

fore the first trial of the cause, showing the filing of a written waiver of the jury and a submission of the case for trial to the court. Of that order, in connection with other matters which are clearly irrelevant to the questions now presented, the plaintiffs in error have presented a properly certified copy, and ask that by direct order or by writ of certiorari it be made a part of the record. The formal writ under the circumstances is not necessary, and the clerk will cause the order as certified to be printed as a part of the record, and will also attach to the transcript the original writ of error.

While this disposes of the motion to dismiss and of the counter motions of the plaintiffs in error, we deem it proper here, besides calling attention to the remarks of the Chief Justice in *Railway Co. v. Stewart*, 95 U. S. 279, in respect to what should be contained in a transcript, to say that the words "all proceedings in the case," as used in the first clause of rule 14 of this court (21 C. C. A. cxv., and 78 Fed. cxv.), are to be interpreted with reference to the words "all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court," found in the third clause of the rule. It is not intended that irrelevant papers, proceedings, or orders shall be certified; and, that the clerk may not be left in doubt, he may well require of the counsel or attorney of the appellant or plaintiff in error in a cause a præcipe stating specifically what the transcript shall contain, and, attaching a copy of the præcipe to the transcript, certify that it is a true and correct transcript according to the præcipe. The motion to dismiss is overruled.

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MISSOURI, K. & T. RY. CO. v. HALL.

(Circuit Court of Appeals, Eighth Circuit. April 18, 1898.)

No. 1,001.

1. TRIAL—DIRECTION OF VERDICT.

Where the testimony would not compel every reasonable man, with fair and impartial judgment, who hears it, to come to the same conclusion in respect to a material fact in issue, it is not error to refuse to take the case from the jury.

2. CARRIERS—ACTION FOR INJURY TO LIVE STOCK—DAMAGES—EVIDENCE.

Testimony of one accustomed to handling cattle, that certain cattle, after being in a railroad collision, failed to gain properly, by reason of which they were damaged in value a certain sum per head, is admissible in an action to recover damages resulting from the collision.

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

T. N. Sedgwick, for plaintiff in error.

John C. Gage, Sanford B. Ladd, Charles E. Small, Mr. Lane, and Mr. Hicks, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. While the Missouri, Kansas & Texas Railway Company, the plaintiff in error, was transporting a train load of cattle for John J. Hall, the defendant in error, it ran an engine into the rear of the train, and, as the defendant in error claims, knocked down and killed some of the cattle, and injured others. He sued the company for the loss which he alleged that he had sustained from this collision. The case was tried by a jury, which returned a verdict against the company.

It is assigned as error that the court refused to dismiss the case at the close of the evidence for the defendant in error, and that it refused to direct a verdict for the company at the close of all the evidence. But the collision was undisputed, and the only question was whether any damage to the cattle was caused thereby, and, if so, how much. Upon that question the testimony was conflicting. Some of the witnesses testified that the collision tore off one end of the caboose, and knocked down all, or nearly all, of the cattle; that from 30 to 41 of them were taken out dead 21 miles beyond the place of the accident; that many of them had ribs broken in, or horns torn off, or hips broken down; that within three days after the collision 97 of them died, and that those that lived were so injured that they would not thrive or take on flesh. On the other hand, witnesses testified, in effect, that all this loss was the result of the poor and weak condition of the cattle when they were shipped, and that the collision was so gentle and trivial that it did not injure them. The testimony to the injury to the cattle was, however, so positive and substantial that we are not satisfied that every reasonable man who heard it with fair and impartial judgment would be compelled to come to the conclusion that the cattle were not injured by the collision, and in this state of the case the court properly refused to withdraw the case from the jury. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 451, 3 C. C. A. 433, 438, and 53 Fed. 65, 70; *Drake v. Stewart*, 40 U. S. App. 173, 178, 22 C. C. A. 104, 107, and 76 Fed. 140, 143. For the same reason there was no error in the refusal of the court to dismiss the case at the close of the evidence for the defendant in error, since the testimony to the injury to the cattle had then been introduced.

The defendant in error testified that he had been engaged in raising and in handling cattle for more than 20 years, that he saw these cattle on the day of the collision and frequently thereafter for four months, and that those that were not killed failed to thrive and take on flesh, so that they were lessened in value five dollars a head by the collision; and the court submitted this evidence to the jury under an instruction that, before they could allow any damages on this ground, they must be satisfied that the failure of the cattle to thrive was caused by the injuries they received in the collision, and not by their journey, and that they should exercise a great deal of care and consideration in coming to their conclusion upon this part of the case. An objection to this testimony was interposed that it was incompetent, irrelevant, and immaterial; that it called for a conclusion of the witness, and that he was not a competent witness; and it is insisted that the court erred in overruling this objection, and submitting this testimony to the jury. The contention cannot be sus-

tained. The questions it presents were carefully considered by this court in *Railway Co. v. Edwards*, 49 U. S. App. 52, 24 C. C. A. 300, and 78 Fed. 745, and for the reasons stated in the opinion in that case there was no error in the ruling of the court here.

A motion was made to strike out certain of the assignments of error in this case, but it is unnecessary to consider it, because we have arrived at the same result upon the merits that we should have reached if we had granted it. For this reason the motion is denied without a consideration of its merits. The judgment below is affirmed.

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GARDES v. UNITED STATES.<sup>1</sup>

GIRAULT v. SAME.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 646.

1. CRIMINAL PROCEDURE—INDICTMENT—SEVERAL COUNTS.

Where an indictment consists of numerous counts, the trial court may, in the exercise of sound judicial discretion, require the government to elect certain counts upon which it will ask conviction; but where the counts are all for transactions connected together, or of the same class, their joinder is proper, under Rev. St. § 1024, and the exercise of the court's discretion will not be disturbed, except in a clear case of improvidence or abuse.

2. SAME—MISTRIAL—FORMER JEOPARDY.

Where, during the trial, a juror becomes disqualified, and the court adjudges a mistrial, a plea of former jeopardy is not good on a second trial, even though all parties were willing to proceed with 11 jurors.

3. SAME—READING OF INDICTMENT.

Where defendants have been arraigned, and have waived reading of the indictment, they may not subsequently complain if the whole indictment is not read at the trial, but such parts of it are read, and such explanations made of the other parts, as may give the jury the clearest comprehension of it.

4. SAME—VERDICT—FORM.

Where the jury find accused guilty upon all counts of an indictment, "Guilty as charged," without specifying the counts, is a proper form of verdict.

5. SAME—COUNT TO SUSTAIN.

Where the verdict is sustained by one good count in the indictment, it must stand, even if all the other counts are bad.

6. SAME—INDICTMENT—AMENDMENT.

Where, after mistrial, and before a new trial, amendments are made to purely formal parts of certain counts of an indictment, and the defendants are not rearraigned, even if the irregularity is material it can affect only the counts so amended, and the error is cured by arrest of judgment on such counts.

7. SAME—SENTENCE—HARD LABOR.

Where the statute under which a prisoner is sentenced provides for imprisonment, but not at hard labor, the words "at hard labor" should not be inserted in the sentence, even if hard labor is a part of the discipline of the prison at which the sentence is to be served.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

J. R. Beckwith, for plaintiff in error Gardes.

Girault Farrar and A. D. Henriques, for plaintiff in error Girault.

J. Ward Gurley, for the United States.

<sup>1</sup> Rehearing denied May 24, 1898.