

as "a citizen of the state of Missouri." But that is not sufficient. And even if it were shown that Lewis was not and could not be found within this district, to be served with process, there is nothing in section 737 of the Revised Statutes which makes it proper for the court to adjudicate the suit without the presence of Lewis, because the issue as to whether Lewis refused to sue, as stated, is one on which Lewis must be heard, and under section 737 he cannot be concluded or prejudiced by a decree rendered in his absence. The statute cannot be construed so as to convert real parties and necessary parties into no parties at all. There is, in this case, no suit to adjudicate unless Lewis be plaintiff, or unless, if he be defendant, he be served or appear. Rule 47 in equity is to the same purport. It makes it discretionary with the court to proceed, as does section 737.

For the foregoing reason, and without deciding expressly or impliedly any other question raised in the case, the only disposition that can now be made of the suit is to dismiss the bill, with costs, but without prejudice to any other suit in any court.

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### HALL v. MEMPHIS & CHARLESTON R. Co.

(Circuit Court, W. D. Tennessee. October 2, 1882.)

#### 1. ACTIONS IN TORT AND EX CONTRACTU—TENN. CODE, § 2746 ET SEQ.

The plaintiff, on the facts stated and proven may, in Tennessee, recover whatever damages he may be entitled to, whether his action sounds in tort or *ex contractu*, all forms of action having been abolished by the Code.

#### 2. CARRIER OF PASSENGERS—LIMITED TICKET—EJECTION—MEASURE OF DAMAGES.

A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and on the refusal to pay the fare ejection from the train was not wrongful. And the measure of damages in a suit for a breach of the alleged contract is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination.

#### 3. SAME—WRONGFUL EJECTION—RESISTANCE BY PASSENGER.

While resistance to the authority of a conductor does not preclude a passenger from recovering reasonable damages for a wrongful ejection from the train, it is his duty, certainly where he is in the wrong, to submit without resistance, except in defense against impending bodily injury; and, right or wrong, unnecessary resistance will excuse the use of force and mitigate the damages for any injury received.

4. SAME--CONTRACT OF CARRIAGE--MISTAKES ABOUT TICKETS.

A contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. *Held*, therefore, that where there is a dispute arising on the train about the ticket it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And, if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of the contract.

5. SAME--PLACE OF EXPULSION--REGULAR STATION.

A regular station is not an improper place to eject a passenger, although there may not be a hotel for public accommodation at that place.

Motion for New Trial.

The plaintiff, who is about 85 years of age, purchased tickets at reduced rates for himself, his wife, about 76 years of age, and his daughter and her child, from Town Creek, a station on defendant's road, to Memphis and return, upon which a limitation was printed, "Not good after 30 days." They were persons of the highest respectability. Going to Texas, they returned after the limitation expired, and the conductor refused to receive the tickets, demanding train fare. This being refused, they were ejected at the next station, as required by a regulation requiring the conductor to demand certain prescribed rates for passengers not holding tickets. The plaintiff insisted that he had purchased the tickets as unlimited tickets, and that the station agent had assured him that, notwithstanding the limitation, he could be carried on them at any time. This was denied by the agent, and there was great conflict of proof on the subject of what transpired at the time of the purchase. The plaintiff offered to pay the difference between the price of the tickets and the regular unlimited tickets, and between the price of the tickets and the train fare, which was refused. He then offered to pay this difference to Collierville, a station further on, where he had friends. This was refused, and he was advised by the conductor to pay train fare to that station. He told the conductor that he would only leave by force, and laying hold of the seat refused to leave it. The conductor forced him out of it, and led or dragged him from the train, and the others were conducted to the platform. There was no hotel there, but a small station-house, in which there was a room in which the parties passed the night, under circumstances of great discomfort. His wrist was somewhat strained, and his wife strained her ankle on the platform.

