No. 45 - Oct Term 1929

New Jersey Court of Errors and Appeals

ROBERT A. KOPENHAFER,
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

Action at Law.
On Appeal from Hudson County Circuit Court.

BRIEF OF DEFENDANT-APPELLANT.

I.

Statement of the Case.

Plaintiff was injured on September 17, 1926, while employed as a car barrer by the Susquehanna Collieries Company, at Lykens, Pennsylvania. His work consisted in placing a bar back of the wheels on coal cars in order to pry them forward for loading in the breaker, when they failed to reach the required point by means of the gravity track leading from the car storage yard to the loading platform. This track was on the property of the Collieries Company (Case, p. 55), and ran underneath a portion of the breaker. The railroad company had nothing to do with that track. Alongside of the loading track was another called the "empty" track. This is clearly shown by the photograph exhibits. It was on or near the "empty" track that plaintiff claims to have

met with his accident. He alleges that he was injured through the negligence of the defendant The Pennsylvania Railroad Company who, by its agents and servants having the care, management and control of certain cars and of an engine or locomotive used in moving said cars, caused said cars "to be suddenly and without warning, negligently set in motion and so negligently operated by defendant as to be caused to strike plaintiff, throwing him to the ground, permanently injuring him" (Case, pp. 2, 3). On this track the railroad company took cars in and out of the collieries yard daily.

It was not necessary for plaintiff to cross the "empty" track in the performance of his work (Case, pp. 151, 152). He testified that he had about finished his day's work at the colliery, and that he went around some steps at the end of the breaker (shown by the photographs) to pick up a hatchet for the purpose of taking it into the building for protection, when suddenly he heard a crash and he was knocked down to the ground by the end of the first car of a train that had been standing on the "empty" track all day. His body fell over the rail, and in endeavoring to extricate himself from this position his foot was caught under the car wheel and crushed (Case, pp. 25-28). In order to get the hatchet he did not have to cross the track, but could walk right beside the cars (Case, p. 26). It lay about four feet from the stairway (Case, p. 25). There was a space of about three or four feet between the track and the steps (Case, pp. 47, 58, 71). He testified that when he started to go around the steps, there was a distance of about ten feet between the steps and the nearest end of the cars (Case, p. 48). He later qualified this distance to about five feet (Case, p. 52). On cross examination (Case, pp. 48, etc.), he testified as follows:

"Q. As I understand it, then, you started to go around the end of the steps on the side next to the empty track, there was about three or four feet between the steps and the track and about ten feet between the steps and the nearest car? A. Yes, sir.

"Q. All of a sudden you heard a crash and you were thrown down? A. Yes, sir.

"Q. When you started to go around the steps did you look to see whether there was anybody around, in the train crew or on the locomotive, to see whether these cars were all to be moved at that time? A. I didn't see any.

"Q. I say, did you look to see if there was anybody? A. I looked down and I didn't take notice of any.

"Q. Did you do that as a precaution before you went between the steps and the track, or did you just do it as a matter of course, or did you just do it? A. I just looked and I didn't notice much of anything. I just stepped there and I didn't see down.

"Q. Why not? A. Why, I just stepped around there. I was looking down where I was walking.

"Q. You were looking down? A. I looked, you know how a person walks."

The draftsman who prepared the sketch, Exhibit D-7 (Case, pp. 155, 157, 199), testified that the distance by accurate measurement between the track and breaker is 6.02 feet, and the overhang of the cars about 18 inches (Case, p. 157).

Exhibit D-6 shows the actual scene of the accident very clearly (Case, p. 198).

The train crew testified that the coupling of the incoming train to the standing cars was a usual coupling and that nothing occurred out of the ordinary, and that there was nothing to indicate to them that there was anybody in a position of danger near the cars (Case, pp. 122, 161, 169).

