

and Starr, or either of them, and that the piece of land claimed by the defendants, upon which the building known as the "Horse Shoe" now stands, is a part and parcel of the ground so located, then the plaintiff has the right of possession to the whole of the ground so located, including the piece in dispute.

These propositions cover all the law raised in this case under the evidence presented. Of course, gentlemen, the court expects you to determine this case according to the law and the evidence, and you will not be governed by any partiality towards either the plaintiff or the defendant. The simple question for you to determine from all the evidence presented in the case is, which one of these parties has the prior possession and occupancy of the piece of ground described in the complaint. If you find from the evidence that the plaintiff and his grantors have been in the continuous occupancy and possession of the tract located by Powers in 1881, and that the piece of ground in dispute is a part of said tract, or if you find from the evidence that in 1894, or prior to the location made by Price, and the erection by him of the Horse Shoe Building, the plaintiff had gone on to this Powers tract, while it was unoccupied and unpossessed public land, and took possession of it, including the ground in dispute, improved it, built a wharf, warehouses, and other structures thereon, costing, as he testifies, about \$30,000, and was in the possession and occupancy thereof at the time Price filed his location notice and built the structure known as the "Horse Shoe," then the plaintiff is entitled to the ground, and you should so find in your verdict. On the other hand, if you find that the plaintiff did not have such possession, or that the ground was unoccupied, unpossessed, and unimproved public land when Price took possession of it, in 1895, then he had the right to go on, locate and occupy it, and the defendants, as his grantees, are entitled to your verdict.

Verdict for the plaintiff.

WILCOX v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, S. D. New York. June 15, 1897.)

NEW TRIAL—SUFFICIENCY OF EVIDENCE.

When one person might think one way and another another upon evidence, it cannot be said that a jury were influenced by any wrong motives in finding either way upon it.

This was an action by Lucina H. Wilcox, administratrix, against the New York, New Haven & Hartford Railroad Company to recover for the alleged negligent killing of her husband. A verdict was returned for plaintiff, and the defendant has moved for a new trial.

W. L. Snyder, for plaintiff.

Henry W. Taft, for defendant.

WHEELER, District Judge. At Mamaronec, on the main line of the defendant's road, where there are four tracks straight for about two miles, with a highway bridge over them a little less than a mile west, the station where tickets are sold and baggage is checked is

on the north side of the tracks, and there is a small waiting room with a platform on the south side of the tracks, from which passengers take trains going east, and there is a fence between the south track and the one next to it, which extends about 70 feet east of the waiting room. The plaintiff and her husband, the intestate, came to the waiting room to take a train east, a little before train time. He started to go along the track, and around the east end of the fence to the station on the north side for tickets and checks. A fast train came along and struck and killed him when he was within about 15 feet of the end of the fence.

After a verdict for the plaintiff, the defendant has moved for a new trial on account of the finding of the jury upon the evidence as to contributory negligence, because the great weight of the evidence is said to have been, on that question, on the side of the defendant. There is no question but that it is within the power, and may be within the duty, of a court to set aside a verdict when it appears to have been found from passion or prejudice, and not upon a fair consideration of the evidence, although there may have been sufficient evidence on each side to require it to be submitted to the jury. The claim here is that, although there was evidence on both sides of this question, the weight of evidence was so great on the defendant's side as to show that the verdict was not fairly reached upon consideration of the whole. The evidence from the plaintiff herself showed that she and her husband, after looking in the waiting room to see if they could get tickets, went to the tracks, and looked up and down, and saw no train either way, and that he started along the track towards the end of the fence; and from others that immediately afterwards a train from the west, coming at the rate of 65 miles an hour, rushed by, and struck him. This evidence as to looking was contradicted by one witness on the part of the defendant, but was confirmed in part by another. On account of her interest, the defendant claims that the balance of direct evidence was largely in its favor as to whether they so looked; and that as the track was straight, and in sight, so far to the westward, if they had looked, they would have seen the train. The great speed of the train would bring it from beyond sight to where they were within less than two minutes, and they might have looked before he started, and the train not have been in sight at all, or have been so far away as not to be noticed by them; and upon the question as to whether they looked or not, the balance of the proof by witnesses would seem to be quite as much in favor of their looking as not.

The defendant also insists that the intestate could and should have gone along the south side of the track to opposite the end of the fence, and then have crossed over; and that when he heard the train he should have gone off on the south side, and been out of its way. The evidence shows that there was no notice to passengers to take any particular way around the end of the fence; that the surface of the roadbed at the edge of the stone ballast of the road on the south side towards opposite the end of the fence was narrow; and that people usually went along the track around the end of the fence, as he started to go, instead of going that way. Under all the

circumstances, it seems to have been a fair question for the jury whether the intestate was in fault in taking the course he did after looking out, as they must have found he did, for the train; and also whether, under the circumstances, when he saw the train coming directly towards him, as he could judge of its speed in that position, and without time to reflect, he should try to go around the end of the fence, rather than off at the side. All these circumstances were to be taken together, and upon all of them the jury had good grounds for deciding either way, as the evidence should have weight with them, whether he was in fault or not. When one person might think one way and another another, upon evidence, it cannot be said that a jury were influenced by any wrong motives in finding either way upon it. As this is the only question made upon this motion for a new trial, this review of the evidence and of circumstances fails to lead to any just conclusion that the verdict was not fairly reached. **Motion overruled.**

HOLMES et al. v. GRABEEL.

(Circuit Court, W. D. Virginia. May 21, 1896.)

EJECTMENT—PURCHASE PENDENTE LITE—AMENDMENT OF DECLARATION.

The filing of an amended declaration in ejectment, wherein the amendment consists in separating plaintiffs, who were before joint plaintiffs, and making some of them joint plaintiffs and some of them separate plaintiffs in the several counts of the amended declaration, as permitted by the Virginia Code (section 2731), is not the commencement of a new cause of action, so as to require service of new process on the defendants. And hence a purchaser of the lands from a defendant originally served pending the suit, and prior to the amendment, is bound by the judgment subsequently rendered.

This was an action of ejectment by Seth C. Holmes and others against Josephus Grabeel. The case was heard upon defendant's objection to the admission in evidence of the record in a previous action entitled *Holmes v. Fulkerson* and others.

C. F. Trigg, B. H. Sewell, White & Penn, and Bullitt & Kelly, for plaintiffs.

A. L. Pridemore, for defendant.

PAUL, District Judge. In this case, the plaintiffs having introduced evidence to trace their title to the land in controversy, beginning with a patent issued to Samuel Young by the commonwealth of Virginia, dated on the 7th day of May, 1787, through succeeding conveyances, devises, and inheritances, to the plaintiffs, the defendant introduced evidence to show title to the said lands by adversary possession. Of the lands in controversy, the defendant claims to have purchased a tract of ——— acres from one Christly Brunk in the year 1873. In rebuttal, the plaintiffs offer in evidence a transcript of the record in an action of ejectment in which Seth C. Holmes and others were plaintiffs and W. W. Fulkerson, the said Christly Brunk, and others were defendants. The said action was tried and determined in the United States circuit court for this district at Abingdon on the 30th day of October, 1880, and a verdict and judgment