

ositions submitted to us arise from the conclusions stated in the court below, as follows:

"The contract between these parties cannot be treated as a sale. In some aspects it was like a shipment on joint account, with special terms. If it be regarded as a partnership in a particular adventure, those conditions of the copartnership by which the defendants were to secure to the plaintiffs at least \$2.50 per ton at in-take weight for the ice shipped, and were themselves to bear all losses, must be regarded. It is better to treat it as a special contract, according to its terms, by which the defendants undertook, in consideration that the plaintiffs would ship the ice, to return to them, free of any expense, \$2.50 per ton, before the property should pass out of the control and custody of the shippers. This action proceeds on that view, and is for damages for the breach of such a contract. Whatever view be taken of the nature of the contract, the same result will be reached. The defendants have wholly failed to perform their part of it. They have not been prevented by any wrong on the part of the plaintiffs. The loss of the plaintiffs from the defendants' breach is the same, and the damages suffered by them are the same, under any interpretation of the contract. No act or acts of the plaintiffs can be held as a waiver of its terms."

We agree to these expressions. Under the circumstances the plaintiffs below were entitled, for their own protection, to make the best of the ice which they could by reasonable efforts, after the defendants below refused to accept it, and they are accountable only for the net proceeds. They have been charged with these by the court below. In attempting to secure the net proceeds, they paid the freight, which the defendants below were holden to pay in any event, and the latter cannot complain that, in the computations of the court below, they were charged with it. The plaintiffs below were charged with the net amount they recovered from the barge for damage to the ice. Therefore, on the principles of law applicable to persons who are compelled to intervene to save property unjustly thrown back on their hands, the plaintiffs below have been credited and debited with the various sums with which they should have been. These principles are so familiar that we do not deem it necessary to elaborate them. The judgment of the circuit court is affirmed.

BUTLER et al. v. MACHEN.

(Circuit Court of Appeals, First Circuit. January 17, 1895.)

No. 110.

TRIAL.—INSTRUCTIONS.—CONSTRUCTION OF CHARGE AS A WHOLE.

Although disconnected sentences of the charge, if taken alone, would seem to indicate that the jury might substitute their own opinion for the evidence produced at the trial, there is no error if these sentences, when read with the remainder of the charge, would bear no such meaning.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Edward C. Machen against Paul Butler and Adelbert Ames, administrators c. t. a. of Benjamin F. Butler, deceased, for the sum of \$17,875. Upon the trial of the case the court, upon the question of proof and preponderance of evidence, charged the jury as follows:

"There are certain rules touching what we call the 'burden of proof,' to which I desire to call your attention. In criminal cases, for a reason which I need not explain to you, the law holds the United States to strict rules as to the burden of proof. But in civil cases, where the issue must be determined one way or the other,—either one party or the other must prevail,—the law requires only what is called a 'preponderance of evidence.' That is to say, if, upon a certain proposition which the plaintiff is bound to prove, or upon a proposition which the defendant is bound to prove, after you weigh all the evidence in the case, you have an opinion in favor of the plaintiff upon the issues which he is bound to prove, or in favor of the defendant upon the issues which he is bound to prove, then you will act upon that opinion, no matter how slight it may be, and no matter how light may be the preponderance—how small may be the preponderance—of evidence in favor of it. Upon the issues which the plaintiff is bound to prove there must be, in order to enable you to find these issues in his favor, a preponderance of evidence in his favor, and so upon the issues which the defendant is bound to prove. I do not know that I can explain what is meant by preponderance of evidence, except that the result of it must be not merely guesswork on your part. It is not sufficient for you to shirk, under cover of the rule of mere preponderance of evidence, by simply guessing; but there must be sufficient evidence in the case—a sufficient preponderance of evidence—to enable you to form an opinion. No matter how doubtful or uncertain you may be as to the correctness of that opinion, if it is an opinion based upon the balancing of all the evidence, no matter how weak, or how doubtful you may be as to its correctness, you are entitled to follow that opinion."

The defendants sued out a writ of error, and assigned this charge as their second assignment of error.

George O. Shattuck and Frank L. Washburn, for plaintiffs in error.
Anson Maltby, for defendant in error.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. The first assignment of error having been waived, the only question to be decided is raised by the second assignment of error, which relates to the correctness of the charge to the jury of the court below. It is always likely to mislead, if a single expression in instructions to a jury is separated from its connection, and verbally criticised. In this case, strictly correct instruction as to the rule of preponderance of evidence was given, but the presiding judge went further, and attempted to make that rule more intelligible to the jury. In so doing he made use of expressions which, it is argued, in effect authorized the jurors to substitute their personal opinions in respect to the rights of the litigants for the evidence produced at the trial; and the definitions of "opinion" given by various lexicographers are pressed in argument to show the error of such instruction. We should have no doubt about our duty if we construed the charge to the jury in the same way as the plaintiffs in error. But that construction can only be sustained by disregarding a large and important part of the language of the court in immediate connection with which the expression "opinion" was used. In every sentence the jury was, in effect, and almost in terms, told that they were to be controlled by the preponderance of evidence. Read together, the only fair and reasonable interpretation is that, in reaching their final conclusion and verdict, they must be governed by

the preponderance of evidence, if they found in it any preponderance. There is no such uncertainty in the charge of the court as warrants the theory that the jury may have been misled as to the rules of law by which they should be controlled in pronouncing their verdict. Judgment affirmed.

UNITED STATES v. MISSOURI PAC. RY. CO.

(Circuit Court, D. Kansas, S. D. September 14, 1894.)

1. INTERSTATE COMMERCE — DISCRIMINATING RATES — INJUNCTION — SUIT BY UNITED STATES.

Under the amendments by the acts March 2, 1889, and February 10, 1891, to the twelfth section of the interstate commerce law, authorizing and requiring the commission to execute and enforce the act, and providing that on the request of the commission it shall be the duty of any district attorney of the United States to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of the act, and for the punishment of the violations thereof, the district attorney so requested may, under the direction of the attorney general, prosecute a suit in the name of the United States against a railroad company to enjoin it from discriminating in rates against one city in favor of another city.

2. SAME—PRELIMINARY INVESTIGATION BY COMMISSION.

Under such amendment, the formal preliminary investigation by the commission, authorized by the original act, is not necessary to vest jurisdiction in the court.

Suit by the United States against the Missouri Pacific Railway Company to enforce the provisions of the interstate commerce law.

Morris Oliggett, Asst. U. S. Atty. (W. C. Perry, U. S. Atty., of counsel).

J. H. Richards and C. E. Benton (B. P. Waggener, of counsel), for defendant.

WILLIAMS, District Judge. This case is submitted to the court upon a demurrer by the railway company to the bill of complaint. For the purposes of this submission, the facts alleged in the complaint are to be taken as true. The bill avers that:

"This action is brought by the authority of and under the direction of the attorney general of the United States, which said authority and direction is given and made in pursuance of the request of the interstate commerce commission of the United States that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters hereinafter complained of."