

RAILWAY COMPANY *v.* BYARS.

Opinion delivered October 14, 1893.

Instruction—Invasion of province of jury.

In an action against a railway company to recover a penalty for an overcharge of passenger fare, it is error to instruct the jury "that if the plaintiff shows that the defendant has placed, at intervals along the line of its road, mile-posts showing the distances, this is, *prima facie*, the distance, and will be considered by the jury as sufficient evidence of the distance, until shown to be erroneous."

Appeal from Franklin Circuit Court, Ozark District.

JEREMIAH G. WALLACE, Judge.

Action by Byars against Missouri Pacific Railway Company. The facts are stated in the opinion.

Dodge & Johnson for appellant.*D. B. Locke* for appellee.

BUNN, C. J. This is an action by the appellee, as plaintiff, against the appellant company as defendant, instituted in the Franklin circuit court for the recovery of the statutory penalty for an overcharge of passenger fare, on the Little Rock and Fort Smith Railroad, between the towns and stations thereon of Ozark and Alma; it being alleged in the complaint that the distance between the two points is twenty-five miles and no more, and that, on the 6th day of December, 1890, the said defendant company, by and through its servants, was operating said railroad, and that, on that day, the conductor of one of its passenger trains demanded and received of plaintiff, a passenger thereon, the sum of 85 cents as fare between said points. Prayer for \$300 penalty and reasonable attorney's fee.

The defendant answered denying that it owned or was operating said railroad, and that it did, on the day

named, demand, take and receive from plaintiff as his fare between said points the said 85 cents, or any unlawful sum, or at any time.

Trial was had at the March term, 1891, of said circuit court, on the issues there made, and in the progress of the same, at the instance of the plaintiff, the court gave the jury the following instruction, to-wit: "That if the plaintiff shows that the defendant has placed at intervals along the line of its road mile-posts showing the distances, this is, *prima facie*, the distance, and will be considered by the jury as sufficient evidence of the distance, until shown to be erroneous."

Verdict for \$250.00 penalty and \$10.00 attorney's fee, from which defendant appealed, setting up in its motion for new trial (which was overruled, and the overruling excepted to) the want of evidence to sustain the the verdict, the excess of the penalty imposed, and the error of the court in giving said instruction.

The constitutional restriction upon courts in this State on the subject of charging juries as to matters of fact ought not to be disregarded, and it is without the province of the courts, in any given case, to say what is *prima facie* evidence unless made so by law, or to say that any state of facts is sufficient; and, for this error of the circuit court in this instance, its judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is deemed unnecessary to consider the other points raised.