

in the aggregate is the amount in dispute. The fact that some defense may be made, or is, in fact, made, which will make the recovery fall below the jurisdictional amount, does not defeat the jurisdiction of the court. It occurs in the practice that judgments are sometimes entered for a less sum than suit could have been brought for. Statutory provision as to costs is made for such cases:

"When, in a circuit court, a plaintiff in an action at law originally brought there \* \* \* recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value, \* \* \* he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs." Rev. St. U. S. § 968.

This statute, at least, shows that the congress does not so construe the statutes conferring jurisdiction on the court that the same will be defeated, if, by defense, the amount claimed in the action should be reduced below \$2,000. In *Hardin v. Cass Co.*, 42 Fed. 652, a suit was brought for a sum exceeding the jurisdictional amount. The statute of limitations was successfully pleaded as to part of the claim. This part of the suit being defeated, the amount left collectible was less than the jurisdictional amount. The defendant insisted that the case should be dismissed. The court, however, granted judgment for the remainder of the claim, although it was for less than \$2,000. The case of *Green v. Liler*, 8 Cranch, 106, was a suit for a large tract of land, alleged to exceed the value which then fixed the jurisdiction of the court. The recovery was for less in value. Mr. Justice Story, delivering the opinion of the court, said:

"As to the first question, we are satisfied that the circuit court had jurisdiction of the cause. Taking the eleventh and twentieth sections of the judicial act of 1789 (chapter 20) in connection, it is clear that the jurisdiction attaches when the property demanded exceeds \$500 in value; and if, upon trial, the demand recovers less, he is not allowed his costs, but, at the discretion of the court, may be adjudged to pay costs."

See, also, *Levinski v. Banking Co.*, 92 Fed. 449.

The judgment of the circuit court is reversed, and the cause remanded, with direction to reinstate said cause on the docket, and to proceed in conformity with this opinion; and it is so ordered.

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NATIONAL ACC. SOC. OF CITY OF NEW YORK v. DOLPH.

(Circuit Court of Appeals, Third Circuit. May 17, 1899.)

No. 12.

1. INSURANCE—ACTION ON ACCIDENT POLICY—EVIDENCE.

The Pennsylvania act of May 11, 1881, which provides that no application or constitution or by-law of the company shall be admitted in evidence as part of a contract of life or fire insurance, or as having any bearing thereon, unless a copy thereof shall have been attached to the policy, does not apply to contracts of accident insurance.

2. REVIEW—HARMLESS ERROR.

A judgment will not be reversed on account of the erroneous exclusion of evidence which was merely cumulative, and where the fact sought to be shown thereby was proved by other evidence without dispute, and properly submitted for the consideration of the jury.

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

H. D. McBurney, for plaintiff in error.

G. M. Watson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. In May, 1887, the National Accident Society of New York accepted Samuel Dolph as a member of said society, and issued to him a policy of insurance, which provided that, in the event of the death of the insured resulting from accidental bodily injuries, the society would pay the principal sum of \$4,000 to Mindwell Dolph, wife of said assured. It appears from the record that, in the application which he made for this policy of insurance, said Dolph stated his occupation to be that of a professional salesman in a lumber yard and a foreman of men, and that his risk was rated as one engaged in such employment. In his said application the assured agreed that, for injury sustained by him when doing an act or thing pertaining to any occupation or exposure classed by the society as more hazardous than those so stated in the application, he or his beneficiary should be entitled to recover only such amount as the society paid for such increased hazards. It was expressed in the policy issued on said application that, if the member of said society (the assured) should be fatally injured while engaged temporarily or otherwise in any occupation classed as more hazardous than the occupation under which the certificate was issued, he should be entitled only to the indemnity or death loss of the division in which the occupation in which he had sustained the injuries was classified. The insured received an injury at the mill at which he was employed, and subsequently died. It was insisted at the trial, on the part of the defendant, that the injury so received was not the cause of death, and that, if it were such injury, it was received by assured while he was engaged in the occupation and performing the duties of an "off-bearer," which were classed by the society as more hazardous than those under which the assured was rated. The evidence on these points was contradictory. It was fairly submitted by the court to the determination of the jury. In the charge of the court in this respect, as well as in its neglect or refusal to charge as requested by the defendant, we find no error. Upon the trial of the cause, the learned judge refused to receive in evidence the application which was the basis of the policy of insurance, basing his refusal so to do upon the statute of the state of Pennsylvania enacted May 11, 1881. This court has held, however, in the case of Insurance Co. v. Carroll, 58 U. S. App. 76, 30 C. C. A. 253, and 86 Fed. 567, that the statute upon which the learned judge relied was not applicable to accident insurance. In accordance with the views therein expressed, we are of the opinion that in such refusal the learned judge erred.

In the record brought to the court the application refused by the learned judge is set out at length, and the fact is disclosed that the

only matter contained therein, pertinent to the issue raised, was contained in section 17, and related to the amount which the plaintiff would be entitled to recover, in case the assured at the time of the accident was engaged in business more hazardous than that in which he had by his representations then made been classed or rated. Clause 4 of the policy sets out the agreement made by the insured in regard to rating as expressed in the application, and expressly provides for the contingency of injury to the assured while engaged temporarily or otherwise in any occupation classed by the society as more hazardous than the occupation under which the certificate or policy was issued. The defendant's manual containing their classification of risks was also received in evidence, so that there was nothing in the application relevant to the issue which was not brought to the attention of the jury. The learned judge clearly set forth to the jury in his charge that, if the assured had met with his accident and consequent injury while engaged in a more hazardous occupation than that in which he had been rated, the plaintiff would not be entitled to recover the full amount named in said policy, but only the \$500, which the policy provided should be paid to one engaged in the more hazardous occupation. The jury had before them for consideration all the evidence which was necessary to enable them fairly to determine all the questions of fact which were properly submitted to them. We fail to see how anything in the excluded application would have aided them, or tended to have changed the result,—at most, its evidence would have been but cumulative. Under these circumstances, there was no reversible error in refusal to receive the same. "The court will not reverse for error which it is evident has done no injury to party complaining." *Chase v. Hubbard*, 99 Pa. St. 226. To the same effect is the case of *Galbraith v. Zimmerman*, 100 Pa. St. 374. We are of the opinion that the verdict should not be disturbed, and that the judgment of the circuit court should be affirmed.

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CLUNE v. RISTINE.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1899.)

No. 1,032.

1. RAILROADS—OBSTRUCTION ON TRACK—NEGLIGENCE.

A rock weighing some 200 tons, which was embedded in the face of the slope of a railroad cut along the side of a mountain, slid from its place, in the night, upon the track, and an engine attached to a train, coming in collision with it, was wrecked, and the engineer killed. The cut was through a formation known as "slide," consisting of loose boulders embedded in clay or gravel and the slope stood at an angle of about 45 degrees. The road had been built about eight years, during which time no change had been made in the slope, and the only inspections had been made by observations from passing trains or hand cars. The bank was regarded as safe by the company's engineers. There had been no recent rains, and no night patrol of the cut was being made at the time. *Held*, in an action against the railroad company to recover for the death of the engineer, that such facts did not warrant a preemptory instruction for the defendant, but that the question whether it had exercised ordinary