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No. 9746

United States

Vol 1
2269

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

SEP 10 1941

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a cor-
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
In and for the Southern District of California
Central Division

No. 433-J Civil

J. LESLIE MORRIS COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT
FOR RECOVERY OF INTERNAL REVENUE
TAX AND INTEREST

Comes now the plaintiff in the above entitled action and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff, J. Leslie Morris Company, Inc., at all times herein mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California. Said principal place of business is located within the Sixth Collection District of California.

II.

That one Nat Rogan was on, to-wit: July 30, 1935, and prior thereto, and thence continuously up to

and including the date of the filing of this complaint, collector of Internal Revenue of the United States for the Sixth District of California.

III.

That the tax and interest involved herein arises under the laws of the United States providing for internal revenue and more specifically under Section 606 (c) of the Internal Revenue Act of 1932. That all of the taxes and interest sued for herein were assessed and imposed in respect of sales by plaintiff of [2] rebabbitted automobile connecting rods during the period from June 21, 1922, to August 1, 1935. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiff, and before their acquisition by plaintiff, had been used as operating parts for automobile motors, and by reason of such use the babbitt metal lining constituting a part of said connecting rods had become worn, chipped, roughened and otherwise impaired.

IV.

That none of the articles sold by this plaintiff, on which the tax sued for herein was assessed and paid, were manufactured or produced or imported by said plaintiff; that plaintiff is, and at all times herein mentioned was, engaged in the business of repairing and rebabbiting worn and damaged automobile connecting rods; that the process used was only a repair and did not change the identity of

the parts in any manner, as trade-names and model numbers appearing thereon were not altered or removed; that all repaired connecting rods were packed in cartons clearly marked to indicate that the parts had only been rebabbitted and repaired.

V.

That on or about the 15th day of November, 1935, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department, and the Collector of Internal Revenue for the Sixth District of California, determined that there were due from plaintiff, pursuant to the provisions of Section 606(c) of the Internal Revenue Act of 1932, certain excise taxes together with interest thereon, upon the sale by plaintiff or rebabbitted automobile connecting rods, in the sum of \$6,800.59; and pursuant to such determination the defendant assessed said taxes and interest, or caused the same to be assessed against the plaintiff, and the Collector of Internal Revenue for the Sixth District of [3] California made demand upon plaintiff for the payment of said taxes and interest.

VI.

That pursuant to the aforesaid demand the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of \$500.00, on or about the 1st day of September, 1937.

VII.

That Section 606(c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of rebabbitted and repaired automobile connecting rods, and therefore, the assessment heretofore alleged is illegal and void. Accordingly, on or about the 18th day of November, 1937, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said \$500.00, representing tax and interest paid under provisions of Section 606(c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on Official Form Number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

“Commissioner of Internal Revenue,
Washington, D. C.

Sir:

Re: J. Leslie Morris Co., Inc.
1361 S. Hope Street,
Los Angeles, Calif.

Under account number Nov. 36 Misc 2027-1 your office assessed \$6800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932,

to August 1, 1935. On September 1, 1937, this taxpayer made a payment of \$500.00 on said assessment.

The above payment of \$500.00 represents a payment by this taxpayer on the liability as established by the [4] commissioner's office. This tax has not been passed on to the purchaser in any manner, either by separate billing or by a raise in prices.

The J. Leslie Morris Co., Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article is packed in a carton marked 're-babbitted' and bearing the statement 'Our famous spinning process used in repairing this connecting rod'. This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage bat-

teries, automobile engines and upon the following rulings and decisions:

S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, in the sale of his product, took in part payment trucks of his own make, some of which were repaired by replacing un-serviceable parts by new parts, that no tax would attach to the sale thereof under section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a [5] chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

This policy was continued with reference to used motorcycles by a ruling published in 1932. (S. T. 514, C. B. December 1932, p. 471):

“Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by

section 606 (b) of the Internal Revenue Act of 1932.” ’

“In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule.

(S. T. 648, C. B. June 1933, p. 384) :

““The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.” ’

“This rule was extended by *J. C. Skinner vs. United States* to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

“This rule was continued by the Federal Court in *Montieth Brothers Company vs. United States* rendered October 5, 1936 and in *Hempy-Cooper Manufacturing Company vs. United States*. Both these cases related to the taxability of rebabbitted connecting rods and

rewound armatures. The court found in favor of the plaintiff in both of these cases, and adopted findings which left no doubt as to sale of rebabbitted connecting rods being free of tax. [6]

“Attention is called to a letter to the National Standard Parts Association, Detroit, Mich. over the signature of Mr. D. S. Bliss dated June 30, 1936, in which it was held that no tax attached to the sale or exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that ‘repaired connecting rods’ were used in the rebuilt engine under consideration.

“In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

“J. LESLIE MORRIS COM-
PANY, INC.,
By J. LESLIE MORRIS,
President”

VIII.

That on or about the 25th day of March, 1938, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of \$500.00.

IX.

That the tax and interest covered by this suit has not been included in the price of the article with respect to which it was imposed, or collected from the vendee or vendees. [7]

For a Second, Several and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

I.

Plaintiff, by reference, hereby makes Paragraphs I, II, III, IV, V, and IX of its first cause of action a part of this cause of action, as if the same were fully set forth herein.

II.

That pursuant to the aforesaid demand the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of \$500.00, on or about the 22nd day of April, 1938.

III.

That Section 606 (c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of rebabitted and repaired automobile connecting rods, and therefore, the assessment heretofore alleged is illegal and void.

Accordingly, on or about the 7th day of June, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said \$500.00 representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on Official Form number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

“Commissioner of Internal Revenue
Washington, D. C.

Sir:

Re: J. Leslie Morris Co., Inc.
1361 S. Hope Street,
Los Angeles, Calif.

“Under account number Nov. 36 Misc. 2027-1 your office assessed \$6800.59 against the above taxpayer to [8] cover the manufacturer’s excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. On April 21, 1938, this taxpayer made a payment of \$500.00 on said assessment.

“The above payment of \$500.00 represents a payment by this taxpayer on the liability as established by the commissioner’s office. This tax has not been passed on to the purchaser in

any manner, either by separate billing or by a raise in prices.

“The J. Leslie Morris Co., Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article is packed in carton marked “re-babbitted” and bearing the statement “Our famous spinning process used in repairing this connecting rod.” This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

“It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage batteries, automobile engines and upon the following rulings and decisions:

“S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, [9] in the sale of his prod-

uct, took in part payment trucks of his own make, some of which were repaired by replacing unserviceable parts by new parts, that no tax would attach to the sale thereof under section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

“This policy was continued with reference to used motorcycles by a ruling published in 1932.

(S. T. 514, C.B. December 1932, p. 471):

“ ‘Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.’ ”

“In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule.

(S. T. 648, C. B. June 1933, p. 384) :

“ ‘The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.’ ”

“This rule was extended by *J. C. Skinner vs. United States* to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, [10] and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

“This rule was continued by the Federal Court in *Montieth Brothers Company vs. United States* rendered October 5, 1936 and in *Hempy-Cooper Manufacturing Company vs. United States*. Both these cases related to the taxability of rebabbitted connecting rods and rewound armatures. The court found in favor of the plaintiff in both of these cases, and adopted findings which left no doubt as to sale of rebabbitted connecting rods being free of tax.

“Attention is called to a letter to the National Standard Parts Association, Detroit, Mich. over the signature of Mr. D. S. Bliss in

which it was held that no tax attached to the sale or exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that "repaired connecting rods" were used in the rebuilt engine under consideration.

"In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

"J. LESLIE MORRIS

COMPANY, INC.,

"By J. LESLIE MORRIS,

"President." [11]

IV.

That on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of \$500.00.

For a Third, Several and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

I.

Plaintiff, by reference, hereby makes Paragraphs I, II, III, IV, V, and IX of its first cause of action a part of this cause of action, as if the same were fully set forth herein.

II.

That pursuant to the aforesaid demand the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of \$500.00, on or about the 13th day of August, 1938.

III.

That Section 606 (c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of rebabitted and repaired automobile connecting rods, and therefore, the assessment heretofore alleged is illegal and void. Accordingly, on or about the 20th day of August, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said \$500.00, representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim was duly filed on refund plaintiff alleged and set forth as the grounds Official form number 843; that in said claim for the refund claimed, as follows, to wit: [12]

“Commissioner of Internal Revenue
Washington, D. C.

Re: J. Leslie Morris Co., Inc.
1361 S. Hope Street,
Los Angeles, California

Sir:

“Under account number Nov. 26 Misc. 2027-1 your office assessed \$6,800.59 against the above taxpayer to cover the manufacturer’s excise tax on the sale of rebabbitted automobile connecting rods sold during the period from June 21, 1932 to August 1, 1935. On August 9, 1938, this taxpayer made a payment of \$500.00 on said assessment.

“The J. Leslie Morris Company is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer and is packed in a carton marked “Re-babbitted” and bearing the statement “Our Famous spinning process used in repairing this connecting rod.” This company is well known to the automobile trade as a re-babbitter of connecting rods. They have never manufactured a new rod, and could not do so for the reason that they have not the necessary equipment.

“It is contended that since the re-babbitted connecting rods do not lose their original identity and since the re-babbitting is only a repair,

that no tax should attach upon the sale thereof. Our contention is based on the actual facts and the following Treasury decisions and Court Decisions:

“S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, repaired used trucks by replacing worn parts with new parts, that no tax attached to the sale thereof under [13] section 606 (3) of the Internal Revenue Act of 1924, but that a tax would attach to the sale of the new parts used therein.

“This policy was continued with reference to the sale of used motorcycles by a ruling published in 1932. S. T. 514, C. B. December 1932, P. 471. In this instance the Bureau held:

“ ‘Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.’ ”

“In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule, S. T. 648, C. B. June, 1933, p. 384.

“ ‘The retreading of old tires by resurfacing or replacing of the actual tread down to

the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.' ”

“The above rule was followed by the United States District Court in *J. C. Skinner v. United States*, 8 Federal Supplement 999. In this case the Court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires, that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

“This rule was continued by the Federal District Court in *Monteith Brothers Company v. United States*, *Mempy-Cooper Manufacturing Company v. United States* and *Pioneer Motor Bearing Company v. United States*. [14]

“In view of the foregoing decisions and the fact that the rebabbitting process does not alter the original identity of the connecting rods, it is claimed that no tax is due upon the sale thereof, and that the \$500.00 payment referred to above was unjustly and illegally collected and should be refunded.

“J. LESLIE MORRIS
COMPANY, INC.

By J. LESLIE MORRIS,

“President.”

IV.

That on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of \$500.00.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$1,500.00, together with interest thereon, from the dates of the respective payments, at the rate of six per cent per annum, and for such other and further relief as the court deems fitting and proper.

DARIUS F. JOHNSON,
Attorney for Plaintiff. 1124 Van Nuys Building,
Los Angeles, California. [15]
(Verification.)

[Endorsed]: Filed Jun 15, 1939. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [16]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to the Complaint, admits, denies and alleges as follows:

I.

The allegations of Paragraph I of the Complaint are admitted.

II.

The allegations of Paragraph II of the Complaint are admitted.

III.

Answering the allegations of Paragraph III of the Complaint, defendant admits that the tax in controversy arises under Section 606 (c) of the Revenue Act of 1932 and that said taxes were assessed and imposed in respect of automobile connecting rods sold by plaintiff during the period between June 21, 1932, and July 31, 1935, inclusive, but it is denied that said sales were of "rebabbitted automobile connecting rods". It is denied that all or any part of said connecting rods sold by plaintiff were manufactured by any person or [17] persons other than plaintiff. In this connection, it is alleged that the connecting rods sold by plaintiff, or the greater part of them, were connecting rods manufactured and produced by it, within the meaning of the Revenue Statute, from a combination of new materials and usable materials salvaged from discarded, used or worn out connecting rods, or scrap acquired by plaintiff from jobbers and junk dealers; that such used connecting rods as were salvaged and used by the plaintiff in the manufacture of connecting rods sold by it were discarded and junked by their former owners because they were no longer regarded by such owners as serviceable or fit for the purpose to which they were originally put and adapted, and that the remainder of plaintiff's sales of connecting rods consisted of newly manufactured rods purchased by plaintiff from outside sources in instances where used forgings were not yet available, due to the re-

cent advent of particular types or models of rods, and that said newly manufactured rods were sold by plaintiff as its own product and were commingled with the connecting rods produced and manufactured by plaintiff from a combination of new and used materials. All other allegations of Paragraph III are denied.

IV.

Answering Paragraph IV of the Complaint, it is admitted that none of the articles sold by plaintiff were imported by it. All other allegations of said Paragraph IV of Complaint are denied. It is further alleged in this connection that plaintiff at all times material to the issues in this action was engaged chiefly in the business of making and producing automobile connecting rods and selling them under its own trade name therefor throughout the United States, Canada, New Zealand and Australia to wholesalers, known also as jobbers, for replacement purposes in connection with the repairing of automobile motors by mechanics and garage men.

[18]

V.

Answering Paragraph V of the Complaint, defendant admits that the Commissioner of Internal Revenue determined that taxes in the aggregate sum of \$5,243.49 were due by plaintiff under the provisions of Section 606 of the Revenue Act of 1932, in addition to the original taxes paid by plaintiff in the amounts shown in the monthly excise returns filed by plaintiff with respect to the cash portion of each and every sale of automobile connecting rods made

by it during the taxable period. In this connection, it is alleged that said sum of \$5,243.49, together with interest thereon of \$1,164.42 and penalties of \$392.68, or an aggregate sum of \$6,800.59, was duly assessed on the November, 1935 assessment list of the Commissioner of Internal Revenue and that demand for payment of said tax was duly made. That said additional assessment of \$5,243.49 was made on the basis that the allowance granted by plaintiff for the serviceable article taken in trade on its sales should be included as part of the sales price in computing the tax. All other allegations of Paragraph V of the Complaint are denied.

VI.

The allegations of Paragraph VI are admitted. In further answer to the allegations of Paragraph VI, defendant alleges that plaintiff has paid on said assessment of \$6,800.59 only the sum of \$1,500.00 and is still indebted to the United States in the remaining amount of \$5,300.59, plus interest.

VII.

Answering the allegations of Paragraph VII of the Complaint, defendant denies the assessment in question is illegal or void. It is admitted that plaintiff filed a claim for the refund of the sum of \$500.00 paid on September 1, 1937, on account of the total addi- [19] tional assessment of \$6,800.59 and that said claim was filed on Treasury Department Form 843 and recited in support thereof the grounds which are quoted in Paragraph VII of the Complaint. It

is denied that said grounds correctly set forth the facts or are legally sufficient to constitute a claim for refund. It is alleged that the remaining allegations of Paragraph VII are argumentative and require no answer. In further answer to Paragraph VII of the Complaint, it is alleged that plaintiff's purported claim for refund is legally insufficient as a basis for the recovery of said sum of \$500.00 because said claim for refund was filed prior to the payment of the entire assessment of \$6,800.59 and that the Court is without jurisdiction to grant recovery herein for the reason that plaintiff has failed to comply in said claim, or otherwise, with the provisions of Section 621 (d) of the Revenue Act of 1932 and the Regulations promulgated pursuant thereto.

VIII.

Paragraph VIII of the Complaint is admitted.

IX.

Paragraph IX of the Complaint is denied.

In answer to the plaintiff's alleged second and separate cause of action, defendant admits, denies and alleges as follows:

I.

Answering Paragraph I of said alleged second cause of action, defendant, by reference, hereby adopts the answers made to Paragraphs I, II, III, IV, V and IX of plaintiff's alleged first cause of action with the same force and effect as if said answering paragraphs were again fully set forth. [20]

II.

Paragraph II of the alleged second cause of action is admitted. Further answering Paragraph II of the second cause of action, defendant alleges that plaintiff has paid on said assessment of \$6,800.59 only the total sum of \$1,500.00 and is still indebted to the United States in the remaining amount of \$5,300.59, plus interest.

III.

Answering the allegations of Paragraph III of the alleged second cause of action, defendant denies that the assessment in question is illegal or void. It is admitted that plaintiff filed a claim for refund of the sum of \$500.00 paid on April 22, 1938, on account of the total additional assessment of \$6,800.59. That said claim was filed on Treasury Department Form 843 and recited in its support the grounds which are quoted in Paragraph III of said alleged second cause of action of the Company, but it is denied that said grounds correctly set forth the facts or are legally sufficient. It is alleged that the remaining allegations of said Paragraph III of the alleged second cause of action of the Complaint are argumentative and require no answer. In further answer to the allegations of Paragraph III of the alleged second cause of action, defendant alleges that plaintiff's said claim for refund is legally insufficient as a basis for the recovery of said \$500.00 because the same was filed prior to the payment of the entire assessment of \$6,800.59 and that the Court is without jurisdiction to grant any re-

covery herein because plaintiff has failed to comply in said claim, or otherwise, with the provisions of Section 621(d) of the Revenue Act of 1932 and the Regulations promulgated pursuant thereto.

[21]

IV.

The allegations of Paragraph IV of the alleged second cause of action of the Complaint are admitted.

In answer to plaintiff's alleged third and separate cause of action, defendant admits, denies and alleges as follows:

I.

In answer to Paragraph I of plaintiff's alleged third cause of action, the defendant, by reference, here adopts the answer made to Paragraphs I, II, III, IV, V and IX of the plaintiff's first alleged cause of action with the same force and effect as if said answering paragraphs were again fully set forth.

II.

The allegations of Paragraph II of plaintiff's alleged third cause of action are admitted. In further answer to said Paragraph II of plaintiff's alleged third cause of action, defendant alleges that the plaintiff paid on said assessment of \$6,800.59 only the total sum of \$1,500.00 and is still indebted to the United States in the remaining amount of \$5,300.59, plus interest.

III.

Answering the allegations of Paragraph III of plaintiff's alleged third cause of action, defendant

denies that the assessment in question is illegal or void. It is admitted that plaintiff filed a claim for the refund of \$500.00 paid August 13, 1938, on account of the total assessment of \$6,800.59; that said claim was filed on Treasury Department Form 843 and recited in support thereof the grounds which are quoted in Paragraph III of said alleged third

[22]

cause of action of plaintiff's Complaint. It is alleged that the remaining allegations of Paragraph III are argumentative and require no answer. In further answer to the allegations of said Paragraph III, defendant alleges that plaintiff's purported claim for refund is legally insufficient as a basis for the recovery of said \$500.00 because the same was filed prior to the payment of the entire assessment of \$6,800.59. Further answering, the defendant alleges that the said claim for refund is also insufficient because of the failure to allege therein that plaintiff has not included the tax in the price of the articles with respect to which it was imposed, or that plaintiff has not collected the amount of the tax from the vendees, or that it has repaid the amount of the tax to the ultimate purchasers of the articles, or has secured the written consent of such ultimate purchasers to the allowance of the credit or refund as required by Section 621(d) of the Revenue Act of 1932 and Article 71 of Treasury Regulations 46. It is alleged that plaintiff has wholly failed to comply with the requirements of said Article 71 of Treasury Regulations 46 and Section 621(d) of the Revenue Act of 1932 in its claim for

refund, or otherwise, and for that reason the Court is without jurisdiction to grant plaintiff any recovery herein and plaintiff's alleged third cause of action should be dismissed.

IV.

The allegations of Paragraph IV of the alleged third cause of action are admitted.

By way of further answer to plaintiff's Complaint and as a counter-claim, defendant alleges as follows: [23]

I.

