MILLER *v.* JOHNSON.

Opinion delivered December 21, 1931.

1. THEATERS AND SHOWS—CARE AS TO PATRONS.—The holder of an amusement concession who allowed the owner of a motordrome to operate it within the concession was under obligation to use ordinary care to see that the motordrome was reasonably safe for patrons.
2. THEATERS AND SHOWS—WHAT LAW GOVERNS.—The actionable quality of acts causing injury to a patron at a fair should be determined by *lex loci,* and not by *lex fori.*
3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Denial of a new trial for absence of evidence which was cumulative and was known before the trial, *held* not an abuse of discretion.
4. THEATERS AND SHOWS—LIABILITY OF AMUSEMENT PROPRIETOR.—A patron injured by a defective platform is entitled to recover from the holder of an amusement concession, who permitted the motordrome to be operated, regardless of the holder's rights as against his co-defendant motordrome owner.
5. DISMISSAL AND NONSUIT—RIGHT OF PLAINTIFF TO DISMISS.—Plaintiff, on announcement by the jury that they had a verdict and before it was rendered, could dismiss the action against one of the alleged tort-feasors, there being no cross-complaint against him by the other defendant.

Appeal from Arkansas Circuit Court, Northern District; *W. J. Waggoner,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was instituted by appellee, Bertha Johnson, against appellant and others to recover damages for

personal injuries sustained by her in the collapse of a platform negligently constructed about an amusement contrivance known as a motordrome, operated on the show grounds of appellant in Heavener, Oklahoma.

Appellant had the concession for amusement devices on the grounds and allowed Puryear, the owner of the motordrome contrivance, to exhibit it on the grounds, receiving for the privilege 25 per cent. of the gross receipts from its operation.

The motordrome is a contrivance shaped like a large barrel with an open top, the bottom end being cone-shaped. Around this barrel-shaped contrivance is built a platform, twelve feet or more from the ground and within two or three feet of the top of the motordrome, the platform being about three feet wide and encircling the drome, in which a person rides a motorcycle. The purpose of this platform is to provide means for seeing the performance within the motordrome. The momentum of the motorcycle causes the machine to keep to the inside wall while the machine is running horizontal to the ground.

Appellee, with her husband and two friends and others, were attending the performance at the motordrome when the platform collapsed and injured her. One of the boards on which the patrons were required to stand contained a large knot, which weakened it to such an extent that it broke. The knot was not visible to the patrons because the top side of the plank was painted, although the knot was visible and could have been easily discovered by the operator, as the plank was not painted on the under side. The defective condition of the plank was not denied in the testimony of appellant, and no proof was offered on his part about the exercise of any care in seeing that the platform was properly constructed and made safe for visiting patrons.

Appellant defended on the ground that the owner and operator of the motordrome, George B. Puryear, was an independent contractor over whom he had no control whatever; that he had the exclusive right to show

and operate the amusement features at Heavener, Oklahoma, during the fair, and that he sold the right to Puryear to operate the motor drome for 25 per cent. of the gross receipts.

Appellant owned and operated the Ralph R. Miller Shows, including a number of attractions, which were advertised to be at the annual county fair at Heavener, the announcements being carried in the newspaper, on billboards, posters, placards and circulars as the Ralph R. Miller Shows. The shows occupied the south end of Main Street, there being several attractions, among which was the motordrome, which was in the same inclosure and among the other attractions owned and operated by Ralph R. Miller. The motordrome had the sign of Ralph R. Miller Shows on it, the ticket booth where tickets were sold had the same sign over it, and the tickets sold for admission to the motordrome had Ralph R. Miller Shows printed on them and were furnished by Ralph R. Miller. The mechanics who erected the drome, as well as the performers inside, had uniforms with Ralph R. Miller Shows stamped on the back.

The court's instructions to the jury are not included in the record. Upon the return of the jury announcing it had a verdict, the appellant dismissed its suit against Puryear, the owner and operator of the motordrome, and a verdict was rendered against appellant, and, from the judgment thereon, this appeal is prosecuted.

Joseph Morrison, for appellant.

John W. Moncrief and *Sam T.,* and *Donald Poe,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists for reversal that the evidence was not legally sufficient to support the verdict; that the court erred in not granting him a new trial because of newly-discovered evidence; and also in allowing appellee to take a nonsuit as against the alleged operator of the motordrome.