The brakes were set on the standing cars and at the time of the coupling they moved only the dis-

tance involved in the extension and taking up of the "slack" (Case, pp. 57, 66, 74, 79, 84, 90, 124, 127, 129, 130, 162, 163, 167, 170, 172, 173, 174). The signals of the trainmen were given for the purpose of the train movements, and not necessarily to persons near the tracks, although warning of the car movements would be given if they saw anyone standing around (Case, pp. 32, 33, 165, 167).

The plaintiff testified that at the point of the accident, the "empty" track was straight in the direction of the locomotive for about 500 feet (Case, pp. 26, 49). The draftsman who prepared the map testified that by actual measurement it was 650 feet (Case, pp. 124, 156). It was not unusual to have cars standing on the car track all day, as in the present instance (Case, p. 71).

There was testimony that plaintiff had gone in back of the standing coal car on the "empty" track to urinate, and that when the cars were moved he was thrown down; and a number of witnesses testified that he had so admitted to them (Case, pp. 85, 86, 88, 89, 117, 123, 125, 126, 131, 134, 136, 140, 142, 146, 148, 150). This, however, plaintiff denied. That would have placed him in a position behind the car where the train crew could not see him, and where he would have been a trespasser or a mere volunteer.

Plaintiff resides at Wisconisco, Pennsylvania, which is about a mile from Lykens, where the accident happened; and he has lived there all his life (Case, pp. 2 and 53). Defendant is a corporation organized and existing under the laws of the State of Pennsylvania (Case, pp. 2 and 7). Harrisburg, the capital of Pennsylvania, is located in Dauphin County, and Lykens is located in the same county (Case, p. 139). Plaintiff's residence and the scene of the accident are located remote from Jersey City, New Jersey, where the present case came on

for trial in the Hudson County Circuit Court (Case, pp. 87, 135, 139). It is comparatively easy of access from Lykens to Harrisburg, which is the county seat of Dauphin County, and also the official corporate situs of defendant company. Plaintiff, however, brought no suit against the defendant in the State of Pennsylvania, or elsewhere except the pending action, which was commenced in the Hudson County Circuit Court, in the State of New Jersey, on September 9th, 1927, nearly a year after the accident occurred (Case, pp. 1, 59 and 60).

Prior to joining issue, the defendant, appearing specially, moved to dismiss the case on the ground that to be required to defend the action in the Hudson County Circuit Court, at Jersey City, New Jersey, imposed an unwarranted burden on interstate commerce (Case, pp. 4 and 5). This motion was denied (Case, p. 6). Appropriate objection to the Court's ruling was noted on the record, and answer was filed, reserving the right to renew the motion (Case, p. 8). At the opening of the trial in Hudson Circuit, a like motion was made, which was renewed at the conclusion of the trial. Both motions were denied (Case, p. 180).

A motion to direct the verdict in favor of the defendant was also denied (Case, pp. 180, 190).

The case was on trial in the Hudson Circuit four days (Case, pp. 21, 53, 172). It became necessary to continue the trial over one week-end to the following Monday (Case, p. 53). Defendant was under the necessity of having a number of witnesses present in its behalf (Case, p. 53), all transported from the vicinity of Lykens, a remote point in the coal mining region of Pennsylvania (Case, p. 139). That this involved great inconvenience and expense is perfectly obvious (Case, p. 176). The evidence is replete with situations which show the

expense and inconvenience which the trial of this case at a point remote from the residence of the parties and the scene of the accident entailed, and defendant offered to submit proof *in extenso* to demonstrate the burden which the trial imposed upon defendant and upon interstate commerce, but the Court sustained plaintiff's objection to the offer (Case, pp. 61, 176).

The jury rendered a verdict in favor of the plaintiff and against the defendant in the sum of $7,500 and judgment thereon was entered accordingly (Case, p. 11). From this judgment, the present appeal is taken (Case, pp. 13 and 14).

II.

Grounds of Appeal Relied Upon.

Appellant relies upon Grounds of Appeal numbers 1, 2, 3, 7, 8 and 9 (State of Case, pp. 18-20).

III.

Questions Involved.