That the defendant is a corporate body politic.

II.

That the United States Commissioner of Internal Revenue on his November, 1935 Miscellaneous tax assessment list, page 2027, line 1, determined and assessed an additional tax and interest in the aggregate amount of \$6,800.59 against the plaintiff on account and in respect of sales made by plaintiff of automobile connecting rods during the period from June 21, 1932, to and including July 31, 1935.

III.

That on September 1, 1937, plaintiff paid the sum of \$500.00 on account of the said additional assessment. Thereafter plaintiff paid the sum of \$500.00 on April 22, 1938, and \$500.00 on August 13, 1938, and there remains due and unpaid to the defendant from the plaintiff on account of said additional assessment the sum of \$5,300.59, together with interest as provided by law.

IV.

That although the Collector of Internal Revenue for the Sixth Collection District of California has, on behalf of the defendant herein, demanded that plaintiff pay the entire amount of said additional assessment, plaintiff has failed, neglected and refused to pay the sum of \$5,300.59, plus interest thereon, and is indebted to the defendant in said amount, for which defendant here asserts a counter-claim without, however, waiving the defendant's right to rely upon any of the defenses above set forth in this Answer. [24]

Wherefore, the defendant, having fully answered the plaintiff's Complaint, prays judgment as follows:

I.

That the plaintiff take nothing by this action.

II.

That the defendant have Judgment against the plaintiff herein in the amount of \$5,300.59, plus interest according to law, together with defendant's costs expended.

BEN HARRISON, E. H.

United States Attorney.

E. H. MITCHELL, E. H.

Assistant U. S. Attorney.

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed Oct. 16, 1939. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

I, hereby substitute Darius F. Johnson and Meserve, Mumper and Hughes, as my attorneys in the above entitled matter, in the place and stead of Darius F. Johnson.

Dated: This 23 day of April, 1940.

J. LESLIE MORRIS
COMPANY, INC.

By J. LESLIE MORRIS,

President.

I, hereby agree to the substitution of Darius F. Johnson and Meserve, Mumper and Hughes, as the attorneys for the plaintiff, J. Leslie Morris Company, Inc., in the above entitled matter, in my place and stead.

Dated: This 23 day of April, 1940.

DARIUS F. JOHNSON.

[27]

We hereby accept the above substitution of Darius F. Johnson, and Meserve, Mumper and Hughes, as attorneys for the plaintiff, J. Leslie Morris Company, Inc., in the above entitled matter, in the place and stead of Darius F. Johnson.

Dated: This 30th day of April, 1940.

MESERVE, MUMPER and
HUGHES,

By SHIRLEY E. MESERVE.

Received copy of the within Substitution of Attys
this 6 day of May, 1940.

BEN HARRISON,

U. S. Attorney.

By ARMOND MONROE JEWELL,

Asst. U. S. Atty. Attorney for Deft.

[Endorsed]: Filed May 6, 1940. R. S. Zimmer-
man, Clerk. By C. E. Hollister, Deputy Clerk. [28]

At a stated term, to wit: The February Term
A. D. 1940 of the District Court of the United
States of America, within and for the Central Di-
vision of the Southern District of California, held
at the Court Room thereof, in the City of Los An-
geles on Wednesday the 24th day of July in the
year of our Lord one thousand nine hundred and
forty.

Present: The Honorable: Paul J. McCormick,
District Judge.

No. 433-M Civil

J. LESLIE MORRIS COMPANY, INC.

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

This cause having come before the Court for
trial without a jury on May 28, 1940, and on May

29, 1940, and having been ordered submitted for a decision, and the Court having duly considered the matter, now files its "Conclusions of the Court" and orders as follows:

Upon all the evidence and stipulation in the record, Findings of Fact, Conclusions of Law, and Judgment are ordered for the plaintiff as demanded by the Complaint under the issues of Complaint and Answer, and against the defendant under the issues of the Counterclaim. Attorneys for the plaintiff will prepare, serve, and present the same under the rules within five days from notice hereof. Exceptions allowed defendant. See written Conclusions of the Court filed herein this day. [32]

[Title of District Court and Cause.]

CONCLUSIONS OF THE COURT

McCormick, District Judge:

When consideration is given to the irreconcilable conflict of federal court decisions upon the crucial factual issue in this action, i. e., whether taxpayer in rebabbing used and damaged connection rods of automobiles is a manufacturer or producer of such parts or accessories, it is indisputable that there is more than doubt as to the meaning of the terms "manufacturer" or "producer" in Section 606 of Revenue Act 1932 and subsection (c) thereof. 47 Stat. at Large, Part 1, pp. 261-262, Title 33 U. S. C. A., Sec. 606.

Under such a record doubts arising under the taxing statute should be resolved against the taxing agency and favorable to the taxpayer. *Miller v. Nut Margarine Co.*, 284 U. S. 498, at page 508; *Erskine v. United States*, 9 Circuit, 1936, 84 F. 2d 691.

It is only by straining the terms "manufacturer" and "producer" contained in the taxing statute under consideration from their usual, ordinary and normally understood meanings into all-inclusive situations that these terms of doubtful signification can be extended to a service station or processor such as plaintiff taxpayer, whose transactions under consideration in this cause are actually no more than repairing damaged used connecting rods of automobiles and charging for the repair job [33] and service upon delivery of the customer's repaired rod or of another rebabbited second-hand repaired rod. We think no such forced and omnibus meaning of the terms "manufacturer" or "producer" can be fairly attributed to Congress in order to subject the articles sold by the plaintiff to the tax under (c) of Section 606. There is nothing in the statute which intimates that such was the Congressional intent. The decision of the District Court for the Northern District of California in *A. P. Bardet, et al., d.b.a. Pioneer Motor Bearing Co. v. United States*, No. 20364L, decided May 18, 1938, 384 C. C. H. p. 10,589, wherein the taxpayers suing are competitors of the plaintiff who had engaged in a like process and business of rebabbiting connection rods of automobile engines, as the taxpayer,

and who were held not to be manufacturers under the same statute as here involved, persuades us to conclude that the operations and practices shown by the record before us are neither manufacture nor production of automobile parts within the meaning of subsection (c) of Section 606, Revenue Act 1932.

Our conclusions are also supported by the decision of the District Court (Mo., 1937) in *Hempy-Cooper Mfg. Co. v. United States*, 19 Am. Fed. Tax Reports 1313, and *Con-Rod Exchange, Inc., v. Hendrickson* (D. C., W. D. Wash., 1939) 28 F. Supp. 924. These cited tax cases involved rebabbited connecting rods of automobiles, and we think they present situations identical with the record before us in this action.

For the sake of uniformity, if for no other reason, taxpayers identically situated and doing precisely the same thing in relation to tax laws should be treated alike. Our inquiries and investigations have failed to disclose that the government has taken appeal in the cases referred to, and we are therefore justified in assuming that refunds have been made to the respective taxpayers situated as is the plaintiff taxpayer in [34] this action.

We are not unmindful of the decision of the Seventh Circuit Court of Appeals in *Clawson & Bals, Inc., v. Harrison, Collector*, 108 F. 2d 991, reaching a contrary conclusion as to the meaning of the terms "manufacturer" and "producer" as applied to rebabbiting activities similar to those shown by the record before us. This decision by a

federal appellate court is entitled to and has been given careful study and respectful consideration. We feel, however, that no adequate discussion is to be found in the opinion of the court, differentiating between the broad meaning of the terms in matters of general concern and those relating specifically to tax laws. Such a distinction is supported by eminent authority, and we believe it must be regarded in ascertaining the meaning of tax legislation where the taxing statute itself does not clearly define the meaning of terms contained in it. See *Hartramft v. Wiegman*, 121 U. S. 609; *Kuenzle v. Collector, etc.*, 32 Philippine 516, and *Heacock Co. v. Collector, etc.*, 37 Philippine 979.

We think the rule of *stare decisis* is not applicable to the decision of the learned Court of Appeals of the Seventh Circuit. See *Continental Securities Co., v. Interborough R. T. Co.*, 165 Fed. 945, at p. 960.

Inasmuch as our Circuit Court of Appeals has not considered or decided the question under consideration in this action, we are justified in formulating and reaching our own conclusions under the record before us and in the light of other identical situations considered and determined uniformly by the federal courts of the Ninth Circuit. Accordingly, as the plaintiff taxpayer has not passed on the tax to the customer or to anyone, it is entitled to recover the amount illegally collected, and the government is not entitled to anything [35] under its counterclaim.

Findings and judgment are ordered for the plaintiff and against the defendant as prayed under the issues of complaint, answer and counterclaim.

Dated this July 24, 1940.

[Endorsed]: Filed Jul. 24, 1940. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[36]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial on the 28th day of May, 1940, at the hour of 10 o'clock A. M. in the above entitled court, the Honorable Paul J. McCormick, Judge, presiding, a jury having been expressly waived. Darius F. Johnson, Esquire and Messrs. Meserve, Mumper & Hughes, appearing for plaintiff and Ben Harrison, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing for the defendant United States of America, and evidence both oral and documentary having been introduced and the court being fully advised in the premises, and the cause having been submitted for decision, the court now makes its findings of fact as follows:

FINDINGS OF FACT

I.

The court finds that the plaintiff, J. Leslie Morris Company, Inc., at all times herein mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California. Said principal place of business is located within the 6th Collection District of California. [37]

That the Articles of Incorporation of plaintiff set forth the following purposes of its incorporation:

“To own, maintain and operate a business for the manufacture, sale and distribution of automotive and industrial bearing metals and products.

To own, maintain and operate branch plants and offices in the State of California and elsewhere for the manufacture, sale and distribution of such metals and products.

To acquire land, buildings and personal property in the State of California and elsewhere for the purposes of establishing, maintaining and operating such plants and offices as may be necessary for the manufacture, sale and distribution of such metals and products.

To acquire, by purchase, lease or assignment, patents and patent rights bearing on the manufacture of such metals and products.

To acquire, by purchase, lease or assignment, plants or businesses of other persons, firms or corporations for the further development of the business of this corporation, and to acquire and hold shares of stock and bonds of other corporations, and to sell, exchange or otherwise dispose of or trade in such shares and bonds.

To do any and all things necessary to properly carry on the business of the corporation, and to do any and all things necessary or incidental to the carrying of the various lines of business in which this corporation may now or hereafter be engaged.”

That plaintiff stated in its Capital Stock Tax returns for the years 1933, 1934 and 1935, in answer to the question: “Nature of [38] Business in Detail”, as follows: (1933) “Manufacture motor bearings”; (1934) “Rebabbitting Connecting Rods”; and (1935) “Rebabbitting Connecting Rods”. That plaintiff stated in its Corporation Franchise Tax returns for the years 1932, 1933 and 1934, in answer to the question “Kind of Business”, as follows: (1932) “Mfg. Motor Bearings”; (1933) “Mfg. Motor Bearings”; and (1934) “Mfg. Motor Bearings”.

II.

The court finds that one Nat Rogan was, to wit, July 30, 1935, and prior thereto, and thence continuously up to and including the date of the filing of plaintiff’s complaint, Collector of Internal Rev-

enue of the United States for the 6th District of California.

III.

The court finds that the tax and interest involved herein arises under the laws of the United States providing for internal revenue and more specifically under Section 606 (c) of the Internal Revenue Act of 1932. That all of the taxes and interest sued for herein were assessed and imposed in respect of sales by plaintiff of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. All of said connecting rods were manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff, had been used as operating parts for automobile motors, and by reason of such use the babbitt metal lining constituting a part of said connection rods had become worn, chipped, roughened and otherwise impaired; except that when plaintiff's stock was low in certain sizes plaintiff would purchase new rods which had never been used from automotive manufacturers or their representatives and sell them to its customers. The percentage of new rods thus sold, however, is very small—less than five (5) per cent.

IV.

The court finds that none of the articles sold by this [39] plaintiff, on which the tax sued for herein was assessed and paid, were manufactured or produced or imported by said plaintiff; that plaintiff is, and at all times herein mentioned was, engaged

in the business of repairing and rebabbiting worn and damaged automobile connecting rods; that the process used was only a repair and did not change the identity of the parts in any manner, trade-names and model numbers appearing thereon were not altered or removed; that all of the connecting rods sold by plaintiff were packed by plaintiff in cartons bearing its trade name, "Moroloy bearing service" and stating, "Rebabbited Connecting Rods, Centrifugally Cast, Accurately Machined".

It is true that used connecting rods received by plaintiff from automotive jobbers represent about 85% of the rods received by plaintiffs; about 10% are received from commercial accounts and about 5% received from automobile dealers. The rods to be rebabbited are received in packages containing from one rod to one hundred rods per package; however, the packages average between twenty and sixty rods per package. The shippers deliver them to the plaintiff. The rods are removed from the packages and checked against the packing slips. Any special instructions regarding rebabbiting are removed from the package at this time. About 20% of the rods carry these special specifications, required usually because of undersizes or that the same bushings are to remain.

It is true that the used rods are segregated according to their respective types and any pin bushings are removed. (About $\frac{1}{2}$ the rods have a clamp type shank end and require no pin bushings). They are removed by an arbor press or with a hammer

and chisel. On about $\frac{1}{2}$ of the rods it is necessary to remove the nuts and bolts and use auxiliary nuts and bolts during the process in order that the original nuts and bolts may be used again. A power driven socket wrench is used on all nuts. [40]

It is true that the babbitt is then melted from the bearing end of the rod by placing that end into a solution of molten babbitt. Any remaining babbitt adhering is chipped off with a chisel and the bearing end of the rod is then cleaned with hydrochloric acid. The bearing end of the rod is then dipped into molten tin or solder so that the babbitt when poured will bond to the rod. The nuts are removed using the same power driven socket wrench and steel separators are inserted between the cap and the shank and the nuts and bolts are replaced. Separators keep the cap from adhering to the shank when the babbitt is applied. Model A Ford rods require no separators. Any oil holes in the bearing end of the rod are plugged with asbestos wicking, small corks, or even toothpicks in order to prevent the babbitt from plugging the oil holes during the rebabbiting process.

It is true the bearing end of the rod is inserted into a mould mounted on a revolving spindle at right angle to the axis of the spindle. The rod is then rotated and by means of a hand ladle molten babbitt is poured through an opening in the mold. The centrifugal force spreads it evenly over the inside surface of the bearing end of the rod. On about 25% of the rods, the rebabbiting must be

done by hand. This is accomplished by placing the bearing end of the rod in a stationary mould and after calking, babbitt is poured into the space covering the inside surface of the rod.

It is true the rods are then cleaned by an oakite bath. Steel separators are then removed by means of another power driven socket wrench and any auxiliary nuts and bolts are removed and the originals replaced. A revolving sand paper disk is used to remove adhering particles of babbitt. Two drill presses are used to clean out the oil holes. The rods are then dipped in a rust preventive and hung on a rack to dry. The rods are then placed in a lathe and the babbitt is rough bored, faced and chamfered. The babbitt on about 20% of the rods must be bored to special undersize as ordered; a second lathe [41] is used for this purpose. A hand milling machine is used to cut oil pockets in the babbitt. About 50% of the rods rebabbitted require oil pockets. A slotting tool is used to separate rod and cap on Model A Ford rods. This operation leaves necessary oil grooves in the babbitt. A circular saw is used to notch the babbitt flange. About $\frac{1}{2}$ of the rods require new bushings in the small end of the shank, which are installed by a hand operated arbor press. Approximately 50% of the rods require the babbitt flange to be faced by a special tool placed in a drill press. Model A Ford and 6 cylinder Chevrolet rods require an oil groove on the face of the babbitt bearing which is cut in the shape of a figure 8 by a hand operated grooving machine. Certain

Pontiac bearings require a continuous oil groove around the center of the babbitt, which is cut by a motor driven cutting tool.

It is true all of the rods except the 20% which are finished to special undersize, on the lathe, are finished to standard size by means of a hydraulically operated broaching machine. On Model A Ford rods, it is necessary to use a chamfering tool mounted in a drill press to smooth the very thin pin bushings used in these rods. All rods are then given a final inspection and new nuts and bolts replaced where necessary. The rods are then boxed and ready for shipment.

That plaintiff issued illustrated catalogues containing price lists and advertising and also issued price lists; that both the price lists and the catalogues were issued under the name of "Moroloy Bearing Service" and referred to the rods as "Re-babbitted"; that in the catalogues and price lists plaintiff held itself out to be a company with branches from coast to coast and listed between fourteen and fifteen branches through the United States and Canada. The catalogues referred to these branches in the following statement:

"Service

Fifteen manufacturing branches located at strategic points [42] over the United States and Canada, rendering a coast to coast service, convenient to every jobbing center. Ample stock at all branches assure same day shipment. Tele-

phone and telegraphic orders receive instant attention.”

That the invoices of plaintiff bore this title: “Moroloy bearing service, J. Leslie Morris Co., Inc.” and under this title were a list of addresses in thirteen different cities in the United States and Canada purporting to be branches.

V

The court finds that on or about the 18th day of November, 1935, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department, and the Collector of Internal Revenue for the Sixth District of California, determined that there were due from plaintiff, pursuant to the provisions of Section 606 (c) of the Internal Revenue Act of 1932, certain excise taxes together with interest thereon, upon the sale by plaintiff of rebabbitted automobile connecting rods, in the sum of \$6,800.59; and pursuant to such determination the defendant assessed said taxes and interest, or caused the same to be assessed against the plaintiff, and the Collector of Internal Revenue for the Sixth District of California made demand upon plaintiff for the payment of said taxes and interest.

VI

The court finds that pursuant to the aforesaid demand, the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of \$500.00, on or about the 1st day of September, 1937.

VII

The court finds that on or about the 18th day of November, 1937, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal [43] Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said \$500.00, representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on Official Form Number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

“Commissioner of Internal Revenue,
Washington, D. C.

Sir: Re: *J. Leslie Morris Co. Inc*
 1361 S. Hope St.,
 Los Angeles, Calif.

Under account number Nov. 36 Misc 2027-1 your office assessed \$6,800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. On September 1, 1937, this taxpayer made a payment of \$500.00 on said assessment.

The above payment of \$500.00 represents a payment by this taxpayer on the liability as

established by the commissioner's office. This tax has not been passed on to the purchaser in any manner, either by separate billing or by a raise in prices.

The J. Leslie Morris Co., Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article is packed in a carton marked "rebabbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod." This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new [44] rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage batteries, automobile engines and upon the following rulings and decisions:

S. T. 458 C. H. June, 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, in the sale of his products,

took in part payment trucks of his own make, some of which were repaired by replacing un-serviceable parts by new parts, that no tax would attach to the sale thereof under Section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

This policy was continued with reference to used motorcycles by a ruling published in 1932. (S. T. 514, C. B. December, 1932, p. 471):

“Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.”

In a case relating to retreading of automobile tires, [45] published in 1933, the Bureau of Internal Revenue once more applied the same rule. (S. T. 648, C. B. June, 1933, p. 304):

“The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.”’

This rule was extended by *J. C. Skinner vs. United States* to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

This rule was continued by the Federal Court in *Monteith Brothers Company vs. United States*, rendered October 5, 1936, and in *Hempy-Cooper Manufacturing Company vs. United States*. Both these cases related to the taxability of rebabbitted connecting rods and rewound armatures. The Court found in favor of the plaintiff in both these cases, and adopted findings which left no doubt as to the sale of rebabbitted connecting rods being free of tax.

