

BRUCE, District Judge, after stating the facts, delivered the opinion of the court.

Special charge No. 1 asked by defendant, and refused by the court, should have been given. Whether the demurrer and exception taken to the claim made should have been sustained or not, it would seem clear that after the introduction of the evidence no case was made for exemplary damages, and this claim and the evidence in support of it should have been withdrawn by the trial judge from consideration by the jury. It is said in reply to this that, the verdict of the jury being in terms for actual damages, it operated no prejudice to the defendant, but who can say that which was admitted to go to the jury on this subject did not tend to swell the verdict? The charge was at least misleading, and the theory of fraud and deceit, which seemed to be the basis upon which both actual and exemplary damages were claimed, was not sustained by the evidence. The action of the court on the motion for a new trial and the remittitur filed by plaintiff of \$760 must have resulted from a consideration of the evidence in support of the claim of actual damages, and by leaving out of view the evidence introduced and allowed to go to the jury on the question of exemplary damages, there does not seem to be evidence in the record to support the verdict for \$4,260 actual damages, as the jury found it, or \$3,500, the amount to which it was reduced, because the claim for the rental for the time the cars were detained by the defendant was substantially all that was left of the plaintiff's claim. To this there was the plea in reconvention that the oil contracted for was not strictly prime summer yellow, but only prime summer yellow cotton-seed oil, and that the sample furnished was not up to the quality of oil contracted for, by which the defendant became liable for damages in breach of its contract. No complaint, however, is made of the charge of the court in this branch of the case. The judgment should be reversed, with costs, and it is so ordered.

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#### BOOTH v. LIMITED PARTNERSHIP OF J. L. S. HUNT.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 356.

#### ADMISSIBILITY OF EVIDENCE—ADVERSE CLAIM TO PROPERTY SEIZED IN EXECUTION.

Certain property seized in execution against a partnership was claimed in the name of a limited partnership of which one of the members of the debtor firm was the active member, and the right of property was tried by jury according to the Texas statute. The claimant put in evidence a published notice of the formation of the limited partnership, dated but little over a month before the seizure on execution. Certain questions were then asked by the execution creditor tending to elicit evidence that the person named as special partner had not put any money into the limited partnership. *Held*, that the exclusion of these questions was erroneous, as the execution creditor had a right to show that the alleged limited partnership had no existence in fact, but was a mere cover to save the property from the execution.

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

H. P. Drought, for plaintiff in error.

Thomas H. Franklin, for defendant in error.

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

BRUCE, District Judge. C. D. Booth obtained a judgment against the partnership of Hunt & Booth and against J. L. S. Hunt and W. H. Booth, the persons comprising the firm of Hunt & Booth. Plaintiff in that judgment had execution dated June 26, 1894, and the marshal executed it by a levy upon the property in controversy in this suit and took it into his possession. The limited partnership of J. L. S. Hunt filed affidavit and bond for trial of the right of property under the statute and law of the state of Texas, and issue was joined between claimant and C. D. Booth, the creditor in execution, and the cause was docketed and came on for trial at the December term of the court. The case was tried by a jury, and the verdict was, "We find at the date of the levy of the execution by the marshal the hay levied on was the property of the limited partnership acting under the firm name of J. L. S. Hunt," and judgment was rendered for the defendant.

The errors assigned are the sustaining of the objection made by the counsel for defendant Hunt to the following question: "Is it not a fact that said J. A. Gray never contributed any actual cash to the limited partnership of Hunt & Gray, and is it not a fact that this \$4,700 alleged to have been contributed by the said J. A. Gray at the time his son (your brother-in-law) was engaged with you in the business was not drawn out at the time the said Lucian Gray left the business, but continued in it?" The second assignment of error is that the court erred in sustaining the objection of counsel for defendant Hunt, by counsel for plaintiff Booth, and in instructing the jury to disregard the answer of the defendant Hunt to said question, the question and answer being as follows: "Is it not a fact that you formed this limited partnership with your father-in-law, J. A. Gray, for the purpose of defeating the claim of C. D. Booth?" The answer to the question was that it was not a fact, but that he formed said partnership for the purpose of protecting the money of J. A. Gray which he had in his business. To which question and answer counsel for the said Hunt then and there objected, for the reason that the court had already ruled that the purposes of the partnership were not to be inquired into in this case, and the court sustained said objection, and held that the purpose of the limited partnership was not and could not be an issue in this case, and instructed the jury to disregard the answer. To which ruling of the court the plaintiff excepted at the time, and assigns the ruling for error here.

