

petition, that his competitors get no advantage in freight rates, as it is that he himself pay only reasonable charges for his own shipments. The second section of the act aims to secure equality in rates of all shippers similarly situated, and any favoritism in this particular is declared to be unlawful; and, by the eighth section of the act, any carrier who does such unlawful act is made liable to the person injured for the full amount of damages sustained in consequence of such unlawful act, together with reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. It is said that the plaintiff has failed to allege the facts from which it may appear that defendant performed like service under substantially similar circumstances and conditions for the Consolidated Coal Company; that the statement, as made, involves conclusions only. I do not think this criticism is well made. The pleader alleges the ultimate facts which constitute the right of recovery, and has alleged them in the language of the act which confers the right of action. He has declared that the defendant rendered to the Consolidated Coal Company, for 25 cents a ton, services like those rendered to him, for which it charged 30 cents per ton, and that these services so rendered to the Consolidated Coal Company were performed under circumstances and conditions substantially similar to those attending the services rendered to the plaintiff. Plaintiff is not required to set forth details of facts which show that the services were alike, or rendered under substantially similar circumstances and conditions. This is a matter of proof. Again, it is said that, inasmuch as it does not appear from the petition that plaintiff was charged any more than the schedule rates prevailing at the time, he shows no damages. This view overlooks the main purpose of the enactment of section 2, namely, to prevent unjust discrimination. Plaintiff is entitled to such damages as he sustained by reason of the discrimination. Whether this is the difference between the discriminating charges or otherwise need not now, for the purposes of this demurrer, be determined. The demurrer must be overruled.

HETTINGER v. MEYERS.

(Circuit Court, D. Kansas, Second Division. June 21, 1897.)

PROMISSORY NOTE—FAILURE OF CONSIDERATION.

The maker of a promissory note given in payment for stock in a national bank, and immediately transferred by indorsement to said bank by the payee, cannot resist payment of the note, in the hands of a receiver of the bank, on a plea of failure of consideration because of the insolvency of the bank, where the payee has fully indemnified him against loss.

McKinstry & Fairchild, for plaintiff.

D. H. Martin and Z. L. Wise, for defendant.

WILLIAMS, District Judge. It appears from the testimony in this case: That the plaintiff is the receiver of the Hutchinson National Bank, of Hutchinson, Kan. That on or before the 17th day of August, 1893, James Meyers, the defendant, purchased of one W. L. Little, of said Hutchinson, Kan., 10 shares of the stock of said bank,

of the par value of \$100 per share, agreeing to pay therefor the sum of \$1,000. That he executed his note to the said Little for the sum of \$1,000 in payment for the said stock, and that the said Little on the same day, after business hours, transferred, assigned, and delivered the said note to the said Hutchinson National Bank, and received credit on the books of said bank for the sum of \$1,000 on account of his indebtedness to the same. That on October 18th the said Hutchinson National Bank closed its doors, being insolvent, and was taken in charge by the comptroller of the currency, and the plaintiff in this action was appointed receiver. Finding the note mentioned herein among the assets of said bank, he has brought suit upon the same, which is the subject-matter of this action. At the time of the execution of said note the following agreement in writing was entered into between the parties, which writing is in words and figures as follows:

"This writing witnesseth that W. L. Little, of Hutchinson, state of Kansas, has this 17th day of August, 1893, sold to James Meyers, of the said city and state, ten shares of stock of the Hutchinson National Bank, of said city, of the par value of \$100.00 per share, for the sum of \$1,000.00, upon the following conditions, to wit: That said W. L. Little herein agrees and binds himself, his heirs and assigns, to purchase the aforesaid ten shares of stock at the expiration of six months from this date at the price above stated, together with any interest or losses paid by the said Meyers on the said stock during the said term of six months, if said Meyers shall so elect. In witness whereof, we have hereunto set our hands and seals this year and date above mentioned.

"[Signed]

W. L. Little.
"James Meyers."

Afterwards said James Meyers, believing that said stock, after the failure of said bank on the 18th of October, had become of but little or no value, and that he might be liable upon the same for an assessment of 100 per cent., took from the said W. L. Little two notes of \$1,000 each, the payment of which notes was secured by mortgage upon real estate in the said city of Hutchinson, one of which notes was transferred by said Meyers to other parties for the sum of \$750, which sum was paid him by the purchaser thereof. That the property covered by the mortgage is reasonably sufficient in value to secure the payment of the other note for \$1,000. The defendant, Meyers, pleads failure of consideration for said note, and denies his liability as a stockholder under the transactions herein referred to.

One of the main troubles about the case is want of simplicity in the pleadings, and, though drawn by very learned counsel, it is perhaps for this reason that they might be termed too artistic. The court sees nothing in the case to sustain the contention of the defendant. The note was transferred to the bank in his presence, with his knowledge, and with the understanding before the note was executed that it was to be so transferred. He made no objection at the time to its being transferred and becoming the property of the bank. The transaction was completed when the note was transferred, and the bank acquired the right to consider it a part of its assets, and there is no reason why it should not be so considered. So he has no defense at law to the note. The agreement that was made at the time of the execution of the note seems to have been fully com-

plied with. It seems from the testimony that his liability as a stockholder cannot exceed the sum of \$750. He has already received that. There can be no failure of consideration, because he is secured against loss by the other note of \$1,000, executed to him by Little, which is secured by mortgage upon real estate. If this suit should fail, then the bank equitably should have the proceeds that he has received from Little, to wit, the \$750 in money, and the note secured by the mortgage upon real estate. While this could not be done in this action, yet in equity it ought to be done. Then why should he be allowed to defend against this note? As the court has already stated, there is no valid defense that can be made. The findings of law and fact asked for by the plaintiff in this action will be given, and those asked for by the defendant will be refused, and the verdict and judgment in this case will be for the plaintiff.

BALTIMORE & O. R. CO. v. CAMP.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 449.

1. DAMAGES FOR PERSONAL INJURY—EVIDENCE—PLAINTIFF'S FAMILY.

In an action against a railroad company to recover damages for personal injuries caused by negligence, evidence that the plaintiff has a wife and child is inadmissible.

2. RAILROAD—INCOMPETENT EMPLOYEE—EVIDENCE OF REPUTATION.

In an action against a railroad company for injuries received in a collision caused by the gross negligence of a telegraph operator, after the plaintiff has introduced evidence tending to show that the operator was not a fit man for the place, evidence offered by the defendant that the general reputation of the operator as a telegraph operator was good is admissible.

3. PLEADING—AMENDMENT—NEW DEFENSE.

When a defendant is granted leave to withdraw the answer and file a demurrer, upon the overruling of the demurrer it is not error for the court to refuse to permit him to file an answer setting up a new defense, where no excuse is given for not pleading it in the first answer.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action for personal injuries by John P. Camp against the Baltimore & Ohio Railroad Company. There was judgment for plaintiff, and defendant brings error.

J. H. Collins, for plaintiff.

S. M. Hunter and R. A. Harrison, for defendant.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. This is the second time this case has been before this court. It is reported in 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952. The plaintiff was a locomotive engineer of the Baltimore & Ohio Railroad Company, and was seriously injured in a collision between two of the freight trains of the company at a point about six miles east of Black Hand, a station of the Central Ohio Division.