

and, as the present record does not disclose the exact circumstances under which it was written, we will not express an opinion at this time as to its admissibility. The statement made by the engineer, Stewart, to the witness E. H. German, concerning the condition of the ratchet, as testified to by the latter, was clearly hearsay, and should have been withdrawn from the consideration of the jury, in compliance with the motion made to that effect. The judgment of the lower court should be reversed, and it is so ordered, with directions to grant a new trial.

In re BOYD et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

CUSTOMS DUTIES—"ARTICLES OF WEARING APPAREL"—LACE APRONS.

Lace aprons are dutiable at 50 per cent. ad valorem as "articles of wearing apparel," under paragraph 349 of the tariff act of 1890, and not at 60 per cent., as "articles made wholly or in part of lace," under paragraph 373 of the same act. 49 Fed. Rep. 731, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Boyd, Sutton & Co. protested against an assessment by the collector of the port of New York, and the board of general appraisers sustained the protest, the collector appealed to the circuit court, which reversed their decision, (49 Fed. Rep. 731,) and the protestants appeal. Reversed.

W. Wickham Smith, for appellants.

Henry C. Platt, Asst. U. S. Atty., for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The firm of Boyd, Sutton & Co., on November 3, 1890, imported certain lace aprons, upon which the collector of customs at the port of New York assessed duty at the rate of 60 per cent. ad valorem, under paragraph 373 of Schedule J of the act of October 1, 1890, as "articles made wholly or in part of lace." The paragraph is as follows:

"Par. 373. Laces, edgings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched handkerchiefs, and articles made wholly or in part of lace, ruffings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances, or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: provided, that articles of wearing apparel and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed."

The importers protested, claiming that said aprons were dutiable at 50 cent. ad valorem, as "articles of wearing apparel," under paragraph 349 of the same act:

"Par. 349. Clothing ready made, and articles of wearing apparel of every description, handkerchiefs, and neckties or neckwear, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, all of the foregoing not specially provided for in this act, fifty per centum ad valorem: provided, that all such clothing, ready made, and articles of wearing apparel, having India rubber as a component material, (not including gloves, or elastic articles that are specially provided for in this act,) shall be subject to a duty of fifty cents per pound, and, in addition thereto, fifty per centum ad valorem."

The board of general appraisers reversed the decision of the collector, and sustained the contention that the goods were dutiable as wearing apparel, under paragraph 349. Upon appeal the circuit court reversed the board, and sustained the collector. Appeal was duly taken to this court.

These aprons are "articles made wholly or in part of lace." They are also "articles of wearing apparel." Upon the argument we indicated that in our opinion the latter was the more specific designation, and that, therefore, "articles made wholly or in part of lace," which were also "wearing apparel," were not to be included with the other "articles made wholly or in part of lace," provided for in paragraph 349, being specially provided for in paragraph 373. The learned judge who heard the case below was of the opinion that articles made wholly or in part of lace, and which were also wearing apparel, were included in the enacting clause of paragraph 373, because the proviso at the close of that paragraph excepted wearing apparel of a certain kind from the operation of its enacting clause, it being "the effect of a proviso to carve an exception out of the enacting clause." In our opinion, this is too close an interpretation of the paragraph. Conceding that the object of the proviso was to carve an exception out of the enacting clause, it is manifest that it does not refer to all the classes of merchandise therein contained. Edgings, insertings, and trimmings are hardly wearing apparel, and lace window curtains certainly are not. The proviso deals with "articles of wearing apparel * * * when embroidered by hand or machinery," and finds its natural antecedent in the enumeration, "articles embroidered by hand or machinery;" the paragraph thus providing that, though an embroidered article was also an article of wearing apparel, and as such subject to a lower rate of duty, it should nevertheless pay at as high a rate as embroideries composed of the same materials. It is only to articles, whether made wholly or in part of lace or not, which are also embroidered, and which would thus be within the other enumeration of the enacting clause, "articles embroidered by hand or machinery," that the proviso applies, and the articles in controversy are not embroidered. The decision of the circuit court is reversed, and that of the board of appraisers affirmed.

