

Chinault was concerned, but it was so far as Dr. Moore's conduct was involved. The meaning of the word as employed in the contract must have reference to such disasters as are brought about through the culpable intention or designing of the assured. In one sense—that of scholastic philosophy—nothing is accidental, but we cannot employ such refinements in the interpretations of contracts of indemnity against casualties. Nor do I find that the assured was engaged in fighting or violating the law in that sense which would invalidate the policy. Dr. Moore was unarmed, and, according to the evidence of the only impartial witness to the tragedy, had made no menacing gestures at the time he was shot. He was, in my opinion, the victim of the nervous apprehension of Dr. Chinault. It does not follow that, if Dr. Chinault should be excused for the homicide, the defendant ought to be relieved of the obligations of the policy. He had the right to act upon appearances, and, though deceiving, they would relieve him. He may have acted in good faith in apprehension of immediately impending danger, and this, according to some authorities, would excuse him. But such defenses cannot be invoked by this defendant. It must stand upon a calm investigation of the actual facts.

4. The point that no notice was given of the assured's death is not well founded in fact. The evidence of the secretary at the home office in New York shows that prompt notice was there received and acted upon.

5. Nor does the fact that litigation is pending in Arkansas constitute a bar.

Judgment will accordingly be entered for the plaintiff for the sum of \$5,000, with 6 per cent. interest from the date of the institution of this suit.

LOWRY v. MT. ADAMS & EDEN PARK INCLINE PLANE RY. CO.

(Circuit Court, S. D. Ohio, W. D. June 3, 1895.)

No. 4,782.

1. DAMAGES—PERSONAL INJURIES.

A verdict of \$7,500 for personal injuries causing great suffering, and resulting in permanent disability, of a man who had previously been earning \$300 a month, is not excessive.

2. CHARGING JURY—COMMENT ON FACTS.

The fact that a judge, in charging the jury, has failed to refer to certain facts which would have borne in favor of the defeated party, is not ground for a new trial, when the jury has been told that all issues of fact were to be determined by them, on the testimony, and that the comments of the court were for the purpose of illustration only.

3. PRACTICE—MOTION FOR NEW TRIAL.

Rules of procedure upon motions for new trials, contained in state statutes, do not apply in the federal courts upon such motions, which must be determined according to the course of the common law.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Newly-discovered evidence which is merely cumulative or merely contradictory of other evidence is not ground for a new trial.

This was an action for personal injuries by Joseph A. Lowry against the Mt. Adams & Eden Park Incline Plane Railway Com-

pany. Upon the trial the jury gave a verdict for the plaintiff for \$7,500. The defendants moved for a new trial. Denied.

C. W. Baker, for plaintiff.

Ramsey, Maxwell & Ramsey, for defendant.

SAGE, District Judge. It is claimed that the verdict, which was for \$7,500, is excessive. The testimony is that the plaintiff was earning \$300 a month. He was under the charge of a physician for several months. The left thigh was terribly torn and lacerated by the iron head of the tongue of the wagon which the car came in collision. The wound was from five to seven inches long, ragged and exceedingly painful. The parts would not reunite until finally skin grafting was resorted to. According to the testimony, some 500 patches were made before the wound was completely healed. The testimony of the surgeons who were in charge was that the plaintiff was crippled, and would continue to be so during life. The power of extending and retracting the limb was seriously impaired, and the surgeon testified that he was as nearly restored at the time of the trial as he ever would be. In *Railway Co. v. Brown*, 6 C. C. A. 142, 56 Fed. 804, the court of appeals of the Seventh circuit held that \$7,500 was not excessive damages for so injuring a railroad laborer that he became paralytic. In *Southern Pac. Co. v. Rauh*, 1 C. C. A. 416, 49 Fed. 696, a verdict for \$10,000 was sustained upon the testimony of the attending physician, corroborated by that of another medical expert, that the plaintiff could not regain his health, although physicians called by defendant testified that plaintiff ought to recover soon. In *Shumacher v. Railroad Co.*, 39 Fed. 174, the jury awarded \$8,000 damages. Judge Parker, in his opinion, said that he was at one time inclined to regard the damages as excessive, but he sustained the verdict, holding that before a court could interfere on that ground the damages must be so excessive and disproportionate as to warrant the inference that the jury was swayed by prejudice, preference, partiality, passion, or corruption. In *Osborne v. City of Detroit*, 32 Fed. 36, the plaintiff suffered a complete paralysis of the right side, resulting from injuries occasioned by a defective sidewalk. Judge Brown upheld a verdict of \$10,000. I do not feel at liberty to set aside the verdict of the jury in this case upon the ground that it is excessive, nor do I think it my duty to order a remittitur.