Attention is called to a letter to the National Standard Parts Association, Detroit Michigan, over the signature of Mr. D. S. Bliss, dated

June 30, 1936, in which it was held that no tax attached to the sale or exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that 'repaired connecting rods' were used in the rebuilt engine [46] under consideration.

In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

J. LESLIE MORRIS COM-
PANY, INC.,

By J. LESLIE MORRIS,
President."

VIII

The court finds that on or about the 25th day of March, 1938, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of \$500.

IX

The court finds that pursuant to the demand of defendant, all as hercinabove set forth, plaintiff

paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of \$500 on or about the 22nd day of April, 1938.

X

The court finds that on or about the 7th day of June, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for the refund of said \$500.00 representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on official form number 843; that in said claim for refund plaintiff alleged and set [47] forth as the grounds for the refund claimed, as follows, to wit:

“Commissioner of Internal Revenue,
Washington, D. C.

Sir: Re: J. Leslie Morris Company, Inc.,
 1361 S. Hope Street
 Los Angeles, California.

Under Account Number Nov. 36 Misc. 2027-1 your office assessed \$6800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. On April 21st, 1938, this taxpayer made a payment of \$500.00 on said as-

assessment. The above payment of \$500.00 represents a payment by this taxpayer on the liability as established by the Commissioner's office. This tax has not been passed on to the purchaser in any manner, either by separate billing or by a raise in prices.

The J. Leslie Morris Company, Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rods as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article was packed in a carton marked "rebabbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod". This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should [48] attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage batteries, automobile engines and upon the following rulings and decisions :

S. T. 458 C. B. June 1925, p. 265. This ruling held that where the manufacturer of automobile truck chassis in the sale of his product, took in part payment trucks of his own make, some of which were repaired by replacing un-serviceable parts by new parts, that no tax would attach to the sale thereof under Section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used Chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

This policy was continued with reference to used motorcycles by a ruling published in 1932. (S. T. 514, C. B. Dec. 1932, p. 471) :

‘Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by Section 606 (b) of the Internal Revenue Act of 1932.’

In a case relating to retreading of automobile tires published in 1933, The Bureau of Inter-

nal Revenue once more applied the same rule. (S. T. 648 C. B. p. 384):

‘The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.’ [49]

This rule was extended by *J. C. Skinner v. United States* to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

This rule was continued by the Federal Court in *Montieth Bros. Company vs. United States* rendered October 5, 1936, and in *Hempy-Cooper Manufacturing Company v. United States*. Both these cases related to the taxability of rebabbitted connecting rods and rewind armatures. The court found in favor of the plaintiff in both of these cases, and adopted findings which left no doubt as to the sale of rebabbitted connecting rods being free of tax.

Attention is called to a letter to the National Standard Parts Association, Detroit, Mich., over the signature of Mr. D. S. Bliss in which it was held no tax attached to the sale of exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that 'repaired connecting rods' were used in the rebuilt engine under consideration.

In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted [50] connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

J. LESLIE MORRIS COM-
PANY, INC.

By J. LESLIE MORRIS,
President."

XI

The court finds that on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim of \$500.00.

XII

The court finds that pursuant to the demand of defendant, all as hereinabove set forth, plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of \$500 on or about the 13th day of August, 1938.

XIII

The Court finds that on or about the 20th day of August, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said \$500.00, representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim was duly filed on official form number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

“Commissioner of Internal Revenue,
Washington, D. C.

Re: *J. Leslie Morris Co., Inc.*,
1361 S. Hope St.

Dear Sir:

Los Angeles, Calif. [51]

Under account number Nov. 26 Misc. 2027-1 your office assessed \$6,800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connect-

ing rods sold during the period from June 21, 1932 to August 1, 1935. On August 9, 1938, this taxpayer made a payment of \$500.00 on said assessment.

The J. Leslie Morris Company is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer and is packed in a carton marked "Re-Babbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod." This Company is well known to the automobile trade as re-babbitter of connecting rods. They have never manufactured a new rod, and could not do so for the reason that they have not the necessary equipment.

It is contended that since the rebabbitted connecting rods do not lose their original identity and since the rebabbitting is only a repair, that no tax should attach upon the sale thereof. Our contention is based on the actual facts and the following Treasury decisions and Court decisions:

S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, repaired used trucks by replacing worn parts with new parts, that no tax attached to the sale thereof under section 606

(3) of the Internal Revenue Act of 1924, but that a tax would attach to the sale of the new parts used therein.

This policy was continued with reference to the sale of used motorcycles by a ruling published in 1932. S. T. 514, [52] C. B. December 1932, p. 471. In this instance the Bureau held:

‘Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.’

In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule. S. T. 648, C. B. June 1933, page 384.

‘The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.’

The above rule was followed by the United States District Court in *J. C. Skinner v. United States*, Federal Supplement 999. In this case the

Court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires, that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

This rule was continued by the Federal District Court in *Montieth Brothers Company vs. United States*, *Hempy-Cooper Manufacturing Company vs. United States* and *Pioneer Motor Bearing Company vs. United States*.

In view of the foregoing decisions and the fact that the rebabbiting process does not alter the original identity of the connecting rods, it is claimed that no tax is due upon the sale thereof, and that the \$500.00 payment referred to above was unjustly and illegally collected and should be [53] refunded.

J. LESLIE MORRIS COM-
PANY, INC.

By J. LESLIE MORRIS,
President."

XIV

The court finds that on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of \$500.00.

XV

The court finds that the tax and interest covered by this suit has not been added to, or included in the sale price of any of the connecting rods rebabbitted by plaintiff, nor has said tax or interest been collected from the purchasers, either directly or indirectly.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the court concludes as a matter of law, the following:

1. That plaintiff has complied with all statutory requirements constituting conditions precedent to the institution and maintenance of this suit; that plaintiff's claims for refund of tax and each of them, are legally sufficient to constitute a claim for refund; that defendant waived any and all grounds for rejection of plaintiff's claims as set forth hereinabove and each of them, which grounds were not set forth by defendant in its notice of rejection.

2. That the excise tax imposed by Section 606 (c) of the Internal Revenue Act of 1932 does not apply to the sale of used connecting rods by plaintiff which were rebabbitted as hereinbefore set forth.

3. That the process of rebabbitting the used connecting rods by plaintiff as hereinabove set forth, does not constitute manufacturing or production, but is only repair and the plaintiff was not [54] during the time involved in this action, the manufacturer, producer or importer of connecting rods

within the meaning of Section 606 (c) of the Internal Revenue Act of 1932.

4. That Section 606 (c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of used connecting rods rebabbitted as set forth in the within findings of fact and, therefore, the assessment heretofore alleged is illegal and void.

5. That under the evidence and the law, the plaintiff is entitled to a judgment against defendant in the sum of \$1500.00.

Judgment is hereby ordered to be entered accordingly.

Dated: August 21st, 1940.

PAUL J. McCORMICK

Judge of the United States
District Court.

Approved as to form in accordance with Rule 8.

ARMAND MONROE JEWELL,
Assistant United States Attorney.

[Endorsed]: Filed Aug. 21, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [55]

In the District Court of the United States Southern
District of California, Central Division

No. 433-M—Civil

J. LESLIE MORRIS COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 28th day of May, 1940, at the hour of 10 o'clock A.M. in the above entitled court, the Honorable Paul J. McCormick, Judge, presiding, a jury having been expressly waived. Darius F. Johnson, Esquire and Messrs. Meserve, Mumper & Hughes, appearing for plaintiff, and Ben Harrison, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing for the defendant United States of America, and evidence both oral and documentary having been introduced, and the court being fully advised in the premises, and the cause having been submitted for decision, and the court having filed herein its findings of fact and conclusions of law in accordance therewith:

Now therefore, it is hereby ordered, adjudged and decreed that plaintiff have judgment against de-

defendant in the sum of \$1500; that defendant recover nothing under its counterclaim.

Dated: August 21st, 1940.

PAUL J. McCORMICK,

Judge of the United States District Court.

Approved as to form in accordance with Rule 8.

ARMOND MONROE JEWELL,

Assistant United States Attorney.

Judgment entered Aug. 21, 1940.

Docketed Aug. 21, 1940.

Book C. O. 3, Page 515.

R. S. ZIMMERMAN,

Clerk.

By B. B. HANSEN,

Deputy.

[Endorsed]: Filed Aug. 21, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [56]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled suit, numbered herein No. 433-M, on the 21st day of August, 1940, in which suit J. Leslie Morris Company, Inc., is plaintiff.

Dated: November 19, 1940.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

ARMOND MONROE JEWELL,
Assistant United States Attorney.

By ARMOND MONROE JEWELL,
Attorneys for Defendant.

Copy mailed Nov. 20, 1940, to Darius F. Johnson,
Esq., Atty for Plaintiff, 1124 Van Nuys Bldg., Los
Angeles, Calif.

R. S. ZIMMERMAN,
Clerk.

By E. L. S.,
Deputy Clerk.

[Endorsed]: Filed Nov 19, 1940. R. S. Zimmer-
man, Clerk. By Edmund L. Smith, Deputy Clerk.

[57]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE REC-
ORD AND DOCKET ON APPEAL

Good cause appearing therefor, it is hereby or-
dered that the defendant appellant may have to
and including February 7, 1941, within which to
file its record and docket the above-entitled cause
on appeal to the Circuit Court of Appeals for the
Ninth Circuit.

Dated: This 18th day of December, 1941.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Dec 18, 1940. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[58]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET CAUSE ON APPEAL

Good cause appearing therefor, it is hereby ordered that the defendant appellant may have to and including February 17, 1941, within which to file its record and docket the above-entitled cause on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 5th day of February, 1941.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Feb. 5, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [59]

[Title of District Court and Cause.]

ORDER PERMITTING ORIGINALS TO BE
SENT TO CIRCUIT COURT IN LIEU OF
COPIES.

Good cause being shown therefor, it is hereby ordered that all of the original papers and exhibits in

the above-entitled case may, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, and said papers and exhibits may, by designation and stipulation of the parties, become part of the record on appeal in the above-entitled case.

Dated: this 5th day of February, 1941.

PAUL J. McCORMICK,

Judge.

[Endorsed]: Filed Feb. 5, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [60]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

Pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, it is hereby stipulated by and between the parties hereto, through their respective counsel, that the following shall constitute the record on appeal in the above-entitled case:

1. Complaint.
2. Answer.
3. Notice of transfer of proceedings to Judge McCormick dated September 19, 1939, signed by Clerk.
4. Substitution of attorneys authorized April 23, 1940, and accepted April 30, 1940.
5. The Clerk's minutes of the District Court

dated May 29, 1940, before Honorable Paul J. McCormick.

6. The Clerk's minutes of the District Court dated June 4, 1940, before Honorable Paul J. McCormick.

7. The Clerk's minutes of the District Court dated July 24, 1940, before Honorable Paul J. McCormick.

8. Conclusions of the Court dated July 24, 1940, before Honorable Paul J. McCormick.

9. Findings of fact and conclusions of law signed by Honorable Paul J. McCormick on August 21, 1940. [61]

10. Judgment signed by Honorable Paul J. McCormick on August 21, 1940.

11. Notice of Appeal dated November 19, 1940.

12. Order extending time within which to file record on appeal and docket cause on appeal dated December 18, 1940.

13. Order extending time within which to file record on appeal and docket cause on appeal dated February 5, 1941.

14. Order permitting original papers and exhibits to be sent to the Circuit Court in lieu of copies on appeal dated February 5, 1941.

15. All volumes of the Reporters Transcript in the above-entitled case.

16. The following exhibits: (a) Plaintiff's Exhibits 1 to 64 inclusive; (b) Defendant's Exhibits A to F, inclusive.

17. This Designation of Record On Appeal.

Dated: February 6, 1941.

WILLIAM FLEET PALMER,
United States Attorney.

EDWARD H. MITCHELL,
Assistant United States Attorney.

ARMOND MONROE JEWELL,
Assistant United States Attorney.

By ARMOND MONROE JEWELL,
Attorneys for Defendant & Appellant.

DARIUS F. JOHNSON, and
MESERVE, MUMPER and
HUGHES,

By SHIRLEY E. MESERVE,
Attorneys for Plaintiff & Appellee.

[Endorsed]: Filed Feb 10, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[62]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 62, inclusive, contain full, true and correct copies of the Complaint; Answer to Complaint; Notice of Transfer of Cause to Judge McCormick; Substitution of Attorneys; Minutes of the Court dated May 29, 1940, including Minute Order Submitting Cause; Minute Order dated June 4, 1940, for Submission of Proposed Findings of Fact and Conclusions of Law; Minute Order of July 24, 1940,

for Judgment; Conclusions of the Court; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Two Orders Extending Time to File Record and Docket Cause on Appeal; Order for Transmittal of Original Exhibits to Circuit Court of Appeals; and Stipulation Designating Contents of Record on Appeal; which, together with the original Reporter's Transcript of Proceedings and Testimony, and the original Exhibits, transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court, this 15th day of February, A. D. 1941.

(Seal) R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk.

[63]

[Title of District Court and Cause.]

TESTIMONY

Appearances:

For the Plaintiff

Darius F. Johnson,
Meserve, Mumper and Hughes.
By Shirley E. Meserve, Esq.,
615 Richfield Building, Los
Angeles, California.

For the Government:

Wm. Fleet Palmer, Acting United
States Attorney.
A. M. Jewell, Assistant United
States Attorney. [64]

Los Angeles, California

Tuesday, May 28, 1940.

10:00 O'Clock A. M.

Mr. Meserve: Has your Honor read the pleadings?

The Court: Yes, I have.

Mr. Meserve: Mr. Jewell, I think probably the best way to present our proof would be by the introduction of the pictures first.

The Court: Is there a dispute of fact as to whether the reconditioning amounted to a reconstruction?

Mr. Meserve: That is the issue.

The Court: There is an issue of fact on that?

Mr. Jewell: No issue of fact of the process particularly because we have worked together and have prepared a group of pictures which will be introduced on behalf of the Plaintiff, which illustrates the process, with a legend upon them. As to whether or not that particular process amounts to mere repair, as the Plaintiff contends, or, as the Government contends, manufacture, is the question before the Court.

The Court: Is the Court to understand that what is the issue is the result of the activity, or what you call the process?

Mr. Jewell: That is correct.

Mr. Meserve: That is correct. That is why I refrained from making an opening statement, because I asked your Honor [65] whether you had read the pleadings. The issue, to my mind, is sim-

ply whether we are taxable under the provisions of Section C 606 of the Revenue Laws. The whole issue, as I view it, is whether the action of the Plaintiff corporation in its business operation constitutes a manufacturing process or whether it is essentially a repair of a mechanical device. In order to present the matter graphically, Mr. Jewell for the Government and ourselves have reviewed a series of photographs, and attached a legend to them to explain the same, in relation to Plaintiff's business, and we intend, of course, to illuminate that by testimony that cannot be covered by either the legend or the picture.

Mr. Jewell, perhaps we can get in the record our stated understanding at our meeting yesterday, and the purpose of these pictures, so we will not be in confusion as to the stipulation.

Mr. Jewell: Do you want me to state my view of it?

Mr. Meserve: You can state your view of it, and if that accords with the way we understood it, it will not have to be stated twice.

Mr. Jewell: It is hereby stipulated that the series of photographs to be introduced on behalf of Plaintiff are true photographs of Plaintiff's business establishment as it now exists, and that the legend appearing beneath each picture constitutes the testimony of Mr. J. Leslie Morris, president of Plaintiff corporation, had he been asked those questions [66] on direct examination.

(The documents referred to was received in

evidence and marked "Plaintiff's Exhibits 1 to 32 Incl.")

[Set Out in Separate Volume.]

Mr. Meserve: That is correct; and is the identification of the photograph.

Mr. Jewell: That is correct.

Mr. Meserve: And for the sake of saving time.

The Court: Very well.

Mr. Meserve: Is that satisfactory to the Court?

The Court: So understood.

Mr. Meserve: We will offer first a photograph and legend, that we have indicated as one, which is——

The Clerk: Plaintiff's Exhibit 1 in evidence.

The Court: Does the stipulation go to the extent that the process or method in use at the applicable time, under the complaint and answer, was the same as that depicted or picturized in the photographs?

Mr. Jewell: No, if the Court please, except insofar as the direct testimony of Mr. Morris appearing at the bottom of the picture will go to prove it. The Government can't stipulate that was the process that was used.

Mr. Meserve: We will connect that up, your Honor.

The Court: Is the Court to understand that the Government is stipulating that this verbiage that appears in typewriting under the picture in Plaintiff's Exhibit 1 may be considered as evidentiary, and has the same effect as evidence under oath?

Mr. Jewell: That is correct, your Honor, sub-

ject to [67] the same right of cross examination, if that appears necessary.

Mr. Meserve: Mr. Jewell and I dictated these legends together, and corrected them. There is one other statement I think appropriate to be in the record. It is to be understood between Plaintiff corporation and the Government that there will be no intention to take advantage of phrases in their perhaps technical application. In other words, a play of words is not intended by the legend; the legend is descriptive, and that the facts to be found by the Court are not to be applied from the legend except as it may be descriptive. That was the understanding, wasn't it?

Mr. Jewell: Yes.

Mr. Meserve: We got to the point where we were playing with words, as to whether they would have effect or not, and Mr. Jewell and I discussed it, and agreed that the legend was intended only to be descriptive.

Mr. Jewell: I think it can be stated that the legend is only descriptive, and any use of the words therein shall not call for a conclusion by the words themselves pointing toward either repair or manufacture.

The Court: The word "jobber" seems to be quoted in the legend attached to Exhibit 1.

Mr. Jewell: I believe that is done for the purpose of indicating that it is a sort of a slang name.

Mr. Meserve: In other words, it is a phrase that has [68] been developed in the trade or merchan-

dising that perhaps is not an accurate statement of his exact business—jobber.

The Court: There is no issue here of the correct interpretation of the phrases that appear to be quoted in the legend?

Mr. Jewell: That is correct.

Mr. Meserve: That is correct.

Mr. Jewell: We don't want the shadings of the words to have bearing upon the legal conclusion, but they are just used as best we could for descriptive purposes. For instance, if we use the word "make," and that connotes that rods are manufactured by plaintiff, rather than substitute some other word we ask that the Court ignore that connotation and follow the process described pictorially and verbally. For instance, if we stipulated, or Plaintiff, Mr. Morris, testified that the rods are returned, there immediately arises an implication that he sent them out, so we have tried to avoid the use of that particular word.

Mr. Meserve: The whole question, if your Honor pleases, is whether or not the J. Leslie Morris Company manufactured a connecting rod that is used in the automotive industry, or repairs on existing connecting rods.

The Court: Does the Government concede that to be the sole and exclusive issue in the case?

Mr. Jewell: Not the sole and exclusive issue, because [69] of this fact: That the tax is levied on sales by a manufacturer—I don't believe there will be any controversy, but that method of doing busi-

ness by the Plaintiff corporation amounted to sales of these rods which they re-babbitted. Whether or not those sales were sales by a manufacturer of automobile accessories will, I believe, under the cases, draw now only upon the actual process, although principally so, but also upon the manner in which Plaintiff conducts his business, and the general similarity to a manufacturer aside from that mere process.

The Court: That is what I was talking about; whether it was trade practice, or whether it is admitted to be in a certain category. Trade practices are very material. If it is trade practice that has been acquiesced in by the Governmental agency, that is one thing; if it is an open field of investigation, it is quite another.

