the Shelbys had not been. For "a surety will be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered." *O'Neal v. Kelly*, 65 Ark. 550. See also *White River, Lonoke & W. Ry. Co. v. Star Ranch & Land Co.*, 77 Ark. 128; *Lawhon v. Toors*, 73 Ark. 473; *Singer Mfg. Co. v. Boyette*, 74 Ark. 600.

Even if the Shelbys had consented to a different arrangement about the water heater (but they did not) from that specified in the lease, Boone did not consent to any change in the lease. The change was a material one, and, as we have said, according to the above authorities, Boone would have been released from the obligations of his contract, even though the Shelbys were not discharged from their covenants.

We need not inquire concerning other questions. For, under the law, upon the undisputed evidence as to the above, the judgment is right, and it must be affirmed.

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BREWER v. STATE.

Opinion delivered January 31, 1910.

LARCENY—FINDING LOST GOODS.—If the finder of lost articles neither knows nor has any means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time; if he does know, or has the immediate means of ascertaining, who the owner is, there must be a felonious intent to steal at the time of the taking, in order to constitute larceny.

Appeal from Jackson Circuit Court; *Charles Coffin*, Judge, reversed.

*S. A. Moore*, for appellant.

*Hal L. Norwood*, Attorney General, and *William H. Rector*, Assistant, for appellee.

There was no error in the second instruction, and the eighth requested by the defendant was properly modified. Bishop's New Crim. Law § § 878-882; 1 Wharton, Crim. Law (10 ed.),

§ § 901-907; 3 Cox, C. C. 453; 33 Conn. 260; 8 Tex. App. 40; 19 Mo. 249; 116 Mass. 42; 29 O. St. 184.

MCCULLOCH, C. J. The grand jury of Jackson County returned an indictment against defendant, Trigger Brewer, upon two counts, one charging him with the crime of grand larceny in stealing forty dollars in money, the property of J. B. Pritchard, and the other charging him with the crime of receiving stolen property. On a change of venue to Independence County he was tried and convicted of the crime of grand larceny, and appeals to this court.

The prosecuting witness testified, in substance, that he was a traveling salesman, and that one evening about 6:30 o'clock at Newport, in Jackson County, he entered the coach of a waiting railroad train standing at the station, after having purchased a ticket, which he placed in a pocket-book he calls his credential book, and which also contained his money, and that the book was in the hip pocket of his trousers; that he sat down beside a woman and conversed with her awhile, when defendant came in and talked to the woman a few minutes and then walked out of the train; that he saw a credential book in the defendant's hand as the latter left the train, but thought nothing of it until he missed his own book a few minutes later; that, after discovering the loss of his book, he went out to look for defendant, but did not find him until he came back in the coach; that he then walked up to defendant and demanded the book; that the latter denied having it, and that he then put his hand in defendant's pocket and drew out the book, with the money still in it. The book contained forty dollars in money. There was other evidence corroborating the testimony of this witness in each material feature.

Appellant testified that he was to some extent intoxicated that day, and found the pocket-book on the ground near the train and went into the coach with it in his hand, and so held it while he was talking to Pritchard and the woman, and that after he left the train he kept the book in his hand while he made a trip over to a restaurant. He testified that when he went back into the coach he had the pocket-book in his vest pocket, and when Pritchard took it out of his pocket and said "This is mine," he replied, "If it is, you could have had it before

now if you had said anything about it." Other witnesses testified that they saw defendant pick up the pocket-book off the ground as he started to get on the train, and that he spoke of it at the time. One witness said he remarked, "Some one has lost this book," and another that he said, "Look here what I have found," and another that he said, "I have found a book; do you know who it belongs to?"

The court gave the following, among other instructions, over defendant's objection: "2. If you believe from the evidence that the defendant found the pocket-book, and either knew or found out to whom it belonged, and on demand of the owner denied having it, or did not voluntarily return it to him, he would be guilty of larceny, and you should so find."