It was a trial of the right of property under the law of Texas. The plaintiff sought to show that the property levied on was the individual property of Hunt, and therefore subject to levy under his

execution. The claimant, on the contrary, sought to show that such was not the fact, but that it was the property of the limited partnership, which had been formed and did business under the name of J. L. S. Hunt. Claimant had put in evidence a paper called a "Notice of Partnership," dated San Antonio, May 19, 1894, which stated among other things that the capital contributed by the said J. A. Gray, special partner, is \$4,700 in cash; that the period at which said partnership is to commence is the 19th day of May, 1894, and that it will terminate on the 1st day of June, 1895. The question asked was as to whether Gray had contributed any actual cash to the partnership, and whether the \$4,700 was not contributed to another partnership in which one Lucian Gray had been a partner and had retired. The objection to the question was sustained, and it was not answered. The inquiry was a proper one on the issue being tried at the time, for the answer must have tended either to show the fact of the limited partnership as claimed or to show that in fact, whatever the notice of partnership might state, the facts were otherwise, and, in short, that there was no such partnership as claimed. This is perhaps made clearer when we come to the second question, which was answered, but the objection was sustained by the court and the jury instructed to disregard the answer, and the court held that the purpose of the limited partnership was not and could not be an issue in this case. The facts, however, touching the formation of the alleged partnership were fair matter for inquiry upon the issue made. It was not a mere inquiry as to purposes, but facts were sought, and the facts should have gone to the jury, and the jury, under the direction of the court, could have found partnership as claimed or no partnership, as they should find the facts from the testimony. It is not very clear what was meant by the statement that the purpose of the limited partnership was not and could not be an issue in this case, but it was at least misleading, because it assumed as a fact the existence of the limited partnership, which was the matter which the plaintiff in execution contested, and had a right to contest, in the case. The issue was not merely if there was a limited partnership on paper, but one in fact and law, which owned the property in question, and the ruling of the court narrowed the inquiry, and in fact took from the jury the question which the plaintiff in execution and the claimant, under the law of Texas, had a right to have tried, and upon which both sides tendered evidence. This was not a question of the settlement of a partnership account, but the inquiry was to the question whether the limited partnership existed as claimed or whether it did not, and whether the claim was not in point of fact a mere cover to protect Gray in fraud of the rights of the plaintiff in execution. The judgment of the circuit court should be reversed, and the cause remanded for further proceedings in conformity with this opinion.

## ALABAMA GREAT SOUTHERN R. CO. v. O'BRIEN.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 363.

## 1. TRIAL—INSTRUCTIONS—REQUESTED CHARGES.

The court is not bound to give requested charges the substance of which has been accurately and soundly stated in the general charge.

## 2. SAME—REFUSAL TO GIVE GENERAL CHARGE.

Refusal to give a general charge for defendant is not erroneous where there is proof tending to support plaintiff's case, although the preponderance of proof may appear to be against him.

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

This was an action by Pat O'Brien against the Alabama Great Southern Railroad Company to recover damages for personal injuries sustained while in its employ as an engineer by jumping from his engine in order to avoid a collision. The jury returned a verdict for plaintiff in the sum of \$4,500, and judgment was entered thereon by the court. Defendant brings error.

Albert Howell, Jr., for plaintiff in error.

Burton Smith, for defendant in error.

Before McCORMICK, Circuit Judge, and BRUCE, District Judge.

PER CURIAM. The assignment of errors points out 12 grounds of alleged error in the action of the trial court, 11 of which relate to the refusal to charge the jury as requested by the defendant. Most of the requested charges are substantially embraced and more accurately and soundly stated in the court's charge. The others, when reduced to their essential extract, make a request for the general charge for the defendant. While there is possibly a preponderance of proof against plaintiff's contention on the single vital issue of fact joined by the parties, it is clear to us that there was proof tending to support the case of the plaintiff. There was, therefore, an issue for the jury. As we have already said, the matter of the requested charges, as far as it was proper for any of them to have been given, was embraced in the charge of the court, and therefore should not have been repeated in the language of counsel, colored, more or less, as such language always is, by the bias of advocacy. The judgment of the circuit court is affirmed.

## GROVES et al. v. SENTELL.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1895.)

No. 383.

## 1. WRIT OF ERROR—REVIEW WHERE JURY IS WAIVED—PLEA OF RES JUDICATA.

A judgment recited that the case was heard on an exception of res judicata, and that, a trial by jury being waived, the same was submitted to the court, "whereupon, considering the law and the evidence to be in favor of