

competition of the two companies, and it was not the intention that the more diligent of the two corporations should secure them.

I hold that the failure of the Northern Pacific to construct its road by way of the Columbia River valley, the forfeiture of its grant therefor declared by congress in 1890, and the construction by the Oregon & California Company of its road in apt time under its grant of July, 1866, are all matters foreign to the question under consideration. The fact remains that the lands in controversy were granted lands at the time the grant to the Oregon & California Company took effect. They were, therefore, not the subject of the grant to that company. When that grant was made the beneficiary thereof had full notice of the prior grant, and had reason to understand that the lands so devoted to aid the construction of the other road were not within the purview of its own grant, and were not promised it by the United States. Under these circumstances it cannot be justly said, as urged by counsel for the defendants, that the United States is now placed in the attitude of breaking faith with the Oregon & California Company. That patents were issued to the defendant company for these lands does not affect the decision of this case upon the demurrer. The public lands of the United States are held in trust for the people, and cannot be disposed of by the unauthorized acts of the agents or officers of the government. The demurrer to the bill must be overruled.

CONSOLIDATED ICE-MACH. CO. v. TRENTON HYGEIAN ICE CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

1. NEW TRIAL—MISCONDUCT OF JURY—"QUOTIENT" VERDICT.

A verdict obtained by taking one-twelfth of the aggregate amount of the several estimates of the jurors is not objectionable when there was no antecedent agreement to be bound by the result, and when each juror deliberately assented to and accepted the amount thus ascertained.

2. SAME—EVIDENCE—AFFIDAVIT OF JUROR.

It is against public policy to receive the affidavit of a juror for the purpose of impeaching a verdict by showing that it was a "quotient" verdict.

3. SAME—MISCONDUCT OF JURY—WHAT CONSTITUTES.

In an action to recover the price of an ice plant sold, where the defense was rested largely upon the alleged poor quality of ice produced, it was highly improper for jurors, on encountering one of defendant's ice wagons during the trial, to examine the ice, and test its quality for themselves.

4. SAME—WAIVER BY PARTY.

Where, however, such misconduct had come to the knowledge of the defeated party before he had closed his testimony, and he nevertheless went on with the trial, and did not call the matter to the court's attention until after the return of the verdict, he waived his right to object thereto, and could not have a new trial on that ground.

At Law. Action by the Consolidated Ice-Machine Company against the Trenton Hygeian Ice Company to recover the price of an ice-machine plant. There was a verdict for plaintiff, and defendant now moves for a new trial. Motion denied.

John H. Kitchen and Gilbert Collins, for plaintiff.
C. H. Beasley and Allan L. McDermott, for defendant.

GREEN, District Judge. This was an action brought by the plaintiff against the defendant to recover the consideration price of an ice plant made, constructed, and set up by the plaintiff for the defendant in the city of Trenton. The defendant insisted that the ice plant was in various respects defective, and not in accordance with the written contract which had been made by the parties; that it was impossible to produce good, merchantable ice by it when in operation; and that in consequence of the impure character of the ice which had been made by the machine great loss had accrued to the defendant. Upon the trial the jury rendered a verdict in favor of the plaintiff for \$78,363.42. A motion was immediately made for a new trial, and two causes were assigned therefor: (1) That the verdict which had been rendered was technically a "quotient" verdict; (2) that the verdict was invalid because of the misconduct of the jury during the trial.

While it may be accepted as settled that a verdict rendered in pursuance of an agreement by the jurors to accept one-twelfth of the aggregate amount of their several estimates, without the assent of their judgment to such a sum as their verdict, is invalid, yet it is equally well settled that, although jurors divide the aggregate of their several estimates by 12, and return the quotient as their verdict, it will not be held to be legally objectionable if, after the amount has been ascertained, the respective jurors deliberately assent to and accept the amount so obtained as, in their opinion, a just verdict, and so return it. The essential ingredient of a "quotient" verdict which renders it objectionable in the eye of the law is that there should be an antecedent agreement between the jurors to accept the result of the division without hesitation as the proper and true verdict to be rendered. The testimony taken on the rule to show cause in this case shows that upon the suggestion of one of the jurors, after the jury had retired to their room for the consideration of the issues to be decided by them, it was agreed that each juror should write upon a slip of paper that amount which should be allowed to the defendant for the damages which the defendant claimed to have sustained by the imperfect condition and operation of the ice plant after it had been delivered to it, and that the total amount of these sums should be divided by 12, and the result, if satisfactory, should be the verdict on that branch of the case. It will be noticed that this proposed course of action related to but one of the various defenses which had been interposed by the defendant to the plaintiff's claim. The affidavit before the court shows that this agreement was attempted to be carried out but in fact was carried out only partially; for the result turned out to be so unsatisfactory, when the division was made, that a number of jurors declined to accede to it, and insisted that another ballot should be taken. Even that produced an unsatisfactory result. And still another attempt was made—in fact, five or six

in all—before the sum was produced which seemed to be satisfactory to all the members of the jury. When that sum was obtained by the division as described, each juror, without exception, assented to it, and adopted it as the fair and just allowance which should be made to the defendant for the damages which it claimed, and rendered it in open court as their true verdict.

