

Cromwell v. County of Sac, 94 U. S. 351; Nesbit v. Riverside Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746; David Bradley Manuf'g Co. v. Eagle Manuf'g Co., 18 U. S. App. 455, 7 C. C. A. 442, 58 Fed. 721.

The other six bonds do not come within the estoppel, because it does not appear that they were held by any one who was a party to the decree; and the plaintiff in error is not in a situation to ask, as he does, that, in order to uphold them, we disregard the decision of the supreme court of the state, and follow the earlier ruling of the United States circuit court in the chancery suit. It does not appear that he obtained the six bonds, either directly or remotely, from an innocent holder for value; and, as already stated, it must be assumed that he did not buy them until after the state court had declared them invalid. The judgment of the circuit court is affirmed.

CHICAGO, R. I. & P. RY. CO. v. LEE.

(Circuit Court of Appeals, Eighth Circuit. September 21, 1896.)

No. 753.

CARRIERS—WHO ARE PASSENGERS—EVIDENCE.

Where the court, on an issue as to whether one injured in a railroad accident was a passenger on the train, admitted evidence that a few minutes before the accident the conductor of the train looked into the car where plaintiff was, addressed him, and remarked that he would be back soon, it was error to exclude evidence by one of the brakemen that the conductor, who was killed in the accident, did not go to the box car in which plaintiff was riding, while he was in charge of the train, and did not know that plaintiff was riding therein. Caldwell, Circuit Judge, dissenting.

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

W. F. Evans (M. A. Low and J. E. Dolman, with him on the brief), for plaintiff in error.

J. R. McClure, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On October 8, 1894, while the defendant in error, Ray Lee, was riding on a box car in one of the freight trains of the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, the train was derailed, and the defendant in error was injured. He sued the railway company for the damages resulting from this injury. The case was tried to a jury. The two principal issues presented by the pleadings were: First, whether or not the plaintiff was a passenger of the railway company at the time of his injury; and, second, whether or not his injury was caused by the negligence of the railway company. The defendant in error produced his evidence in chief, and rested. The plaintiff in error then produced its evidence in defense, and rested. There was then no evidence in the case to the effect that the conductor or any of the trainmen in charge of the freight train when

it was wrecked had any notice or knowledge that the defendant in error was on that train. The defendant in error thereupon took the stand, and testified that about 25 or 30 minutes before the wreck the conductor of that train looked into the car where he was, said "Hello!" to him, and remarked that he would be back pretty soon. The plaintiff in error then offered to prove by one of the brakemen who was on that train that the conductor, who was killed, did not go to the box car in which the defendant in error was riding at any time while he was in charge of the train, and that he did not know that the defendant in error was riding upon it. The court refused to admit this testimony, and this ruling is assigned as error.

After this ruling had been made, counsel for plaintiff in error requested the court to charge the jury that if they found from the evidence that the conductor of the train first learned that the plaintiff was on the train a few miles east of the place where the wreck occurred, the fact that the conductor did not stop and put the boy off would not create the relation of carrier and passenger between the plaintiff and the railway company, and would not make the defendant liable for the injury in question, even though that were caused by the negligent operation of the train. But the court refused to give this instruction, or any of like character. It did charge the jury: "That if the plaintiff was on this car with the knowledge of the defendant, or any of its agents, for the purpose of being transported over its line of road, and was properly there,—and whether or not he was properly there is a question for you to determine under the evidence in this case,—his relations then to the railway company were those of a passenger, and it is immaterial whether or not he had a ticket, or whether or not he had at the time of the accident paid his fare." The counsel for plaintiff in error excepted to each of these rulings. If, as the court held and charged, the testimony of the defendant in error that the conductor of the train on which he was injured knew that he was riding in a box car on that train before the wreck was competent and material evidence to prove the allegation that he was a passenger, then the testimony offered by the railway company to the effect that the conductor did not approach that car while he was in charge of that train, and did not know that the defendant in error was there, was equally competent and material, and should have been received. An impartial trial requires the admission of competent testimony upon both sides of the material issues involved. On account of the rejection of this testimony, the judgment below must be reversed, and the cause remanded, with directions to grant a new trial.

