

of the company, to purchase all the machines on hand that remained over that season, and this Clark indebtedness, he says, was put into the form of this note, not as a note given for the purchase by Clark of any machinery, but was put in this form for the convenience of this transaction, and was turned over by him to Osborne & Co. in payment, or part payment, for these nine mowers that you have heard testified about. Now, it is claimed here that the provision in the note for attorney's fees, this 10 per cent., cannot be recovered because no suit has been commenced against Clark. I am inclined to think that provision applies especially to the suit brought upon the note itself. It is a little vague in its terms, but I think before 10 per cent. attorney's fees can be recovered there should have been a suit commenced on the note itself,—that is against the maker; so that, so far as that 10 per cent. for attorney's fees in these notes is concerned, there can be no recovery.

Here is a little memorandum which I have made, which I think is correct, with the exception that the attorney's fees, in every instance, should be struck out. In the case of those four judgments of course the attorney's fees are merged in the judgment, and that is the suit against the parties themselves, and can be recovered; but in the other cases you may strike out the attorney's fees, and deduct that from any sum that you may find for the plaintiff in this case.

Now, gentlemen, I think you will understand the testimony here, —understand the case, and I hope you will be able to arrive at a satisfactory conclusion. I will hand you this memorandum; I have compared it with the notes here, and it is proper also that you should have the pleadings and these notes, and you can run over this memorandum also, so as to satisfy yourselves as to the correctness of it. This memorandum was merely made by me to facilitate matters. You are not bound by it, gentlemen. You have the notes there and you can make your own calculations.

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### ROWE v. MATTHEWS and others.

(*Circuit Court, E. D. Michigan.* October 15, 1883.)

#### NEW TRIAL—DISCRETION OF COURT—DISTURBING VERDICT.

The granting of new trials is largely a matter of discretion. Errors in the admission of testimony or in the instructions of the court, even though material, are not always sufficient to require a reversal. It is only where the case has been submitted to the jury upon a wrong theory, or where the court is not satisfied that justice has been done, or is of opinion that a new trial will or ought to produce a different result, that the verdict should be disturbed.

#### On Motion for New Trial.

This was an action of trespass on the case, against the marshal

and his deputy, to recover the value of certain goods seized upon execution in favor of creditors of one Gladwin, formerly a boot and shoe dealer in this city. Plaintiff claimed title by virtue of a bill of sale and possession taken thereunder at a time when Gladwin had become wholly insolvent. Plaintiff, who was his brother-in-law, had made advances of money to him amounting to \$2,185. He came to Detroit for the purpose of obtaining security for its repayment, but, under advice of counsel, had his stock appraised, and took a bill of sale, paying Gladwin a small difference of \$15 between the amount of his claim and the value of the stock, upon their estimate, and took possession within 24 hours. The creditors of Gladwin subsequently obtained judgments against him, and levied upon the stock, when plaintiff began this action. The case turned upon the question of fraud in the transfer, and the jury returned a verdict for the plaintiff. Motion was made for a new trial, upon the ground that the verdict was against the law and the evidence, and that there were numerous errors in the instructions of the court to the jury, and in the admission and rejection of testimony.

*J. G. Dickinson and Alfred Russell, for the motion.*

*John D. Conely, contra.*

BROWN, J. This motion is based upon some 59 alleged errors in the findings of the jury and the rulings of the court. These exceptions may be classified as follows: (1) That the verdict was against the law and the evidence; (2) that the court erred in certain of its rulings with respect to the admission of testimony; (3) that the court erred in several particulars in its instructions to the jury.

With regard to the first ground, I need only say that at the trial the verdict met with my entire approval, and that I have seen no reason for changing my opinion. I have also reviewed the alleged errors in the rulings and instructions of the court, and am of opinion that none of the exceptions thereto are well taken. Had I found errors in them, I should have scrutinized their importance carefully before setting aside the verdict.