NORTHERN PAC. R. CO. v. McCORMICK.

(Circuit Court, D. Montana. April 3, 1893.)

EJECTMENT—ANSWER—DENIALS—DEMURRER.

In an action of ejectment, where the answer contains a specific denial of the allegations of the complaint *seriatim*, sufficient to put in issue all the allegations showing title in plaintiff, this, under the Montana practice, will authorize defendant to show any facts tending to prove that plaintiff has no title; and therefore the fact that defendant also sets forth new matter for the purpose of showing title in himself does not render the answer bad on demurrer, even if these averments are insufficient.

At Law. Ejectment by the Northern Pacific Railroad Company against John McCormick. Demurrer to answer overruled.

Cullen, Sanders & Shelton and F. M. Dudley, for plaintiff.
Toole & Wallace and W. M. Bickford, for defendant.

KNOWLES, District Judge. This is an action to recover from the defendant the possession of a certain tract of land. Sufficient facts are set forth in the complaint to show that plaintiff received from the United States a grant of twenty-odd sections of public land, not mineral, on each side of the line of its railroad as definitely fixed through the state of Montana, when the same should not be sold, granted, reserved, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time of the said definitely fixing of said line. In the complaint it is alleged as follows:

"That the general route of said railroad extending through the territory of Montana was duly fixed February 21, 1872, and that the following described land, to wit, south half of northwest quarter, and north half of southwest quarter, of section 21, township 13 north, of range 18 west, P. M. Montana, was on and within forty miles of the general route of said railroad, so fixed as aforesaid, and that said land was on said February 21, 1872, public land, to which the United States had full title, not reserved, sold, granted, otherwise appropriated, and free from pre-emption or other claims or rights. That thereafter, to wit, on July 6, 1882, plaintiff definitely fixed the line of its said railroad extending opposite to and past said south half of northwest quarter and west half of southwest quarter of said section 21, township 13 north, of range 18 west, P. M. Montana, and filed a plat thereof in the office of the commissioner of the general land office. That said land is on and within forty miles of the said line of railroad so definitely fixed as aforesaid. * * * That said land was on said day public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That by reason of the foregoing facts said plaintiff became on July 6, 1882, the owner and seised in fee simple of said land, and said land then became, and has ever since remained, and now is, the property of the plaintiff, to which the plaintiff is entitled without let or hindrance from said defendant. That the United States has neglected, failed, and refused to issue to said plaintiff a patent for said land, and that heretofore, to wit, May 1, 1889, the said plaintiff being possessed of the said premises, the said defendant did wrongfully and unlawfully, without consent and against the will of the plaintiff, entered thereon, and ousted plaintiff therefrom."

To those allegations, in his answer, the defendant made the following denials, to wit:

"First. That the land mentioned and described in said complaint * * * was on the 21st day of February, or at any date subsequent thereto, public

land, to which the United States had full title. That the land was not reserved, sold, granted, or otherwise appropriated, and that the same was free from pre-emption or other claims or rights. That the land mentioned in said complaint was on the 6th day of July, 1882, public land of the United States, to which the United States had full title. That by reason of the facts alleged in plaintiff's complaint, or any other facts, the plaintiff became on the 6th day of July, 1882, or at any other time, the owner, or seised in fee simple or otherwise, of the land described in said complaint; and also denies that said land then or at any other time became, or that the same has ever since remained, or that it now is, the property of the plaintiff, or that the plaintiff is entitled, either without let or otherwise, to have said land, or any part or parcel thereof. That on May 18, 1889, or at any time, the plaintiff was possessed of said land, or any part or parcel thereof."

