

I think, under this provision, the court below might issue a notice requiring the defendant to be present at a certain hour of some day named, and not less than 6 nor more than 20 days from the date and service thereof, and stating that at said time said action would be taken up by said court and disposed of according to law. The writ of *mandamus* will therefore be issued as in the petition prayed for.

Dwyer *et al.* v. St. Louis & S. F. R. Co.

(Circuit Court, W. D. Arkansas. June 29, 1892.)

1. TRIAL—INSTRUCTIONS—DIRECTING VERDICT.

If a case is one which fairly depends upon the effect or weight of evidence, a court has no right to withdraw the case from the jury, unless the testimony be of such a conclusive character as to compel it, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it. The court may direct a verdict for the defendant, if the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside.

2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—DANGEROUS PREMISES—NOTICE.

A yard master in the service of a railroad company is not required to quit the service of such company, or fail or refuse to perform the work devolving upon him, although he knew of the dangerous condition of the company's car yard, provided the same was not so far dangerous as to threaten immediate injury, or the condition of the car yard was not so dangerous but that the yard master, as a reasonably prudent man, could come to a well-grounded conclusion that he could safely perform his duty for the benefit of his employer. If the above conditions exist, and the yard master is killed in the discharge of his duty, without contributory fault on his part, his wife and children may recover of the company.

3. FEDERAL COURTS—DIRECTING SPECIAL FINDINGS—FOLLOWING STATE STATUTES.

The federal courts are not bound by a clause in the Code of a state with regard to the duty of courts to direct a jury to make special findings.

4. EXCESSIVE DAMAGES.

A court cannot interfere with a verdict of a jury on the ground of excessive damages, unless the damages are so excessive as to lead to the conclusion that the same is the fruit of passion or prejudice. To warrant a conclusion of that kind, the damages must be shocking to the sense of justice, or it must be manifest that the same are unreasonably large.

At Law. On motion for a new trial. Denied.

Rogers & Read, for plaintiffs.

B. R. Davidson, for defendant.

PARKER, District Judge. Suit against defendant by plaintiffs, as the wife and children of James Dwyer, deceased. Recovery prayed for on the ground that defendant negligently caused the death of James Dwyer, employe of defendant, in the capacity of yard master, at Ft. Smith, Ark. Jury trial had. Verdict for plaintiff for \$17,820. Defendant, by its counsel, files a motion for new trial. The first ground of said motion is that the court erred in overruling defendant's motion to require plaintiffs to elect on which count of complaint they would rely. There is no error in this action of the court. The plaintiffs relied on a state of negligence created by defendant. They simply set out in the

two counts of their complaint the facts upon which they relied to show a condition of negligence. There is here but one cause of action, and it arises from the negligence of defendant in killing James J. Dwyer. But if there were two separate causes of action they might be joined, and the plaintiffs could proceed to try both of them at the same time, as, where two causes of action of the same nature exist, they may be joined in the same complaint. Section 5014, Mansf. Dig. Laws Ark. par. 6, which provides "that all claims arising from injuries to persons or property may be joined," and, when so joined, they may, of course, be tried in the same suit; so I can see nothing in this ground for a new trial.

The second ground is that the court erred in admitting testimony over objection of defendant, and the third is that the court erred in excluding testimony offered by defendant. I do not consider either of these causes as having any weight, especially as no specific errors of this kind have been pointed out by counsel.

The fourth cause is that the court erred in overruling defendant's motion to instruct the jury to find the issues for the defendant. This cause is not one upon which a new trial can be granted, because there were facts on the side of plaintiff of such proving power as made it necessary that they should be passed on by the jury. The case is not of that character that can be taken by the court from the jury. It is one which, in my judgment, fairly depends upon the effect or weight of evidence, and such a case could not be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it. *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18; *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533; *Township of Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. Rep. 403. If the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant. Such is the rule laid down in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Marshall v. Hubbard*, 117 U. S. 415, 6 Sup. Ct. Rep. 806; *Harris v. Railroad Co.*, 35 Fed. Rep. 116; *North P. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266. I am not able to say that the facts in this case warrant the application of the rule asked for by defendant.

