

FORTY-SECOND ST., M. & ST. N. AVE. RY. CO. v. HANNON.

(Circuit Court of Appeals, Second Circuit. March 10, 1898.)

No. 100.

TRIAL—SUFFICIENCY OF CHARGE—INTERESTED WITNESS.

Where the testimony of the plaintiff had been expressly contradicted, the court charged that plaintiff was an interested witness, and that the jury were to consider her interest, and "weigh her testimony in view of that fact, and in view of all the other evidence in the case, just as you would the testimony of any witness in the case, only as she may have a greater interest." *Held*, that it was proper to refuse a further charge that the jury were "not bound to believe the testimony of the plaintiff, even though it were not contradicted or impeached."

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

This was an action at law by Catherine Hannon against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company to recover damages for personal injuries. In the circuit court judgment was rendered for the plaintiff, and the defendant sued out this writ of error.

Nathan Ohtinger, for plaintiff in error.

John M. Gardner, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We find no error calling for a reversal of the judgment in this case. The amendment to the complaint introducing an additional element of damages for money expended was foreshadowed in the bill of particulars, and its allowance was within the discretion of the trial judge. The charge was concrete, rather than general. It instructed the jury upon the specific facts in proof, and correctly informed them as to the propositions of law arising upon those facts. That being so, the court was under no obligation to charge in general terms, as requested by defendant. As to the request to charge specifically that the jury "are not bound to believe the testimony of the plaintiff, even though it were not contradicted or impeached," it is sufficient to say that the situation presented by the evidence in this cause did not call for such explicit instructions, although, of course, there would have been no error in giving them. They are usually given where the only testimony in support of some material fact is that of the interested witness, and there is no evidence controverting it; and there is some risk of the jury assuming that they must find according to the uncontradicted evidence. In the case at bar, however, the plaintiff was expressly contradicted by the conductor, himself an interested witness; and the court charged that plaintiff was an interested witness, that the circumstance that she was interested did not prevent their believing what she said if they did believe it, but that they were to consider her interests, and "weigh her testimony in view of that fact, and in view of all the other evidence in the case, just as you would the testimony of any witness in the case, only as she may have a greater interest." This was sufficient

upon the record in this case. There was no material error in the admission or rejection of evidence. The judgment of the circuit court is affirmed.

In re POSTAL TEL. CABLE CO.

(Circuit Court of Appeals, Seventh Circuit. November 26, 1897.)

No. 302.

JUDGMENT ON REMAND—REPUGNANCY TO MANDATE.

A motion for mandamus from an appellate court to correct an alleged disobedience of its mandate will be denied where the record of the case on appeal does not constitute the entire record in the lower court, and does not present important facts necessary to the determination of the question of repugnancy between the mandate and the order made under it. In such case the proper remedy is an appeal.

Otto Gresham, for appellant.

Addison C. Harris, for appellee.

Before JENKINS and SHOWALTER, Circuit Judges.

PER CURIAM. The petitioner moved for a writ of mandamus, advising this court that upon filing in the court below the mandate in the case of Cable Co. v. Vane, 53 U. S. App. 319, 26 C. C. A. 342, and 80 Fed. 961, that court provided—and, as it is claimed, in disobedience of the mandate—that the proceeds of the sale of the telegraph wires should be applied in payment and satisfaction of the claim of Vane for the sum of \$1,898.33, with interest, for labor done by direction of the receiver, as shown by the reports of the master, and that such payment should be made in priority to the claim of the Postal Telegraph Cable Company. The record in the case of Cable Co. v. Vane would seem not to constitute the entire record of the suit in the court below. The questions whether the work performed by Vane under contract with the receiver was ordered by the court, or whether it was necessary to the preservation of or was beneficial to the trust estate, or whether such contract had been or should be ratified by the court, are not presented by the record in the original suit. We are unable, therefore, upon the record before us, to determine the facts. It may be, or it may not be, that the action of the court below was repugnant to the mandate; but, in the state of the record, we can only determine the question upon an appeal, and not by the summary writ of mandamus. Petition denied.

MARKS v. VAN EEGHEN et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 65.

EXECUTORY CONTRACT—REPUDIATION BY ONE PARTY—RESULTING RIGHT OF ACTION.

Where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and, if the latter elects to treat the contract as terminated, his right of ac-