Such a verdict, so obtained and so assented to, without the antecedent agreement to be bound by it, which seems to have been wanting in this case, is not objectionable as a "quotient" verdict. But, even if it were so objectionable, the only evidence that the verdict was arrived at in this manner is the affidavit of one of the jurors who was himself guilty of the alleged misconduct, if it was misconduct. Such an affidavit from a juror cannot be received to impeach his verdict, or to show what transpired in the jury room among his fellow jurors while engaged in the consideration of the case in question. Public policy, sound reason, are wholly against it. To admit such evidence would tend to defeat the solemn act of the jury, done under the solemn obligation of an oath publicly taken in a court room, and would open the door widely to iniquitous influences, resulting always in injustice. It must be rejected. There is absolutely therefore no legal evidence before the court that the verdict in this case was arrived at in any other manner than fairly and justly; hence this reason falls to the ground.

The main issue in this case chiefly concerns the insufficiency of the ice plant erected by the plaintiff for the defendant under a written contract, especially with reference to the character of the ice produced by it when in operation. The plaintiff claimed that the ice plant was in good condition, and would produce, if properly operated, good, pure, merchantable ice. The defendant denied this, and it was the chief contention in the cause. During the trial it appears, by the affidavits presented to the court on this motion, that a wagon filled with the ice made by the plant in question happened to be at the door of the courthouse as the jurors were passing out at recess, and that some of them, seeing it, closely examined the ice, tasted it, smelled it, and criticised it; and this conduct on the part of the jury is assigned as a second reason for a new trial. It is hardly necessary to say that a cause should be decided by a jury solely upon the evidence produced before it legally during the trial, in the presence of the court, and that it is highly improper for a jury, or any member of it, to acquire information or knowledge touching any issues pending in the cause in any other way. It was an important question whether the ice made by this ice plant in every respect accorded with the guaranty of its character which the plaintiff had made as a consideration for the execution of the contract in question. A large amount of evidence had been taken pro and con upon this issue. Beyond question, those jurors who saw fit to investigate, for the purpose of informing themselves as to the character of the ice made by the plant, that load of ice which was standing before the courthouse, did a highly improper act.

Such evidence was wholly illegal, and should have received no attention by any jury, nor should it have been permitted to have any effect upon the action of the jury. Had the matter been brought to the attention of the court immediately upon its becoming known, as it should have been, in all probability the trial would have been then and there terminated. But the evidence is that the incident occurred while the testimony was in the course of being taken. It was known to the defendant almost immediately and before it had closed its testimony; and yet, after it was so known, witnesses were sworn on both sides, testimony taken, the cause summed up by the counsel, the jury charged by the court, and the verdict rendered, without any reference being made to it in any manner.

The failure to act promptly in matters of this sort is often fatal, and it must be held to be so in this case. A party cannot be permitted to lay by, after knowledge of a matter of this character, and speculate upon the result, complaining only when the verdict is unsatisfactory. As was stated by Judge Shipman in *Berry v. De Witt*, 27 Fed. Rep. 723:

"A party cannot know during the trial a fatal objection arising from the misconduct of a juror upon the trial, and yet keep silent, and then seek to take advantage of it in the event of an adverse verdict. The effect of the misconduct by the juror is lost if it is not complained of by the injured party as soon as he knows of it."

As stated in this case, complaint was not made until the result of the trial was known. Such laches destroys the defendant's right.

The rule to show cause is discharged.

WHITENACK v. PHILADELPHIA & R. R. CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

1. PLEADING—GENERAL DEMURRER TO SEVERAL PLEAS.

A general demurrer which is filed to several pleas must be overruled if any one of the pleas is good.

2. NUISANCE—PLEADING—LIMITATION OF ACTIONS.

In an action at law in a federal court in New Jersey for the maintenance of a nuisance, a plea of the state statute limiting actions for nuisance to a period of six years is good, it being necessary to plead the statute in order to limit the recovery to that time.

3. SAME—WHEN ACTION LIES.

An action at law for a private nuisance may be maintained against a person who actively maintains a nuisance originally erected by another, even though defendant has never been notified to abate the same.

At Law. Action by Agnes Whitenack against the Philadelphia & Reading Railroad Company to recover damages for the maintenance of a nuisance. On demurrer to the pleas. Demurrer overruled.