The fifth cause for new trial is that the court erred in giving its charge to the jury as the law of the case over the objection of the defendant, the objectionable provisions at the time being specified or pointed out. Without dwelling in detail on the charge of the court as given, and on the propositions the court refused to give, I think the law was clearly and fully declared. To my mind, both reason, justice, and authority sustain the charge of the court. The following part of the charge is in relation to the fact that deceased was not called on either to quit the service, or fail or refuse to perform the work devolving on him, although he knew of the dangerous condition of defendant's car yard, provided the same was not so far dangerous as to threaten immediate injury, or

the condition of the yard was not so dangerous but that the deceased, James J. Dwyer, as a reasonable and prudent man, as he was, could come to a well-grounded conclusion that he could safely perform his duties for the benefit of his employer. If that was the case, then he acted with prudence and care, as measured by the acts of a man possessing these characteristics. In such a case, there would not be that case of patent, flagrant danger that would signal deceased to take no chances, or, if he took them, he did so at his peril. If the danger was no greater than that described in the charge of the court, then reasonable and prudent men in the performance of duty would confront such danger, and what such men would do, under such circumstances, the deceased might do without being chargeable with contributory negligence, as the rule for his guidance is derived from what reasonable men would do under the same circumstances. The above remarks apply with equal force to that part of the charge relating to the construction of the foreign fruit car, upon which rests one ground of the negligence of the defendant, as set out in the complaint. The authorities sustaining this principle are very numerous. The proposition is very clearly stated by Judge WALLACE in *Railroad Co. v. Young*, 49 Fed. Rep. 723, and many authorities are there referred to as sustaining the principle. Beach, Neg. 373, and notes; *Soeder v. Railway Co.*, 100 Mo. 673, 13 S. W. Rep. 714; *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. Rep. 937.

The sixth cause is that the court erred in refusing instructions asked for by defendant numbered 6, 8, 9, and 10, and requiring instruction No. 10 to be qualified before giving same. There is no error in this, as the law relative to the case was fully given in the charge of the court, and the propositions asserted as named in this cause for new trial were properly refused.

The seventh cause is that the court erred in refusing to require the jury to make special findings as requested by defendant. The court is not bound by the clause of the Code of the state, in regard to the duties of courts, to direct special findings. In a case of this kind such findings can answer no good purpose. They may be used to put the jury in an inconsistent position, and thus afford a ground for an attack on their verdict by the court. It was no error for the court to refuse to instruct the jury to make special findings. *Association v. Barry*, 131 U. S. 120, 9 Sup. Ct. Rep. 755; *Railroad Co. v. Horst*, 93 U. S. 291; *Nudd v. Burrows*, 91 U. S. 426.

The eighth cause is that the verdict was contrary to and not supported by the evidence. I am not prepared to say that the verdict was against the evidence, or rather against its preponderance, nor can I correctly assert that the position set up in the ninth cause for new trial, that the verdict is contrary to the law as given by the court, is well taken.

The tenth cause is that the damages assessed were excessive, appearing to have been rendered under the influence of prejudice or passion. Excessive damages, appearing to have been given under the influence of passion or prejudice, are a good cause for a new trial, under the Code of the state. Section 5151, Mansf. Dig. At common law, if damages

given by a jury were so extravagant as to make it probable that the jury was actuated by passion or prejudice, a verdict might, upon this ground, be set aside. *Shumacher v. Railroad Co.*, 39 Fed. Rep. 174, and authorities there referred to. This is, substantially, the rule of the statute. When can a court interfere with a verdict on this ground? When can a court say the amount of damages is so excessive as to lead to the conclusion that the same is the fruit of passion or prejudice? The answer is, when the same is shocking to the sense of justice, or it is manifest the same is unreasonably large. *Railroad Co. v. Cella*, 42 Ark. 528.