1. Should not the Court below have directed a verdict in favor of the defendant on the grounds that the evidence did not disclose any negligence of defendant, as alleged in the complaint, as the proximate cause of the injury complained of, and that plaintiff's own negligence was the proximate cause of such injury?

2. Should not the Court below have dismissed the action, because to compel defendant to submit to trial in that Court imposed an unwarranted burden on interstate commerce?

IV.

ARGUMENT.

(a) The Court should have directed a verdict in favor of the defendant.

Grounds of Appeal numbers 2 and 3 apply to this point. They are as follows:

> "2. The said Hudson County Circuit Court denied defendant's motion to direct a verdict in favor of defendant and against plaintiff.
>
> "3. The said Hudson County Circuit Court submitted to the jury the determination of the negligence of the defendant and the contributory negligence of the plaintiff."

There was no evidence to show that the proximate cause of plaintiff's injury was the alleged negligence of the defendant, as quoted on pages ~~1 and~~ 2 of the brief, *supra*. On the contrary, plaintiff's own lack of care of himself is shown to have been the proximate cause. He had worked in that vicinity and at the particular work in which he had been engaged just prior to the accident, about three years (Case, p. 22). He knew that the cars on the "empty" track were moved in and out of the yard, along that track. He testified that some signals were usually given before the cars were moved, but the testimony clearly shows that those signals were for the direction of the train crew in moving the train, and not particularly for persons in and about the track, unless the train crew saw them there (Case, pp. 32, 33, 56, 133, 165).

There is nothing in the case to show that the train crew knew, or had any reason whatsoever to anticipate, that plaintiff was near the "empty" track or had any duty calling him there, so as to raise a legal duty on their part to warn him of

any intended movement of the cars; and indeed, no amount of investigation or precaution on their part would have made any difference in this respect, if plaintiff's testimony is to be taken as true, for, according to his own story, he walked around the stairway and stepped through the small space—be it ten feet or five—between the steps and the nearest car, when, suddenly there was a "terrible crash" and he was struck by the end of the nearest car and thrown to the track. This could have taken but an instant, and in the ordinary conduct of the train movement no amount of precaution by the train crew, reasonable or otherwise to the utmost, could have prevented the accident; for it happened too quickly for them to have observed the presence of plaintiff and to warn him of the train movement, and could readily have happened after the signals to move the train had been given and too late to relay stop signals (Case, p. 167).

The plaintiff himself could have avoided the accident if he had exercised even a scintilla of care for his own safety, for, again according to his own story, there was a space of from three to four feet between the cars and the side of the breaker, and five—or ten—feet between the end of the stairway and the first car, and it was into this space that he stepped to pick up the hatchet without taking any precaution to ascertain whether the train crew were present or a movement of the cars was contemplated. This is clearly demonstrated by his own testimony. He did not inform himself of the presence of the train crew nor notify them of *his* presence nor of his intention of doing what he did. He had sufficient space to have kept clear of any movement of the cars that might take place if he had tried to do so, but even then common prudence

and care for one's safety should have moved him to refrain from placing himself in the position in which he did. He must have gone too near the track unnecessarily or he could not have been struck. And he did this voluntarily. There was nothing that required him to do it. The only other explanation of the occurrence, on plaintiff's version, is that the car jumped off the track and hit him, and then immediately jumped back again and caught his foot under the wheel; which, of course, is ridiculous.

But according to other witnesses, and his own statements to them, plaintiff voluntarily placed himself in a position of danger by going upon the track behind the car to urinate, as above indicated; and if he did this without notifying the crew of his presence there, he was a trespasser to whom defendant owed no legal duty except to refrain from wilfully injuring him. There is neither allegation nor evidence of wilful or wanton injury of the plaintiff by defendant, nor is there any evidence of negligent injury; and plaintiff's own voluntary, negligent and heedless act was clearly the proximate cause of the injuries he sustained.

In *Harris* v. *S. S. Co.*, 75 N. J. Law 861, this Court said:

> "We think a verdict for the defendant should have been directed in view of the facts which the evidence exhibited. * * *
>
> "When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless

his action was justified by a custom of which the defendant knew or ought to have known."

