

New York statutes are radically different from the Virginia law now under consideration, and the courts of last resort in those states have held that it is the absolute and unqualified duty of railroad companies under said acts to fence the entire line of their roads. The other cases cited by the plaintiff in error refer to local statutes containing provisions not found in the sections of the Virginia Code that we have just passed upon, and consequently they can have but little weight as authority in disposing of questions raised by this writ of error.

We conclude that the instruction complained of, so far as the interests of the plaintiff's intestate were concerned, as an employé of the defendants in error, correctly interpreted to the jury the legislation to which it referred, and that the court below did not err in giving it. The rights of the deceased employé were duly guarded, and all matters pertaining to the negligence of the defendants, on all other grounds than the failure to fence, were still left for the consideration and determination of the jury. The irrelevant matter in said instruction contained was in part eliminated by the instruction afterwards given (as No. 4), in giving which it follows as a matter of course from what we have said that the court below did not err.

Deciding the questions raised by the assignments of error so far considered as we have, it becomes unnecessary, and, as the case is not to go back to the court below for a retrial, also improper, for us to dispose of the other points discussed by counsel, referring to the question of boundary, inclosure, and contributory negligence. We should not pass upon the law relating to the risks assumed by the plaintiff in error's intestate when he accepted employment of the defendants below, for the reason that neither the case made by the declaration, nor the points suggested by the assignments in error, will justify us in doing so, although counsel deemed it proper to argue the same. We must confine ourselves to the case as made by the pleadings, and disclosed by the record. In any view of the case justified by the evidence (all of which we have carefully considered), in connection with the instructions given and refused, and with reference to the pleadings, we fail to see that the plaintiff below has been prejudiced in any manner by the judgment complained of. In our opinion, a peremptory instruction by the court, directing a verdict for the defendants below, would, at least, not have been improper. We find no error, and the judgment is affirmed.

---

BURNHAM et al. v. NORTH CHICAGO ST. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1897.)

No. 349.

**TRIAL TO THE COURT—AGREED STATEMENT—JUDGMENT—REVIEW ON ERROR.**

When a case is submitted upon a stipulation as to facts, which is mainly a statement of evidence, and not of the ultimate or issuable facts, and the court thereupon makes neither a general finding nor a special finding of facts, but merely finds that the facts are as set forth in the agreed statement, a judg-

ment rendered thereon is invalid; nor can the appellate court, in reviewing such judgment, draw the inference of fact from the admitted evidence, however plain such inference may be.

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

Norman Williams, Charles S. Holt, and Arthur D. Wheeler, for plaintiffs in error.

John A. Rose, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The action in this case is in assumpsit; the plea, nonassumpsit. The special count in the declaration charges that at the request of the defendant in error, the North Chicago Street-Railway Company, the plaintiffs in error constructed, and delivered in Chicago, a steam tramway motor, upon the promise of the defendant to pay therefor, when requested, a sum equal to the cost of construction, estimated at the regular rate charged by the plaintiffs for similar work, and that on that basis the machine was worth, and did actually cost, \$10,000. A docket entry shows that, the cause coming on to be heard, the parties, by written stipulation, waived the jury, and submitted the cause for trial by the court "as a case stated upon an agreed statement of facts, which statement and stipulation are as follows." The stipulation set out is not in exact accord with the entry. It is "that a jury shall be, and is hereby, waived, and said cause submitted to the court for trial upon the foregoing statement of facts," and that "for the purpose of said trial the said statement shall be considered by the court to be in evidence, and as absolutely true." Another entry states that "the court, having considered, and being now fully advised, finds the defendant not guilty"; but, as such a finding is not responsive to the issue in assumpsit, it may be disregarded. It is shown by a bill of exceptions, in which the agreed statement of facts is set out, that the court, after hearing counsel, declared certain propositions of law, and refused others, which, in the view we take of the case, need not be stated, except the following: "The court further finds and holds the facts to be those set forth in the agreed statement thereof filed herein, and shown above, upon which agreed statement trial was had"; "and thereupon the court ruled that, upon the agreed facts in the case stated, the plaintiffs were not entitled to judgment against the defendants"; and "that the defendant was entitled, in law, upon said agreed facts in the case stated, to a judgment against the plaintiffs for its cost in the case incurred." Judgment to that effect was entered.

The assignment of error contains numerous specifications, the last of which only, that the court erred in giving judgment for the defendant, need be considered. It is evident that the case was submitted and tried upon a mistaken view of the so-called statement of facts, which in the main is a statement of evidence, and not of the ultimate or issuable facts. An agreed statement of facts,

it is well settled, may "be taken as the equivalent of a special finding of facts," presenting for review on writ of error only questions of law; but manifestly it is necessary that the ultimate facts be stated, and not evidence, merely, from which the facts to be established may be inferable. *Supervisors v. Kennicott*, 103 U. S. 554; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481; *Distilling & Cattle-Feeding Co. v. Gottschalk Co.*, 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609. The motor which the plaintiffs made for the defendant, it is admitted, was not constructed, in all respects, in conformity with the model agreed upon; but on behalf of the plaintiffs it is contended that the defendant, by the use made of the motor after delivery, and by declarations of intention in that respect, had elected to keep the motor, and that such election is deducible from the agreed statement as a conclusion of law. But the question, in our opinion, remains one of fact, or perhaps of mixed law and fact, in respect to which, as it is presented here, it is not competent for the court to declare a legal conclusion, strongly evident as, upon the facts and circumstances stated, the inference of fact may be deemed to be. It follows that the judgment rendered is invalid. It is supported neither by a general finding appropriate to the issue, nor by special finding, nor by an agreed statement of facts which can be regarded as equivalent to a special finding. The agreed statement probably contains sufficient evidence to enable a trial court to determine the disputed questions between the parties, either by a general or a special finding, but the finding that the facts are as set forth in the agreed statement is neither the one nor the other. The statement being one of evidence, the finding does not make it a statement of facts. To what extent, upon another trial, the parties shall be bound by the agreement as a statement of evidence, if that becomes a matter of dispute, will be a question for the circuit court. The judgment is reversed, and the case remanded, with direction to grant a new trial.

---

UNITED STATES v. FERGUSON.

(Circuit Court of Appeals, Second Circuit. January 13, 1897.)

1. MONEY WRONGFULLY RETAINED BY FEDERAL OFFICER—CLAIM AGAINST UNITED STATES—STATUTE.

Money taken from one arrested for larceny from a post office was retained by the inspector under the erroneous supposition that it was the money stolen. *Held*, that an order by the prisoner to the inspector to pay it to a third person was not an assignment of a claim against the United States, within Rev. St. § 3477, requiring such assignments to be made in the presence of witnesses, and after the allowance of the claim.

2. SAME—RIGHT OF ACTION—ASSIGNMENT OF.

A written order to an officer to pay to a third party money belonging to the drawer, but retained by the officer without authority, is an assignment of the right of action to recover it.

3. REVIEW ON APPEAL—FINDINGS OF FACT.

Findings of fact will not be reviewed where the evidence is not in the record.