Is that the case here? Is a verdict of \$17,820, as the compensatory price of the life of a man like Mr. Dwyer, so large as to shock the sense of justice? Or is it unreasonably large? He was a man of large experience in his calling. He was prudent, sober, industrious, careful with his earnings, devoted to his occupation, faithful in all respects to his family, with ability to earn from \$85 to \$90 per month. Physically, he was a strong, healthy man, with, according to the evidence, a life expectancy of 32 years. What is the life of such a man worth to his family? Take his earnings at \$85 per month for 32 years, and you have \$32,640. Or take off 10 years for old age, disability, and loss of time, and you have for 22 years, at \$1,020 per year, \$22,440. Making a liberal allowance for present payment, that is, for discounting the price of a human life, and when you take what the jury found, you do not have an amount shocking to the sense of justice. Nor is it manifest from their finding such an amount that the damages are unreasonably large. This is the test for the court, and it can be governed by no other. When we have a statute so barbaric, and almost brutal, as to prohibit the consideration by the jury of that terrible agony, grief, and suffering of the faithful wife and little children for their loss by death of such a husband and father as Dwyer, we should award fairly compensatory damages. The award should be made with a reasonably liberal spirit. Under this statute, man is considered only as an animal, a beast of burden, like a horse or a mule, with nothing to be considered when he is killed by negligence but his earning capacity. Then, under such a condition, when his earning power is fairly shown, and manifestly the jury have not gone beyond it in giving damages to his wife and children, we cannot infer that they have done that which is shocking to our sense of justice, or that they acted from passion or prejudice.

The eleventh ground, based upon the allegation of newly-discovered evidence, is not sustained as required by the law. I think the law on all the propositions involved was fairly given, and the subject-matter in controversy was fully stated. The evidence pro and con was weighed by the jury. I am not prepared to say the jury could not find from the evidence the truth of the propositions as claimed by plaintiffs. Upon the whole case, I can see no ground for interfering with the verdict. The motion for new trial is therefore overruled.

REUSENS v. STAPLES.

*(Circuit Court, W. D. Virginia. April 23, 1892.)***DEEDS—EXECUTION AND ACKNOWLEDGMENT—EFFACEMENT OF SEALS.**

Deeds executed in Massachusetts in 1800 and 1838 conveying land in Virginia, the signing and ensealing whereof were acknowledged and verified according to the registry acts then in force, (Acts Va. Dec. 1792, and Feb. 1819,) and duly admitted to record in pursuance thereof, must be held to have passed the legal title, although no seals appear upon the deeds at this date; for it will be presumed that the waxen seals then in use, and which were liable to be effaced, were properly affixed.

At Law.

Statement by PAUL, District Judge:

This was an action of ejectment brought by G. Reusens, a citizen of New York, against A. P. Staples, a citizen of Virginia, to recover 16,649 acres of land lying in Patrick county, Va. In the course of the trial the plaintiff offered in evidence, by way of tracing his title, two deeds, the first of which was from John Soley, of Boston, Mass., conveying 50,000 acres of land in Patrick county, Va., to John Miller Russell, of Charlestown, in the state aforesaid. (This deed also conveyed several other tracts of land lying in Bath and other counties in Virginia from said John Soley to said John Miller Russell, Joseph Russell, and John La Farge, but the said lands are not involved in the suit at bar.)

The attestations on said deed are as follows:

"In witness whereof the said John Soley, Jun'r, hath hereunto set his hand and seal this twentieth day of March, in the year of our Lord one thousand and eight hundred.

JOHN SOLEY, Jun'r.

"Signed, sealed, and delivered in the presence of

"GEORGE BLAKE.

"WILLIAM ALLINE,

"JOHN PRYOR, Jr."

"*Commonwealth of Massachusetts, Suffolk:* On this twentieth day of March, in the year of our Lord one thousand eight hundred, before me, Wm. Alline, a justice of the peace for the county of Suffolk aforesaid, personally appeared Mr. John Soley and acknowledged the within written instrument by him subscribed to be his voluntary act and deed, and consented that the same should be entered of record. Wm. ALLINE, Justice of Peace."