Mr. Jewell: The Government contends that all evidence concerning the manner in which Plaintiff taxpayer, or the Plaintiff corporation, operates his business of merchandising the particular product, or, which construction is described in these pictures, and will be further elaborated on by testimony, that all of those facts, and the manner in which it conducts its business are relevant in determining whether or not sales by it were sales by a manufacturer.

The Court: The pleadings set up certain alleged conclusions by taxing agencies of the Government relating to re-tread- [70] ing tires, and other fabricated instrumentalities. I want to know whether those are going to be issues here, or whether you

are conceding facts of just what was done, regardless of the legal results from those facts.

Mr. Jewell: I don't believe I understand your Honor with respect to those matters appearing in the pleadings.

The Court: Maybe you have not read the pleadings.

Mr. Jewell: I believe I have.

The Court: They cite a number of instances here in which they claim there is an analogy between their cases and your cases.

Mr. Jewell: Whether that analogy exists will depend upon the proof Plaintiff puts on.

Mr. Meserve: Your Honor, I think we are still back to the fundamental statement I made. The issue, even though as amplified by Mr. Jewell for the Government is: Was the J. Leslie Morris Company, during the time involved in this period, a manufacturer of a device used in the automotive industry, or a repairer of a pre-existing device.

The Court: They won't concede that is the sole and exclusive issue, so we can't save time. I was going to save time by getting together on an agreement as to what the Court had to decide.

Mr. Meserve: I think your Honor perhaps understands, although we did not express it in as precise manner as it should be, that what we mean is that we are not bound by the language [71] using the word "make" as an admission of the manufacture, or the word "repair" as an admission by the

Government that that is the exclusive function of those two words, as an example.

Mr. Jewell: That's right. What I intend to mean is that there are certain other factors besides the particular process described in these photographs and the testimony appearing below. For instance, the manner of advertising, the manner of securing customers, and those sort of things, go to make the Plaintiff a manufacturer or not a manufacturer.

The Court: I think it is a concrete question applicable to each taxpayer whether he is a manufacturer or simply a repairman.

Mr. Jewell: That is correct. I believe the cases so hold.

The Court: Proceed.

Mr. Meserve: We next offer, your Honor, Plaintiff's Exhibit 2—is it, Mr. Clerk?

The Clerk: Yes.

Mr. Meserve: Picture 2, with the legend.

The Clerk: Plaintiff's Exhibit 2.

Mr. Meserve: Your Honor, we introduce the 32 separate exhibits that pictorially, with the legend, set forth the story of the business as nearly as we can abbreviate it. Wouldn't it be better if we waited a moment [72] and let the Court acquaint himself with the whole legend; then the rest of the testimony will be far more intelligible?

The Court: I think so. I have looked over these casually.

J. LESLIE MORRIS

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: You will state your name to the Court.

The Witness: J. Leslie Morris.

Direct Examination

By Mr. Meserve:

Q. Mr. Morris, you are an officer of the Plaintiff corporation? A. I am.

Q. In what capacity? A. President.

Q. You were the responsible person for its organization, of the J. Leslie Morris Company?

A. Yes, sir.

Q. When was it incorporated?

A. It was incorporated in 1925.

Q. Was that at the time that you commenced the business that you are now in?

A. No, we had been in the business two or three years prior to that time.

Q. Then you have been in the business of re-babbitting [73] connecting rods since '22 or '23?

A. About 1923.

Q. And you have been continuously engaged in that business since that date?

A. Continuously.

Q. Your principal place of business is in this city? A. Yes.

Q. You have how many other places that you perform this service?

(Testimony of J. Leslie Morris.)

A. At the present time we have one other, Chicago. We have branches, but where we perform the operation. I might say New York and Columbus also do some rebabbitting.

Q. Do you have other branches throughout around the United States?

A. Affiliated with our company, yes.

Q. Are you familiar, Mr. Morris, with the exhibits that have been introduced in this case, Plaintiff's Exhibits 1 to 32, inclusive, the pictures?

A. Yes.

Q. And are you familiar with the legend that is recited under each picture? A. Yes.

Q. And that fairly, in brief form, correctly recites the method by which connecting rods are treated through your plant from the time they arrive until the time they are ready to leave, is that correct? [74] A. Yes.

Q. The pictures were taken as of the present time? A. Yes.

Q. What difference, Mr. Morris, is there in the method of rebabbitting as indicated in the pictures, Plaintiff's Exhibits 1 to 32, than the method of rebabbitting used in 1932 to 1935, the period involved in this case? A. They are the same.

Q. The procedure?

A. The process was the same.

Q. Was substantially the same? A. Yes.

Q. Were the devices exhibited in the pictures, by which each operation was had, substantially the same? A. Yes.

(Testimony of J. Leslie Morris.)

Q. Briefly, Mr. Morris, will you tell us your method of doing business as distinguished from the mechanical method—do I make myself clear?

A. A large percentage of the connecting rods that are brought to us for rebabbiting come from automotive wholesale jobbers. These jobbers have in their establishments a stock or shelving of connecting rods that have been either rebabbitted by ourselves or by other companies performing the same service to what we term the industry. These connecting rods are exchanged in order to give immediate service. It is merely to facilitate service. Now, then, the whole- [75] saler, after making the exchange, sends the rods to us to be rebabbitted. That is one phase. Another is that on the later model rods, the rods that the jobber or ourselves probably do not have in stock,—those are sent to us by the wholesalers to be rebabbitted, and in this instance, we would send the same rods to them exactly that they send to us, because of the late model, or their inability to have a service or to exchange them, or because of the cost, or anything of that sort; we rebabbitt the same connecting rods, and send them back to the customer. Does that answer you?

Q. Mr. Morris, you also do business with such organizations as, for example, the Howard Motor Company, who are California distributors of the Buick automobile, do you not?

A. Yes, we have done that.

(Testimony of J. Leslie Morris.)

Q. And for J. V. Baldwin Company?

A. Yes.

Q. Who are the distributors for the Chevrolet?

A. Yes; and for Paul Hoffman.

Q. And the Paul Hoffman Company who are distributors for the Studebaker?

A. That's right.

Q. Just explain to us, Mr. Morris, what occurs when, we will say, you receive, as an example, 12 connecting rods from the Howard Automobile Company—Buick connecting rods.

The Court: May I interpose?

Mr. Meserve: Yes. [76]

The Court: Are those connecting rods new, or have they been used?

The Witness: The connecting rods that are sent to us, sir?

The Court: Yes.

The Witness: The connecting rods are sent to us; they are rods that have been removed from an automobile which is being repaired at that time.

The Court: And are they from automobiles that have been used for transportation?

The Witness: Yes, in every case; so far as we know, in every case. Of course, we can instantly determine a new connecting rod that had never been babbitted before.

The Court: Mr. Meserve's question may be propounded.

(Testimony of J. Leslie Morris.)

(The question referred to was read by the reporter, as follows)

“Q. Just explain to us, Mr. Morris, what occurs when, we will say, you receive, as an example, 12 connecting rods from the Howard Automobile Company — Buick connecting rods.”)

The Witness: They go through the process that is shown in the pictures there, and are returned to the Howard Company. Now, in the event that the Howard Company was in a big hurry, and we had the particular rod already in stock, babbitted, which came from a similar automobile, similar Buick car, because they will not interchange—should we have that and Howard was in a hurry, he would probably say, “Give me an [77] exchange on that today. I need this one quickly.” But very rarely that we exchange them.

By Mr. Meserve:

Q. Mr. Morris, start from the genesis of your business, the beginning of your business of rebabbitting used connecting rods—start from the first part of your business, if that can be done, before you build up the supply for exchange.

A. For at least two or three years after starting in our business of rebabbitting connecting rods, we did not own a single connecting rod. They were brought to us, we babbitted them and returned them to the customer that brought them to us.

(Testimony of J. Leslie Morris.)

Q. The identical rod?

A. The identical rod. We would get them in groups. We had no exchange service at all at the beginning of our business. Later that came in as a part of the business, just to expedite the repair operation on automobiles.

Q. In other words, Mr. Morris, do I understand it to be a fact that as your business grew, from its beginning, where you rebabbitted connecting rods and returned them to the customer and delivered the identical rod received, rebabbitted,—as your business grew you acquired certain definite brands of connecting rods, such, as for example, the Chevrolet, Ford, Studebaker, or the well known makes of automobile or automobile motors? [78]

A. We found that was necessary to give the service that the trade demanded.

Q. By that you mean this, if I can state it correctly: An employee of J. V. Baldwin comes to you with two connecting rods for rebabbiting, of a given size. If he does not want to wait, and you have them in stock, you hand him two connecting rods that have been rebabbitted, is that correct, and take his two which he brought in in exchange, and charge him for the rebabbiting?

A. That is right, if you will eliminate the phrase "of a given size," because if it is of a special size we have to give the same connecting rods back; they have to be rebabbitted.

Q. I merely intended to use "size" as standard in size.

(Testimony of J. Leslie Morris.)

A. The standard size, yes.

Q. When you say "standard size," you mean the size of the connecting rods used in motors strictly used in the industry?

A. Yes, the size that originally came in the car.

The Court: I want to develop that.

The Witness: I am sorry.

The Court: I don't think it's your fault. Let us take the type of automobile—any type; say the type in 1937, for illustration. Have the types of the construction upon which you work been changed annually, or at intervals? [79]

A. At intervals.

Q. Let us take any of those cars, so as not to advertise any of them particularly, any of those standard makes of automobiles, of 1937 type. Supposing one of those cars was in the repair shop and it was necessary to secure one of your appliances. Just how will that be brought about? Suppose the automobile needs repair of the part as to which you fabricate an instrumentality; just explain the process.

A. The garagemen, or wherever the automobile is being repaired—the repairer, let us say, of the automobile, would bring in a connecting rod. It is a common practice; that happens dozens of times a day. The connecting rod that he has received from the automobile he brings in to our establishment, and we babbitt it, if we have none we can exchange for it, or, in many instances, they demand we bab-

(Testimony of J. Leslie Morris.)

bitt the same one and return it or, if they are in a hurry, and would like for us to exchange it, and we have one in our stock that was removed from a car identical with the one he has brought us, then we make the exchange.

The Court: So there are some instances where you supplant the connecting rod that is to be repaired with a connecting rod that has been theretofore repaired from another vehicle?

The Witness: From another vehicle of exactly the same make, the same year, that used the same connecting rod.

The Court: But an instrumentality that was in a [80] separate vehicle entirely from the one from which the connecting rod that was brought in by the repairman was taken?

The Witness: Yes. We look at it on an exchange basis.

By Mr. Meserve:

Q. Mr. Morris, rebabbitting, or the babbitt is the wearing surface of the bearing, isn't it, on a connecting rod? A. Yes.

Q. It is the wearing surface? A. Yes.

Q. The same as the sole of your shoe is the wearing surface of your shoe; that is the bearing of your foot, is that correct? A. Yes.

Q. And babbitting is replacing the wearing surface of a soft metal back in the bearing of a connecting rod, isn't that correct?

(Testimony of J. Leslie Morris.)

A. That is correct.

Q. And in the early days of the automotive industry, when automobiles were rare, and were luxuries instead of necessities, that function was performed in a great many instances, and in nearly all instances, in the garage itself, or in the establishment of the car manufacturer, when they had a burned out bearing? A. Yes.

Q. They rebabbitted it by hand in their own shop? [81] A. Yes.

Q. When they were repairing the automobile?

A. Yes.

Q. And as the industry grew, it has become a specialty; rebabbiting has taken that function away as a part of the garageman's duty? A. Yes.

Q. For the sake of speed, and a better finished wearing surface; isn't that correct?

A. That is correct.

Mr. Jewell: If the Court please, I request that counsel for the Plaintiff not make his questions quite so leading.

Mr. Meserve: I don't intend to lead the witness, your Honor, in anything that I cannot establish by an indirect question, except and only for the purpose of brevity and clearness.

Q. Mr. Morris, so that we may have before us a physical look at a connecting rod, do you have one in the courtroom here? A. Yes.

Q. Can you produce it for us?

A. Yes, sir.

(Testimony of J. Leslie Morris.)

Q. You have here a box, Mr. Morris, of an assembly of several connecting rods. Will you assist us by selecting from them any one connecting rod, and describe it for us?

A. The connecting rod I have in my hand is a rebabbitted [82] rod for a Packard automobile. This is the identical rod as removed from the Packard, that probably the exchange would be for. This was removed because the babbitt was worn. When this car is repaired, they bring it over to us, and we either rebabbitt the same one or make an exchange.

Q. That is, if you have a particular rod of the same size in your establishment?

A. Yes, the same diameter, width, and all; if it happened to be the same connecting rod, and also a definite distance from the crank shaft up to the wrist pin. In other words, we can only use a connecting rod made by the car manufacturer. These are both connecting rods made by Packard. It is just a case of which one was presented to us, whether we exchanged it or whether we put it through the shop and babbitted it. The result is the same.

The Court: This internal annular member, that is not cast with the shaft itself; it is separate?

The Witness: It is a separate operation, sir, even at the factory.

The Court: Supposing the ring,—I will call it the ring,—the annular metallic member itself—

(Testimony of J. Leslie Morris.)

The Witness: The shaft?

The Court: I am speaking of this member as distinguished from the outer frame, the inside ring, the metallic-like annular member, do you understand?

The Witness: Yes. [83]

The Court: I don't know whether I explained it in trade parlance.

The Witness: You do. Might I say that this is not separate. This is all machined; all a part of the same forging. That is just the action of the cutting edge around there. This is not a bearing. That is inserted.

The Court: That answers the question.

The Witness: Another rod would not show it that way.

Mr. Meserve: Your Honor, may I be so rude as to interrupt, and have these two identified before we go to two more, so that we may know what we are talking about?

The Court: Yes, these may be identified.

Mr. Meserve: We will identify the rod without the babbitt as Plaintiff's Exhibit next in order.

The Court: Of the Packard.

The Clerk: Plaintiff's Exhibit 33.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 33.")

The Witness: They are both Packard connecting rods.

(Testimony of J. Leslie Morris.)

Mr. Meserve: And the rod that has been babbitted?

The Witness: That was a babbitted flange——

The Court: Just wait a minute until we get it identified.

The Clerk: Plaintiff's Exhibit 34.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 34.") [84]

The Court: Now, Mr. Meserve, you have these two rods here, and we will mark these now, Mr. Hansen.

Mr. Meserve: Mark the one that is not babbitted as the next exhibit in order.

The Court: These are the Buick construction?

The Witness: Exactly.

The Clerk: Plaintiff's Exhibits 35 and 36.

(The rods referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 35 and 36," respectively.)

The Court: Do you desire to explain something about the construction of this that will clarify what is in the Court's mind?

The Witness: Yes.

The Court: Will you do so?

The Witness: The Buick, this——

The Court: Let us avoid the use of the word "this," and "those," and refer to them here by the exhibit number, if we can. Each one of these instruments will now be marked. You will find it on

(Testimony of J. Leslie Morris.)

the tag, Mr. Morris, if you will refer to those respectively.

The Witness: Exhibit 35 represents a connecting rod, and it is probably removed from the vehicle. The babbitt, you will observe, is damaged. That connecting rod would have given further service, and probably was removed because of piston ring trouble. It was probably pumping oil, and the [85] mechanic gets into the automobile to correct the oil pumping, which is a very common act of the garage service, and in opening up this, he finds it is cracked. Exhibit 35 represents a connecting rod which would probably be an exchange. As a matter of fact, this one was offered to us in exchange for Exhibit 36, which is the identical connecting rod, both carrying the name of the manufacturer.

By Mr. Meserve:

Q. Mr. Morris, may I interrupt just a minute so that we can get the story seriatim in our minds?

A. Yes; probably I am not making it clear.

Q. That is all right. Will you just explain, so we will all have it clear, the function of the connecting rod, first.

A. The connecting rod connects the piston which carries the energy from the cylinder when the charge of gas and air are exploded in the cylinder. The connecting rod delivers the energy to the crank shaft.

Q. The lower end of the shaft, that is babbitted, is the circular part that is attached to the crank shaft of the motor?

A. Yes.

(Testimony of J. Leslie Morris.)

Q. And the upper end, which you are holding in your hand, Plaintiff's Exhibit 36, is the part that attaches onto the piston? A. Yes. [86]

Q. And is known as the wrist pin?

A. No, it is by means of the wrist pin that the piston is attached to the connecting rod.

The Court: I believe you stated that 35 would probably be exchanged?

The Witness: Yes.

The Court: Why would that be true?

The Witness: Because of the break in the babbitt at the point near the edge.

The Court: Why would it not be repaired and the identical instrument sent back to the customer?

The Witness: Purely from a matter of service and speed. It would take probably three-quarters of an hour to babbitt the same connecting rod.

The Court: But it could be rebabbitted and work efficiently in the motor vehicle from which it was originally taken?

The Witness: Yes, because in many instances we do rebabbitt the same rod and it goes back and functions efficiently in the vehicle from which it was removed.

Mr. Meserve: I perhaps think, your Honor, that we haven't got the matter entirely clear, either for the record or for the Court.

Q. The connecting rods that are brought in to you for babbitting, Mr. Morris, are not in any way unusable for the same motor from which they have

(Testimony of J. Leslie Morris.)

been removed, or an identical [87] motor of the same type, are they? A. No.

Q. Except and only for reserVICING the wearing portion of the bearing, which is babbitted?

A. Yes.

Q. And that is one of the common failures in automotive operation? A. Yes.

Mr. Jewell: If the Court please, just for the purpose of keeping the record, because the Government is interested in these types of cases, not so much in this particular case, except as it represents a type of case all over the country, and with the type of examination which is leading, Mr. Meserve has induced the witness to state two things which are exactly contrary to each other.

Mr. Meserve: I have no intention of making contrary statements.

Mr. Jewell: I know you haven't, but for the purpose of clearing up the record, I think he should confine his examination to a little bit more direct questioning, because the witness answered yes to a question that the rods were in no way unusable, and then he added the qualifying phrase, except insofar as the babbitt had been melted, or was non-usable. I think it will clutter up the record, unless the examination is kept in more direct questions.

The Court: I think leading questions should be avoided, [88] especially with an informed witness. I take it the witness understands the process thoroughly.

(Testimony of J. Leslie Morris.)

Mr. Meserve: There is no doubt about that, your Honor.

The Court: He probably understands it better than counsel or the Court; and if the questions are direct, he will impart to the Court his knowledge, without any leading questions.

Mr. Meserve: The point I had in mind, I thought it was indicated just at the close of your Honor's last remarks—the impression was left with me that the Court thought these connecting rods that were brought in were in some way damaged, and that only occasionally one could be repaired and sent back.

The Court: It is rather an unsafe thing for counsel to exercise the powers of divination as to what the Court thinks.

By Mr. Meserve:

Q. Mr. Morris, you have here, as I understand it, a series of connecting rods exemplifying the process of rebabbitting the same type of rod?

A. Yes.

Q. Will you select those, please?

A. I will be glad to.

Q. You just put them upon the stand, Mr. Morris, and hand me the first rod of your selection.

A. This is a Chevrolet connecting rod. I had the boys take two or three of them together, just as they came to us [89] for rebabbitting. The connecting rod, as it comes to us to be rebabbitted—this is a Chevrolet of 1937 type; Chevrolet-6.

(Testimony of J. Leslie Morris.)

Q. Are the three that you are discussing the same?

A. All the same; just removed from a Chevrolet 1937 automobile.

Q. Just select one of those so that we can have it identified.

The Clerk: Plaintiff's Exhibit No. 37.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 37.")