H. M. T. Beekman, for the demurrer.

John R. Emery and S. H. Grey, opposed.

GREEN, District Judge. The declaration in this cause, as amended, charges the defendant with having contributed to the maintenance of a certain embankment, piers, and bridge, which its lessors had wrongly built, constructed, and maintained across the Raritan river, near the lands of the plaintiff, which caused the waters of the Raritan to be backed upon the plaintiff's land, and inflict great damage there. To this declaration the defendant filed three pleas: First, the plea of general issue; second, the plea of the statute of limitation; and, third, that the defendant had had no notice from the plaintiff to abate the nuisance, although it was not the erector of the embankment, but simply the lessee thereof. To the last two pleas the plaintiff filed a general demurrer. It is well settled by the law of pleading that if but a single demurrer is filed to a declaration containing several counts, if any count be deemed good, judgment must be given against the demurrant; and so, if the defendant plead several pleas, all of which are demurred to, judgment must be given for the defendant, if either of the pleas be good. 1 Chit. Pl. p. *665, note 3. This principle is recognized in this state in the case of *Hudson v. Inhabitants of Winslow*, 35 N. J. Law, 437. In this suit there were 10 special pleas. Some of the pleas were held to be good, and others bad. In delivering the opinion of the court, Justice Beasley says: "As some of the pleas contained in the demurrer are good, the defendants are entitled to judgment." The same rule prevails in the federal courts. In case of *U. S. v. Girault*, 11 How. 22, Mr. Justice Nelson says: "As the demurrer put in is general to four several pleas, if any one constitutes a good bar to the action the demurrer is bad."

The first plea demurred to is the plea of the statute of limitation. I do not see how this can be held to be other than a good plea in bar. The action is an action on the case for damages alleged to result to the plaintiff from the erection or maintenance of an obstruction to a water course, whereby the plaintiff's lands are seriously affected by the overflow of water. The Revised Statutes of New Jersey expressly declare that all actions of trespass and upon the case shall be commenced and sued within six years next after the cause of such action shall have accrued, and not after. It is well settled that the defendants, to claim any benefit of the statute of limitation, must specially plead it, and, unless it be so specially pleaded, damages that may be recovered by the plaintiff cannot be limited to the six years immediately antecedent to the commencement of the action. It seems, then, that it is a perfectly proper plea for the defendants to interpose to this case, so that the cause of the action may be limited, in accordance to the statute, to the six years prior to the commencement of the suit; and, so far as this plea is concerned, the demurrer is overruled, with leave to the plaintiff to reply to the plea in question within 30 days.

The other plea demurred to is to the effect that no notice had been given to the defendant that the embankment in question was a nuisance, or inflicted the injury complained of, or to re-

move the same. The allegation in the declaration is that the defendant maintained and continued the nuisance in question after it became possessed of the premises on which it was erected. I think the principle governing this case is that an action may be maintained against a party who continues a nuisance erected by another, by actively maintaining it, without notice or request to abate it. Whether there has been such maintenance is a question for the jury, but the allegation of the declaration that it was so maintained by the defendant, I think, is not answered by a plea that it had no notice to remove it. In fact, it may be questionable whether the plea itself, as pleaded, does not amount to the general issue. At any rate, I think the demurrer, so far as this plea is concerned, was well taken, upon the authority of *Banking Co. v. Ryerson*, 27 N. J. Law, 457, in which case I think Chief Justice Green states the law clearly, succinctly, and in accordance with justice.

The result, however, is, as this demurrer is general, and one plea which has been demurred to has been held to be good, the demurrer must be overruled, with costs to the defendants.

SMITH v. PHILADELPHIA & R. R. CO.

(Circuit Court, D. New Jersey. September 26, 1893.)

DAMAGES—EXCESSIVE VERDICT.

In an action to recover damages for erecting and maintaining an embankment across a living stream, thereby throwing back the waters upon plaintiff's land to its injury, where the embankment has been maintained for 18 years, and the recovery is limited by the statute to the last 6 years, the jury should award nothing for the damage caused by the first 12 years, and a verdict is excessive which apparently includes the entire damage.

At Law. Action by Abraham Smith against the Philadelphia & Reading Railroad Company to recover damages alleged to have been caused to plaintiff's land. There was a verdict for plaintiff, and defendant moves for a new trial. Granted, unless verdict is in part remitted.

R. V. Lindabury, for plaintiff.

John R. Emery and Samuel H. Grey, for defendant.