CALDWELL, Circuit Judge (dissenting). The boy was in a stock car in charge of a mare. The mare was transferred from a car of an eastern railroad company into a car of the defendant railroad company at Joliet, Ill. The boy and mare were carried in the defendant's car from that place to the place where the train was wrecked. Between Joliet and the place of the wreck the train had changed crews three times. On this state of facts it was quite irrelevant

whether the conductor on the train at the time it was wrecked had seen the boy a few minutes before the wreck occurred or at any time. The boy's relation to the defendant railroad company had been established before this conductor took charge of the train. The instruction of the court quoted in the opinion of the majority did not relate to the circumstance of the boy seeing the conductor a few minutes before the wreck, but to what had taken place prior to that time, and long before the conductor, who was killed in the wreck, had anything to do with the train. At least two conductors and crews had preceded him in the conduct of the train before he came on duty. The conductor was killed in the wreck, and the offer was to prove that he "was not at the car containing the boy and the horse at any time after the train left Eldon." This was an offer to prove a mere conclusion. It was not an offer to prove any fact or facts from which the conclusion might be deduced, as, for instance, that the witness and conductor were constantly together from the time the train left Eldon to the place of the wreck, and that during that time they did not go to the car containing the boy and mare. No fact was offered to be proved which would tend to show the conductor had not gone to that car.

The same remark applies to the offer to prove the conductor "did not know of the boy's presence in the car." This was calling for the mere opinion of the witness about a matter obviously not within his knowledge. How was it possible that he should know what the dead conductor knew about the boy's presence in the car? The conductor may have had full information of the boy's presence in the car from the conductor who preceded him, or in many other ways. The court below was undoubtedly right in excluding the proffer of testimony upon the ground that it was irrelevant and immaterial and upon the further ground that it was an offer to prove mere conclusions and opinions of the witness and not facts. Upon the evidence, the judgment was right, and should be affirmed.

UNITED STATES v. COLMAN.

COLMAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1896.)

Nos. 303, 304.

1. DISTRICT ATTORNEYS—PER DIEM ALLOWANCE.

Rev. St. § 824, authorizing a per diem and mileage allowance for examinations "before a judge or commissioner of persons charged with crime," does not apply to preliminary examinations where no formal accusation has been made and witnesses are not examined.

2. SAME—MILEAGE.

Mileage may be necessary, and so properly allowed, though charged for attendance upon successive days before the same commissioner.

3. SAME.

Rev. St. § 824, authorizing a charge of "five dollars a day for the time necessarily employed for examination of persons charged with crime," does not authorize two or more charges for attendance before one commissioner in different cases on the same day.

4. SAME.

It is proper to allow a claim for attendance in court on days when the court is open for business, though it is not shown that claimant was in actual attendance.

5. SAME—EXPENDITURES.

Claims for money paid out for printing and for stenographer's services are properly disallowed when it is not shown that the expenditures were proper and necessary.

6. SAME—MILEAGE.

The district attorney is not entitled to mileage for attending sessions of court on a day following a day on which he was present at an examination before a commissioner at the same place, for which examination he was allowed mileage.

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

J. H. M. Wigman, for the United States.

Elihu Colman, per se.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. Elihu Colman brought his petition against the United States, seeking judgment for sums alleged to be due for services rendered by him as United States attorney for the Eastern district of Wisconsin, between February 17, 1890, and April 24, 1892. His demands were allowed in part only, and each party has prosecuted a writ of error. The court, in accordance with the statute (24 Stat. 505), made a special finding of the facts, and stated its conclusions of law.

Items to the amount of \$95.60 were allowed for attendance before United States commissioners, "for necessary examinations preliminary to the issuance of warrants, * * * to determine whether or not warrants should issue, and whereupon warrants were afterwards actually issued, duplicate charges for the same day being excluded," and items amounting to \$145 for like attendance "for necessary examinations preliminary to the issuance of warrants * * * to determine whether warrants should issue, and upon which warrants were afterwards actually issued, but upon the same days for which allowance has been made in the foregoing third finding, or in former accounts duly allowed." These allowances, it is insisted, are justified by the clauses of section 824 of the Revised Statutes, which authorizes a per diem and mileage for examinations "before a judge or commissioner of persons charged with crime." On the authority of *U. S. v. Patterson*, 150 U. S. 65, 14 Sup. Ct. 20, and *U. S. v. Stanton*, 17 C. C. A. 475, 70 Fed. 890, it is contended, on the contrary, that the section does not apply to such preliminary examinations where no formal accusation has been made, and witnesses are not examined. We are constrained to accept the latter view. As is said in the *Patterson Case*, "the inquiry is never limited to the fact or character of services, but always extends to the statutory authority for compensation"; and while that case had direct reference to the right of a commissioner, under section 847, to compensation "for hearing and deciding on criminal charges," the conclusion of the court was predicated on the proposition, equally applicable to section 824, that "a criminal

charge, strictly speaking, exists only when a formal written complaint has been made against the accused, and a prosecution initiated," or, as it is also expressed, that, "in the eyes of the law, a person is charged with crime only when he is called upon in a legal proceeding to answer such a charge." Accordingly, in the Stanton Case, the court of appeals for the Second circuit held that the section does "distinctly require that there should be that formal accusation of crime which makes the investigation of the case by examination of witnesses before the commissioner a judicial function of that officer." The examinations in question are not found to have been of that character, but seem rather to have been for the purpose of determining whether formal charges should be made.

