

ant. The plaintiff moves to set aside the verdict as being against the weight of evidence, and for misconduct of the jury in connection with that recommendation.

The cause was tried before upon substantially the same evidence and instructions, and the jury disagreed. There was a fair question of fact involved, on which there was substantial evidence on each side. The constitution of the country, under which the government is carried on, and the court sits, provides that this question should be tried by jury, and that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Article 7 of amendments. If the verdict was so against the great preponderance of evidence as to show that the jury did not consider and act upon the evidence, but were moved by passion or prejudice, or some other motive, to set it aside would be according to the rules of the common law. But to set it aside because another jury might find the other way would not. The evidence in this case was not so clearly in favor of the plaintiff as to show that the verdict for the defendant was not fairly reached on due deliberation upon all the evidence.

The allegation of misconduct of the jury rests upon an affidavit of conversation with a majority of them since the verdict, in which they said that the recommendation was the basis of their agreement, and that some of them believed that the recommendation would obtain compensation for the plaintiff. Few verdicts would probably be reached if some of the jurors should not, in some measure, yield to the views and judgment of others. If they could themselves overthrow their verdict by stating their grounds for concurrence outside, afterwards, great mischief would follow. If a way was open for giving the reasons, those given would often, probably, not be the true ones. Their deliberations are conclusively merged in their verdict, so far as they are concerned, unless misconduct in reaching it is shown from other sources. Chief Justice SHAW, in *Murdock v. Sumner*, 22 Pick. 156, said that affidavits of jurors are to be received with caution, and that the rule is inflexible that they will not be received to show misconduct or irregularity on the part of the jury, or any of them. If their affidavits would not be received, much more should the evidence of loose conversation be refused. The fact of the recommendation is, however, relied upon as, in itself, misconduct, and the statements of the jurors are said in argument to heighten its effect. The recommendation was not any part of the verdict any more than the recommendation of mercy accompanying a verdict of guilty in a criminal case is, and is no more evidence of misconduct. Apparently the jury in this case were moved by sympathy for the plaintiff in his great misfortune to make the recommendation, hoping it would relieve him somewhat from what, in their view, they could not award him compensation for. If this was technically misconduct, it would not furnish ground for setting aside the verdict unless it influenced the finding of the verdict, and there is nothing but the mere outside statements of the jurors to show that it did. In *Owen v. Warburton*, 4 Bos. & P. (1 N. R.) 326, the affidavit of an outside person showed that the jury proposed to draw

lots for a verdict, and that of the foreman was relied upon to show that they did so. But Sir JAMES MANSFIELD, C. J., said that the judges, after consultation with other judges upon the subject, were all of the opinion that the affidavit of a jurymen could not be received. There is, therefore, no misconduct of the jury made apparent, and no evidence that what is called misconduct had any effect upon the verdict. The motion for a new trial must, upon these considerations, be overruled.

Motion for new trial overruled, and judgment on the verdict ordered.

ROOT v. CATSKILL MT. RY. CO.

(*Circuit Court, S. D. New York.* February 14, 1888.)

NEW TRIAL.—GROUNDS FOR TRIAL.—FAILURE TO URGE DEFENSE ON.

In an action against a railroad company for injuries sustained by a passenger on one of its trains, occasioned by another car being kicked against the one she had entered, the defendant claimed that plaintiff was improperly in the car before the train was made up, and introduced considerable testimony as to prohibitions, publicly given to the passengers on the platform at the time, against entering a car until the train was made up. No exception was taken to any part of the charge, and no request made to charge that the plaintiff had the burden of affirmatively proving that there were no prohibitions against her entering the car, and that she consequently was rightfully therein. *Held*, that such question would not be considered on a motion for a new trial.

At Law. On motion for new trial.

George W. Wickersham and *C. S. McMichael*, for plaintiff.

Cornelius Van Santvoord, for defendant.

SHIPMAN, J. This is a motion by the defendant for a new trial of an action at law for damages to the plaintiff through the negligence of the defendant, as a common carrier of passengers. A very general statement of the plaintiff's case is that, on August 9, 1886, after her ticket had been purchased for her passage from Cairo to Catskill Landing, and after she had taken her seat in a car of the defendant upon her journey, the car in which she was standing was, through the negligence of the railroad company, violently hit or bumped by another car, which was then being coupled to her car; that she was thrown upon the floor by the force of the collision, and suffered injuries which eventually proved to be severe and permanent. Cairo is the terminus of the Cairo branch of the defendant's narrow-gauge railway. On the arrival of the afternoon train it returns to Catskill with its load of passengers about as soon as the return train can be conveniently made up; and, inasmuch as the statute of the state of New York requires that the baggage car should precede the passenger cars, it is always necessary that the train should be rearranged. This is usually done, and was done on the afternoon in question, in the following way: After the landing of the passengers by the up-train, and the removal of the gang-planks, which had been placed