

tion; for by the last section of the act of 1891 said section 5976 of the General Statutes of 1889 is expressly repealed. Except when the language of the legislature is such as to admit of no two meanings as to its import, it is the duty of the courts to be constrained by the interpretation which will plainly effectuate the legislative intent, and preserve the known public policy of the state. The motion to strike out the first count of the answer is therefore overruled.

2. The second count of the answer, it seems to me, is quite unnecessary. It pleads matters evidently based on the first section of said act of 1891. I take it that this section applies only to the instance where suit is brought to recover on the note or contract vitiated by usury. The action here is replevin, to recover the possession of the personal property mentioned in the mortgage given to secure a debt affected by usury. The plaintiff in this action can only recover the specific chattel, or its equivalent in money, where the plaintiff is in position to so elect. No judgment in *assumpsit* or for the mortgage debt can be rendered therein. *Hamilton v. Clark*, 25 Mo. App. 428. So, if the defense interposed by the defendant in the first count of the answer be sustained by the proofs, it will put an end to this action. Neither the statute in question, nor any known rule of procedure, entitles the defendant to any relief over against the actor in such event. The motion to strike out the second count of the answer is sustained.

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### HARKINS v. PULLMAN PALACE CAR CO.

(Circuit Court, D. Delaware. November 14, 1892.)

#### 1. DEATH BY WRONGFUL ACT—EXCESSIVE DAMAGES.

In an action against a railroad company to recover damages for the death of plaintiff's husband, an ordinary laborer, 30 years of age, earning about \$400 a year, a verdict of \$7,000 is not so excessive and exorbitant as to induce the belief that the jury were influenced by partiality or prejudice, and a new trial should be refused.

#### 2. SAME—RULE OF DAMAGES.

In an action by a wife for causing the death of her husband, a day laborer, the maximum recovery is not necessarily limited to a sum which would produce an annual income equal to one half his annual earnings.

At Law. Action by Maggie Harkins against the Pullman Palace Car Company to recover damages for the death of her husband. Verdict for plaintiff for \$7,000. On motion for new trial. Refused.

*George H. Bates*, for the motion.

*Levi C. Bird*, opposed.

WALES, District Judge. This was an action to recover damages for the death of plaintiff's husband, caused, it was alleged, by the negligence of the defendant. A trial was had at the present term, and the

jury returned a verdict for the plaintiff for \$7,000. A motion is now made, on part of the defendant, for a new trial on the ground of excessive damages.

It is conceded that in cases of this character the principle on which damages are to be assessed is that of pecuniary injury, and that no compensation can be given for the loss of comfort or companionship; and it is claimed, in support of the motion, that Mrs. Harkins, on the most liberal estimate, would be fully compensated for the loss she has sustained by the payment to her of a sum of money which would yield an annual interest equal to the one half of her husband's yearly income at the time of his death. The deceased husband was an ordinary laborer, 30 years of age at the time of his death, and had been earning \$1.35 per day, or at the rate of \$400 a year. A person of his age, all other conditions being favorable, could purchase an annuity of \$200 by the payment of the principal sum of \$2,630, which latter sum, it is contended by defendant's counsel, should be the maximum damages to be allowed to the plaintiff. This basis of calculation is, however, much too narrow. The question for the jury was, what was the life of her husband worth to the plaintiff in a pecuniary point of view? And in answering that the jury were not necessarily confined to a calculation of the husband's wage-earning capacity only. The life of an honest, industrious, and kind-hearted husband and father, exclusive of mere affection and sentiment, has for his wife a money value in addition to what he may be earning by his personal labor or business. We do not know on what principle the jury proceeded in making up their verdict. It is not charged that they were actuated by improper motives, the only reason urged for the motion being that the damages are excessive, whatever may have been the basis of calculation. Where this is the sole objection, the court must be clearly convinced that the sum awarded is grossly disproportioned to the loss sustained before granting a new trial; and, although, in our opinion, a smaller sum would have been a sufficient allowance, we are not able to say that this verdict is so excessive and exorbitant as to justify us in setting it aside. The verdict does not give the plaintiff so much more than she is fairly entitled to, and in the like proportion inflict a wrong and hardship on the defendant, as to offend the sense of justice of every reasonable person who may be familiar with all the facts of the case. The case was given to the jury with special instructions on the computation of damages, and we are not disposed to interfere with their verdict because they have made a somewhat higher award than we should have done. It is impossible to lay down any exact rule of assessment in actions of tort. The jury are the judges of the facts, and the court will not usurp their duty or nullify their judgment except in an extreme case. A verdict is the expression of the sense of the jury on the questions of fact intrusted to their judgment for decision, and it is only where they have exceeded all just and reasonable limits in giving damages that a court will interfere; and the excess must be glaring and flagrant to demand such interference. This verdict is not so large as to induce the belief that the jury were influenced by partial-

ity or prejudice, nor so clearly wrong and unjustifiable as to require a new trial. We feel constrained, therefore, to refuse the motion, and it is so ordered.

DALLAS, Circuit Judge, concurs.

ROBISON *v.* McCRACKEN *et al.*

(Circuit Court, S. D. New York. August 23, 1892.)

1. RAILROAD COMPANIES—CONSTRUCTION CONTRACT—VALIDITY—INTEREST OF DIRECTORS.

A railroad company, a corporation in form only, by its president entered into a construction contract, whereby defendants agreed to complete the superstructure of the road, furnish materials, and equip it by a certain date, and in payment therefor certificates for \$1,800,000 of its full-paid stock and \$1,800,000 of first mortgage bonds, comprising the entire capital stock and bonds, were to be delivered to defendants. On the day of the contract, and contemporaneously therewith, defendants agreed with plaintiff, acting on behalf of certain directors who were the actual stockholders, that if the contract was complied with on the part of the company they would pay to him one half of the net profits realized from the contract out of the stocks and bonds. The road was completed. One hundred and fifty thousand dollars was determined, without formal accounting, as the proportion of net profits due plaintiff, \$50,000 of which was paid. *Held*, that though the contract was voidable, yet being an executed one, and no stockholders or creditors objecting, defendants could not retain the balance of the amount which they agreed to pay complainant.

2. SAME—FALSE REPRESENTATIONS.

The alleged fact that defendants were induced to enter into the agreement as to amount of profits by false representations as to the amounts remaining due for right of way, and as to the amount of work done, could not entirely release defendants from liability, but could only go in reduction of the recovery.

3. SAME—NEW TRIAL—COMPROMISE VERDICT.

In an action for the remaining \$100,000 due plaintiff under the contract, after a trial occupying 10 days, a verdict was returned for plaintiff for the full amount, less \$7,500, which sum represented one half of the amount paid by defendants for the assignment of a judgment against the road. *Held* that, this part of the verdict being a compromise, the same would not be set aside because defendants were not credited with the whole amount of the judgment.

At Law. Action by Willard F. Robison against William V. McCracken & Co. On motion by defendants for a new trial. Denied.

*Wager Swayne*, for plaintiff.

*Milton L. Southard*, for defendants.

SHIPMAN, Circuit Judge. This is a motion by the defendants for a new trial of an action at law, wherein a verdict was rendered for the plaintiff.

In February, 1886, David Robison, Jr., James M. Ashley, John Cummings, William Baker, all of Toledo, Ohio; L. G. Mason, Edward Middleton, and A. W. Wright, all of the state of Michigan,—formed a corporation by the name of the Toledo, Saginaw & Muskegon Railroad Company, to build a railroad of 96 miles in length from Muskegon, Mich., to a point near Ashley, in that state, where it would intersect