

in "Such is the constant practice," says Mr. Justice Swayne, in *Bowditch v. Boston*, 101 U. S. 16, because "it gives scientific certainty to the law in its application to the facts, and promotes the ends of justice." The court cannot allow the jury to assume the truth of any material fact without some evidence legally sufficient to establish it, and the jury cannot legally infer the existence of a material fact unless there is some proof of it. "The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings." *Railroad Co. v. Woodson*, 134 U. S. 622, 10 Sup. Ct. 630. It therefore follows that, when the facts and circumstances are admitted and undisputed, it becomes a question of law for the court to decide whether they support the averments of the pleadings, and it is error to leave a question of law to the arbitrary determination of a jury, for everybody knows that a case of this kind can have but one result if left to a jury, moved, as it must be, by the natural and creditable instincts of human nature, to sympathize with the afflicted. No case can be conceived which more strongly invokes the obligation to duty imposed upon the courts as set forth in the oft-quoted language of Mr. Justice Miller, in *Pleasants v. Fant*, 22 Wall. 116:

"It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial."

That the contract between the parties in this case, if decided by the rules of law, and not determined by the sympathies of the jury, would have had another result, finds apt illustration in the case cited in the brief, *Mary M. Selden v. American etc., Insurance Co.*, where Mr. Commissioner Guy, in a carefully considered report, which was confirmed by the circuit court of the city of Richmond, reaches the conclusion that there was no liability upon a similar policy.

The judgment of the court below is reversed.

UNITED STATES v. HARRIS et al.

(District Court, E. D. Pennsylvania. January 29, 1897.)

CARRIERS—TRANSPORTATION OF LIVE STOCK—RAILROAD RECEIVERS.

Rev. St. § 4388, imposing a penalty for violation of the statute relating to the transportation of live stock upon "any company, owner, or custodian of such animals," does not apply to receivers of a railroad appointed by a court to control and manage the road.

This was an action by the United States against Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers of the Philadelphia & Reading Railroad Company, to recover a penalty

for the alleged violation of Rev. St. § 4388, relating to the transportation of live stock. The case was heard on a rule for judgment on a point reserved.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty.

John G. Lamb, for defendants.

BUTLER, District Judge. The defendants are sued under section 4388 of the Revised Statutes, charged with willful disregard of the law relating to the transportation of live stock. The section provides that "any company, owner or custodian of such animals who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars." The construction of the statute, and the proceeding under it are governed by the rules of the criminal law, as fully as if the proceeding was by indictment. The exclusive purpose of the section is to inflict punishment. Those named as liable to such punishment are the railroad company and the owners and custodians of the animals. The defendants here sued are neither. What reason therefore is there for supposing that the suit can be maintained? The language must receive a strict construction, confined to its obvious import. U. S. v. Hartwell, 6 Wall. 395; U. S. v. Wiltberger, 5 Wheat. 76; Grooms v. Hannon, 59 Ala. 510; Com. v. Wells, 110 Pa. St. 463 [1 Atl. 310]. No straining, however desperate, would be adequate to make the terms embrace the defendants. They are simply the court's officers, appointed to execute its orders. The property is in custody of the court and is controlled and managed by it, through these officers. It would be immaterial to say that in this view no one can be punished under the section during such custody, if it were true. It would not be true, however, for the owners, as well as those in direct charge of the stock, may be so punished during such custody. If others also should be punished congress should provide for it. The instances cited by the prosecution in which courts have enforced the interstate commerce law, and other statutory provisions relating to the management of railroads and their property, generally, while in custody of the law, are equally immaterial. Such cases bear no relation to this. Of course courts will enforce observance of these provisions in their management of the property and business, when attention is called to the subject. The question whether a criminal proceeding may be prosecuted to punish their officers under the section in question, is a totally different one. If it be said the intention is not to punish these officers, then who is intended to be punished? Certainly not the company and stockholders, from whose control the road was taken, and who are not sued in consequence. Surely it is not intended to punish creditors, who had no possible connection with the matter complained of. The courts permit suits to be brought against such officers for debts, or other liabilities incurred, as a means merely of ascertaining the amount due; but

judgments recovered even in such cases can only be enforced by consent and direction of the court.

The defendants' rule for judgment notwithstanding the verdict is made absolute.

HARRISBURG TRUST CO. v. SHUFELDT.

(Circuit Court, D. Washington, N. D. January 23, 1897.)

ACTION ON NOTE—DEMAND OF PAYMENT.

The commencement of an action on a note payable on demand is itself a demand of payment, and it is unnecessary to allege a request for payment before the commencement of the action.

Strudwick & Peters, for plaintiff.
Hastings & Steadman, for defendant.

HANFORD, District Judge. This is an action to recover a balance due after deducting partial payments upon a negotiable promissory note, made payable on demand. The defendant has demurred to the complaint, his contention being that the same is insufficient, for failure to allege a demand prior to the commencement of the action. There is a rule of long standing, and supported by the weight of authority in this country, that the commencement of an action is itself a demand, and that failure to request payment, prior to the commencement of the action, affords no ground of defense. *Bank v. Fox*, Fed. Cas. No. 2,683; 5 Am. & Eng. Enc. Law, 528z⁴⁰. It is insisted, however, that the courts and the text-books in this country have fallen into error by following early decisions, which were controlled by peculiar facts, and which are insufficient of themselves to establish a general rule upon the subject. It is unwise to depart from business customs and practices which have been sanctioned by repeated decisions of courts, and acquiesced in for a considerable time, and which may fairly be supposed to have been contemplated by the parties at the time of making their contract. This contract must be construed as one having been made subject to the rule above stated, and the maker of the note is, by the terms of his contract, liable without any demand, prior to the commencement of an action. Demurrer overruled.

CITY OF JACKSONVILLE v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1896.)

No. 529.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—PERSONAL INJURIES.

A municipal corporation is liable in damages to parties injured through its negligence in failing to keep its streets in proper repair, though no special statute authorizes an action for such cause.

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