

lateral, or that, even if the plaintiff was a party to the sale, yet it could not recover because no contract of warranty was in fact coupled with it. The issues thus arising were admittedly for determination by the jury, unless, as the defendant insisted, no evidence had been adduced upon which a finding thereon in favor of the plaintiff could reasonably be based. The trial judge, being of opinion that there was such evidence respecting both questions, submitted them, under properly guarded instructions, to the jury, and it is this action of the court which is complained of in the first three specifications of error. The circumstances of the case were peculiar, and the evidence, oral and documentary, as to warranty, and as to who were the real parties to the sale, and to the warranty if there was a warranty, was somewhat complicated; but that there was sufficient evidence upon these issues to support a verdict for the plaintiff our examination of the record has fully satisfied us. This being so, it follows that a refusal to allow the jury to pass upon them could not have been justified, and that the learned judge was therefore right in declining to affirm the first three points of the defendant below, and in requiring the jury to ascertain from the evidence the truth as to the facts which by those points was assumed to have been conclusively established in accordance with the defendant's contention.

The fourth specification rests upon the postulate that there was no contract of sale between these parties, and if this hypothesis could be accepted the question presented would be a serious one, for we do not doubt that a warranty, if independently given, and not as collateral to a contract of sale, does require a distinctive consideration for its support. But where the warranty shown is, as in this case, part of a transaction of sale, no separate consideration is necessary. *Morris v. Fertilizer Co.*, 12 C. C. A. 34, 64 Fed. 55.

The fifth specification of error is not sustained. The evidence of the defendant's acquiescence in the laying of the electric line in question without the defendant's supervision, precluded the court from charging as was requested by the fifth point submitted on behalf of the defendant.

The sixth and last specification has been sufficiently disposed of by what has been said with especial reference to those which precede it. The judgment is affirmed.

DE CASTRO v. COMPAGNIE FRANCAISE DU TELEGRAPHE, DE
PARIS A NEW YORK.

(Circuit Court, S. D. New York. September 24, 1896.)

1. SPECIAL APPEARANCE—MOTION TO SET ASIDE SERVICE—FOREIGN CORPORATIONS.

A foreign corporation appearing in an action for the sole purpose of moving to set aside service of summons upon it, and stay proceedings, does not thereby waive the objection that it had ceased to do business in the state prior to such service, had no property within the jurisdiction of the court, and hence could not properly be found for service.

2. SAME.

A foreign corporation which has ceased to do business within a state cannot be "found" therein, so that general service may be effected upon it, merely because it has property within the jurisdiction of the court.

This was an action by Hector De Castro against the Compagnie Française du Telegraphe, de Paris à New York, a foreign corporation. Defendant appeared for the purpose of moving to set aside the service of the summons, and to stay all proceedings.

Edward K. Jones, for the motion.

Eugene G. Kremer, opposed.

LACOMBE, Circuit Judge. Since it appears that, for some time prior to the service of the summons, defendant, a foreign corporation, had ceased to do business in this state, and had no property within this jurisdiction, it could not properly be found here for purposes of service. Inasmuch as the defendant has not appeared generally in the action, but only for the purpose of moving to set aside the service of the summons, and to stay all proceedings, it has not waived this objection, and is entitled to an order setting aside service of the summons.

On Motion for Reargument.

(October 15, 1896.)

The additional affidavits presented on this motion for reargument do not make out a state of facts differing in essential particulars from that on which the order was made. That property is here is not material, since no effort was made to acquire jurisdiction of the defendant through its property, by attachment or similar process. When it is questioned whether or not a corporation is to be "found" within a federal district, so that general service of a summons can be effected upon it, and not merely such qualified service as will affect only such property as it may have within the district, the test to be applied is whether or not it is doing business within the district. When it begins to do business here, it comes here; while it continues to do business, it remains; and, when it finally ceases to do business, it departs. It has been held by the supreme court that service upon an officer of a nonresident corporation, who is temporarily within the state, is not sufficient to give jurisdiction of a foreign corporation not doing business within the state, although a state statute, as interpreted by the highest court of the state, expressly authorized such mode of service. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559. It is not easy to see how the mere refusal of the state officers to revoke a designation for purposes of service, made while the corporation was in business here, will operate to prolong indefinitely the original designation long after the corporation may have departed. There are no new facts bearing on the subject of defendant's "doing business" here at the time of service, and the motion for reargument is therefore denied.

NEWARK CITY ICE CO. v. FISHER.

(Circuit Court of Appeals, Third Circuit. October 23, 1896.)

No. 23.

CONTRACT OF SALE—DAMAGES FOR BREACH.

The measure of damages for refusing to accept and pay for the subject of a contract of sale is the difference between the contract price and the market value at the time when it should have been accepted, less expenses which the seller was saved by such refusal.

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

This was an action by Fred S. Fisher against the Newark City Ice Company for breach of contract for the sale of ice. In the circuit court judgment was given for defendant, and the plaintiff appealed. That judgment was reversed and the case sent back to the circuit court for assessment of damages. 10 C. C. A. 546, 62 Fed. 569. From such assessment defendant brings error.

R. V. Lindabury and John O. H. Pitney, for plaintiff in error.

Roger Foster, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. This is the second time this case has been here. On the first, two questions were involved: Is the ice company liable? If it is, for how much? We disagreed with the circuit court respecting the first; and being without sufficient evidence to determine the second, we sent the case back, with directions to hear further testimony and ascertain the damages, in accordance with suggestions then made. It is now here on alleged errors committed in ascertaining the damages. The assignments are numerous; but we deem it unnecessary to discuss them. They all relate to the measure of damages applied. It is sufficient to say that none of them can be sustained. The measure is in strict accordance with our former suggestions. We then believed it to be right, and we believe so still. The plaintiff's loss by the defendant's failure to accept and pay for the ice, was the loss of such profits as he would have realized if the ice had been accepted and paid for; and these profits consist of the difference between the contract price and the value of the ice in the market at the time when it should have been accepted—less the cost of loading, which the plaintiff was saved by the refusal to accept. That the plaintiff had the ice ready for delivery was decided when the case was first here. Whether he had it in actual possession or under control by contract with others, is unimportant. In the latter contingency the nature of the contract does not concern the defendant; presumably the plaintiff was required to take the ice or respond in damages, as the defendant is being required to do for its failure to take. We fully agree with the circuit court in its response to the defendant's requests to find, on which the alleged errors are principally founded, and need not add anything to what is there said in vindication of its rulings.

The judgment is affirmed.