In their numerous exceptions counsel for the defendants seem to have shared in a misapprehension, which, judging from the number of motions of this character, is a common one, that nothing more is necessary to entitle a party to a new trial than to show such errors as would be deemed sufficient by an appellate court to justify setting aside the verdict. Nothing could be more misleading than this idea. Whatever may be the rule upon writs of error, the granting of new trials is largely a matter of discretion. Errors in the admission of testimony or in the instructions of the court, even though material, do not, as matter of law, necessitate a reversal of the proceedings. It is only where the case has been submitted to the jury upon a wrong theory, or where the court is not satisfied that justice has been done, or is of opinion that a new trial will or ought to produce a different result, that the verdict should be disturbed. Noth-

ing is better calculated to demoralize the administration of justice, and to justify the popular belief in the uncertainty of the law, than the practice of granting new trials upon trivial grounds, to give the defeated party another chance. It is for the interest of suitors and the public not only that cases should be fairly tried, but that the verdict of a jury should be the end of the controversy. Of course, this cannot always be the case. Courts will sometimes mistake the law upon a vital point. Juries are occasionally dominated by passion, sympathy, or prejudice. In either event, injustice is likely to occur, unless a new trial be granted. But if the court is satisfied that substantial justice has been done, and that a retrial is sought to give the plaintiff an opportunity of pressing an inequitable claim, or the defendant to patch up a technical defense, the verdict should stand, though inadmissible testimony may have crept in, or inadvertent expressions may have been used by the court. It was formerly the practice in Ohio to allow a second trial in every case, but the law was found to operate so unsatisfactorily that it was finally repealed. Under our practice it is only in actions of ejectment, and that for obvious reasons, that a retrial is permitted as a matter of course.

The position we have assumed is sustained by a great wealth of authority. The cases are collected and abstracted in 1 *Grah. & W. N. T.* 302-310, 341-347.

In *McLanahan v. Universal Ins. Co.* 1 *Pet.* 170, 183, Mr. Justice SROXY, speaking for the supreme court, stated the proposition referred to in the following language:

"It is to be considered that these points do not come before this court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is that the application is not a matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial by a bill of exceptions to the cognizance of the appellate court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law."

If we are asked why there is greater discretion in the trial court than in a court of error in this particular, the obvious answer is that the former is more fully possessed of the case, has opportunities of observing the witnesses, their demeanor upon the stand, and the hundred other minor incidents of a jury trial which may tend to satisfy it of the justice or injustice of the verdict. A court of error, revising its rulings, sees nothing in the case beyond the bald statements in the bill of exceptions, and is bound to pass upon the questions involved as abstract propositions of law.

The case under consideration was fairly tried. The requests of the

defendants were all given in substantially the language in which they were couched, except one, which would have required the withdrawal of the case from the jury. I have no criticism to make upon the verdict, and no reason to suppose a different result would be reached upon a second trial.

The motion must be denied.

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"THE HEAD-MONEY CASES."<sup>1</sup>

EDYE and others v. ROBERTSON. (Five Cases.)<sup>1</sup>

(Circuit Court, E. D. New York. September 5, 1883.)

1. CONSTITUTIONAL LAW—REGULATION OF COMMERCE—LICENSE TAX ON VESSELS BRINGING ALIEN PASSENGERS—ACT OF AUGUST 3, 1882.

The act of congress of August 3, 1882, (22 St. at Large, 214,) entitled "An act to regulate immigration," which levies a duty of 50 cents for every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States, to be paid to the collector of customs of the port to which such passenger shall come, by the master, owner, agent, or consignee of every such vessel, is a regulation of commerce with foreign nations, within the provisions of article 1, § 8, of the constitution of the United States.

2. SAME—CAPITATION TAX.

The duty thus levied is not within the provision of article 1, § 9, of the constitution, that "no capitation or other direct tax shall be laid, unless in proportion to the census." The act is an act regulating commerce, and authorizing the commerce in question on conditions to be observed, and the duty is a license fee, measured by the number of passengers. It is not a capitation tax, but a tax on the owner of the vessel, and on the business of bringing in alien passengers.

3. SAME—UNIFORMITY OF TAXATION—GENERAL WELFARE.

The act is not in violation of article 1, § 8, of the constitution, providing that "congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." It is not passed in the exercise of the power of laying taxes, but of regulating commerce. The tax being a license tax, the rule of uniformity is sufficiently observed, inasmuch as the tax extends to all persons of the class selected by congress; that is, to all steam and sail vessels coming to all ports in the United States, from all foreign ports, with all alien passengers. And the case is not one where a court can say that the tax is not laid for the general welfare of the United States.

4. SAME—CONFLICT WITH PRIOR TREATIES.

The act in question is not in violation of treaties in existence before the act was passed, between the United States and the various foreign countries of which the owners of the vessels bringing the passengers were citizens or subjects, which provided for freedom of commerce or navigation, since it applies to citizens of the United States and their vessels as well. *Semble*, that even if the act were in conflict with the prior treaties, it would supersede them, under article 6 of the constitution, providing that all laws and all treaties shall be the supreme law of the land in equal degree.

<sup>1</sup>Reported by R. D. & Wyllys Benedict, of the New York bar.