By Mr. Meserve:

Q. Plaintiff's Exhibit No. 37, Mr. Morris, which you have identified is what, again, for the record?

A. It represents the connecting rod as it is received from a 1937 automobile, Chevrolet.

Q. Do you have a way, Mr. Morris, of identifying that type or make of automobile from an examination of the rod itself?

A. Yes, they all carry a numbering on the shank of the rod.

Q. Do they carry the manufacturer's name as an identification mark?

A. In many instances they do. In some instances they do not.

Q. Do they, on a Chevrolet? [90]

A. Yes, they do.

Q. Is it on the rod in question, the one which you just introduced?

A. Frequently, in Chevrolet parts, as well as others of that group, you find generally G. M., mean-

(Testimony of J. Leslie Morris.)

ing General Motors. This one here—that one seems to have only the number on it.

Q. What is the next rod in the series that you have before you, and the next process?

A. I brought this in so that we could follow the legend that is on the pictures, and show each operation as it took place.

Q. That is correct.

A. The next operation, after melting the babbitt out of the connecting rod, the old babbitt that is left in there, is to tin the connecting rod. That has been tinned, and is ready to receive the charge of babbitt we are going to pour in there, as described by our pictures. There are different stages.

Q. Is this connecting rod you have handed me still a Chevrolet?

A. A Chevrolet, 1937 car.

The Clerk: Plaintiff's Exhibit 38.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 38.")

The Witness: As described in the legend, the next [91] operation is to insert the steel separator shims, and then cast the babbitt into the connecting rod. The separator shims are placed in there so that the connecting rod and the cap will be equally separated in two pieces—will be equally open as these two separator shims are removed.

Q. The rod which you have just described is a rod for use in a Chevrolet? A. Yes, 1937.

Q. The next step in the process—

(Testimony of J. Leslie Morris.)

The Clerk: Plaintiff's Exhibit No. 39.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 39.")

The Court: Let me interrupt just a moment. I observe on these tags, as you refer to them, certain legends and figure at the head of them. Does that correspond to the photographs that have been introduced in evidence?

The Witness: No, sir, I am afraid it does not. I can readily put numbers on them though.

The Court: If you did it would facilitate the examination, and save our time. If that hasn't been done, you may go through it.

The Witness: The separator shim is now removed; the connecting rod has carefully been bolted together, and it is now ready to be machined. We are now ready to pour the babbitt in the connecting rod.

Q. And your last statement refers to the connecting [92] rod you have handed me?

A. Chevrolet 1937, yes.

Mr. Meserve: I offer that as Plaintiff's Exhibit.

The Clerk: 40.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 40.")

Mr. Meserve: May I interrupt you, Mr. Morris? And I think, with the Court's permission, it would be better to put the rod in first, and then describe it by Exhibit number, if I may do that.

(Testimony of J. Leslie Morris.)

Q. Now, Mr. Morris, Plaintiff's Exhibit 41, if you will describe it.

A. Represents the next step in the process of rebabbitting. We have bored out the babbitt and faced the edges of the babbitt so that the rod is the proper width. It is a steel flange. We do no facing with the rod at all, but we do face the babbitt; chamfer the inside. Plaintiff's Exhibit 42 is the final step in babbitting the Chevrolet 1937 connecting rod. Oil grooves have been cut, and the connecting rod is ready to be installed in the automobile from which it was removed, or any other Chevrolet of the same year and make.

(The rods referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 41 and 42," respectively.)

Q. From the last exhibits that have been introduced, and that you have testified concerning, Mr. Morris, can you [93] select one as an example upon which you can show us the identification of the original producer of the rod, or source of its manufacture?

A. Practically every one of these——

Q. From one exhibit that is in evidence.

A. Yes, this is an exhibit. This is a Packard number. That is generally accepted in all books, and that is a product of the Packard Motor Company. It was either made by or for them, because they all carry that same number on the shank of the rod. This rod is a Buick and "Buick" is very definitely

(Testimony of J. Leslie Morris.)

marked on there, on both of the rods; that is, Plaintiff's Exhibits 36 and 35.

Q. And next to the Buick name?

A. The Buick trademark.

Q. Is there anything on the Chevrolet rods that is similar?

A. The Chevrolet rod has the characteristic number that is always there, and it always has "G. M.," indicating General Motors. I have one Chevrolet here that carries another number: C. B. 463.

Q. Does that indicate anything to you?

A. Yes, it does. That is the manufacturer of the connecting rod.

Q. What manufacturer, or do you know?

A. I do know. Clawson and Bals, of Chicago.

Q. Who manufacture connecting rods for automobiles? [94]

A. Steel forging; yes; the steel connecting rod is forged.

Q. Mr. Morris, in referring to the identification marks that you have just testified to, on the exhibit before you, as to the Packard and others, how are they placed on the shank of that connecting rod?

A. That represents an operation in a drop forging plant. The connecting rods are forged from a billet of steel. Two dies—and by die, I mean a piece of hard steel that is recessed to form half of this we see here as the connecting rod, and the other

(Testimony of J. Leslie Morris.)

side is recessed to form the other half—those two are actuated by a press and hammer. We speak of that as a drop hammer, because it drops; the same operation exactly as a blacksmith does, except they do it with dies in the industry; and that forms the billet into the connecting rod. It is very heavy equipment, and I don't know but one in Los Angeles that is capable of doing it. It is just scattered over the country—the few people that can drop forge in dies the connecting rods used in automobiles.

Q. The drop forging does not in itself make the connecting rod?

A. No, that makes what we call the blank, and from that it is machined. It is placed in heavy machinery that is necessary to cut this type of steel, because it is very tough steel, and ordinary equipment will not handle it. [95]

Q. Then do I understand it to be correct, Mr. Morris, that the numbering and the identification mark of the car manufacturer is in the die in the drop forged piece?

A. Yes, and you then get, as a result, the raised figure on the shank of the connecting rod, because it is a recessed figure on the die that forms it. That gives the result in a raised figure on the shank of the rod. I might add that this knowledge of mine is simply in observing operations. I have never in my life been identified with any drop forge company.

Q. Now, at any time during the operation of your business, Mr. Morris, from the beginning to

(Testimony of J. Leslie Morris.)

date, have you ever removed from any connecting rod its manufacturer's identification mark?

A. Never.

Q. Would there be any way to remove, we will say, for example, the Packard identification marks on Exhibit 33, and replace them with any similar type of identification marks, raised?

A. No, that would be impossible.

Q. Of your own, or any other person's selection?

A. So far as I know, that would be impossible.

Q. That must be done by drop forging with the die in which the billet is cut, from which the rod is ultimately [96] machined?

A. That is correct.

Q. Now at any time, Mr. Morris, in the operation of your business, from its beginning to date, have you ever put any identification mark on a rod of your own? By that I mean of your own company?

A. A steel identification?

Q. An identification mark on a connecting rod of your own?

A. No. I might say we put occasionally, in the days gone by—I remember a few years ago, probably the late '20's, we had a rubber stamp stamped "Moroloy"; it was nothing permanent. The very moment it was installed the oil would erase it.

Q. "Moroloy" is a trade name you have for your babbitting process?

A. That's right.

Q. I am asking you if you have ever removed from any connecting rod that was in your plant its

(Testimony of J. Leslie Morris.)

identification marks or numbers, and replaced thereon an identification mark of your own, as being a connecting rod of your own manufacture.

A. Never.

Q. If a person desired to remove the numbers or the name, we will say, "Buick" from the ones you have in the exhibit, or "G. M.," and certain numerals, they could be [97] machined off there?

A. If they wanted to do it, the simplest way would be to grind them off with a circular wheel.

Q. And it could not be replaced in raised numerals or letters.

A. Not to any knowledge of mine could it be done.

Q. What would be the only way a person could put back on a plain rod any identification mark?

A. With steel stencils.

Q. It would cut into the rod instead?

A. It would cut into the rod instead.

Q. State, Mr. Morris, whether or not each connecting rod that comes into your plant, retains the original identification marks that were on it.

A. All connecting rods that come into our plant retain the original identification mark that was on it. The caps and the shank portion of the connecting rod are kept together. One cap is never placed on another connecting rod.

Q. Just explain to us what you mean by "cap" and "shank,"—those portions of the connecting rod.

A. That is detached to allow it to be placed

(Testimony of J. Leslie Morris.)

around the crank shaft. What we speak of as the cap—I am describing Plaintiff's Exhibit 33—this cap is machined by the Packard Automobile Company, or somebody whom they employ to do it, and we must keep the cap and rod at all [98] times together. This cap must be put back on the same connecting rod, and we rebabbitt it; if I make myself clear.

Q. Referring to the last statement, Mr. Morris, as it relates to the exhibit of the Chevrolet rods, you use the same cap on the identical rod that it came on? A. We do.

The Court: Aren't these shanks and caps interchangeable?

The Witness: No, sir, they are not machined that well.

The Court: There is a variance between all of the different manufacturers?

The Witness: Yes.

By Mr. Meserve:

Q. And there would be a variance between all of the connecting rods of the same class of the same manufacturer?

A. There would be a variance in the same connecting rods in the same automobiles, if I make myself clear; that is, as to width, and all, because they have been machined together when they were made, and the bolt holes are not always directly in the center of these two widths, so if I take a cap from this connecting rod and put it on this, you will very

(Testimony of J. Leslie Morris.)

frequently find an uneven edge, which interferes with your rebabbitting. That is the purpose of keeping the cap portion and the shank portion of the connecting rod [99] together.

Q. That would be true of the six cranks taken out of the same cylinder motor?

A. Six connecting rods you mean to say?

Q. That is what I mean.

A. Taken out of the same motor, yes.

Q. Mr. Morris, I would like to have you explain to us the method by which you do business with your customers. I tried to make that clear at the beginning, and we were led off into this mechanical operation.

A. The customer consists, as I said in the legend, of three types: The car manufacturer—the car agency, I should say; the car agency, the industrial account, and the automotive wholesale merchant. The automotive wholesale merchants probably give us 85 per cent of the rebabbitting business that we enjoy.

Q. Can you give us an example of an automotive wholesale merchant by name?

A. Yes, Chanslor & Lyon Company—Chanslor & Lyon Stores, Inc., I believe is the exact title. Colyear Motor Sales Co.; and one that is known by all of us, the Western Auto Supply Company.

Q. Give us the process of your business relation with any one of those customers.

A. Their truck will come up to our door and lay

(Testimony of J. Leslie Morris.)

off a package of connecting rods for rebabbitting. Those rods [100] are checked in.

Q. You don't need to describe that.

A. That is shown in the legend. I was going to say the connecting rods are rebabbitted and returned to the customer.

Q. And what charge is made?

A. For the rebabbitting charge only.

Q. You referred in the early part of your testimony, Mr. Morris, to an exchange. I want you to clarify that. Explain what you mean when you make an exchange with your customer.

A. The connecting rod is brought to us for rebabbitting. If the customer is in a hurry and wants it quickly, and we happen to have a connecting rod from identically the same type of automobile—by type, I mean make and model and year—then, instead of delaying him for the time necessary to babbitt his own connecting rod, that he brought to us, we hand him an exchange connecting rod, which is exactly the same thing except that we have babbitted it previously, and already have it on hand. The charge is exactly the same for rebabbitting it or exchanging it. We make no additional charge for the service of exchanging the rod. If he wants his own connecting rod babbitted and given back to him, or if he wants to accept the exchange which we have to offer, the charge is exactly the same.

Q. How do you acquire, Mr. Morris, the connect-

(Testimony of J. Leslie Morris.)

ing [101] rods that you have rebabbitted, that you have waiting to exchange?

A. We bought the earlier ones. Of course, we have bought no earlier ones now for many years; we bought them from established agencies. They secured the earlier type of rods from car wrecking establishments, when they had been removed from the automobile. They get them together and select them, and we buy them at so much apiece. The connecting rod that we are always more in need of than those obtainable is the late type of connecting rod, as for instance, as we sit here, the 1939 or the 1940 Chevrolet connecting rods are very much in demand. We find it necessary to go to the J. V. Baldwin Company and buy 100 or 200 connecting rods for our stock. We not only have to stock ourselves, but we have to stock the jobber who is depending upon us, or the automotive merchant who is depending upon us to service him in the connecting rod rebabbitting exchange business.

Q. Then you buy these new from J. V. Baldwin, as a dealer?

A. It comes to us in the original package, in the case of General Motors, from J. V. Baldwin. Occasionally we buy from Felix, another Chevrolet dealer, and they come in original boxes.

Q. You stock them on your shelves?

A. Yes. [102]

Q. That is a babbitted connecting rod?

A. We get it babbitted by the factory; it is a complete connecting rod.

(Testimony of J. Leslie Morris.)

Q. You take that new Chevrolet connecting rod, and do what with it, when one of your customers comes in with a used one?

A. We exchange it, sir, with our regular charge for rebabbitting that connecting rod, just the same as if we rebabbitted it ourselves.

Q. And the one that is exchanged, the one that is brought in, you rebabbitt it and put that in stock?

A. Yes, we put that in stock.

Q. And repeat the same operation on the next rod that comes in of the same type?

A. Yes. May I interject a thought? We repeat it over and over to the extent that we have never purchased connecting rods to be rebabbitted in volume. They won't even represent five per cent of our monthly sales of rebabbitting.

The Court: Read that.

(The record referred to was read by the reporter, as follows:)

“Q. And repeat the same operation on the next rod that comes in of the same type?

“A. Yes. May I interject a thought? We repeat it over and over to the extent that we have never purchased connect- [103] ing rods to be rebabbitted in volume. They won't even represent five per cent of our monthly sales of rebabbitting.”)

The Witness: I think I had better clarify that. The purchase of connecting rods for rebabbitting represents less than five per cent of our rebabbitt service to wholesalers.

(Testimony of J. Leslie Morris.)

The Court: And the other ninety-five per cent is largely exchange?

The Witness: That is it. They ship rods to us, and we ship them back.

The Court: That is a little beyond what I had in mind. How much of that ninety-five per cent is included in the delivery to your customers of a new rod that you have obtained from someone who deals in new rods?

The Witness: Five per cent; just about five per cent of our monthly sales.

The Court: The other ninety-five per cent would consist of taking the used and damaged rod and processing it, as you have described, and delivering that identical rod so processed back to your customer?

The Witness: No, sir; not the identical rod; a rod exactly like it.

The Court: That is what I am talking about.

The Witness: Yes. Not the identical rod, but a rod exactly like it. [104]

The Court: How much of the approximately ninety-five per cent of your volume is brought about by delivering to the customer the identical rod which you got from him, after having processed it in your establishment?

The Witness: I would say—of course, it will vary from time to time, but year in and year out I would say it would average possibly 15 or 20 per cent.

The Court: Then at 60 or 65 per cent—let us

(Testimony of J. Leslie Morris.)

put it in the larger figures—would consist of the delivery to your customer of a rod that had either been processed in your establishment, or a new rod that had been obtained by you from one of these dealers?

The Witness: That is exactly correct, yes, sir.

By Mr. Meserve:

Q. Mr. Morris, when a rod is brought in to your establishment from one of your customers that is bent or broken, in any part of it, do you use it?

A. We cannot accept it for rebabbiting. Our catalog and our price sheet both stipulate that cracked, bent, or broken connecting rods cannot be accepted for exchange, and we return them to the sender.

Q. Then to that extent you do not in your business use damaged connecting rods?

A. We cannot.

Q. The connecting rod, as a connecting rod, must be in perfect condition, except and only as to the wearing, bearing [105] surface which you babbitt?

A. The babbitt liner which goes in between the crankshaft and the connecting rod, yes.

Q. Any other deviation than that is rejected?

A. It makes it unfit for further service, yes.

Q. Either for rebabbiting that rod or for the replacement of one of like kind?

A. We send it back to the customer that sent it to us, because it is unfit for further service.

Q. Then in your place of business, Mr. Morris, you do nothing in any way to repair a connect-

(Testimony of J. Leslie Morris.)

ing rod other than the babbitt in the lower end of the shank? A. That is correct.

Q. You don't attempt to align them or straighten them?

A. The rod is straightened in the process of boring it. We bore it in parallel with the pin. The rod is held on the wrist pin. That simulates the wrist pin, when it is in service, and the tool that bores through this, as shown in the legend, is bored parallel to this hole. If there was a slight bend in the connecting rod, it would still be parallel.

Q. I don't think you followed my question. Look at Plaintiff's Exhibit 36. Had that rod come into your plant with a bend in the shank—

A. We couldn't use it. [106]

Q. Let me finish,—would you straighten it in your plant,—the bend in the shank? A. No.

Q. Or repair any other similar type of damage?

A. No.

The Court: The connecting rod—to simplify it—is made up of two units; the shank, and what do you call the other?

The Witness: The cap.

The Court: Your work is exclusively on the cap part of that device?

The Witness: No sir, we babbitt this part, between the shank and the cap.

The Court: You include that shank, do you?

The Witness: This is separate at this point, and these two bolts hold them together. This cap would

(Testimony of J. Leslie Morris.)

be detached. I have one here. You see the break line?

The Court: Yes.

The Witness: We babbitt both sides, of course.

By Mr. Meserve:

Q. Mr. Morris, it is required to babbitt the entire circular inside portion of the crankshaft, the upper part of the shank and cap, in order to make a complete bearing surface?

A. The connecting rod?

Q. The connecting rod, I mean. [107]

A. Yes, it is necessary to babbitt the entire circumference of the bearing.

The Court: If the shaft were bent, why wouldn't you straighten it, true up the device?

The Witness: Because a connecting rod is a very important part of the engine, and failure of the connecting rod means not just the replacement of that connecting rod, but invariably it means that the entire engine has to be replaced, because in breaking, they almost always are thrown to the side of the engine. We have instances of that at all times. So we never attempt to correct an imperfection in the connecting rod itself for fear of the responsibilities that it entails with the customer.

The Court: Supposing there was a torque, or strain, or a stress on the shank of the rod, and the result was that the rod was bent, not broken; there was no fracture in the metal, but there was a bending of the metal, and only in a small degree, but in

(Testimony of J. Leslie Morris.)

a large degree mechanically and from an engineering standpoint, would you service that part of the rod?

The Witness: I might say, sir, that that would be corrected when the piston was attached to the rod. There is a practice of aligning the connecting rod and piston just before they are installed into the cylinder. We don't have this device; that is in the garage. In other words, the service that you mention is a part of the garageman's [108] service in installing the connecting rod in the engine, rather than in our place, where we are babbitting it. To correct that slight bend that you speak of, that is a service of the garageman.

We have in each garage a fixture known as an aligning jig, and that aligning jig is employed after the piston has been attached to this end of the connecting rod, and I think the slight irregularity that you refer to would be corrected at that time with just an ordinary lever bending it, that goes with the aligning jig; but we are not called upon to do it ourselves at all.

By Mr. Meserve:

Q. Mr. Morris, if in going through the operation of rebabbitting, in your plant, a connecting rod was discovered to be out of alignment, as indicated by the Court in a previous question, would you proceed to then rebabbitt it, if it was bent?

A. No, our catalog states definitely that we do not, and will not.

Q. You do not——

(Testimony of J. Leslie Morris.)

A. We do not rebabbitt a bent rod, no, sir.

Q. Or one that is out of alignment, as you see it?

A. Yes, as we observe it from the eye, because we do not check for alignment.

Q. What, Mr. Morris, is your method with the customer, take, for example, who is outside of the city of [109] Los Angeles, at Fresno, who writes and asks you to ship him so many of a specific type of connecting rod that you have rebabbitted and have on your shelf? What is your method?