See also:

Swanson v. *C. R. R. Co.*, 63 N. J. Law 605.

It is respectfully submitted, therefore, that the Court below erred in refusing to direct a verdict in favor of the defendant, and in submitting the issues to the jury for determination.

(b) The Court below should have dismissed the action.

Grounds of Appeal numbers 1, 7, 8 and 9, apply to this point. They are as follows:

"1. The said Hudson County Circuit Court denied defendant's motion to dismiss the cause.

"The following questions were overruled:

"To the plaintiff—

"7. 'And referring to the record and the date of the issuance of the summons, which was September 9th, 1927, pretty nearly a year after the accident, will you state, Mr. Kopenhafer, how it was that you came to start this action a year after the accident happened, and that you didn't start it before?'

"8. 'How did you come to bring this suit in Hudson County Circuit anyway?'

"9. The said Hudson County Circuit Court refused to permit defendant's counsel to cross examine plaintiff to show all the circumstances surrounding the commencement of the suit, how and when and why and under what conditions and terms it was brought, and also to show the burden that it casts on the defendant railroad company, to defend the suit in this State, under the circumstances of this case, to bear out the motions made to dismiss the action as an unwarranted burden on interstate commerce."

To require the defendant to defend this action in the Courts of New Jersey, at a point in a foreign state remote from the scene of the accident and where neither plaintiff nor defendant reside, not only imposed an unwarranted burden upon interstate commerce but is completely violative of fixed principles of justice and fairness, and contrary to the law of the land.

In the old English law, every freeman was entitled to a trial in his own vicinage. The Crown evidently found it very advantageous to itself to fix trials at remote parts of the realm where the individual was unknown and where either he was unable to attend at all or able to do so only at great inconvenience, and where he was often unable to procure the attendance of witnesses in his behalf. There the individual was at the mercy of the Crown, and evidently the situation in this respect at last became unbearable, because it is a matter of common knowledge that at last there came an uprising which eventually wrung from the Crown, at Runnymede, in 1215, the Magna Charta, which, among other things, contained the provision vouchsafing to the subjects a speedy trial by a jury of their peers in their own vicinage.

Our own Statute in New Jersey recognizes this fundamental principle, for it provides that:

> "201. Every local action shall be tried in the county where the lands in question are situate or the cause of action arose, unless the supreme court in actions pending therein shall order the trial to be at the bar of the supreme court, which shall only be done if the matter or property in dispute shall be of the value of three thousand dollars; if the party who shall obtain a rule for a trial at bar shall not recover to the amount of the said sum, he shall be entitled to no more costs than if the cause had been tried at the circuit."

"202. An action merely transitory shall at the discretion of the court be tried in the county in which the cause of action arose, or the plaintiff or defendant reside at the time of instituting such action, or if the defendant be a non-resident, in the county in which process was served upon him."

3 Comp. Stat. 4113, Secs. 201, 202.

Our Legislature has also provided with regard to service of process upon foreign corporations that:

"In all personal suits or actions hereafter brought in any Court of this State against any foreign corporation, process may be served upon any officer, director, agent, clerk or engineer of such corporation either personally or by leaving a copy thereof at his dwelling house or usual place of abode, or by leaving a copy at the office, depot, or usual place of business of such foreign corporation; *provided,* that in case there is no officer, director, agent, clerk or engineer of said corporation residing in this state, nor any office, depot or usual place of business in this state, process may be served upon any motorman, conductor or servant of said corporation while in the discharge of his duties.

2 Comp. Stat., p. 1653, Sec. 88.

"In all personal suits or actions hereafter brought in any Court of this State against a foreign corporation the summons may lawfully be served upon any officer or director, or upon any ticket agent or freight agent, of such corporation, personally, in the county in which the venue is laid.

"If the defendant be a domestic corporation, then the summons may lawfully be served personally on any officer or agent in charge of its principal office, or on any ticket agent or freight agent employed in any of its offices in the county in which the venue is laid."

P. L. 1916, p. 410, Chap. 198.

And it is in accordance with these enactments that plaintiff seeks to justify his action against the defendant in impleading it in the present case in a tribunal foreign to the residence of the parties and the situs of the accident.

The United States Government, when it took over the operation of the railroad systems of this country during the World War, saw the viciousness of the situation involved, and to curb it the Director General of Railroads promulgated general orders No. 18 and No. 18A, which provide as follows:

"GENERAL ORDER NO. 18.

"April 9, 1918.

"Whereas the act of Congress approved March 21, 1918, entitled 'An Act to Provide for the Operation of Transportation Systems while under Federal Control,' provides (S. 10) 'that carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President.'

"But no process, mesne or final, shall be levied against any property under such Federal control (40 Stat. at L. 451, 456, Chap. 25, Comp. Stat. Sections 3115¾a, 3115¾j, Fed. Stat. Anno. Supp. 1918, pp. 757, 762); and,

"Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating

absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government, and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs;

"It is therefore ordered, that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

"GENERAL ORDER NO. 18a.

"APRIL 18, 1918.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"'It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.'"

These orders were sustained by the United States Supreme Court in *Ala. & Vicksburg Ry. Co.* v. *Journey,* 257 U. S. 111; 66 L. Ed. 154 (1921), where it said that:

"It was within the power of the Director General to prescribe the venue of suits; and the facts set forth in the order show both the occasion for it and that the venue prescribed was reasonable."

The United States Supreme Court has also recognized and sustained the principle in

Davis, Dr. Genl. v. *Farmers Co-op. Equity Co.,* 262 U. S. 312; 67 L. Ed. 996 (1923);

A. T. & S. F. Ry. Co. v. *Wells,* 265 U. S. 101; 68 L. Ed. 929 (1924);
Di Santo v. *Penna.,* 273 U. S. 34, at p. 37; 71 L. Ed. 524, at p. 526 (1927);
Mich. Cent. R. R. Co. v. *Mix,* U. S. ; 73 L. Ed. 266; U. S. Adv. Ops., March 1, 1929, No. 7, p. 266 (1929).

As previously stated, this case was on trial four days in Hudson County Circuit Court, in Jersey City, New Jersey, carrying over one week-end. There were a large number of witnesses present in behalf of defendant, all of whom had to be transported from the vicinity of Lykens, a remote point in the coal mining region of Pennsylvania, and who had to be cared for by defendant during the course of the trial. It was necessary either to pay their expenses during this time or to transport them back and forth from their homes and the place of trial. The latter alternative was not only impracticable,—it was impossible. The train service could not accomplish it. None of these witnesses were amenable to process of subpoena to compel their attendance in the New Jersey Court. Defendant was forced to the procedure of either persuading them to attend voluntarily and transport them to the trial or to take their depositions in advance of trial. The unsatisfactory procedure and injustice of trying a case of this character by depositions is perfectly apparent. Defendant does not know what facts it has to meet until plaintiff has put his case in evidence, and, therefore, is forced to surmise as best it can in advance what evidence to take by depositions. No matter how clear its forethought might be in this respect, elements are bound to crop out in the course of the trial which it is impossible to satisfactorily meet unless the witnesses are in court

and available for use as the case progresses. Testimony taken out of the presence of the Court, before a Commissioner having no power to rule on the propriety of the evidence, invariably leads to controversies between counsel and the incumbering of the record with a mass of incompetent and irrelevant testimony, all subject to innumerable objections, which have to be ruled upon by the Court when read at the trial, and also subject to the inevitable "fishing" of opposing counsel into every conceivable channel in the hope of gaining information that is desired in advance, and which, when once disclosed, even though later held inadmissible, has caused mischief which cannot be rectified. By the time the depositions have been threshed out upon the trial, the jury, who absolutely do not understand this procedure, no matter how carefully it is explained to them, are completely mystified and misled. Jurors wonder why the witnesses have not been brought into Court, and inevitably conclude that something irregular is being done by the defendant (who has been thus forced into this position through no action of its own), and that it is trying to accomplish something which it is afraid to bring out into the open in court. Other harmful effects will readily occur to the Court.

