

of the appellant not only to procure the order, but to see to the proper lodgment of the same.

The case then presented is whether the appellant, without having obtained an order of appeal returnable within 30 days, in accordance with the rules of this court, and where our rule in relation to filing the transcript has not been complied with, shall now be allowed to docket the cause and have the same heard. The rules of this court in regard to the return day of appeals and to the filing the transcript are directory, and it is within the sound discretion of the court to relieve parties who have not complied therewith. While we say this, we also say that the rules of the court, although directory, were made to be observed, and that our patience is tried with applications for relief where counsel have utterly ignored and disregarded their plain requirements. An observance of the rules preserves the rights of parties, and facilitates the business of the court. Disregard of them not only injuriously affects the rights of parties, but delays and embarrasses the court, to the hindrance of other causes. In the case at hand it appears that, although no actual return day was fixed for the appeal, yet at the time of the order the appellee was in court by counsel, who had full knowledge of the proceedings consenting to an informal appeal bond, and that, although no proper order enlarging the time of filing the transcript was made and filed in this court, yet the transcript was presented to the clerk at and before our first term after the order of appeal was taken. The decree appealed from was not a money decree, the nonenforcement of which could seriously affect the rights of the appellee, who, it would seem, has only been prejudiced, if at all, by the expenses and trouble of docketing and dismissing the cause, and of contending against the present motion to redocket the same. Considering all these matters, a majority of the judges are of opinion that the exercise of sound discretion requires that the motion to docket be granted, on condition that the appellant shall pay all costs incurred in this court up to this time, including the costs heretofore made in docketing and dismissing under rule 16, and it is so ordered.

PALMER v. CHICAGO HERALD CO.

SAME v. CHICAGO EVENING POST CO.

(Circuit Court, S. D. New York. October 4, 1895.)

1. SERVICE OF PROCESS—CORPORATIONS—WHERE FOUND.

An Illinois corporation, publishing a newspaper in Chicago, had continuously in New York an agent who solicited advertisements for such newspaper, and had authority to contract for the publication thereof at regular rates, the making of such contracts being a substantial part of the corporate business. *Held*, that the corporation impliedly assented to be found in New York, and service of summons might be made upon it there. *Goldney v. Morning News*, 15 Sup. Ct. 559, 156 U. S. 518, distinguished.

2. SAME—MANAGING AGENT—NEW YORK STATUTE.

Held, further, following the decision of the New York state courts, that such agent was a "managing agent," within the meaning of Code Civ. Proc. N. Y. § 432.

These were two actions for libel, brought by Tyndale Palmer against the Chicago Herald Company and the Chicago Evening News Company, corporations organized under the laws of Illinois. The actions were commenced in the supreme court of New York by service of summons, in each case, upon one Thaddeus B. Riker, as a managing agent of the respective defendants, under the provision of Code Civ. Proc. N. Y. § 432, that service may be made upon a foreign corporation, where no officer can be found, and the cause of action arose within the state, upon a managing agent. The defendant in each action appeared specially in the state court, and moved to set aside the service, on the ground that Riker was not its managing agent. This motion having been denied, and the denial affirmed by the general term of the state court, the defendants removed the cases to this court, and moved to set aside the service of the summons. The defendant in each case, in its moving papers, alleged that it had no place of business, officer, agent, or property in the state of New York, and denied that Riker was its agent or authorized to receive service of legal process in its behalf. It appeared, however, that Riker was authorized to solicit advertisements in New York for the papers published by the several defendants, to make contracts therefor at schedule rates, and to transmit applications for special rates to the home offices of the papers in Chicago; that advertisements were inserted in a trade paper describing Riker as the Eastern representative of the papers published by the defendants; and that the names of both papers were painted on the door of the office occupied by Riker.

Wager Swayne, for the motion.

James R. Soley, opposed.

LACOMBE, Circuit Judge. The case principally relied upon—*Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559—decides that service upon an officer or agent of a foreign corporation, who is only casually within the state, and not charged with any business of the corporation there, does not bind the corporation when it is not doing business within the state. Where, however, such foreign corporation carries on some substantial part of its business in the state by means of an agent or representative appointed to act there, it impliedly assents to be found there. It is sometimes not easy to determine what acts constitute a "carrying on business" within the meaning of the authorities. In *U. S. v. American Bell Tel. Co.*, 29 Fed. 17, and *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 4 C. C. A. 403, 54 Fed. 420, there will be found careful discussions of the principles which underlie the rule. In the case at bar it appears that the defendant in each suit has continuously in this state an agent, who solicits advertisements for defendant's paper, and who has authority to contract on behalf of defendant with persons offering advertisements to publish the same in the paper at its regular schedule rates. The making of such contracts is a substantial part of the corporate business, and it may fairly be held that the defendant does business within this state.

The question whether or not, upon the facts now before this court, the agent who makes these contracts is to be held a "managing agent" of the defendant within the meaning of the state statute as to service upon foreign corporations, has been decided adversely to defendant by the general term of the state supreme court. There seems no good reason for giving a different construction to the state statute from that given by the courts of the state in a case where the foreign corporation, by doing business within the state, has impliedly assented to the state regulation as to service of process. The motion to set aside service of the summons is denied.

KIMBLE v. WESTERN UNION TEL. CO.

(Circuit Court, D. Delaware. December 4, 1895.)

PRACTICE—STAYING ACTION TILL COSTS OF FORMER ACTION PAID.

Plaintiff commenced an action in a state court to recover damages for injuries alleged to have been caused by defendant's negligence. The cause was removed by the defendant to the United States circuit court, in which, after the court, on the trial, had instructed the jury to render a verdict for the defendant, the plaintiff submitted to a voluntary nonsuit. The plaintiff afterwards commenced another action against defendant, for the same cause, in the United States circuit court in another district. *Held*, that the plaintiff's proceedings in such second action should be stayed until the costs of the first action were paid, although the first action was prosecuted by plaintiff in forma pauperis, under the act of congress of July 20, 1892 (27 Stat. 252).

This was an action by George T. Kimble against the Western Union Telegraph Company to recover damages for personal injuries. Defendant moved for a stay of plaintiff's proceedings.

Anthony Higgins and Albert Constable, for plaintiff.

Levi C. Bird and Andrew E. Sanburn, for defendant.

WALES, District Judge. The plaintiff has sued the defendant to recover damages for personal injuries alleged to have been received by him in consequence of the negligence of the defendant. He had already sued the defendant for the same cause in the circuit court of the Second judicial circuit of the state of Maryland, from which, on motion of the defendant, the case was removed to the United States circuit court for the district of Maryland. At the trial of the cause, after the close of the evidence, the court, on motion of the defendant's attorney, instructed the jury to find a verdict for the defendant; and thereupon, upon the order of the court, the plaintiff, being called, made default, and judgment of non pros. was entered. On these admitted facts, and on motion of defendant's counsel, the plaintiff has been ruled to show cause why he should not be ordered to pay the costs of the first, before prosecuting the present, action.

Formerly, excepting in actions of ejectment, it was not usual to stay the proceedings in a second action until the costs in a prior one for the same cause, and between the same parties, had been paid.