A. The method of shipping those—we ship the connecting rod, and make a charge for rebabbing.

Q. What other charge, if any, do you make?

A. We require a deposit, which is carried as a deposit charge, which will be refunded when the forging, which we haven't charged him for, is returned to us in exchange.

Q. You require a deposit on what?

A. On the connecting rod. We charge merely for the bearing when we ship it to him, and we send him the connecting rod itself; therefore he makes a deposit, which stands on our books until he has returned the connecting rod that he has received from the automobile, to us. In other words, if he comes to our counter and says, "Let me have a 493 connecting rod," which is our Exhibit 36, in the parlance of our stockbook and our handling of the connecting rod, and he brings none with him at all, we charge him a deposit until the exchange connecting rod which is acceptable to us for rebabbing is

(Testimony of J. Leslie Morris.)

brought to us. Now, on our Fresno question——

Q. Let me stop you a minute. When you say you charge him a deposit, you charge him a deposit for the price of the rod, and make him a separate charge for the rebabbitting? [110]

A. That's right; for the sake of speeding up, we frequently combine the two, but in that instance we use the word "complete," which indicates he has a deposit on the connecting rod itself.

Q. Then what occurs if you later receive from this customer a rod of a similar type?

A. We immediately issue him a credit for the full amount of the deposit.

Q. The full amount of the deposit or the cost of the rod, is that it?

A. Yes. We show a deposit charge opposite each rebabbitting quotation.

Q. What does that deposit charge represent?

A. It represents the value of the connecting rod itself, as we determine it on the basis of supply and demand at the time. In going through our book you will find a great many of them with the valuation of 10 cents for the reason that they are no longer desirable; they are obsolete. They were used in cars that have long since passed from the highway, and in many instances we suggest to them that we would just as soon sell them the rebabbitting, connecting rod and all, instead of bothering to send the old connecting rod back, because it is for an obsolete car which is no longer used on the highway.

(Testimony of J. Leslie Morris.)

Q. Then the amount of deposit is dependent upon the current demand for that type of connecting rod? [111]

A. Yes. On the other hand, if it was a very late connecting rod, we would probably charge as much as \$12.00. In the late Packard, like I have in my hand, it is unobtainable except from the Packard place, and you pay \$12.00 when you go to buy it. So they range from ten cents to that.

Q. That is the current unit charge for the connecting rod?

A. Yes, what we can get the agent to duplicate the rod for in the event the customer did not send it back.

The Court: You referred to obsolete rods that come to the establishment. What do you mean by an "obsolete rod"?

The Witness: I mean a rod that was built by the manufacturer, as an instance, in an automobile that has now long since been consigned to the scrap heap. For instance, let me cite for example possibly a 1913 Jewett, or possibly, if your memory goes back so far, to a Crit, or Corbin, and some of the cars that we knew at the beginning of the automobile industry, that have no value now because they will fit no other automobile except the one it was intended for. That is why we speak of it as obsolete.

The Court: What do you do with that obsolete rod that you took in the course of trade?

(Testimony of J. Leslie Morris.)

The Witness: Unless we had one, and we don't usually have these obsolete ones; we have long since sold them to the junkman, and he has hauled them away; there is no purpose of babbitting them any more; the opportunity of selling them [112] is too remote.

Q. Then you do not sell any of those rods that you have characterized as obsolete?

A. No, sir, we have no market for them.

Q. I can't understand why a charge is made, then, on account of an obsolete rod.

A. I will explain that. The wholesaler we send rods to sometimes carries a rod of that type in stock. You understand that 10 cents was not arrived at automatically—just instantaneously; the 10 cents, through the years, has probably decreased in value from \$1.50, maybe two or three dollars; maybe five dollars. Fifteen years ago say a rod that is now carried for ten cents was probably worth five or six dollars. The wholesaler, when he has these in stock, we, of course, ask him to send them in before they have lost their value, because in the business we are in, we have to protect the wholesale merchant a great deal, and that is why we carry the valuation down rather than write it off entirely. We feel it is his obligation if he fails to send it in at any time during its downward course, and he retains it in his stock. Do I make myself clear?

Q. You make yourself clear, but I don't understand just why you take a device that is obsolete

(Testimony of J. Leslie Morris.)

in the conduct of your reconditioning business. It depends upon what you mean by obsolete.

A. I mean by that we don't babbitt it and put it back [113] in stock.

Q. Would you junk it?

A. Yes, we would probably throw it out the window, so generally it will ultimately be sold as junk. It is not worth rebabbitting again. We have probably two or three we have been caught with, and would be glad to get rid of it because we are unable to sell the babbitting surface on it any longer.

Q. These devices would be infinitesimal, the obsolete devices that you take in in your business?

A. I don't exactly like the phrase that we have taken them in. We take them in only when we get an opportunity to sell one which we had in stock.

Q. By "taken in," I just meant to emphasize what you have stated in several other words.

A. Yes.

Q. Did I do it correctly?

A. You did it correctly, yes. I understand.

Q. You spoke earlier in your testimony about putting a rubber stamp on the inside of this babbitt that would come off when the lubrication occurred. What was that; a patented process you have?

A. No, just a trade name. We did not put it on the babbitt, but stamped it on the shank, and we only did it for, I imagine, 60 days. We found it did no good; it did not stay on the rod at all. It was a pure experiment. I understood [114] Mr. Meserve's question to refer to the practice way back in the

(Testimony of J. Leslie Morris.)

'20's which really indicated it was babbitted by us. It was a rubber stamp, with red ink on it, that instantly came off, washed off, and there was no purpose of using it further.

Q. During the applicable period in this case—you know what I mean? A. Yes.

Q. —did you put a mark of any kind upon the instrument that you processed?

A. We never put on any kind.

Q. You spoke about some catalog. You had some prospectus of your activity? A. Yes.

Q. You have that here in court? A. Yes.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same date.)

[115]

Los Angeles, California
Tuesday, May 28, 1940
2:00 o'Clock P. M.

J. LESLIE MORRIS

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination
(Continued)

By Mr. Meserve:

Q. Mr. Morris, you have called to my attention since the adjournment, corrections which you desire

(Testimony of J. Leslie Morris.)

to make in your testimony, your answers in response to questions this morning; first, as concerning your business; will you state what that was that you wanted?

A. I was asked a question, I believe, as to where we have branches. I was a little confused. This is my first time on the witness stand. I said New York, Columbus and Chicago. I forgot entirely Seattle and Portland. I would like to supply Seattle and Portland in addition to that.

Q. You wanted to correct your testimony, did you, as to what else you did to the connecting rod, other than rebabbit it?

A. You asked me the question: "Rebabbiting is the only thing that you do to the connecting rod?" And I said, "Yes." As a matter of fact, the legend and the pictures show [116] that we push a new bushing into the upper end of the connecting rod; so I want to correct that.

Q. You are pointing to the small end of the connecting rod, Exhibit 34?

A. On Exhibit 34.

Q. And you had a third note?

A. The Court asked me about straightening or aligning the connecting rod, and he asked me: "Do you?" and I took it in the present tense, and I answered "No." That statement is correct so far as it goes, but I forgot we were talking about periods six or seven years ago, so I want to correct that to say that we attempted to construct three or four

(Testimony of J. Leslie Morris.)

different little devices for aligning the connecting rod. One was a little electric attachment that had a light, and if the rod was misaligned, when we put it on there, the light would burn. That we found was an unnecessary operation, because if we did align the connecting rod, the garageman or mechanic later has to attach the piston to this connecting rod before he can install it in the engine.

The very first operation he has to do when he attaches the piston to the connecting rod is to align the whole assembly, because, after all, the alignment is not so much between the parallel axis and the shaft, but between the perpendicular wall of the cylinder, the piston standing down there perpendicularly at right angles to the axis of the crank shaft; so the operation we were doing we found had to [117] be repeated before the connecting rod could be installed in the engine, so there is no need for us to do it in our place. I want to make that correction.

Mr. Meserve: Mr. Reporter, will you be kind enough to read the Court's question and the witness' answer which appears on page 93 of your notes?

(The record referred to was read by the reporter, as follows:

“The Court: Then 60 or 65 per cent—let us put it in larger figures—would consist of the delivery to your customer of a rod that had either been processed in your establishment, or a new rod that had been obtained by you from one of those dealers?

(Testimony of J. Leslie Morris.)

“The Witness: That is exactly correct, yes, sir.”)

By Mr. Meserve:

Q. Now, is that answer correct, Mr. Morris, as you reflect on it?

A. That is a little confusing. I don't know yet just exactly what the Court wanted on that point. I am just a little confused. Maybe if you would read the question previous to that it would help me.

Q. With your Honor's permission, I think I can clear up the witness' mind what the Court was seeking information on. What per cent, Mr. Morris, of rods used in your business are new rods or rods that you purchase and repair [118] and place in stock for service?

A. What per cent of what, sir?

Q. Of the total volume of your sales business.

A. About five per cent per month.

Q. And the remaining 95 per cent——

A. Now, I am following you.

Q. —consist of what?

A. The remaining 95 per cent of our business consists of connecting rods that we receive, babbitt and return to the customers. I say customers collectively, because I don't want to leave the impression that the connecting rods go directly to the same parties who sent them in. In other words, if we receive in this morning's shipment from five or six different jobbers, let us say, seventy-five Chevrolet connecting rods, this afternoon or tomorrow morn-

(Testimony of J. Leslie Morris.)

ing those shipments will go back; the 75 connecting rods will be of the Chevrolet type; that is, of the same 75 that came in the previous morning, the 75 connecting rods will be on their way back to the six or seven or eight or ten customers I mentioned, but I wouldn't say that the identical Chevrolet rod that came from one customer goes back to that same customer, because they are all exactly alike. Unless we put some mark on them, it would be physically impossible for us to tell who they came from, except we have the others waiting in the stockroom to go out.

Q. The five per cent of the total of the 100 per cent [119] based on your total sales represents connecting rods that you purchase either new from automotive representatives, or second-hand ones from people who deal in second-hand rods?

A. Yes, sir.

Q. That is, both together total five per cent?

A. Both together total less than five per cent, I might say.

Q. And that five per cent of your total business, Mr. Morris, is occasioned by what practice?

A. What makes it necessary?

Q. Yes.

A. Demands from jobbers who haven't yet, or wholesalers who haven't been able to stock their shelves with the late type of connecting rods, and they depend on us to ship them to them. You men-

(Testimony of J. Leslie Morris.)

tioned this morning Fresno. If the wholesaler in Fresno we are speaking of, has an order which comes over his counter for a set of '40 connecting rod exchanges, he has the old connecting rods, but the garageman has brought them in to him; he is in Fresno, and he wants as fast service as he can get on them; so he immediately wires us—telegraphs us or phones us to ship him these connecting rods. I ship them to him, but in that turnover I am compelled to buy the late connecting rods to the extent of the less than five per cent of the total babbitting I mentioned. [120]

Q. Then, if I understand it correctly, the five per cent of rods you are obliged to purchase, both of new and second-hand, represents the lag or space of time that it would require the rods that come in in the morning to go through and be babbitted, and be back out on the shelf. Is that correct?

A. That is right. You might call it the slack.

Q. To take up the slack? A. Yes.

Q. It is a fact, is it not, Mr. Morris, that in many instances, or in some instances, you do rebabbit and deliver back the actual rod received from the customer?

A. In a great many instances.

Q. And that represents about what per cent of the total?

A. Let us say 10 per cent, because usually those rods that go directly back to the customer arise from the instructions that are on the order. Frequently

(Testimony of J. Leslie Morris.)

they say, "Same rods back." On other occasions they are machined—babbitted by us; the babbitt is poured to a size to fit a particular crankshaft that has been ground, so a standard rod would be useless to them; so naturally we babbitt the same rods and send them back to them.

Q. And it is also occasioned, is it not, from unusual types of rods, such as come out of tractors and large Diesel motors? [121]

A. Yes, that's right; expensive rods. There are some connecting rods—for instance, some rods we babbitt for three or four dollars each, which the cost of the rod alone would be around forty to buy the rod outright; but nobody wants to do that. Our files are full of letters—they have even wired, for a certain type of rod, and we write or wire right back, "Unable to secure. Send us rods in for rebabbiting." We can't give service on those rods, because they cost too much, and we can't expect the turnover of those we receive in exchange.

Q. Mr. Morris, is there a distinction in the automotive industry, and your particular branch of it in particular, between a damaged or injured connecting rod and one that is worn?

A. Definitely.

Q. What is the distinction?

A. The one that is merely worn requires rebabbiting. The one that is damaged—what is the other word you used—damaged or—?

Q. Or injured.

(Testimony of J. Leslie Morris.)

A. Or injured, why, it's not fit for further service.

Q. A worn connecting rod that comes into your plant for rebabbiting can operate in an internal combustion motor? A. Yes.

The Court: Cannot be, you say? [122]

Mr. Meserve: Can.

The Witness: It can operate, yes.

Q. The rebabbiting is for building up the bearing so it will operate more efficiently?

A. Preserve the oil pressure, and things of that sort. It will function. In fact, I suppose 95 per cent of the automobiles that pass this building right now, the bearings are too loose, but they are still running just the same.

Q. Can you tell us, Mr. Morris, when you are buying connecting rods, to meet this five per cent that you have defined, approximately what the average cost of those connecting rods is; not the new one, but the second-hand one—about what the average cost is?

A. The average cost would be in excess of \$1.00, I would say; possibly \$1.50. I haven't prepared figures on that, so I would guess between \$1.00 and \$1.50 would be our average cost.

Q. What would be the range of cost of the popular types?

A. From \$1.00 to \$3.50.

Mr. Meserve: Mr. Jewell, do you care to have any further evidence on that? I am merely asking

(Testimony of J. Leslie Morris.)

you. We have here specimen invoices, if you would like to have them in the record on this phase of the evidence. Pardon me, your Honor, I should have asked permission to address counsel. [123]

Mr. Jewell: Will the Court permit me to examine these a moment?

Mr. Meserve: It is merely to substantiate the statement of fact made by the witness.

Q. Mr. Morris, I will show you what appear to be invoices addressed to the J. Leslie Morris Company, a group of them, and ask you to examine them and tell us what they are, please.

A. These are invoices for connecting rods purchased from Mr. LaVine, a gentleman who deals in this type of commodity, and I recognize it. He is so familiar with us down there that he uses the name "Pete," but we all know him as Mr. LaVine. It represents sales to us of connecting rods to be rebabbitted, which are other than brand new. They have been removed by like establishments, or by someone from where he secures them, and carefully selected to see that there is nothing wrong with them, because when we are paying \$1.90 or \$1.60—

Q. Mr. Morris, will you answer the question?

A. Yes. That is what they are.

Q. Look through the group of invoices I have handed you, and advise us if that is a fairly representative type as to cost.

A. Yes, it is.

Q. Of the rods that you purchased to fill in the five per cent of the rods that you rebabbitt. [124]

(Testimony of J. Leslie Morris.)

A. Second-hand rods, yes, sir, that is correct.

Q. What, Mr. Morris, would be the approximate average weight of a connecting rod that would be of a popular type?

A. I would say the average weight would be around two or two and a half pounds each.

Q. The smaller ones, of course, are lighter than the larger ones? A. Yes.

Q. But those that you purchase in the five per cent will average——

A. Two or two and a half pounds each.

Mr. Meserve: We will offer the invoices together, as one exhibit.

The Clerk: Plaintiff's Exhibit 43 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 43.")

ORDER No. 11 DATE Sept 19 35

M. J. Leslie Morris Co., Inc.

SHIP TO 126 So. Hope St.

AT S. A.

HOW SHIP _____

TERMS Net WHEN Mr. Morris

SALESMAN _____ BUYER _____

12	647-	1.60	✓	19	20-
50	603-4-	.55	✓	37	50-
12	635-	1.33	✓	16	20-
2	648-	2.00	✓	16	00-
12	500-	1.25	✓	15	00-
37	533-	1.25	✓	30	00-
8	580-	1.50	✓	12	00-
12	488-	1.25	✓	15	00-
12	554-	1.00	✓	12	00-
2	572-	.25	✓	5	00-
				Total ✓ 167.90	

6

J.P.P.

SEP 9 1935 D.K.

No. 433-11 Civ.
Morris Co.
 vs
USA
 EXHIBIT
 No. 43
 Filed 5/29 1940
 R. S. ZIMMERMAN, Clerk
 By M. S. Hansen
 Deputy Clerk

No. 9716
 UNITED STATES CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
FILED
 MAR 27 1941
PAUL P. O'BRIEN
 CLERK



(Testimony of J. Leslie Morris.)

Mr. Meserve: And with the right, Mr. Jewell, if we elect, subject to the approval of the Court, to substitute copies in lieu of the originals, if we would like to keep them in our permanent record.

Mr. Jewell: That is perfectly acceptable to me.

By Mr. Meserve:

Q. Are you familiar, Mr. Morris, with the going price of junk, that would be junk occasioned by damaged connecting rods not further usable, or that type of steel, during the period in question? [125]

A. Yes, I would be.

Q. What, approximately, was the going price of junk?

A. It was very low at the beginning of this period, and it increased, I would say, from eight to ten dollars per ton.

Q. What would you say was the highest price junk brought during that period?

A. Scrap forging steel, is what you mean?

Q. Yes, scrap forging steel.

A. I would say the top price would have been \$11.00 a ton.

Q. During the course of your business, Mr. Morris, you have published a price list for your trade of the prices charged for rebabbiting the various types of rods? A. Yes, sir.

Q. I will show you, Mr. Morris, one of the earliest in date, and ask you if that is a copy of your published price list that was effective as of the date that appears on its face. A. That was, yes.

(Testimony of J. Leslie Morris.)

Q. Can you briefly for us, Mr. Morris, so that it can be made intelligent in the record, define the symbols that appear on the inside of the price list, by just taking any one item; and those apply the same as to all items, except a variance in the price, do they not? A. That's true. [126]

Q. Just explain it.

A. This is a net price sheet to the wholesaler; that is the wholesale merchant, I believe I have spoken of him as; stock No. 2, net rebabbitting, \$1.80; net rod, 50 cents; net complete is the sum of the two, \$2.30.

Q. Taking the first item in the first left-hand column of the document that you are looking at, which is No. 2. That is your stock number?

A. Yes, sir.

Q. And you have a catalog that identifies that by its stock number? A. Yes.

Mr. Meserve: We will offer in evidence as Plaintiff's Exhibit next in order the identified price list effective May 15, 1931.

The Clerk: Plaintiff's Exhibit 44 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit 44.")

By Mr. Meserve:

Q. I show you a similar document that is dated effective August 1st, 1932. Would your testimony be the same as to that, except that it is a later price list?

(Testimony of J. Leslie Morris.)

A. Exactly the same, yes, sir. That is the price list we used at that time.

Mr. Meserve: We will offer the document that was last identified by the witness as Plaintiff's next exhibit in [127] order.

The Clerk: Plaintiff's Exhibit 45 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 45.")

PLAINTIFF'S EXHIBIT No. 45

Revised

Confidential Net Prices for Authorized
Jobbers Only

Effective August 1st, 1932

[National Standard Parts Association Emblem]

Moroloy

Connecting Rod and Main Bearing
Rebabbitting

J. Leslie Morris Co., Inc.
"Coast to Coast"

National Rebabblers to the Automotive
Parts Jobber

Moroloy Bearing Service

Moroloy Bearing Service

655 W. 55th St.

New York City

(Testimony of J. Leslie Morris.)

