

head. The section was then taken over the hill, and placed upon a siding, the engine returning for the rear section which it brought up, when the train was again coupled and proceeded. At about 11 o'clock at night, about two hours after leaving Cayuga, and when nearing Ridge Farm, Ill., the train again became uncoupled immediately behind the dead switch engine, and in the same manner as before. Bane was at that time on top of a box car between the two engines. The forward part of the train proceeded to the switch at Ridge Farm, and then the engineer, upon being informed of the mishap, reversed his engine, and backed the train to the rear portion, which had become disengaged, and was about a quarter of a mile distant. In going that distance, Bane stood upon the footboard of the dead engine, having hold of the hand rail on the south side of the rear end of the tender. Upon approaching the rear end of the train, he signaled to the fireman with his lantern, which he held in his right hand, holding to the hand rail with his left hand. The train not slowing, Bane undertook to cross upon the footboard to the other side of the engine, in order to signal to the engineer. He stood with his back to the tender, and, turning to pass around the drawbar, he examined, with the aid of his lantern, the step on the further side of the drawbar, satisfying himself that it was in proper condition, but paid no attention to the hand rail on the tender, and did not examine it. In attempting to cross around the drawbar, he reached for the hand rail, and his hand rested on the smooth surface of the frame of the tank in the 10-inch space between the two hand rails. He lost his balance, fell backward upon the north rail of the track, and received the injuries complained of. The negligence charged in the declaration is the failure "to have upon the rear end of the tender of the switch engine a hand rail reaching from one side thereof to the other, to reasonably protect employes engaged in operating such switch engine and tender, and in coupling the same to other cars." At the trial the case was rested upon the conclusion of the evidence for the plaintiff, the defendant below offering no testimony, but moving the court to direct a verdict for the defendant. The adverse ruling of the court upon that request is assigned for error.

Clarence Brown and Charles A. Schmettau, for plaintiff in error.
F. W. Dundas, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The test of liability is failure in the discharge of duty. Unless the master stood in breach of duty in hauling, as part of this freight train, a switch engine of the construction of the one in question, responsibility for the injury here cannot justly be imposed upon him. This switch engine was not being operated. Bane had no concern with it except as it constituted part of the freight train being hauled. Neither the hand rail nor the footboard was for use in connection with the operation of the train. Bane used these instrumentalities as a convenience in an attempt to cross from one side to the other of the train. He assumed, without examination, that with respect to the hand rail the switch engine was of like construction to some others with which he was familiar, and that the hand rail was continuous across the engine. Liability is asserted upon the broad pretense that the master had no right to haul a switch engine in this train unless it was equipped with a continuous hand rail across the rear end. The contention cannot be upheld. The master owes no duty to the servant to provide cars or engines of but one pattern. There rests no such obligation upon the master. "A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those

itself owns and uses." *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. In that case liability was asserted because a foreign car, having deadwoods or bumpers, was hauled in a train with other cars, which had none, and thereby the danger of coupling was enhanced. There, as here, the cars were not out of repair or in defective condition. They were merely of different construction. The court observed:

"But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervener was no boy placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks were in this respect obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

The master has the right to haul over his road cars or engines of different construction, particularly if they are in ordinarily safe condition. The risk in operation is assumed by the servant, although it is thereby enhanced, provided the risk be apparent, not requiring special skill or knowledge to detect it. In such case the master and the servant stand on common ground, with equal means of knowledge. If the hand rail in question can be said to have been of defective construction, because not continuous, the defect was obvious, and open to the observation of all. In such case the servant assumes the risk. *Railroad Co. v. Meyers*, 46 U. S. App. 226, 236, 22 C. C. A. 268, and 76 Fed. 443. The court should therefore have withdrawn the case from the jury. The judgment is reversed, and the cause remanded, with directions to award a new trial.

SILVER PEAK MINES v. HANCHETT.

(Circuit Court, D. Nevada. May 21, 1897.)

No. 635.

AFFIDAVITS—IRREGULARITY OF FORM.

An affidavit which begins by reciting, "S., a corporation, the plaintiff above named, by M., its attorney, being duly sworn," etc., though irregular in form, is not a nullity, the true interpretation thereof being that it is the affidavit of M., who is the attorney of the corporation. An attorney may make the affidavit for the corporation.

The heading to the affidavit for attachment referred to in the opinion is as follows: "Silver Peak Mines, a corporation, the plaintiff above named, by M. A. Murphy, its attorney, being duly sworn, says," etc. The heading in the affidavit attached to the complaint is as follows: "M. A. Murphy, being duly sworn on behalf of the plaintiff in the above-entitled action, says," etc. The motion to dissolve the attachment was based upon the ground that there was no affidavit on file made by or on behalf of the plaintiff.

M. A. Murphy, for plaintiff.

James F. Dennis, for defendant.

HAWLEY, District Judge (orally). I think the form of the heading of the affidavit is subject to criticism. The form as to the affidavit of the complaint is certainly much better. But the point that is raised is purely technical in its character, and it goes simply to the form, and not the substance, of the affidavit. The true interpretation to be given to that affidavit is that it is the affidavit of **M. A. Murphy**, who is the attorney for the corporation. It is not susceptible, in my judgment, of any other judicial interpretation. The law is well settled that an agent or an attorney may make the affidavit. *Grocery Co. v. Smith*, 61 Mo. App. 665, 669; *Drake, Attachm.* §§ 93-93b, and authorities there cited; 3 Am. & Eng. Enc. Law (2d Ed.) 207, and authorities there cited. The motion to dissolve the attachment is overruled.

FOSTER v. CRAWFORD.

(Circuit Court, D. Indiana. May 31, 1897.)

1. REVIVAL OF JUDGMENT.

A proceeding to revive a judgment being a collateral proceeding, no error in such judgment is available against it, if the court which rendered it was duly organized, and had jurisdiction of the subject-matter and the parties.

2. LEVY OF EXECUTION—PRESUMPTIVE EVIDENCE OF SATISFACTION.

Though the levy of an execution upon sufficient personal property is, *prima facie*, presumptive evidence of the satisfaction of the debt, such presumption is overcome by proof, even without the return of the officer, that the property levied on was returned to the execution defendant.

A. W. Hatch, for plaintiff.

W. R. Crawford, for defendant.

BAKER, District Judge (orally). The first reason assigned by counsel why the judgment ought not to be revived is that the judgment appears to be void upon its face, in consequence of the defendant having an answer on file setting up matter in bar of the plaintiff's complaint, and that he was called and defaulted, and the matter submitted to a jury simply for the assessment of damages, whereas the cause ought to have been, as is claimed, submitted to the jury upon the issues raised by the pleadings, and the whole question of the defendant's liability determined by the jury after hearing all the evidence of the parties, respectively, in regard to the matters of complaint and matters of defense. The error so pointed out, if an appeal had been taken, and the correctness of the judgment challenged in a direct proceeding, would have been availing, and the judgment would undoubtedly have been reversed. The present attack, however, is collateral; and, where a collateral attack is made upon a judgment, different principles control. If three things are found or are shown affirmatively by the judgment to exist, the judgment will be valid and unassailable as against a collateral attack. These three things are: First, a regularly organized court; secondly, jurisdiction over the person of the defendant; and, third, jurisdiction over the subject-matter. All these requisites affirmatively appear on the face of the