It does appear to me that these denials in the answer of defendant do put in issue the allegations of the complaint showing title in plaintiff. When such is the case, the defendant can prove any facts which will tend to show that plaintiff has no title to the land in dispute. In the case of *Marshal v. Shafter*, 32 Cal. 177, the court said:

"It is proper at this point, however, to say that it is settled beyond controversy in this state that the defendant may, under the general denial, give in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter."

This doctrine was fully supported in the case of *Bruck v. Tucker*, 42 Cal. 346. It was there held that when the question of title is raised by general issue the setting up of title by defendant in himself in the answer amounts to nothing. The practice pertaining to an issue of title raised by a general denial was applied to such an issue raised by a specific denial under the code of practice prevailing in Montana, by the supreme court of the territory, in the cases of *Meyendorf v. Frohner*, 3 Mont. 282, 323, 324, and *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. Rep. 409. In this last case the question was fully considered, and there can be no doubt that this is the practice in this state upon this question at this time. The practice of the state courts must control that of this court in actions at law such as this.

The defendant set forth facts as new matter showing title in himself. Plaintiff demurred to the answer, and contends that the defendant is bound by these allegations, presented to show title in himself. Plaintiff has cited several cases to support his position that the defendant is bound by this new matter, and the court can consider them and determine therefrom which party is entitled to recover. In my opinion the cases are not in point. They refer to cases where the complaint states the particular title under which plaintiff claimed, and the sources of the same. In them it was held that plaintiff was confined to the title as alleged. It is a familiar maxim in ejectment that the plaintiff must recover on the strength of his own title, and not upon the weakness of that of the defendant. Where the plaintiff's title is denied it might turn out that the defendant would have no title, and yet the plaintiff not entitled to recover, owing to some defect in his own. I do not think it necessary to express any views upon the force and bearing of the facts set up as new matter in the answer, as, with my view

of the practice under the denials in the answer, the defendant would not be confined to the same, but could prove other or additional facts which would have a tendency to show that plaintiff has no title. For these reasons the demurrer is overruled.

KESTER v. WESTERN UNION TEL. CO.

(Circuit Court, N. D. Ohio. March 27, 1893.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DAMAGES FOR MENTAL ANGUISH.

No damages are recoverable for mental anguish arising from the fact that the plaintiff was prevented by the delay in the delivery of a telegram from attending his father's funeral, and consoling his mother in her bereavement.

At Law. Suit by Henry J. Kester against the Western Union Telegraph Company for damages for negligence in transmitting a telegram to plaintiff. Defendant demurs. Demurrer sustained.

Tyler & Tyler, for plaintiff.

Henry Newbegin, for defendant.

TAFT, Circuit Judge. This is an action for damages for the negligence of the defendant in transmitting to plaintiff a telegraphic message, as follows:

"Bloomville, Jan. 4, 1892.

"H. J. Kester, Holgate, O.: Father dead. Send word to Brinkman. Funeral Wednesday, eleven A. M.
J. F. Kester."

J. F. Kester paid the usual tolls for the transmission of the message, which was delayed four days, instead of reaching the plaintiff the same day, as it should have done. No damages are alleged except mental anguish arising from the fact that the plaintiff was prevented by the delay in the message from attending his father's funeral, and consoling his mother in her bereavement. The defendant demurs to the plaintiff's petition, on the ground that it does not state facts sufficient to constitute a cause of action.

The question presented is whether mental anguish alone constitutes any basis for damages in such a case. The authorities are in conflict. Until 1880 there was no authority of any respectability whatever sustaining a cause of action for damages based upon mental anguish only. In 1880 a decision was made by the supreme court of Texas in a delayed telegram case sustaining the view that, though the injury sustained was solely mental pain, damages might be recovered. That case has not been consistently followed in Texas, and yet it is true that by the decisions of the supreme court of that state, as well as by those of the states of Indiana, Alabama, Kentucky, Tennessee, and North Carolina, damages may be recovered in a case like the one at bar. *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. Rep. 351; *Railway Co. v. Wilson*, 69 Tex. 739, 7 S. W. Rep. 653; *Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep.