F. D. Larrabee, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, (after stating the facts as above.) It is assigned for error that the court refused, at the request of the defendant, at the close of all the evidence in the case, to return a verdict for the defendant. The plaintiff's evidence, if believed, was sufficient to sustain the verdict. This is not contested, but it is said the plaintiff's witnesses were unworthy of credit, and that their testimony was disproved by the witnesses for the defendant. It was for the jury to say whether, and how far, the evidence was to be believed. If, by giving credit to the plaintiff's evidence, and discrediting the counter evidence, the plaintiff's case was made out, the court should not have withdrawn the case from the jury.

One of the grounds for a new trial was that the verdict of the jury was arrived at by adding together the several sums each juror thought the plaintiff ought to recover, and dividing the aggregate sum by 12. But the allegation was not proved, and was, indeed, disproved. It was not a quotient verdict. Moreover, the denial of a motion for a new trial cannot be assigned for error.

An interview of the plaintiff's attorney with one of the defendant's witnesses, and what he said about the interview in the course of his argument to the jury, is made a ground of exception. The episode was not noticed by the trial court. No objection was enterred, and no exception taken to anything said or done in relation to it. The matter concerned the attorney's action, and raised a question of professional ethics which had no relation to the case on trial, and cannot affect its decision in this court. If it were otherwise, and the decision of the case depended on our affirming the propriety of the attorney's action, the judgment below would have to be reversed. The judgment of the circuit court is affirmed.

UNITED STATES v. HOWELL et al.

(District Court, W. D. Missouri, St. Joseph Division. December 21, 1892.)

No. 15,243.

1. CONSPIRACY—VIOLATION OF INTERSTATE COMMERCE ACT—INDICTMENT.
Where an indictment, under Rev, St. § 5440, for a conspiracy to commit an offense against the United States, namely, the offense created by section 10 of the interstate commerce law, as amended by the act of March 2, 1889, (25 Stat. 858,) charges a conspiracy between certain lumber merchants and their servants and an employe of a railroad company to procure less than the established rates by false weighing of the lumber shipped, such weighing being done by the railroad employe, the jury, in order to convict, must find an agreement or combination between two or more of the defendants for the purpose named, and also, as an overt act, the actual false weighing of lumber by such employe.

2. SAME—OVERT ACTS—SINGLE OFFENSE.
Where the evidence shows one continuous agreement or intention to secure such underrate, proof of a single overt act in furtherance of it is sufficient to make out the offense; and proof of separate overt acts will not show more than one offense where the agreement or combination is one and continuous.

3. SAME—EVIDENCE—VARIANCE.
The indictment charged that the shipment was made from East Atchison, Mo., where the underweighing was accomplished, to points in Nebraska and Colorado. The evidence showed that the lumber was shipped from Atchison, Kan., and it was also shown that the rates from Atchison and East Atchison were the same. *Held*, that this variance was immaterial, if the overt act charged—the underweighing—was accomplished at East Atchison, within the jurisdiction of the district court trying the indictment.

4. SAME—ESTABLISHMENT OF RATE—POSTING SCHEDULES.
The posting of schedules required by the interstate commerce act is solely for the information of the public, and is not necessary to the establishment of the rate; and hence, where a rate is known to the persons operating the railroad as a fixed rate, having a uniform character, and undertaking to treat all shippers alike in proportion to the distances shipped, then such rate is established, within the meaning of the section under which the indictment was found.

5. SAME—EVIDENCE.
As evidence of the establishment of the rate, the jury may consider the testimony of those employes of the carrier having charge of that branch of its business, and also the fact that it posted a notice stating that schedules of rates could be inspected upon application to its agent.

6. SAME—INDICTMENT—MATERIAL ALLEGATIONS.
The allegation in the indictment that the railroad employe therein named was employed by the railroad to weigh the lumber shipped is material, so far as concerns the overt acts of underweighing therein charged, but it is immaterial whether he was generally employed for the purpose.

7. SAME—UNLAWFUL ACTS OF AGENTS.
The shippers of the lumber may be convicted under this indictment upon a showing that their servants procured the unlawful discrimination in rates as therein charged, provided they knew of such unlawful acts, permitted them to continue, and received, directly or indirectly, the benefit of them; for it was their duty to see that the law was not violated by their subordinates by reason of their own negligence.

8. SAME—EVIDENCE—RESIDENCE OF PARTIES.
In order to the conviction of parties charged with conspiracy it is not essential that they should have resided within the jurisdiction of the court trying the indictment at the time the conspiracy was formed, if the conspiracy was entered into, and had its headquarters, in that jurisdiction.

9. SAME—CIRCUMSTANTIAL EVIDENCE.
The formation and existence of the agreement or combination charged may be shown by circumstantial evidence, and the overt act proved may be considered as one of the circumstances tending to show it.

10. SAME—ACCOMPLICES.
It is not necessary that the testimony of an accomplice in the conspiracy charged be corroborated in every part of the act which goes to make up the offense, but it is sufficient that he be corroborated in some material fact.

At Law. Trial of an indictment under Rev. St. § 5440, against George W. Howell, Herbert N. Jewett, and S. R. Howell, shippers, Ed. Tibbetts and Edward F. Pierce, their servants or agents, and W. D. Mott, an employe of the Chicago, Rock Island & Pacific Railway Company and the Chicago, Kansas & Nebraska Railway Com-

pany, for conspiring to violate the interstate commerce act by false billing, false weighing, and false reports of weight of lumber, and thus obtain a discrimination of rates of transportation. The fraudulent weighing and billing were alleged to have been done by the defendant Mott, by procurement of the defendants Tibbetts and Pierce, acting for the other defendants.

Geo. A. Neal, U. S. Atty.
W. R. Smith and Hall & Pike, for defendants.

PARKER, District Judge, (charging jury.) You have heard the evidence in this case, and the arguments of counsel upon the case. It now becomes the duty of the court to give you the principles of law to apply to that state of the case which you find to be true from the testimony. You are aware that your verdict, as does the verdict of every other jury, consists of two things,—the truth as you find it, and the principles of law applicable to that truth. In that way you get at the result which we call a "verdict." The principle of law given you is that which defines the crime, aside from other principles given by the court, instructing you as to how you should view the evidence of witnesses, and some other subordinate matters of that kind. The definition of a crime is that which the law declares to be the offense, and to which you are to take and apply the evidence to see whether the evidence makes out such a state of case as the law says shall be established to make the crime. Now, this is not a charge for the actual commission of an overt crime, but is only a charge where it is alleged the parties agreed to commit a crime called in law a "conspiracy." It is laid down under the law as it now stands, by section 5440, Rev. St., as amended by the act of congress, as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years."

You are aware of the fact that under the law of the United States you do not fix the punishment, but you pass upon the question of the guilt or innocence of the party charged. This is the statute under which this offense is charged. There are other statutes that have been passed, comprehended in what is usually called the "Interstate Commerce Act," together with the several amendments that have been passed since that time. It is by this act that the overt act—that is, the open act; the actual act done in furtherance of the conspiracy or to effect the object of the conspiracy —is alleged to be a crime. It was first made an offense under that act for common carriers of property for hire to do certain things which are set out in the section of the law as amended by the act of congress of March 2, 1889. It is provided there that any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof,

or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates, then established and enforced on the line of transportation of such common carriers, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district where such offense was committed, be subject to a fine not exceeding $5,000, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court, for each offense.

That is the section of the law which has reference to the common carrier. There was no provision under this act that undertook to declare it a penal offense for the shipper to do certain things. There was no penalty that was applicable to the act of the shipper until the amendment of this law, March 2, 1889. On its first enactment it was manifest to the lawmakers that the railroad companies alone were the parties who would make this unjust discrimination against the people of the country, against the consumer, against the man of small business, against the man who is selling in small quantities, against the man who is willing to assist his neighbor by setting up that generous rivalry in trade that promotes the welfare of the consumer. It was not conceived by the lawmaker who would be the principal party in interest that would be benefited by this discrimination. But the great shipper, the large wholesale dealer, the man running the combine, or the trust or the combination entered into by vast enterprises, would be the one that would seek and was promoting this discrimination in the freight rates of the country when this last law was passed. It was accordingly seen that that would be the purpose of parties so interested. It was therefore declared by the amendment passed on the 2d day of March, 1889, that for certain conduct upon the part of shippers a penalty should be prescribed. The law is as follows:

"Any person, and any officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and enforced on the line of transportation, shall be deemed guilty of a fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court."

Now, that enumerates the different methods that may be used by the carrier for the purpose of carrying on this discrimination, and it contains a general sweeping clause providing that all other devices

or means, such as by reporting falsely to the carrier the contents of the package, and in that way getting a discrimination, or by any other means or contrivance or device, if he seeks to obtain this discrimination for his own benefit, he is liable to a penalty. You and I are to take a view of all the facts and circumstances, and are to enforce the law if it has been violated. If a law is a bad law, it should be enforced in order that it may be the sooner known and repealed, and, if it is a good law, it should be enforced in order that justice may be done. We have nothing to do with the good or bad policy of the law. The question, and the only question, that we are to inquire into, is to first ascertain what the law is, and then whether it has been violated; and we sometimes are enabled to take a more comprehensive and proper view of the state of case by understanding the good or bad policy of the law. Now, it seems to me at a glance that the good policy of this law is apparent, and especially of this provision prohibiting the conduct of the shipper, who is more largely interested in getting reduced rates than any one else— Gentlemen, the shipper, and especially the large shipper, has a great interest to induce him to get a discrimination of rates in his favor,—to get an "underrate," as it is called; and the man who gets a discrimination in his favor in the shipment of his freight, especially if he is doing a large business, seeks thereby a large personal benefit to the detriment of his rival in a small business, and by the same process works an injury to business all over the country, whether he be a lumberman, a wholesale groceryman, or a large shipper.

How can he do that? In the first place, by means of this discrimination he is able to overcome all rivals, and press out smaller business not as well situated in that respect as he is; and not only the rival wholesale dealer, but he is so situated as to be able to do as the proof shows these defendants did. He is able to have branch retail houses all over the country, and operate a business of that kind, caused by the discrimination in his favor. It is therefore agreed that the purpose of this law was to protect the people. That was the intention of it. There was great wisdom in providing that, if there was a discrimination to be made by this means, there should be a penalty attached to such conduct. These are the two provisions of the law that create an offense of the character I have named upon the part of the common carrier or his agent, and also conduct of a like character, or conduct that may be similar, to some extent, upon the part of the shipper. The shipper may commit the offense with or without the concurrence of the other party.

It is alleged in this indictment, in connection with other things, that the purpose of this conspiracy was to enable S. R. Howell, George W. Howell, and Herbert N. Jewett to obtain this discrimination of rates or to obtain rates less than the regular rates charged by this railroad company, specified in the indictment. That was the purpose of the conspiracy. Remember, you are not trying them for doing that, but for conspiring to do that. You are required to find that Mott, who is alleged to be the man who did the overt