The only alternative is to incur the expense and inconvenience of transporting and maintaining such witnesses as will voluntarily attend, as was done in this instance; and the uncertainty of securing such voluntary attendance of witnesses (who naturally are unwilling to leave their homes and business and go to distant and remote places in order to mix in other people's controversies), as well as the cost of such procedure, is also readily apparent. In addition to the cost and inconvenience involved in such attendance is the expense

and inconvenience of securing others to take their places in their regular pursuits while they are absent at the trial, as well as the hazard resulting from the employment of inexperienced substitutes. In the present case the attendance of the three physicians from Lykens—Dr. Lehr, Dr. Perfect and Dr. Bobb—left Lykens to get along as best it could without medical and surgical attendance during their absence (Case, pp. 106, 114, 119).

Both plaintiff and defendant were residents of the State of Pennsylvania when the alleged cause of action arose in that State. Defendant is amenable to service of process in New Jersey and conducts business here. It is also amenable to service in Pennsylvania. The trial of the case at Jersey City, county seat of Hudson County, entailed upon the defendant, a railroad corporation engaged in interstate commerce, the burden, inconvenience and expense of transporting its voluntary witnesses from a distant point in the State of Pennsylvania, and deprived defendant of the privilege and opportunity of enforcing the attendance of involuntary witnesses by process of subpoena and forced it to secure the testimony of involuntary witnesses in Pennsylvania by the cumbersome and unsatisfactory method of taking depositions, or else lose the benefit of their evidence.

Under similar circumstances the United States Supreme Court has held that:

> "Litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations and that this impairs efficiency in operation, and causes, directly and indirectly heavy expense to the carriers—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden on interstate carriers

imposed specifically by the statute herein assailed, is a heavy one, and that the resulting obstruction to commerce must be serious.

"* * * The orderly, effective, administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise and in which the transaction giving rise to it was not entered upon * * * and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at a reasonable cost. * * * Avoidance of waste in interstate transportation as well as maintenance of service has become a direct concern of the public. With these ends the Minnesota Statute as here applied unduly interferes by requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

Davis v. *Farmers Co-op. &c. Co.*, 262 U. S. 312; 67 L. Ed. 996 (1923).

And in the case of *A. T. & S. F. R. R. Co.* v. *Wells*, 265 U. S. 101; 68 L. Ed. 928 (1924), the United States Supreme Court held that a Texas statute which permitted a resident of another state to prosecute in Texas a cause of action which arose elsewhere, against a railroad corporation of another state, engaged in interstate commerce, and which had not consented to be sued there, was invalid. The Court said:

"For the reasons stated in Davis *v.* Farmers Co-op. Equity Co., 262 U. S. 312, 67 L. Ed. 996, 43 Sup. Ct. Rep. 556 (Decided since the entry of the judgment here under review) such a suit necessarily and unreasonably burdens interstate commerce; and the statute is construed and applied as invalid."

See also:

Weinard v. *C., M. & St. P. Railroad*, 298 Fed. Rep. 977.

The question has been recently raised and decided in the First District Court of Jersey City, by Judge CARRICK, who followed the case of *Davis* v. *Farmers Co-op. Equity Co., supra.*

His memorandum, reported in 48 N. J. Law Journal, 179 (March 12, 1925), is as follows:

"FIRST DISTRICT COURT OF JERSEY CITY

MISCHLER FISH CO., *Plaintiff,* *v.* AMERICAN RAILWAY EXPRESS CO., *Defendant.*	Case No. 147328 MEMORANDUM.

JOHN R. PHILLIPS, Attorney for Plaintiff.

W. B. HARLEY, Attorney for Defendant.

The defendant applies to set aside the service of summons in the above case upon the ground that this court is without jurisdiction.