"*Commonwealth of Massachusetts, Suffolk—sc.:* At the supreme judicial court, begun and holden at Boston, within and for the county of Suffolk, on the third Tuesday of February, being the eighteenth day of said month, A. D. 1800, personally appeared before the court George Blake, William Alline, and John Pryor, Jun'r, the witnesses to this instrument, and severally make oath that they saw the said John Soley, Jun'r, sign, seal, and deliver the same as his free act and deed, and that they severally subscribed their names thereunto at the same time. JOHN TUCKER, Clerk."

"I certify that Tucker, Esquire, signer of the above, is now, and was at the time of signing the above acknowledgment, clerk of said supreme judicial court, and that full faith and credit are and ought to be given to his attestations as such. ISAAC PARKER, Chief Justice of said Court.

"Boston, August 19th, 1815."

(Here follows the certificate of the clerk of the county court of Bath county, Va., that said deed was admitted to record in his office on 19th February, 1818.)

"PATRICK COUNTY CLERK'S OFFICE, February 26th, 1818.

"*Virginia, to wit:* This instrument of writing from John Soley, Jun'r, to Miller Russell, and from said Russell to Joseph Russell and John La Farge, with the certificates indorsed thereon, was presented in said office and admitted to record.
SAMUEL STAPLES, Clerk."

The second of said deeds was from John Miller Russell, of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, conveying to Henry O. Middleton, of Fredericksburg, in the state of Virginia, 50,000 acres of land lying in Patrick county, Va., described as being the same tract of land which was conveyed by "John Soley to this grantor by deed the 20th day of March, in the year of our Lord one thousand eight hundred."

The attestation clause of this said deed is as follows:

"In witness whereof the said John Miller Russell hath hereunto set his hand and seal this twentieth day of July, in the year of our Lord one thousand eight hundred and thirty-eight. JOHN MILLER RUSSELL.

"Signed, sealed, and delivered in the presence of

"HENRY M. CHAMBERLAIN.

"NATHAN FISKE."

"JULY 27TH, 1838.

"*Commonwealth of Massachusetts, Middlesex—ss.:* We, Nathan Fiske and Henry M. Chamberlain, justices of the peace in and for said county of Middlesex, do hereby certify that John Miller Russell, named grantor in the above instrument, personally appeared before us and acknowledged the same to be his act and deed on the day and year above written.

"NATHAN FISKE,

"HENRY M. CHAMBERLAIN,

"Justices of the Peace."

"JULY 27TH, 1838.

"*County of Middlesex, Commonwealth of Massachusetts:* I hereby certify that Nathan Fiske and Henry M. Chamberlain are and were magistrates at the time of taking the acknowledgment of the grantor in the above deed. In testimony whereof I, Elias Phinney, clerk of the supreme judicial court of the commonwealth of Massachusetts for the county of Middlesex, have hereunto set my hand and affixed the seal of said court this 27th day of July, 1838.

"ELIAS PHINNEY."

"25TH JANUARY, 1840.

"*In Patrick Clerk's Office:* This deed from John Miller Russell to Henry O. Middleton with the certificate of acknowledgment thereon indorsed (authenticated according to the act of congress) was presented in the clerk's office aforesaid, and admitted to record.
A. STAPLES, Clerk."

To the introduction of these deeds as evidence objection was made by the defendant on the ground that said deeds were not under seal, and instructions on this point were asked for by defendant's counsel.

P. Bouldin, Jr., D. S. Pierce, and E. E. Bouldin, for plaintiff.

N. H. Hairston and Berryman Green, for defendant.

PAUL, District Judge, (after stating the facts.) The Virginia act of assembly, passed December 13, 1792, provided as follows:

"1. That no estate of inheritance or freehold or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed, and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her, or their act before the general court, or the court of that district, county, city, or corporation in which the land conveyed, or some part thereof, lieth, or in the manner hereinafter directed within eight months after the time of sealing and delivering, and be lodged with the clerk of such court to be there recorded."

* * * * *

"5. If the party who shall sign and seal such writing reside not in Virginia, or in the district or county where the lands conveyed lie, the acknowledgment by such party, or the proof by the number of witnesses requisite, or the sealing and delivering of the writing, before any court of law, or the mayor or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such court or mayor or chief magistrate in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within eighteen months after the sealing and delivering, where the party resides out of this commonwealth, and within eight months after the sealing and delivery where the party resides within this commonwealth, shall be as effectual as if it had been in the last-mentioned court."