The third specification of error on behalf of the United States is upon an allowance of \$254.60 for attendance upon examinations of parties charged with crime; but objection is made in the brief only to a single item of \$12.80, allowed as mileage, which it is alleged was unnecessary. The assignment of error should have specified that item as erroneous, and not the sum total, made up in the main of items which are not questioned. See rule 11 of this court (11 C. C. A. cii., 47 Fed. vi.). Besides, the finding of the court is that the mileage was necessary, and it may have been, though charged for attendance upon successive days before the same commissioner. The decision in *U. S. v. Shields*, 153 U. S. 88, 14 Sup. Ct. 735, refers to attendance upon continuous sessions of court and is not applicable to attendance before commissioners on two or more days successively, unless, before departure on a given day, the necessity for presence on the next be known.

The court made a per diem allowance of \$332.80, including \$12.80 for mileage, for attendance upon examinations had on the same day with other examinations before the same commissioner, for which separate per diem allowances had been made, either by the court or in former accounts. This allowance is supported by the opinion of the court of appeals for the Second circuit in *U. S. v. McMahon*, 13 C. C. A. 257, 65 Fed. 976; but we are not able to concur in the view there taken of the decisions of the supreme court in *U. S. v. Erwin*, 147 U. S. 685, 13 Sup. Ct. 443, and *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439. In *Erwin's Case* it was held that a district attorney may have a per diem for services before a commissioner on the same day that he is allowed a per diem for attendance at court; and in *King's Case* that a clerk of the circuit court may charge a per diem for his own attendance upon the court at one place, and another per diem for the attendance of his deputy upon the court at another place; but in neither opinion is it said or implied that for attendance before a single commissioner in different cases upon the same day a district attorney may charge a per diem for each case. By the terms of the statute, he may charge "five dollars a day for the time necessarily employed," "for examination of persons charged with crime." If, on the same day, he attends examinations before different commissioners at different places, he may, according to the decisions cited, charge the per diem, and, of course, mileage, for each attendance; but the proposition that there may be two or more such charges for attendance be-

fore one commissioner on one day seems to us without support either in the language of the statute or in the decisions referred to. This item, including the \$12.80 for mileage which the finding does not explain, should not have been allowed.

The allowance of \$205 for attendance in court on days when the court was open for business, but when it was not shown that the petitioner was in actual attendance, is justified by the decision of the supreme court in *U. S. v. Smith*, 158 U. S. 346, 352, 15 Sup. Ct. 846.

The sum of \$652.80 was allowed as mileage, it being found that the petitioner traveled from his home, in Fond du Lac, to Milwaukee, to attend sittings of the court on days stated, on which there were actual sessions, with the judge in attendance, held on adjournments of the court from days stated over intervening days which were not Sundays. In this instance, again, error is alleged of the entire allowance; but in the brief objection is made to half a dozen only of the 51 items of which it was made up. Besides, the question sought to be raised is one of fact, rather than law.

Among the items of demand not allowed is the sum of \$447.75, found to have been "actually paid out for printing indictments, official letter heads, envelopes, and blanks, and for stenographer's service, but without authority therefor from the attorney general"; and \$76.80, charged as mileage for attending adjourned sessions of court on days named, not allowed, because it appeared "that he was in actual attendance in each instance upon, and had allowance for the next preceding day in, an examination before a commissioner at the same place where the court was held on the following day," and therefore the travel was not necessary. The ruling of the court in these particulars must stand,—in respect to the first since it is not found, as it was in *U. S. v. Stanton*, supra, that the expenditures were proper and necessary; and in respect to the last item, because the finding that the travel was not necessary seems clearly right, and in harmony with the decision in *U. S. v. Stanton*, supra.

It follows that the total allowance of the court was too large by the sum of \$573.40; and it is therefore ordered that the judgment entered be set aside, and that a new judgment in favor of the petitioner in the sum of \$1,202.40 be entered.

WITTY v. SOUTHERN PAC. CO. et al.
(Circuit Court, S. D. California. August 31, 1896.)

No. 635.

1. ARREST—OFFER OF REWARD.

Three men, in search of certain criminals for whose arrest a reward had been offered, fired upon and wounded one of them, who was concealed behind a pile of straw, so that the extent of his injuries was unknown. One of the attacking party, being also wounded, was conveyed to a distant town by another, who returned next morning, accompanied by a deputy sheriff and others. The third member of the original party remained on watch near the straw pile, all night, to prevent the criminal's escape. The deputy sheriff, with other persons, approached the straw pile, and, finding the wounded man utterly incapable of offering the least resistance, formally arrested him. *Held*, that the arrest was in fact ef-