On the facts as conceded in the briefs of counsel for both parties I can see no substantial ground on which to distinguish the question presented from that dealt with by the Federal Supreme Court in the case of Davis *v.* Farmers' Co-op. Equity Co., 262 U. S. 312 (Book 67 L. Ed. 996). The shipment originated outside of this state, nor were the goods transported at any time within this state, delivery was made in New York; neither of the parties is a citizen of this state. That the defendant is authorized to do business in New Jersey does not, I think, distinguish this case in any essential way from the Minnesota case with which the Federal Supreme Court is

dealing where the defendant was soliciting business in Minnesota. The Davis case as well as the other cases cited and discussed upon the briefs of the opposing counsel I think support the defendant's argument that to permit this suit to proceed would be an undue burden upon interstate commerce.

The rule to show cause will be made absolute.

The ruling in this case will likewise govern the disposition of the parallel case of Lay Fish Co. *v.* American Railway Express Co. which is instituted by the same counsel.

(signed) CHARLES L. CARRICK
Judge."

In *Mich. Cent. R. R.* v. *Mix,* U. S. ; 73 L. Ed. 266; U. S. Adv. Ops., March 1, 1929, No. 7, p. 266 (1929), *supra,* the Supreme Court of the United States said:

"We have no occasion to inquire into the local practice. The constitutional claim sustained in *Davis* v. *Farmers Co-op. Equity Co., supra,* was not that under the 14th Amendment as in *Rosenberg Bros. & Co.* v. *Curtis Brown Co.,* 260 U. S. 516, 67 L. Ed. 372, 43 Sup. Ct. Rep. 170. IT WAS ASSUMED THAT THE CARRIER HAD BEEN FOUND WITHIN THE STATE. THE JUDGMENT WAS REVERSED ON THE GROUND THAT TO COMPEL IT TO TRY THE CAUSE THERE WOULD BURDEN INTERSTATE COMMERCE AND, HENCE, WOULD VIOLATE THE COMMERCE CLAUSE. No local rule of practice can prevent the carrier from laying the appropriate foundation for the enforcement of its constitutional right by making a seasonable motion."

And in *Di Santo* v. *Penna.,* 273 U. S. 34, at page 37, 71 L. Ed. 524, at page 526 (1927), that Court also said:

"A state statute which by its necessary operation directly interferes with or burdens

> foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed."

We are not unaware of the view enunciated in *Metcufskie* v. *P. & R. Ry. Co.*, 97 N. J. Law 100 (1922), deciding that it is not contrary to the public policy of this State to hold a defendant amenable to service of process in actions merely transitory in any jurisdiction where at the moment service may be accomplished. This might be particularly so if legal service upon him can be made only at the spot where process is thus served, and where he, by moving from place to place defeats the possibility of legal service at any other point. But that is not the case here.

The present case involves something more than the mere right of the plaintiff to sue a migratory defendant in a transitory action in any jurisdiction in which he may be able to obtain service of process upon such defendant. It goes to the very root of the question whether railroad companies engaged in interstate commerce, who are obliged to carry on their multitudinous and diversified business activities for the convenience and satisfaction of the public, under the pressure and stress of the onerous exactions and regulations imposed upon them by the Federal Congress and Interstate Commerce Commission, as well as the Legislative enactments and the regulations of Public Utility Commissions and municipal boards in the jurisdictions in which they transact their affairs, are to be compelled to go to tribunals for trial distant and remote from the places where alleged causes of action arise, the residence of plaintiff, the location of the defendant, and the situs of witnesses and the evidence, and be subjected to all the burden, inconvenience and difficulty that such a situation entails, regardless of the interference

with and effect upon the orderly transaction of its business and the consequent disadvantage to the public, at the behest, whim or caprice of plaintiffs who, for reasons of personal advantage to themselves and studied disadvantage to interstate carriers, see fit to thus implead them.