Defendant asked the following instruction, which the court over his objection modified by adding the words in italics: "8. If you believe from the evidence that the defendant found the pocket-book and contents, and within reasonable time thereafter made inquiry as to the ownership thereof, you should find the defendant not guilty as charged *unless you further find that he knew or soon learned who the owner was and denied having it.*"

Mr. Bishop, in discussing the offense of larceny in the finding and misappropriation of lost property, says: "Unless, therefore, there is larceny in the original taking, there can be none committed afterward. \* \* \* The law gives to the finder a title in lost goods, but not full and unconditional; and so, if he takes them with the intent to steal them, he commits a larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man, knowing the owner of goods, cannot lawfully pick them up, without returning them to him; but a man, not knowing the owner, can. The doctrine, therefore, is that if, when one takes goods into his hands, he sees about them any marks, or otherwise learns any facts by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise, not. Some of the cases say, if he knows who the owner is, or has the means of ascertaining; but the better form of the doctrine is as just set down, because every man by advertising and inquiring can find the owner if he is to be found, while the guilt of a

defendant must attach at the moment, if ever, without depending on an if." 2 Bish. Crim. Law, § 882.

Prof. Wharton states the law on the subject thus: "When goods are lost—*i. e.*, when the owner has no trace of them, and they show no trace of the owner—the finder has such a special property in them, that according to the now prevalent view, as will presently be more fully seen, even though he feloniously ends to appropriate them when he finds them, it is not larceny. In other words, the mere subjective side is insufficient without the objective. To constitute larceny, there must be not only the intent to steal, but the thing taken must give on its face grounds from which it may be reasonably believed that the owner can be found. If there be no indications of ownership, then the owner may be inferred to have abandoned the goods, and consequently to consent to the finder taking them. In this way we can reconcile the position now before us with the position that when felonious intent and trespass are united in taking a thing, there is larceny. There is no trespass in taking a thing abandoned." 1 Wharton, Crim. Law, § 901 (10 ed.).

In the note to section 909, the author states the rule to be as in other larceny cases, that there must be a felonious intent at the time of finding, and cites many cases in support.

The Supreme Judicial Court of Massachusetts, in an opinion by Judge Gray, then Chief Justice, said: "The finder of lost goods may lawfully take them into his possession; and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny." *Commonwealth v. Titus*, 116 Mass. 42.

An interesting and instructive discussion on this subject may be found in the case of *Griggs v. State*, 58 Ala. 425, where all the authorities are reviewed.

Mr. Rapalje in his work on Larceny and Kindred Offenses, (§ 52) adopts the language of the Massachusetts court quoted

above with an addition which reaches to the precise point in the present case: "The finder of lost goods may lawfully take them into his possession; and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. Larceny cannot be of lost goods by their finder, if his original taking was without a felonious intent, though followed by a felonious asportation; and a charge to the jury that if the defendant, when he found the property, knew or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny, is error, for the reason that, if defendant, when he found the property, meant to act honestly with regard to it, no subsequent felonious intention could make him guilty of larceny."

So the rule clearly deducible from the authorities is that if the finder of lost articles neither knows nor has any immediate means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time. If he does know, or has the immediate means of ascertaining who the owner is, there must be a felonious intent to steal at the time of the taking in order to constitute larceny; and a subsequently formed intent is not sufficient. The instructions hereinbefore quoted, given by the court, do not square with this rule, for they undoubtedly conveyed to the minds of the jury the idea that if the defendant either knew or afterwards ascertained who the owner was, and denied having the pocket-book, or failed to voluntarily return it, this made him guilty of larceny.

The eighth instruction requested by defendant was incorrect in failing to embrace the idea of good faith in making inquiry for the owner or of the absence of a felonious intent at the time of the original taking, and the court might well have refused the instruction altogether. But the modification was incorrect, and rendered the whole instruction prejudicial to defendant, by telling the jury in effect that, notwithstanding he had made inquiry for the owner, if he afterwards learned who the owner was and denied having the pocket book, he would be guilty of larceny.

There was evidence to warrant a submission to the jury of the questions covered by these instructions, and the error of

the court was prejudicial. The court gave other correct instructions on this subject, but they were in conflict with those quoted above, and were therefore calculated to mislead the jury.

Reversed and remanded for new trial.

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