execution of the contract, with defendant's knowledge, the power was not revocable, at least in respect to those cases in which the plaintiff had rendered service. Whether it was revocable at all, in view of the allegation that the defendant stipulated that the plaintiff's service should be exclusive of any interference in that territory, it is not necessary to determine. Perhaps the contract and the power were alike irrevocable from their date if the plaintiff at that time gave notice to the defendant of his acceptance of the offer or promise. Probably the latter is correct.

3. It was necessary that the plaintiff should, within a reasonable time, either have expressly notified the defendant of his acceptance, or have entered upon the performance of the undertaking and given notice thereof to the defendant. The contract alleged in the declaration is wholly unilateral, and continued so until acceptance, either expressed, or implied from entering upon the service with the knowledge of the defendant. The declaration is faulty in this particular.

4. It is alleged that the defendant assigned his patent and "all interests acquired thereunder" to another without the consent of this plaintiff, and without providing for payment of plaintiff. The court is inclined to hold that this disabled the defendant from doing those things in respect of his contract with the plaintiff,—if the contract was closed by acceptance, —which are fairly implied from the contract, and put such obstruction in the way of its execution, as to justify the plaintiff in treating it as repudiated by the wrongful act of the defendant. But as the demurrer is sustained on other grounds, no definite opinion is now declared.

5. In respect to the objection that the alleged contract was within the statute of frauds, and so should have been alleged to be in writing, the ruling is that this question is not before the court. It is not necessary to allege that it was in writing, but only that the contract was made. The point can only arise upon an offer of testimony, where the declaration does not allege it was by parol.

The demurrer must be sustained. Leave will be given to plaintiff to amend his declaration, otherwise there must be judgment for the defendant.

Wunderlich *v.* Mayor, Etc., of New York.

(*Circuit Court, S. D. New York.* February 13, 1888.)

1. Municipal Corporations—Negligence—Defective Streets—Evidence.

In an action for personal injury, received on the streets of the defendant city, testimony was admitted, against the objection of plaintiff, on the point of due care of the streets, tending to show that defendant had about 548 miles of streets, and 845 miles of sidewalk. *Held*, that as the verdict of the jury was in favor of the plaintiff, the admission of such evidence did not prejudice him.

2. Damages—Inadequacy—Personal Injuries.

In an action for personal injury a judgment of $300 will not be set aside as inadequate, when its injustice is not apparent to every one, damages being peculiarly within the province of the jury.

At Law. On motion for new trial.

This action was brought by Otto Wunderlich against the city of New York, to recover damages for personal injury on the street of defendant city. Judgment for plaintiff for $300. Plaintiff moves for new trial.

L. Laflin Kellogg, for plaintiff.

David J. Dean, for defendant.

WHEELER, J. This action was brought to recover damages for personal injuries received by the plaintiff in consequence of being thrown from his wagon by a hole in West street. The plaintiff's evidence tended to show that he received a severe contusion of the hip by the fall from his wagon, which affected his nervous system, and confined him to his bed most of the time, and kept him under a doctor's care for about three weeks; that he had not fully recovered, and the disability and suffering were likely to be permanent. The evidence of the defendant tended to show that the injury was not probably permanent; and, against an objection of the plaintiff, that the defendant had about 548 miles of streets, and 845 miles of sidewalk, to take care of. The jury returned a verdict for the plaintiff for $300 damages.

The plaintiff has moved for a new trial because of the admission of that evidence, and the smallness of the damages. The testimony objected to was admitted upon the point of due care of the streets, on the authority of *Reed* v. *Mayor*, 31 Hun, 312. If the ruling was wrong it did not prejudice the plaintiff, for the finding of the jury on that point was in his favor. The verdict cannot, therefore, properly be set aside on account of that ruling.

There was no measure of damages laid before the jury by proof entitling the plaintiff to any exact, or nearly exact, sum. It all lay in the sound discretion and judgment of the jury; and they were so instructed. Their duty was to award more or less, as they should find the injury more or less severe and permanent. Some might think, upon the evidence, that it was slight, and others that it was quite severe. The amount of the damages was peculiarly within the province of the jury, and their finding on that subject should not be disturbed, unless, as was said by KENT, C. J., in *Coleman* v. *Southwick*, 9 Johns. 45, it was so outrageous as to strike every one with its enormity and injustice. *Leeds* v. *Gas-Light Co.*, 90 N. Y. 27; *Hayward* v. *Newton*, Strange, 940; *Barker* v. *Dixie*, Id. 1051; *Taunton* v. *Smith*, 9 Pick. 11. That is not so in this case.

Motion for new trial denied.

KELLEY *v.* PENNSYLVANIA R. Co.

(*Circuit Court, S. D. New York.* February 10, 1888.)

1. NEW TRIAL—MISCONDUCT OF JURY—RECOMMENDATION BY JURY.
   In an action against a railroad company by an employe for injuries received while in its service, the jury returned a verdict for the defendant, and at the same time the foreman handed the clerk a paper, signed by him, stating that the jury would recommend the defendant to reimburse the plaintiff for expense and loss of time caused by the accident. There was nothing but mere outside statements of the jurors to show that the agreement to recommend influenced them in finding their verdict. *Held* not such misconduct as would warrant setting aside the verdict, statements of jurors not being admissible to show misconduct by them.

2. SAME—VERDICT CONTRARY TO EVIDENCE.
   In an action against a railroad company for injuries received from being caught between two of defendant's vessels, some of the evidence tended to show that the injury was caused by the acts of defendant's servants, and some that it was caused by the motion of the tide. Upon a former trial the jury had disagreed. *Held*, that the verdict for defendant was not so manifestly against the preponderance of the evidence as to warrant setting it aside.

At Law. On motion for new trial.

Herman H. Shook, for plaintiff.

Osborn E. Bright, for defendant.

WHEELER, J. This action was brought to recover for personal injuries received by the plaintiff from being caught between two vessels belonging to the defendant, while assisting in pushing one past the other in a slip belonging to the defendant, when in its employ. The plaintiff's evidence tended to show that another of the defendant's vessels was run against the one he was pushing, and caused the injury to him. The defendant's evidence tended to show that it was not, and that the injury was caused by the motion of the waters given by the tide, and by passing vessels. The defendants also claimed that those in charge of the other vessel were fellow-servants of the plaintiff, and that, if they did run the other vessel against the one he was pushing, he would be barred from recovering of the defendant for any damage thereby caused on that account. The jury were instructed that the captain and crew of the other vessel, employed for a purpose independent of that in which the plaintiff was engaged, would not so be fellow-servants of the plaintiff that he could not recover of the defendant for injuries done to him by its being carelessly or negligently run against the one on which he was employed, and the question whether it was so run against the one that he was on, to his injury, without his fault, was submitted to the jury in a manner to which his counsel took no exception. The jury returned a verdict for the defendant, and, at the same time, the foreman handed to the clerk a paper signed by him stating that the jury would recommend to the Pennsylvania Railroad Company that the plaintiff be reimbursed for the expenses incurred, and loss of time caused, by the accident while in their employ. This paper was handed to the counsel of the defend-