There was much dispute as to the exact occurrences, the inadequacy of light furnished, and assistance to the platform; the plaintiff complaining that they were hurried off and left in the dark, to find their way as best they could, in unpleasantly damp and cool weather for people of their age, while the conductor insisted that he acted with all the courtesy and gentleness possible under the circumstances, and with more attention than usual in like cases, because of the age of the parties.

It was not disputed that the business was disagreeable to the conductor, and that he was at much pains to persuade the plaintiff and other parties to pay the small sum demanded for fare to Collierville, at least, but that the plaintiff insisted on being put off with force unless his offers to pay only the difference between the price of the expired tickets and the train fare were complied with. The train fare to Collierville for the whole party was between three and four dollars. The plaintiff had ample means to pay train fare to either Collierville or Town Creek. The court directed a verdict for the defendant company, with a stipulation, however, to submit to a verdict for the extra fare paid by the plaintiff on the next day for tickets to his destination, if the court should conclude the company was liable for it. Subsequently a verdict was entered for the plaintiff according to the stipulation, and he moved for a new trial.

*Wright & Folkes*, for plaintiff.

*Humes & Poston*, for defendant.

HAMMOND, J. It was much argued at the trial and on this motion for a new trial whether, under this declaration, there could be any recovery *ex contractu* at all, and whether the action did not sound so entirely in damages that the plaintiff could not recover for any mere breach of the contract, irrespective of the question whether the plaintiff had been rightfully or wrongfully ejected from the train. The court was of opinion then, and now is, that this was an immaterial question, since, under our Code, abolishing all forms of action, a plaintiff may recover by a simple statement of the facts, be they what they may, if these facts entitle him to recover in any form. Tenn. Code, §§ 2746-2748, 2896, 2975; *Jerman v. Stewart*, 12 FED. REP. 266, 267; *Angus v. Dickinson*, Meigs, 459; 5 Am. Law Rev. 205, 225. The court, therefore, put the defendant under a stipulation to submit to a verdict for the price of the tickets, not because the ejection of the plaintiff was adjudged wrongful, but because the facts showed that the defendant had refused to carry out its contract, and

had incurred whatever liability attached for that breach. A verdict and judgment were subsequently directed, under the stipulation, for the plaintiff for the amount he paid for the tickets, which settled the right to recover on the facts, but limited the measure of damages to the price of the tickets. This action of the court assumed that the jury would have found the much-disputed facts in regard to the contract in favor of the plaintiff, and proceeded on the theory that he was entitled to be carried on the expired tickets from Town Creek to Memphis and back, and that the defendant company was guilty of a breach of its contract and liable for refusing to carry him. The case was treated as if the plaintiff had paid the extra fare demanded, as he did the next day, when he purchased new tickets and proceeded on his journey, and then sued for a refusal to carry him on the original contract.

It is now argued that, this being so, the plaintiff was wrongfully ejected, and the case should have gone to the jury under proper instructions as to the measure of damages. If the defendant company were complaining and demanding a new trial, I should not refuse it; for, clearly, the fact whether it made any contract other than that expressed on the limited tickets was much disputed, and the jury might have found the verdict either way, and the action of the court was wrongful as to the defendant company in depriving it of a jury trial on that question. But the stipulation was put upon the defendant to compel it to submit to a verdict on that question against itself, and disembarass the case of all other considerations, except the one whether the plaintiff was entitled to recover for putting him off the train anything more than the price of the tickets. The proper direction would have been to find for the plaintiff the amount paid for the new tickets and interest, or not, in the discretion of the jury, instead of a direction to find for the defendant company. But I had not then fully made up my mind that the plaintiff was entitled to recover anything *ex contractu*, and sought to reserve that question by the stipulation. The real question in the case is one of the proper measure of damages. When the court directed a verdict for the defendant corporation, with the stipulation above mentioned, it determined that the price of the extra tickets was the proper measure of damages, and, taking the subsequent action of the court under the stipulation into view, the case stands in the attitude of a direction by the court, on all the facts, assuming conclusively in favor of the plaintiff that he had a contract entitling him to carriage, that the