It is also urged that the charge tended to mislead the jury. It is not claimed that there was any misstatement of law, but that the court failed to refer, in its comments upon the facts of the case, to certain particulars which would have borne in favor of the defendant. The jury were told that all issues of fact were to be determined by them upon the testimony, and that whatever comments the court made were for the purpose of illustrating the statements of law, and were not to control the jury in any degree, with reference to their findings. The charge was altogether oral. No exception was taken to the refusal of the court to direct a verdict in favor of the defendant, and to the refusal of the court to give

one special charge as asked, and to the giving of it with qualifications. In the federal courts, exceptions, to be valid, must be taken at the time of the trial. They cannot be regarded if taken subsequently. Counsel referred in argument to the rules of procedure upon motions for new trial contained in the Ohio Civil Code. The Code does not apply with reference to motions for new trial. They must be according to the course of the common law. See seventh amendment of the constitution of the United States; *Railroad Co. v. Horst*, 93 U. S. 291; *Newcomb v. Wood*, 97 U. S. 581; *Petition of Chateaugay Ore & Iron Co.*, 128 U. S. 554, 9 Sup. Ct. 150; *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. 8.

Upon the hearing of the motion, counsel urged upon the court that on a new trial facts favorable to the defendant might be brought out more clearly; that an exact statement of the location of the barricade, and its distance from the track, and of the distance between the tracks, could be presented, from which it would appear that the defendant was not guilty of negligence. All these were matters that were presented in evidence on the trial. There was no showing that the additional evidence could not have been procured. Indeed, from its very nature it is apparent that it might have been procured as well before the trial as after. Upon all the points suggested, evidence was offered upon the trial. It is a rule of the federal courts that a new trial will not be granted upon the ground of the discovery of cumulative evidence merely. *Ames v. Howard*, 1 Sumn. 482, Fed. Cas. No. 326; *Brown v. Evans*, 17 Fed. 912. It has also been held that newly-discovered evidence to impeach or contradict is not enough to warrant granting a new trial. *Carr v. Gale*, 1 Curt. 384, Fed. Cas. No. 2,433; *U. S. v. Potter*, 6 McLean, 182, Fed. Cas. No. 16,077.

It was also urged that there was no evidence that the car was actually in motion when it came in collision with the wagon which caused it. The only witness who so testifies is the gripman. Isaac Rigdon, for the plaintiff, testifies that the car was in motion when the collision occurred, and that he did not notice any slackening of speed of the car up to the time of the collision. Charles V. Avery, for the plaintiff, testifies that the gripman did not slow the car in any way before the collision. The plaintiff also testifies that there was no slackening up of the car, that he observed, before the collision. Mrs. Redman, for the plaintiff, testifies that she did not notice whether the car had been slacked in any way. To the same effect was the testimony of Mr. Daniel Metz. Howard Kemper, a witness for the defendant, says that the car did not stop until the collision occurred.

The motion for new trial will be overruled.

McCONKEY v. PEACH BOTTOM SLATE CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No: 111.

CONTRACTS—ASSENT.

Plaintiff, in February, 1889, received from defendant corporation an option to purchase its real estate and other property, which was extended from time to time, but not acted on. On April 19, 1890, plaintiff received from defendant a new agreement, in consideration of \$2,000 already paid, and \$5,000 to be paid in 30 days, to sell to him defendant's property at any time within 6 months from April 7, 1890, at the price previously agreed on, of which the \$7,000 was to form a part. It was the understanding of the parties that, if plaintiff did not take the property within the 6 months, the \$7,000 should be forfeited. Within the 6 months plaintiff verbally notified defendant that he had arranged to procure the necessary capital, and would be ready to take the property, but before the expiration of the time some of the capitalists interested withdrew, and plaintiff was unable to, and did not, take the property or give a binding acceptance of the option. The option was not renewed, but plaintiff continued his efforts to obtain capital to buy the property, and was aided and encouraged to do so by the officers of defendant, until July, 1892, when plaintiff had secured the necessary capital, but a difference had arisen between plaintiff and defendant as to the forfeiture of the \$7,000, and plaintiff made no offer in the precise terms of the option of April 19, 1890, until September 13, 1892, when it was declined. *Held*, that the defendant was not bound, after the expiration of the option, to sell the property to plaintiff, and that no binding contract between the parties ever came into existence.

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

This was an action by Charles R. McConkey against the Peach Bottom Slate Company to recover \$7,000, alleged to have been paid under a contract broken by the defendant. The circuit court gave judgment for the defendant. Plaintiff brings error. Affirmed.

Alfred S. Niles and Oscar Wolff, for plaintiff in error.

H. Arthur Stump and James P. Gorter, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

GOFF, Circuit Judge. The plaintiff below, a citizen of the state of Pennsylvania, sued in assumpsit, in the circuit court of the United States for the district of Maryland, the defendant, a corporation and citizen of the state of Maryland. In his bill of particulars filed with his declaration, which contains the common counts only, the plaintiff claims from the defendant the sum of \$7,000, money paid by plaintiff to defendant on account of contract to purchase the property of defendant, situate in Harford county, Md., which contract, it was claimed, had been broken and rescinded by the defendant. The general issue and the statute of limitations were pleaded by defendant. The case was tried to a jury, which, under the direction of the court, at the close of the evidence, returned a verdict for defendant. The plaintiff thereupon prayed for this writ of error, assigning as error the refusal of the court below to give certain instructions asked for by the plaintiff, and the direction by the court that the jury return a verdict for defendant.