So, also, the Virginia act of assembly, passed February 24, 1819, after re-enacting, in substance and without change so far as the case at bar is concerned, provided in its seventh section as follows:

7. Any deed may in like manner be admitted to record upon the certificate under seal of any two justices of the peace for any county or corporation within the United States, or any territory thereof, or within the District of Columbia, annexed to such deed, and to the following effect, to-wit:

"(County or Corporation,) *sc.*: We, A. B. and C. D., justices of the peace in the county (or corporation) aforesaid, in the state (or territory or district) of ———, do hereby certify that E. F., a party (or E. F. and G. H., etc., parties) to a certain deed, bearing date on the ——— day of ———, and hereto annexed, personally appeared before us, in our county (or corporation) aforesaid, and acknowledged the same to be his (or their) act and deed, and desired us to certify the said acknowledgment to the clerk of the county (or corporation) court of ———, in order that the said deed may be recorded. Given under our hands and seals this ——— day of ———.

"A. B. [Seal.]
"C. D. [Seal.]"

Now, the deed from John Soley, Jr., to John Miller Russell, dated 20th of March, 1800, was acknowledged and proved in a court of record of the state of Massachusetts in compliance with the requirements of the Virginia statute, (section 5, Act Dec. 13, 1792,) and it conveyed to said John Miller Russell the legal title to the land described in said deed. The deed from John Miller Russell to Henry O. Middleton, dated 27th day of July, 1838, was acknowledged before two justices of the peace in the state of Massachusetts, in compliance with the provisions of section

7 of the act of assembly of February 24, 1819, and conveyed the legal title to the land to the grantee, and not an equitable interest only, as contended by the defendant. The contention of counsel for the defendant that these deeds were not properly executed, because the seals do not appear attached to the signatures of the grantors, the attesting witnesses, and the justices before whom acknowledged, cannot be sustained. We must remember that at the time these deeds were executed the usual way of affixing a seal was by an impression in wax. The scroll, as used now, had not come into general use. The seals, being of wax, were liable to be effaced or broken off; hence the necessity of having witnesses to the signing and sealing. If, at this remote day from the execution of these ancient documents, we are at liberty to ignore their sanctity as sealed instruments, because the impression in wax is not to be found on them, or the scroll, its legally authorized substitute, in its stead, though we have the highest record evidence that the seals were attached to the documents at the time of their execution and delivery, it would go very far towards converting into equitable, what have been for a century regarded as legal, titles.

"A deed executed in Boston in December, 1798, by parties living there conveying land in Virginia, is properly admitted to record upon a certificate of the proof of its execution by the subscribing witnesses before the court of Suffolk county, signed by a person describing himself as clerk of the court, though no seal is attached to it." *Smith v. Chapman*, 10 Grat. 445. The instructions asking the court to construe these deeds as conveying only equitable interests must be refused.

TEXAS & P. RY. CO. v. LUDLAM.

(Circuit Court of Appeals, Fifth Circuit. June 30, 1892.)

No. 86.

CARRIERS—EJECTION OF PASSENGER—MEASURE OF DAMAGES.

In an action by a passenger against a railroad for being put off at K., nine miles from her destination, because, under the rules of the company, the train did not stop at the latter place, the court, without objection, gave an instruction which substantially declared the company's liability; and further stated that the measure of damages was the price of the ticket she purchased next morning from K. to her destination, and the increased damage suffered by reason of being left at K., instead of at some earlier place, provided that the conductor, by promptly informing her that the train did not stop at her destination, would have enabled her to stop at some other station, where she would have suffered less than she suffered at K. *Held*, that the rule as to the measure of damages was favorable to the company, as authorizing a lessening of the actual damages suffered, and the instruction was not objectionable as stating a conjectural or hypothetical case.

In Error to the Circuit Court of the United States for the Eastern District of Texas. Affirmed.

W. W. Howe, (*R. S. Lovett* and *F. H. Prendergast*, on the brief,) for plaintiff in error.

J. A. Armistead, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.