The evidence is undisputed that the appellant, the holder of the exclusive concession for furnishing amusements to the fair, permitted Puryear, for 25 per cent. of

the gross receipts, to bring his amusement contrivance, the motordrome owned and operated by him, into the grounds with the other features and attractions of appellant's shows, devices and contrivances for affording amusement to the public, all advertised as the Ralph R. Miller Shows, and the operators in the grounds, as well as the performers, wore uniforms with the words Ralph R. Miller Shows on the back. That the tickets for admission to this device were furnished by the Ralph R. Miller Shows and had the name printed thereon.

That appellee, a patron of the show, stepped on the platform and was standing thereon watching the performance within the motordrome when the plank broke, because of the defect or knot near the end thereof, allowing her to fall to the pavement 10 or 12 feet below, a young man falling through striking her, resulting in painful and severe injuries. There was no opportunity afforded appellee to discover the defective condition of the plank, which was painted on the top side and put into the platform upon which the patrons were to stand in order to observe the performance inside the drome. The defective condition could easily have been discovered by the employees in charge of the erection of the platform, the plank not being painted on the under side, and no care whatever was shown to have been exercised by appellant, whose duty it was to use ordinary care to see that the device or contrivance, which he had employed from the owner, was reasonably safe for the patrons invited by him to use it.

It is insisted by appellant that he had no proprietary interest in the motordrome, and had nothing to do with the manner of its operation, and that therefore he was under no duty to those who patronized the attraction, and that Puryear, the owner of the contrivance, was an independent contractor for whose negligence he should not be held responsible. He allowed the owner of this contrivance, however, to erect and operate it for 25 per cent. of the gross receipts among the other contrivances, attractions and amusement devices upon the grounds for

which he held the exclusive concession for furnishing amusements to the people visiting the fair, inviting the patrons to make use of this device the same as the others exhibited and of which he was the owner, and he was bound to the exercise of ordinary care to see that the devices operated were reasonably safe for the purpose for which the public was invited to use them. *Hartman* v. *Tenn. State Fair Assn,* 134 Tenn. 149, 183 S. W. 733, Ann. Cas. 1917D, 931.

In 22 A. L. R., page 620, the annotation states: "The weight of authority is to the effect that the proprietor or manager of a place of amusement owes a duty to the public who are invited there to exercise reasonable care to see that the premises are safe and are kept in a safe condition, and that, if he does not discharge the duty, he may be held liable for injury to a patron, although the exhibition, or performance, or act which resulted in the injury is that of a concessioner, independent contractor, or other third person."

The injury occurred in Oklahoma, and the actionable quality of the acts causing it is to be determined by reference to the *lex loci,* rather than the *lex fori.* 5 R. C. L. 1038, § 129; *Tulsa Entertainment Co.* v. *Greenlees,* 85 Okla. 13, 205 Pac. 179, 22 A. L. R. 602.

The injury here was not caused by the *personal* negligence of the owner or independent contractor, but resulted from the defective condition of the amusement apparatus. Appellant, having the exclusive right to furnish amusements on the grounds and the selection of the kinds of attractions and their operators, cannot excuse himself from liability for failure to exercise ordinary care to have and keep the equipment or apparatus operated for amusement purposes reasonably safe for the patrons and visitors by contending that the device belonged to an independent contractor who alone was responsible for negligence in supplying and operating the device or contrivance.

Appellant made no application for a continuance upon discovery that Puryear, the owner of the motor-

drome who had been sued along with him, was not present at the trial, and he necessarily knew at the time of going to trial what the testimony, now claimed to be newly discovered, would be, since he testified of the facts himself relating to said witness being an independent contractor. This testimony would have been only cumulative in any event, and the court did not abuse its discretion in denying the motion for a new trial on account of alleged newly-discovered evidence.

In our view of the law, appellee could recover of appellant herein without regard to any rights and liabilities existing between appellant and his codefendant, and, since he asked no relief by cross complaint against his codefendant, the plaintiff, appellee could dismiss his action against Puryear, as was done herein, and the court did not err in allowing it to be done.

We find no error in the record, and the judgment is affirmed.