Moroloy Bearing Service

69 N. Tenth St.,
Portland, Ore.

Moroloy Bearing Service

11 So. Ninth St.,
Minneapolis, Minn.

Moroloy Bearing Service

1361 So. Hope St.,
Los Angeles, Cal.

Moroloy Bearing Service

162 No. Fourth St.,
Columbus, Ohio

Moroloy Bearing Service

296 Ivy St., N. E.,
Atlanta, Ga.

Moroloy Bearing Service

606 Santa Fe Drive,
Denver, Colo.

Moroloy Bearing Service

2712-16 So. State St.,
Chicago, Ill.

Moroloy Bearing Service

2354 Valley St.,
Oakland, Cal.

Moroloy Bearing Service

1516 Thirteenth Ave., W.,
Vancouver, B. C.

(Testimony of J. Leslie Morris.)

Moroloy Bearing Service
1934 Broad St.,
Regina, Sask.

Moroloy Bearing Service
10 So. Davis St.,
Jacksonville, Fla.

Moroloy Bearing Service
310 North Laurel St.,
Richmond, Va.

Moroloy Bearing Service
1520 Tenth Ave.,
Seattle, Wash.

Moroloy Bearing Service

Stock No.	Net Rebab.	Net Rod	Net Comp.
2	1.80	.50	2.30
6	1.80	.75	2.55
7	1.80	.75	2.55
12	2.00	7.00	9.00
14	3.00	10.00	13.00
15	4.80	13.00	17.80
17	1.05	.25	1.30
18	1.05	.25	1.30
19	1.05	.25	1.30
20	1.05	.25	1.30
25	1.05	.25	1.30

* * * * *

This confidential net price list is issued for the convenience of your purchasing department.

(Testimony of J. Leslie Morris.)

The "Net Rebabbiting" is charged when the old rod is offered in exchange. The "Net Complete" price is charged when the old rod is not offered in exchange, but promised later. The "Net Rod" charge is credited upon receipt of the old rod.

The "Net Complete" charge is also applicable to the outright purchase of connecting rods.

We ask that the exchange rods to cover those sent out as "Complete" be returned to us fifteen days from date of shipment.

Connecting rods rebabbitted to specified under-sizes are subject to an additional charge of 50¢ net per rod.

Defective forgings will not be rebabbitted but will be returned to the sender.

We are equipped to rebabbitt all types of connecting rods and main bearing caps not listed.

We reserve the right to correct listings of connecting rods sent us for rebabbiting.

All prices are subject to change without notice.

Industrial and Special
Automotive Bearings

Wholesalers receive 60% discount on special
bearings

MOROLOY BEARING SERVICE

[Endorsed]: Plaintiff's Exhibit No. 45. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. That is the one effective 1332. I will show you a similar one, Mr. Morris, that is dated effective April 15th, 1933, and ask if your testimony would be the same as to that.

A. My testimony is the same as to that, yes, sir. That is the net price sheet at that time.

Q. For the time of the last one?

A. Yes, it's the same.

Mr. Meserve: We will ask the Court to mark the one effective April 15, 1933, as the next exhibit in order.

The Clerk: Plaintiff's Exhibit 46 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 46.")

Mr. Meserve: And the one effective September 24, 1934, as 47.

The Clerk: Plaintiff's Exhibit 47.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 47.")

(Testimony of J. Leslie Morris.)

PLAINTIFF'S EXHIBIT No. 47

Moroloy

Western Babbitors Association
Jobbers' Confidential Net Cost Prices
for

Connecting Rod and Main Bearing
Cap Rebabbiting

Also Net Forging Deposits
Effective September 24, 1934

The net rebabbiting is charged when the old rod is offered in exchange.

The net forging price is charged in addition when the old rod is not offered in exchange.

The net forging charge is credited upon return of the old rod to us.

We ask that the exchange rods to cover those sent out, be returned us within fifteen days.

Forgings rebabitted to specified undersizes are subject to an additional charge of 30c each.

Defective forgings will not be rebabitted, but will be returned to the sender.

We are equipped to rebabitt all types of connecting rods and main bearing caps not listed.

We reserve the right to correct listings of forgings sent us for rebabbiting.

All prices are subject to change without notice.

Form 1-A

[Endorsed]: Plaintiff's Exhibit No. 47. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. These documents that have just been introduced in evidence, Mr. Morris, were all of the price lists [128] published and in effect during the period involved in this case, from 1931 to 1934?

A. Yes, sir.

Q. I will show you, Mr. Morris, a document dated 1932, and ask you to identify it.

A. This is our sheet that goes to the jobber to help him to identify the connecting rod.

Q. Do you describe it as a catalog?

A. We call it a catalog, yes. That is the catalog in effect at that time.

Q. I will show you a similar one of 1933.

A. That is our publication, yes.

Q. And those were the two catalogs that were in effect with and at the same time as the price lists and during the time involved in this case?

A. Yes.

Mr. Meserve: We will ask that the one of 1932 be marked as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 48.

Mr. Meserve: And the one 1933—

The Clerk: Plaintiff's Exhibit 49.

(The documents referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 48 and 49," respectively.)

(Testimony of J. Leslie Morris.)

PLAINTIFF'S EXHIBIT No. 49

MOROLOY

Bearing Service
Rebabbitted Connecting Rods
1933

Moroloy Bearing Service
National Rebabblers
Features of 1933!!!!

Jobber's Inventories Reduced

Rights and Lefts Now Interchange

Jobbers need no longer stock both rights and lefts to service off-set pressure feed Connecting Rods. By our exclusive manufacturing practice, developed for 1933 conditions . . .

Jobbers Now Reduce Inventories

50% on These Numbers

Obsolescence Protection
and
Stock Control

Again 1933 conditions demand protection of Jobber's Investments. Moroloy has met the situation with an Obsolescence and Stock Control Plan, which guarantees complete and continuous protection of the Jobber's Connecting Rod Investment. Details on request.

(Testimony of J. Leslie Morris.)

Moroloy Connecting Rods
Are Centrifugally Bonded and Automatically
Machined to Duplicate Original Equipment

Casting

Moroloy Centrifugally Processed Rods meet engineering specifications of original car and motor manufacturers.

This process deposits babbitt on the tinned surface under extreme centrifugal pressure, assuring an absolute bond between babbitt and steel, that is not obtainable by the old fashioned hand poured method.

Centrifugally processed connecting rods are endorsed by the Society of Automotive Engineers and are used exclusively by the following manufacturers:

Auburn, Buick, Continental, Cord, Chrysler, De Soto, Dodge, Durant, Elear, Essex, Gardner, Graham, Hudson, Hupmobile, Jordan, Kissel, Lycoming, Marmon, Plymouth, Ruxton, Studebaker, Stutz, White, Willys-Knight, and Windsor.

“If It’s Not Centrifugally Cast—It’s Not a Factory Duplicate

Automatic Pyrometers

To regulate the temperature of rods, tin and babbitt, the Moroloy Centrifugal Process eliminates human element entirely. Heat control is obtained by approved automatic pyrometers.

(Testimony of J. Leslie Morris.)

Machining and Finishing

Moroloy machining and finishing is accomplished with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers.

Modern high compression engines demand close tolerances, both in bearing diameter and width. Of equal importance is proper length spacing. Moroloy precision tools are automatic in maintaining exact length dimensions between center of piston pin and center of crankshaft.

Moroloy processed rods are straightened, cleaned and serviced with new bolts, nuts, shims and piston pin bushings. Oil Clearance allowed. No scraping nor reaming required.

Electrical alignment is an exclusive Moroloy feature.

For Quick, Simple and Proper Installation,
Insist on Moroloy

The extra quality built into every rod means longer life, trouble free operation and Owner Satisfaction, the factors most important in building your business.

Service

Fifteen manufacturing plants, located at strategic points over the United States and Canada, render a coast to coast service, convenient to every jobbing center. Ample stocks at all branches assure same

(Testimony of J. Leslie Morris.)

day shipment. Telephone and telegraphic orders receive instant attention.

Moroloy Bearing Service
J. Leslie Morris Co., Inc.
“Coast to Coast”

National Rebabbiters to the Automotive
Parts Jobber

Owned and Affiliated Stations Operating in the
following Cities—

655 West 55th St.,
New York City, N. Y.

1361 So. Hope St.,
Los Angeles, Calif.

2354 Valley St.,
Oakland, Calif.

69 North Tenth St.,
Portland, Ore.

296 Ivy St. N. E.,
Atlanta, Ga.

2712-16 So. State St.,
Chicago, Ill.

162 N. 4th Street,
Columbus, Ohio

11 So. Ninth St.,
Minneapolis, Minn.

(Testimony of J. Leslie Morris.)

606 Santa Fe Drive,
Denver, Colo.

1516 Thirteenth Ave., W.
Vancouver, B. C., Canada

1934 Broad St.,
Regina, Sask., Canada

10 S. Davis St.,
Jacksonville, Fla.

1520 10th Ave.,
Seattle, Wash.

310 N. Laurel St.,
Richmond, Va.

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(Testimony of J. Leslie Morris.)

Special Sizes

To fit Reground Crankshafts, Connecting Rod and Main Bearings are finished to micrometer dimensions at an extra charge of seventy-five cents (75¢) per bearing. This charge is Net and should be added after making deduction of regular trade discounts.

Specify exact micrometer size of reground crankshaft.

Industrial and Special Automotive Bearings

To determine list prices for rebabbiting Industrial and Automotive Main Bearings (Bronze or Steel Backs) and Connecting Rods not listed in this hand book:

Measure length of bearing over all. Bearings under 2½" diameter and 3" in length, charge \$3.50. This price is net, not subject to trade discounts. Ask for quotations on larger bearings.

Undersize charge per unit applicable in addition if special size.

(Testimony of J. Leslie Morris.)

Abbreviations:—"C"—Pin clamps in rod. No bushing. "B"—Pin floats in rod. Bushing used. "FFP"—Pin floats in rod and piston. Bushing may or may not be used.

Note—All rods marked thus * are special jobs and are not stocked for exchange. Rods not carried in stock must be sent in for rebabbitting. Bushings, shims, bolts and nuts charged for extra on all special rods requiring these parts new. Modern facilities guarantee the fastest possible service.

Do not accept rods for exchange that are bent, cracked or mutilated.

SECTION I
ALPHABETICAL LIST
REBABBITTED CONNECTING RODS
ARRANGED BY NAME OF MOTOR

Notice to Salesmen: (1) When old rod is offered in exchange, use Column "A" prices, subject to trade discounts. (2) When old rod is not offered in exchange, but promised later, add Column "B" prices NET. Upon return of old rod refund Column "B" prices NET.

Name	Year and Model	No. on Rod	"A"		"B"		Bearing Size		Pin Size and Type
			Stock No.	List Price	Net Forging Deposit	Bearing Diam.	Bearing Width		
A. C. F.	Bus, 17-30 Pass. 1927-32.....	HM-64-65							
		H-9789	258	6.00	*	2 1/4	2 7/16	1 1/4	B
A. C. F.	Bus, 17-23 Pass. 1931, 6 Cyl.....	18090-B	525	3.50	6.00	2 1/4	1 1/2	1 1/8	C
A. C. F.	Bus, 21-29 Pass. 1931-32, 6 Cyl.....	15090-B	526	3.50	6.00	2 1/2	1 3/4	1 1/4	C
Acme	2 Tons, 1927-29	8UD-502	242	3.00	3.00	2 1/8	1 3/8	1	B
Acme	2 Tons, 1928-31	8UD-505	524	3.00	3.00	2 1/8	1 3/8	7/8	B
Acme	4 1/2-7 1/2 Tons, 1925-31 (oil line integral).....	B5D-501	505	7.50	17.00	2 5/8	3	1 1/2	B
Acme	Bus & Truck 3 1/2-6 Tons, 1926-29.....	7TD-500	425	5.00	10.00	2 1/2	1 13/16	1 1/4	B
Acme	7 Tons, 1928-31.....	26HD-501	631	6.50	16.00	3	2 1/8	1 1/2	B
Acme	3 1/2-7 Tons, 1928-31, 6 Cyl.....	7TD-500	425	5.00	10.00	2 1/2	1 13/16	1 1/4	B
Acme	3/4, 1 Ton, 1926-31, 6 Cyl.....	9LD-504	163	2.50	2.00	2	1 1/8	.860	B
Acme	3, 4 Tons, 1929-31, 6 Cyl.....	20RD-501	527	3.50	7.00	2 1/2	1 13/16	1 1/4	B
Acme	2 1/2, 3 Tons, 1929-31, 6 Cyl.....	16RD-500	615	3.50	7.00	2 3/8	1 13/16	1 1/4	B
Acorn	1, 2 Tons, 1927-31.....	8UD-505	524	3.00	3.00	2 1/8	1 3/8	7/8	B
Acorn	2 1/2, 3 Tons 1927-31.....	WSE-2	449	5.00	10.50	2 1/2	1 7/8	1 3/8	B
Ajax	1926, 6 Cyl.....	2120-A-4							
		15001	194	3.00	2.00	1 5/8	1 5/16	3/4	B

[Endorsed]: Plaintiff's Exhibit No. 49. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. Taking, Mr. Morris, just for elucidation, page 3 [129] of Exhibit 49,—and the system used in the catalog and the price sheet is the same, regardless of the year?

A. The system used is the same.

Q. I direct your attention—and this is only just to elucidate the whole matter—to Chevrolet 1932, six cylinder, on page 3, Section 1, and will ask you to explain to us what appears in the next column.

A. That is the serial number.

Q. And that is the number, is it, that appears?

A. On the forging, on the shank of the connecting rod, yes. That is the number that is raised in the die of the connecting rod.

Q. Then in the next column following that?

A. The 516 is our stock number.

Q. And that 516 is the same 516 that appears on the price sheet?

A. Yes, in the net price sheet.

Q. And that is the adopted plan of the catalog all the way through? A. Yes.

Q. The names appearing in the left-hand corner are of the motor manufacturers?

A. That's right.

Q. The stock number that appears in the catalog, and appears in the price sheet, whereabouts does it appear in connection with your business?

[130]

A. On the end of the box in which we pack the connecting rods.

(Testimony of J. Leslie Morris.)

Q. On the carton in which you ship it?

A. On the carton in which we ship it, yes.

Q. You do not put that stock number at any time on the connecting rod itself? A. No.

Q. Or any other identification mark?

A. No.

Q. I believe you testified this morning you did not remove any identification mark that appears on the rod? A. None whatever.

Q. And never have? A. And never have.

Q. Mr. Morris, I will show you a red carton that is produced from your business, and ask you if that is the carton that you just last referred to in your evidence, in which you packed or shipped the rebabbitted rods?

A. This is the carton in which we shipped the rebabbitted rods at the time of the period we speak of.

Q. That was what I was going to qualify next. That is the type used during the time involved in this case? A. Yes.

Mr. Meserve: We will ask the Clerk to mark this as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 50. [131]

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 50.")

By Mr. Meserve:

Q. Referring to Plaintiff's Exhibit No. 50 that you have just identified, Mr. Morris, I will direct

Handwritten label on the side of the box with illegible text.

Stock No.
315

MORLOY
Special



**REBABBETTED
CONNECTING
RODS**
CENTRIFUGALLY
CAST
ACCURATELY
MACHINED

W

(Testimony of J. Leslie Morris.)

your attention to a number that appears on the end, 315, and ask you to tell us what that is.

A. That is the connecting rod for a Pontiac-6.

Q. What is 315?

A. That is the number again that is in our so-called catalog and price sheet; net sheet; our identifying number.

Q. That is your identifying number?

A. Yes.

Q. And, except as to the change in numbers, is the system used the same, each number referring to the particular type of connecting rod, is that correct?

A. That is correct, yes.

The Court: What is the inscription, "Fac. No. 691"? I am reading from Exhibit 48. Is that the factory number?

The Witness: That is the factory number that is on the shank of the rod. That is the same number we have been referring to all the time.

The Court: The factory number of the original manufacturer, whether a Buick, or Chevrolet, or what it is?

The Witness: The factory number that appears on the shank of the rod. Your Honor, that is not always the stock [132] number. Sometimes that varies, but this number that appears on the shank of the rod, we put that merely for identification so they will know what rod we are talking about; what rod they are to receive; what rod they will require; because about the first thing a garageman does when

(Testimony of J. Leslie Morris.)

he takes a rod out is to look at the number; not our stock number, but the number on the connecting rod itself. He goes to his wholesaler and says, "Give me one like that."

The Court: Is that—

The Witness: That is the factory number.

The Court: Not your number?

The Witness: Not my number. That's right, yes. [133]

HARRY W. PATTIN

a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined, and testified as follows:

The Clerk: You will state your full name to the court.

The Witness: Harry W. Pattin.

Direct Examination

By Mr. Meserve:

Q. Mr. Pattin, where do you reside?

A. 2107 Ames Street, Los Angeles.

Q. What is your business or profession?

A. I am a certified public accountant.

Q. And you are licensed to practice your profession in the State of California? A. I am.

Q. How long have you been a certified public accountant? A. Since 1925.

Q. You have performed professional services for the plaintiff corporation in this case?

(Testimony of Harry W. Pattin.)

A. I have. [142]

Q. The J. Leslie Morris Company?

A. Yes.

Q. When did you first perform any accounting services for that corporation?

A. In July, 1933.

Q. And it consisted of what?

A. At that time I had to go back for about a year or a year and a half to audit the books. Since then I have prepared the financial statements, tax returns, and various other special matters.

Q. And you made the annual audit?

A. Yes, I did.

Q. And have made your own examination of the books of the corporation? A. Yes, I did.

Q. For the period through the year 1931?

A. Well, not very extensively back of 1931, although I did see enough of the books and the tax returns to satisfy me that the books were correct.

Q. I show you, Mr. Pattin, a document entitled "Financial Statement, J. Leslie Morris Co., Inc.," for December, 1931, and ask you if you can identify that document. A. Yes, I can.

Q. State what it is, please.

A. This is the balance sheet showing the assets and [148] liabilities of J. Leslie Morris Company, Inc., as of December 31, 1931.

Q. That was prepared, was it, before you became affiliated, or worked professionally for the company? A. Yes, it was.

(Testimony of Harry W. Pattin.)

Q. But since you have been their accountant, you have verified the figures that are indicated on that statement, with the books of the corporation, and determined whether they are correct or incorrect? A. Yes, I did.

Q. What did you find in that particular? That they were correct?

A. Yes, I found they were substantially correct. There was one slight change made after a Federal auditor examined this, a slight change in the rate of depreciation; not very substantial.

Q. In the rate of depreciation?

A. That's right.

Mr. Meserve: We will offer in evidence the document, identified by the witness as Plaintiff's next exhibit in order, being the assets and liabilities or financial statement.

The Clerk: Plaintiff's Exhibit 51 in evidence.

By Mr. Meserve:

Q. I will show you a second document, Mr. Pattin, entitled "Statement of Operations," and ask if you can [149] identify that document.

A. Yes, this shows the result of operations of J. Leslie Morris Company for the year from January 1, 1931 to December 31, 1931.

Q. Are you familiar with the statement?

A. Yes, I am.

Q. Have you verified the figures thereon from the books since you have been the accountant for the company?

(Testimony of Harry W. Pattin.)

