

Charles O. Lauve and C. S. Kellogg, for intervenor.
L. De Poorter, for the receiver.

PARDEE, J. The evidence establishes, as the master reports, that the intervenor received the injuries of which he complains in attempting to get on the passenger train of the Texas & Pacific Railway Company while the same was in motion, and before it stopped at a regular station on the line; that in so getting on the train he was neither advised nor compelled by the agents of the company; and that the intervenor's said attempt contributed directly to his injuries. It is the settled jurisprudence of Louisiana, whose laws control as to the responsibility in this case, that no person can recover damages for injuries received where he has himself contributed to the negligence which caused the injury. See *Knight v. Railroad Co.*, 23 La. Ann. 462, and cases there cited. Attempting to mount a moving railroad train without the advice and direction of the railroad's agents, is negligence, according to all respectable authorities, text-books, and adjudged cases. See *Shear & R. Neg.* § 283; *Hutch. Carr.* § 641; 2 *Ror. R. R.* 1111. The case of *Knight v. Railroad Co.*, above cited, was directly on the point. The exceptions to the master's report will be overruled, and the report will be confirmed.

AMERICAN WELL-WORKS v. RIVERS.

Circuit Court, D. Louisiana. June 14, 1888.)

CONTRACTS—CONSTRUCTION.

A written contract, by which plaintiff agrees to sink an artesian well for defendant, supplying a given quantity of water, does not require that the water should be potable and fit for washing and for making steam, though plaintiff knew defendant was a hotel keeper, and desired water of that character for hotel purposes.

At Law. On motion for new trial.

Action by the American Well-Works against Robert E. Rivers to recover for sinking an artesian well. Verdict for plaintiff, and defendant moved for a new trial.

Before PARDEE and BILLINGS, JJ.

A. C. Lewis, for plaintiff.

Gibson, Hall & Montgomery and Rouse & Grant, for defendant.

PARDEE, J. On the original pleadings in this case the plaintiff was entitled to judgment. The answer admits the contract sued on, admits plaintiff's compliance with all the specified stipulations of the contract, and rests the defense upon a claimed construction, not justified by the

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letter of the contract, which would in effect add to the guaranties already stipulated an additional and onerous one wholly out of proportion to the consideration named in the contract. The contract is one to sink artesian wells. The plaintiff assumed the risk of and guarantied the quantity of water to be furnished. The defendant says that as he was a hotel keeper and the plaintiff knew he wanted the water for hotel purposes, that in addition to the quantity of water expressly guarantied the plaintiff impliedly guarantied that the water should be potable and fit for washing and to make steam. The subject of the contract was necessarily an experiment. If successful, particularly in obtaining pure water, the advantage was to be wholly the defendant's, and the value of the wells would naturally be 10, if not 20, times the consideration to be paid the plaintiff for doing the work. The experiment was necessarily twofold, *i. e.*, as to quantity and quality of water supply. The parties expressly stipulated in writing that the plaintiff should assume all risk as to quantity. To construe the contract so as to charge him with the risk as to quality is to change the character of the contract from one for the sinking of wells to one for the supplying a hotel with water, and bind the plaintiff to a contract he never made. The trite maxim, *expressio unius est exclusio alterius*, or *expressum facit cessare tacitum*, decides the case. See Broom, Leg. Max. 505. "If there be several things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed; and this, even if the law would have implied all if none had been enumerated." 2 Pars. Cont. 28; Chit. Cont. (9th Amer. Ed.) 25. In the contract in question the parties considered the guaranties to be given by the plaintiff, and they expressly stipulated for the guaranty as to quantity, and thereby it is manifest they excluded the more hazardous one as to quality.

On the pleadings, as amended, setting up a subsequent parol contract on the part of the plaintiff to guaranty the quality of the water, the case seems to have been submitted to the jury on the evidence, and there is no substantial complaint that the finding was not in accordance with the law and the evidence.

The affidavit of newly-discovered evidence is not sufficient to warrant a new trial. It does not show the diligence used. The evidence as set forth is cumulative, and if true and in the case it ought not to affect the verdict. That the plaintiff as well as the defendant hoped to get good water may be conceded, but that he contracted with the defendant to guaranty the quality of the water cannot be proved from conversations, however explicit, after the contract between two of the plaintiff's agents as to the hopes, expectations, undertakings, and agreements to get good water, as long as the matter concededly did not take the form of a contract with a consideration. According to what information I have as to the evidence on the trial, I am well satisfied that what defense there is in the case wholly arises under the construction proper to be given to the written contract sued on. The construction given by the trial judge in his charge to the jury was correct, and the charge requested by the defendant was properly refused. The verdict was in accordance with the charge

and the evidence adduced, and ought not to be disturbed. The motion for a new trial is therefore refused.

BILLINGS, J., concurs.

GILES v. PAXSON *et al.*

(Circuit Court, N. D. Iowa, E. D. December 8, 1888.)

1. **DEPOSITIONS—DEDIMUS—CERTIFICATE—DISINTERESTEDNESS OF COMMISSIONER.**
Depositions taken for use in the federal courts of Iowa under Rev. St. U. S. § 866, by virtue of a *dedimus* to a commissioner need have no certificate that the commissioner is disinterested, as the section provides that the depositions shall be taken according to "common usage," which means the statutory provisions of the state; and under the Code of Iowa such certificate is unnecessary, sections 863-865, providing for taking depositions before a disinterested commissioner upon notice, without a *dedimus*, not applying to testimony taken under section 866.
2. **SAME—REDUCTION TO WRITING.**
For like reasons the commissioner need not certify that the testimony taken by a clerk was reduced to writing in his presence, as provided in section 864.
3. **SAME—SIGNATURE OF WITNESS—JURAT.**
Where, in accordance with Code Iowa, § 3737, the commissioner certifies that the deposition was subscribed and sworn to by the deponent at the time and place mentioned, it is unnecessary to follow the signature of the witness with a jurat.
4. **SAME—WRITING ANSWERS SEPARATELY FROM INTERROGATORY.**
While under Code Iowa, § 3735, the answer of a witness should be written under the interrogatory, it is sufficient that the interrogatories are numbered, and the answers thereto are written down separately, with corresponding numbers, when the certificate shows that both the interrogatories and answers were read over to the witness before signing, as under section 3741 an unimportant deviation from the statutory directions will not vitiate the depositions where no prejudice can result from such deviation.
5. **SAME—IDENTITY OF WITNESS.**
Where a commission issues to take the testimony of "W. E. F., of A.," and the caption recites that it is the "deposition of W. E. F., taken at A.," the deposition is properly signed, and the certificate shows that pursuant to the commission the notary caused the witness to come before him, etc., and that he subscribed and swore to the deposition, the deposition sufficiently appears to be that of the person mentioned in the commission.
6. **SAME—RETURNING EXHIBITS.**
It is proper to return with the deposition of a witness a copy of a deed referred to by him, whether the deed is admissible in evidence at the trial or not.

At Law. On motion to suppress depositions.

Action by William A. Giles against Charles Paxson and others. Defendants filed exceptions to certain depositions taken by plaintiff.

Adams & Mathews, for plaintiff.

Ed. P. Seeds and *Henry C. Noyes*, for defendants.

SHIRAS, J. The defendants move to suppress the depositions of Joseph W. Martin and other witnesses on several grounds, the first being