The mere fact that the present defendant has a legal situs in New Jersey which makes the service of process upon it, issuing from a New Jersey court, otherwise valid, does not in any way interfere with the opportunity for legal service of process upon it in Pennsylvania, issuing out of a court of that State. No matter in how many other states it may gain a footing, whether through the location of its property, or the transaction of business, or the filing of its charter there, or by otherwise complying with the exactions of the laws of such state, it never loses its fixed situs in the state from which it derives its corporate existence. It is always present there, and may be served there.

When, therefore, the cause of action arises against such a defendant through an occurrence in the state in which it is a citizen and resident, in favor of a person who is also a resident and citizen of that state, and where all the witnesses to the event and other evidence pertaining to it, ordinarily reside or are located, it would seem to be self-evident that if a suit involving that cause of action is brought against such defendant and the trial thereof brought on at a point far distant and remote from the locality of the occurrence, the defense of such suit, and the trial of the action under such circumstances, of necessity imposes an unwarranted and illegal burden, inconvenience, difficulty and expense upon, and interference with, the ordinary conduct of its affairs and business, as well as that of the witnesses and others who participate in such defense, and it should not be permitted to prevail.

Such a situation has no resemblance, and is in no way analogous, to a situation where, as in the ordinary transitory action, a defendant of migratory tendencies moves from place to place, in various jurisdictions, and defeats the service of process and the adjudication of the rights of the respective parties, except at the point where plaintiff at last puts process upon him.

The question of the unwarranted burden upon interstate commerce was not involved in the *Metcufskie* case, *supra;* and, in any event, the later decisions of the Federal Supreme Court under the Commerce Clause of the United States Constitution, cited *supra,* would supersede those of a State tribunal if in conflict therewith.

> *Spada* v. *P. R. R. Co.,* 86 N. J. Law 187;
> *Olivit* v. *P. R. R. Co.,* 88 N. J. Law 241;
> *W. & A. R. R. Co.* v. *Hughes,* U. S. ; 73 L. Ed. 268; U. S. Adv. Ops., March 1, 1929, No. 7, p. 268.

This is doubtless what influenced Judge CARRICK in his decision in the *Mischler Fish Company* case, *supra.*

And in the *Metcufskie* case, *supra,* at page 102 of the report, Mr. Justice BLACK, speaking for the Supreme Court, in referring to the authorities cited, very carefully pointed out that

> "* * * it is stated a right of action which has accrued in one state will be enforced in the courts of another, *unless prohibited by law, or unless such enforcement will transgress some policy of the state in which the action is brought.*"

A fortiori would the prohibition apply if the policy of the Federal power were transgressed.

See, also, *30 A. L. R.* 281, note.

And it was doubtless a consideration of just such a situation that led the Federal Congress

to adopt the provisions of Section 51 of the Judicial Code, in part quoted as follows:

> * * * "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that wherein he is an inhabitant";

(*36 Stat. At. L., 1091,* Chap. 231; *Vol. 1, U. S. Comp. Stat., 1916,* pp. 1116, etc.) and which has led the Federal Courts to sustain the principle therein involved.

Ladew v. *Tennessee Copper Co.*, 218 U. S. 357, 54 L. Ed. 1069;

Lee v. *C. & O. RR. Co.*, 260 U. S. 653; 67 L. Ed. 443;

Venner v. *Pa. Steel Co.*, 250 Fed. Rep. 292 (N. J. Dist.);

Newell v. *B. & O. RR. Co.*, 181 Fed. Rep. 698;

Hubbard v. *C. M. & St. P. RR. Co.*, 176 Fed. Rep. 994;

W. U. Tel. Co. v. *L. & N. RR. Co.*, 201 Fed. Rep. 932.

It is respectfully submitted, therefore, that to compel the defendant to submit to the jurisdiction of this Court under the circumstances disclosed by the record, denies its rights, privileges and immunities under the Commerce Clause of the Constitution of the United States, and the acts of Congress of the United States, and imposes an unwarranted, oppressive, undue and illegal burden upon interstate commerce.

It is respectfully submitted that the judgment under review should be reversed and the action dismissed.

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