GREEN, District Judge. This is an action to recover damages alleged to have been caused to the plaintiff's farm by the construction and maintenance of an embankment crossing a living stream, and what was termed a "freshet-water channel," thereby penning back the water upon the land of the plaintiff, causing it to become wet, boggy, and sour, and washed away in places. The jury returned a verdict in favor of the plaintiff for \$3,201.84, wherupon a motion was made for a new trial.

A close examination of the evidence satisfies me that a verdict against the defendant ought to be maintained. I think the weight of testimony is clear that the embankment in question not only

absolutely stopped the flow of a living stream of water, causing it to dam back upon the plaintiff's land, rendering it boggy and marshy in places, but as well interfered with the usual flow of the water as it passed across the farm of the plaintiff in times of freshet, changing it in its course almost at right angles, and causing an action of the water which apparently inflicted damage upon the soil. But the verdict in this case, in my opinion, is excessive. The embankment in question was built in 1872. No suit was commenced for damages until 18 years thereafter. By force of the statute of limitation, such suit could only be for such damage as was inflicted between 1884 and 1890, when the suit was commenced; in other words, for the six years antecedent to the date of the writ. It is perfectly clear that the action of the embankment upon the water, both of the living stream and the waters of the river in times of freshet, must practically be constant; hence it is evident that during the 12 years from 1872 to 1884, if, as this jury found, the embankment is the cause of the damage, the land of the plaintiff must have been subject to its deleterious influence, and have been rendered year by year less and less valuable. Yet, for all that damage then inflicted the plaintiff is not entitled to recover. Possibly during the six years covered by this suit the evidences of damage might have become more patent. The soil had become gradually water-soaked and boggy and marshy, and would make less resistance to the movement of the freshet water as it swept across its surface, and more readily give way and be carried off; hence the damage would seem to be greater because it became more visible, when in point of fact its visibility was due to the damage done during all the 12 years previous.

The jury were sent to view the premises on the application of both parties, and saw the land in its present condition. It was undoubtedly an almost insuperable task to guard their minds from the effect of the damages visible on the premises as they saw it. In fact, I may frankly say that I do not see how, from the testimony in the cause, they could fix definitely any sum that would exactly measure the injury inflicted upon the land [subjected to the damaging effect of the water for so many years previously] for and during the term of six years which this suit covers. The amount of their verdict satisfies me that they gave practically the whole amount of the present damage. This, of course, is greatly in excess of the amount which should have been awarded. I have found a very great difficulty in reaching a conclusion as to what would be considered a fair compensation, but, after careful consideration, I have concluded to sustain a verdict for \$600, and, if the plaintiff is willing to reduce the verdict to that amount, it may stand; otherwise, there must be a new trial granted, because of the excessive damages awarded.

CITY OF KANSAS CITY v. LEMEN.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 270.

1. MUNICIPAL CORPORATIONS—GOVERNMENTAL ACTS OF AGENTS—LIABILITY.

Where the mayor and police of a city close a circus that is being held on ground claimed to have been dedicated as a public graveyard, they act for the city in its governmental, not its corporate, capacity, and the maxim "respondent superior" does not apply, so as to make the city liable in damages for their action.

2. SAME—CORPORATE ACTS.

A city is not liable in damages for the wrongful act of its mayor and police in closing without color of law an exhibition, with the intent to injure and oppress the owner thereof.

In Error to the Circuit Court of the United States for the Western District of Missouri.

At Law. Action by Frank Lemen against the city of Kansas City, Mo., for wrongfully closing an exhibition held by plaintiff in said city. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

C. O. Tichenor, F. F. Rozzelle, and Frank P. Walsh, for plaintiff in error.

W. C. Scarritt, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. Frank Lemen filed in the United States circuit court for the western district of Missouri a complaint against Kansas City, a municipal corporation of the state of Missouri, wherein he alleged substantially the following facts: That he was a citizen and resident of the state of Kansas, and the proprietor of a show and hippodrome; that, desiring to exhibit said show in Kansas City, Mo., on the 3d and 4th days of May, 1892, he, before that time, lawfully acquired from the owners of a certain tract of land situated within the corporate limits of Kansas City the right to give an exhibition thereon, and that he took peaceable possession of said land with the consent of the owner, and erected his tents thereon, and that he also fully complied with all of the ordinances and regulations of the city with reference to such exhibitions as he proposed to give, and obtained a license for the exhibition from the proper city authorities, entitling him to give two exhibitions, for which he paid to the city \$20; but that on the day appointed for the exhibition, and just before it was to begin, "the defendant, Kansas City, acting by and through its mayor, police, and other duly constituted and authorized agents, (the said mayor,) personally consenting and directing all things, did willfully, with knowledge that they were acting wrongfully, and without right, and with the intention to harass and oppress the plaintiff, and to break up and ruin his said business, with force and violence come upon said land, and with threats