A. Yes, I know they are based on the books and records; taken from the books and records.

Mr. Meserve: We will offer the profit and loss statement,——

Q. This is a profit and loss statement you have just identified? A. That's right.

Mr. Meserve: —as Plaintiff's next exhibit in order.

The Clerk: Plaintiff's Exhibit 52 in evidence.

(The documents referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 51 and 52," respectively.)

By Mr. Meserve:

Q. Examine Plaintiff's Exhibit 52, Mr. Pattin, will you, and tell us what the result of the J. Leslie Morris Company operation was for the year 1931, as to whether it operated at a profit or loss?

A. It shows a net loss of \$3370.07. [150]

Q. And that includes all of its operations, whether here or in any of its various then existing branches?

A. That's right. That's the entire concern.

Q. Have you, since observing the result of this statement, checked the books to verify whether that loss actually existed or not, as shown by the books?

A. Yes, I did.

Q. And you found it to be correct?

A. Yes.

Q. That it was a net loss of operation for that year? A. Yes.

(Testimony of Harry W. Pattin.)

Q. I will show you another document entitled "Financial Statement, December, 1932," and ask you if that document that you are now examining is similar to Plaintiff's Exhibit 51, except for the year 1932. A. Yes, it is.

Q. Did you have occasion to verify the figures and facts therein contained, from an examination of the company's books? A. Yes, I did.

Q. What did you ascertain?

A. That these figures were taken from the books and records of this company.

Q. And truly reflect the condition as indicated from the books? [151] A. Yes.

Mr. Meserve: We will offer the financial statement for the year 1932 as Plaintiff's Exhibit 53.

The Clerk: 53 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 53.")

By Mr. Meserve:

Q. I will show you a "Statement of Operations," January 1, 1932 to December 31, 1932, and ask you if you identify that as being a similar statement to Plaintiff's Exhibit 51, except for the year 1932. A. Yes, it is similar.

Q. And have you verified the facts and figures indicated on the statement, from the books and records of the corporation?

A. Yes, I did.

Q. And do they truly reflect the condition of

(Testimony of Harry W. Pattin.)

the company as indicated by the books and records? A. They do.

Q. What was the result of the operations of the company for the year 1932?

A. A net profit of \$4574.73.

Q. Was that net profit computed on taking into consideration the same elements that the net loss was determined on the preceding year?

A. Yes. [152]

Q. All of the same phases of operation in all of the various plants of the company?

A. That's right. It is the net result of the entire corporation.

Mr. Meserve: We will offer this statement as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 54 in evidence.

By Mr. Meserve:

Q. I will show you a statement: "Balance Sheet," dated December 31, 1933, and ask you if you can identify that document.

A. Yes, that is the balance sheet of this company as of December 31, 1933.

Q. Who prepared that?

A. I prepared this myself.

Q. From the books? A. Yes.

Q. Was there anything else that you did to verify it? I assume that you checked against the bank records?

A. Yes, I audited the books. I make a continuous audit. I am down there at least once a week.

(Testimony of Harry W. Pattin.)

Q. And that is a correct statement of the company as of that period, is it? A. It is.

Mr. Meserve: We will offer the balance sheet for 1933 as Plaintiff's Exhibit [153]

The Clerk: 55.

(The documents referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 54 and 55," respectively.)

PLAINTIFF'S EXHIBIT NO. 55

J. Leslie Morris Co., Inc.

BALANCE SHEET

December 31, 1933

Assets	Total	Los Angeles	Portland Seattle	Chicago	Columbus	New York
*	*	*	*	*	*	*

[Endorsed]: Plaintiff's Exhibit No. 55. Filed 5/28/1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

By Mr. Meserve:

Q. I will show you a profit and loss and income statement dated December 31, 1933, and ask you if you identify that?

A. Yes, that's the statement of income, profit and loss, for this company, for the year 1933.

Q. Who prepared it? A. I did.

Q. From the books and records of the corporation? A. Yes.

(Testimony of Harry W. Pattin.)

Q. What does the result show for that year?

A. It shows a net loss of \$2258.07.

Q. And was that based upon the same method of calculation of profit and loss that is indicated in this statement for the years 1931 and 1932?

A. Yes, it was.

Mr. Meserve: We offer the document last identified by the witness as Plaintiff's exhibit.

The Clerk: 56 in evidence.

(The document referred to was received in evidence and marked as "Plaintiff's Exhibit No. 56.") [154]

By Mr. Meserve:

Q. The statement that I now hand you, being balance sheet for the year 1934, your testimony is the same as to that, Mr. Pattin, as it was for the previous similar statement for the year 1933?

A. Yes, it is.

Q. You prepared it?

A. I prepared it from the books and records.

Q. And from your audit?

A. That's right.

Q. And it is correct? A. Yes.

Mr. Meserve: We offer the balance sheet for the year 1934 as Plaintiff's Exhibit 57.

The Clerk: Plaintiff's Exhibit 57 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 57.")

(Testimony of Harry W. Pattin.)

By Mr. Meserve:

Q. And I will show you a profit and loss and statement of income, December 31, 1934, and ask you if your testimony is the same as to that as it was to the one previously identified, except as to the year.

A. That's right. This covers the year 1934.

Q. What does that show as a result of the operation?

A. It shows a net profit of \$5191.86.

Q. And no different method of calculation of income [155] or profit or loss was made in this year as against any of the preceding years?

A. No change in the method.

Mr. Meserve: We will offer the document identified as Plaintiff's Exhibit.

The Clerk: 58 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 58.")

By Mr. Meserve:

Q. I will show you a balance sheet of the corporation dated December 31, 1935, and ask you if that is a similar document, prepared by yourself, for that year, as you have testified to as the two preceding years. A. Yes, it is.

Q. You prepared it?

A. I prepared it after audit from the books and records of this company.

Q. And it is correct? A. It is.

(Testimony of Harry W. Pattin.)

Mr. Meserve: We will offer the balance sheet of December 31, as Plaintiff's Exhibit 59.

The Clerk: 59 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 59.")

By Mr. Meserve:

Q. This is a statement of income and profit and loss [156] for that same year? A. Yes.

Q. You prepared that, did you,

A. Yes, I did.

Q. From the same method and same form of procedure that you did for the years preceding, that you have testified to? A. Yes.

Q. And it is correct? A. Yes.

Q. What does that statement show as to the operations of the company for the year 1935?

A. It shows a net profit of \$6,048.16.

Q. In your opinion that is correct?

A. It is.

Mr. Meserve: We will offer the statement last identified as Plaintiff's Exhibit.

The Clerk: Plaintiff's Exhibit 60 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 60.")

By Mr. Meserve:

Q. Did you make a calculation as to the percentage of gross profits for the years 1931 and 1933? A. Yes, I did.

(Testimony of Harry W. Pattin.)

Q. I will show you a document and ask you if that is a memorandum that you prepared in respect to the matters I [157] have just inquired of.

A. Yes, this is.

Q. State what it shows as to the percentages of gross profits for those two years, and just what you mean by that?

A. Well, now, I am comparing 1931 and 1933, 1931 being the first full year prior to this tax.

Q. The one involved in this case?

A. Well, prior to the time this tax became a law, 1933 is the first full year after the excise tax became a law. The gross profit for 1931 I found to be 24.5 per cent for 1933, and the gross profit I found to be 19 per cent, or a decrease or a lower gross profit in 1933 of $5\frac{1}{2}$ per cent.

Q. And that, in face of the fact that the prices charged by the corporation for its services had been raised in that period?

A. Yes, despite that. Of course, I went still further to find out what caused this decrease in gross profit and it's practically entirely due to an increase in the cost of materials.

The Court: Those two items are the figures that should have been included there in the exhibits, I think 52 and 52, where you made pencil notations, and did not put in the percentages? There are some changes here in these exhibits. I am referring now to Exhibit 52; there has been a change [158] there in the itemization?

(Testimony of Harry W. Pattin.)

The Witness: Yes, you see, that is one that was not prepared by me and the phraseology is different from the kind I would use.

The Court: Are these items which you gave in your testimony last—are they items that should be included in these various exhibits?

The Witness: Yes, those percentage figures are based on these figures here.

Mr. Meserve: Cross examine.

Cross Examination

By Mr. Jewell:

Q. What did you mean, Mr. Pattin, by percentage of gross profit?

A. Well, if an item sells for \$1.00, and costs 65 cents, I would say the gross profit is 35 per cent.

Q. That is excluding depreciation, and so forth, in your computation?

A. Well, it excludes selling and administrative expenses. It does include labor on a process and the material used in the process, and those expenses directly connected with a process.

Q. What other items does it exclude?

A. It excludes selling expenses, salesmen's commissions, salesmen's salaries, packing supplies; it excludes all administrative expenses, like general insurance, [159] office salaries, officers' salaries, telephone, certain taxes, bad debts, office depreciation.

Q. You say you made an examination of the books of the company and found out that the in-

(Testimony of Harry W. Pattin.)

crease was what?—It was due to the increase in the cost of materials? I didn't catch that.

A. The decrease in gross profit was almost exclusively due to the increase in the cost of materials rather than labor or certain of these expenses that I charged to the process.

Q. Are all the books of the various affiliated branches of Plaintiff corporation kept in this city, at this office?

A. Not right now. We have changed methods several times, but right now we do get copies of the books of original entry from the other branches.

Q. What was the setup when you first started to perform professional services for Mr. Morris and the plaintiff corporation?

A. I believe they were all kept in Los Angeles at that time.

Q. Do you recall what the first change was—when it occurred?

A. I believe about four or five months after that; that was when they were separated into the different branches, and local bookkeepers and local accountants were [160] employed then.

Q. Any other changes?

A. Well, there have been changes since then. Now Los Angeles keeps the records for Portland and Seattle. Chicago now keeps the records for New York and Columbus as well.

Mr. Jewell: That is all.

Mr. Meserve: That is all.

(Witness excused.) [161]

J. LESLIE MORRIS

a witness recalled by and on behalf of the Plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination [163]

Q. Mr. Morris, in your business, in rebabbitting, do you use old babbitt metal? A. Yes.

Q. As well as new?

A. As well as new, yes.

Q. That is, the babbitt that is on the rod as it comes in is melted out? A. Yes.

Q. And you keep it? A. Yes.

Q. And add new to it as it is needed, is that correct? A. That's correct.

Q. Introduced in evidence in this morning's session was Plaintiff's Exhibit 37, a connecting rod that I understood you to identify as being one to fit a particular type of Chevrolet, is that correct?

A. '37 Chevrolet.

Q. Are you able to state from an examination of Plaintiff's Exhibit 37 who the manufacturer of that rod was?

A. We are more or less familiar with all of the markings of the car manufacturers, and also other manufacturers than the car manufacturers. This rod is marked "C. B. 463." That is the stock number of Clawson and Bals of Chicago. [165]

Q. Will you spell the first name?

A. C-l-a-w-s-o-n and B-a-l-s, Inc.

Q. A concern in Chicago? A. Yes.

(Testimony of J. Leslie Morris.)

Q. Are you familiar with their business to the extent of having been in their plant? A. Yes.

[166]

By Mr. Meserve:

Q. In your business, Mr. Morris, did you ever at any time purchase connecting rods for their value as junk steel or material alone?

A. I never did.

Q. The only connecting rods that you ever purchased [168] were ones that were either new or worn at the place where they needed reabbtting?

A. Correct.

Mr. Meserve: That is all.

Cross Examination

By Mr. Jewell:

Q. How many affiliated plants did you say the Plaintiff corporation has, Mr. Morris?

A. Affiliated?

Q. Or associated.

A. Do you mean that are not owned by the company? Is that what you mean, plants that are not owned by the company?

Q. Over which the company has control, or some business connection. Tell me about your corporate setup in connection with other organizations doing a much similar line of business.

A. This corporation——

Mr. Meserve: If I can interpose an objection, your Honor——

(Testimony of J. Leslie Morris.)

The Court: Subsidiaries and affiliates?

Mr. Jewell: Thus far it was not brought out on direct examination the type of relationship that plaintiff corporation has with the other various business entities shown on the books. They may be subsidiaries; they might not be. I would like to know what that connection, or setup, is. [169]

A. The J. Leslie Morris Company, Inc. owns the plants in New York, Columbus, Chicago, Los Angeles, Portland, and Seattle.

Q. New York, Chicago, and Columbus?

A. Columbus, Ohio, Portland, Oregon, Seattle, Washington.

Q. And Los Angeles?

A. Los Angeles, yes—six.

Q. Those other plants, which you state the plaintiff corporation owns, are they corporations?

A. No, sir, all in the one corporation.

Q. In other words, you actually own the industrial unit?

A. Yes, it's just a part of this California corporation.

Q. I notice on some of the exhibits—52, 53, and 54, and so forth, the balance sheets, the names of some other units: Atlanta, Jackson, Richmond.

A. Jacksonville, Florida, that is. Those plants have been disposed of by the company. They were disposed of in—I will have to ask my accountant on that; I think it was 1931.

Q. I am looking at the 1931 return.

(Testimony of J. Leslie Morris.)

A. Yes.

Q. I see the name of the Atlanta unit appears on the balance sheet for 1932, so you must have disposed of it [170] some time during the year 1932, is that correct?

A. I can't answer that, Mr. Jewell. You will have to ask my accountant to refer to the books.

Q. Anyway, you don't own it now?

A. We do not own it now, no, sir. It was either '31 or '2, but I can't remember the exact time.

Q. These pictures, and the legend affixed beneath, relate your testimony of the process as it existed during the taxable period here involved, at 1361 South Hope, Los Angeles, California.

A. Yes.

Q. What line of business is your corporation engaged in in New York?

A. The equipment is much less.

Q. How about Chicago.

A. Chicago is better organized, and the equipment is just about identical with Los Angeles.

Q. Do you mean identical in size?

A. The tools, I mean; yes, identical in size. It has not the floor area; it is considerably smaller in floor area, but the same operations are done, and we babbitt just about the same number of connecting rods there as we do in Los Angeles.

Q. About what size would you say your shop is in Los Angeles?

(Testimony of J. Leslie Morris.)

A. I think it is 50 by 85, or thereabouts. That [171] does not include, of course, parking space out in front.

Q. Is it the largest as to floor space?

A. Yes, very much the largest one.

Q. Your physical offices are here in Los Angeles?

A. Yes, it is a California corporation; we started here.

Q. What is this establishment that you have out here in Boyle Heights?

A. That is crank shaft grinding and engine bearings.

Q. That is all that you turn out over there?

A. That's right.

Q. Do you have any warehouses, outside of the particular production units?

A. Operated by ourselves?

Q. Yes. A. No.

Q. Do you store in any warehouses?

A. We do store in warehouses, yes.

Q. Will you tell me where those warehouses are?

A. Yes, they are in Boston, Philadelphia—I am trying to get them in order so that I won't miss one: Kansas City, Minneapolis, New Orleans. They are handled by salesmen, and he just works on a commission. We have no part of the management of the business there at all.

Q. But you rent the warehouse?

(Testimony of J. Leslie Morris.)

A. No, merely on a commission. That is the usage that [172] obtains in this business very generally, that these automotive warehouses are set up to supply wholesalers in that vicinity, and they are usually operated independently entirely, and the rental for the space and the service is based entirely on the sales; so much commission on sales.

Q. Do you mean rent for the space and service in the warehouse?

A. Yes, receiving stuff, shipping out, and so on; they handle it on a commission on sales.

Q. These salesmen handle them on a consignment basis? A. Do you mean the warehouse?

Q. Yes. A. We have only a small stock.

Q. How many would you say approximately you have in each warehouse?

A. Approximately I would say we probably carry, from the largest warehouse stock, which is Minneapolis, probably 500 connecting rods to maybe New Orleans, which is a small one, 75 or 100.

Q. Of course, you keep stock at each of these other plants, New York, Chicago, Seattle and Portland?

A. Yes, the necessary stock. Of course, there is quite a variance in the volume of business done in these places, and the stock is usually in proportion to the amount of business done.

Q. Do you have any idea? Is the stock similar?

[173]

(Testimony of J. Leslie Morris.)

A. The stock in Chicago is very similar as to the stock I observed as in Los Angeles. In other places it probably ranges from half that size down to maybe 20 per cent of that size.

Q. How many employees did you employ in your Los Angeles plant during the taxable period?

Mr. Meserve: I will object to that unless he means at any one time. Then I don't know what the materiality of it is.

Mr. Jewell: I will say approximately the average during the taxable period, in the Los Angeles plant?

Mr. Meserve: May I finish?

The Court: I didn't hear what you said, Mr. Meserve, at the end?

Mr. Meserve: I said if it was at any one time, because he could have one man perform the one service and quit every day, and still total his numbers.

Mr. Jewell: I will take an average.

The Witness: Actually working in the shop in Los Angeles here?

By Mr. Jewell:

Q. In your whole unit.

A. That is, both the shop department, office and all?

Q. Yes.

A. It would range right around 20 a day during that [174] period.

(Testimony of J. Leslie Morris.)

Q. Approximately how many of those would be in production?

A. I would say 12 or 14. That would include shipping and receiving.

Q. How about New York? How many approximately do you employ?

A. It employs three people.

Q. Chicago about the same as Los Angeles?

A. Not quite as many. I would say 18. If Los Angeles had 20, Chicago at that time would probably be operating 18.

Q. Seattle? A. Seattle two.

Q. Portland?

A. Three. Correction there; three in the shop at Portland, and the young lady in the office would be four.

Q. In these warehouses which are maintained at various points you consign the rods to the salesmen there for stock?

A. Those small stocks that the salesman carries, yes, they belong to the company.

Q. They are consigned? A. Yes.

Mr. Jewell: If the Court please, I would like to confer with counsel for a moment. [175]

The Court: I will ask a question along that line: How is the transaction affected in Seattle, we will say, if you only had three employees in the shop, or in Portland, I believe you said you had two; suppose a man wants to obtain one of these processed rods, and he has one that is damaged or

(Testimony of J. Leslie Morris.)

injured, what is the method of transaction there?

The Witness: Just the same as here, sir. He comes in. Of course, we carry a much smaller stock, so we babbitt a great many more in proportion to the sales there, but the sales are much smaller.

Q. Let us take Boston, where you said there were warehouse facilities, but no shops. A. Yes.

Q. What is the method there?

A. The rod is exchanged when it is brought to the counter.

Q. What is done with the rod obtained from the customer?

A. It is sent to the nearest branch that is equipped to do the work of babbitting.

Q. There is no way in those places, where there is merely a warehouse facility, to obtain back the identical processed rod that is delivered to the company?

A. Obtain back for the customer, do you mean?

Q. Yes.

A. No, we can't babbitt the rod and give him the [176] same one back. We usually make arrangements, however, with some shop in town to do that work for us, because it is very necessary sort of thing everywhere, and we have arrangements in nearly every city with some machine shop that will do that work for us, for an emergency.

Q. What would be the emergency?

(Testimony of J. Leslie Morris.)

A. A set of connecting rods would come in to be babbitted, let us say undersized, to fit a crank shaft that is ground. They couldn't wait to send them all the way to Chicago or Boston, so we would have to send them out to be babbitted by a machine shop in Boston.

Q. You may or may not have them in stock in the warehouse?

A. We couldn't possibly, because the crank shaft varies so much. They merely clean up the imperfections in the crank shaft, and stop there, so we sometimes have a crank shaft with six different sizes of connecting rods on it.

Q. Approximately what size inventory did you carry in your Los Angeles plant during the taxable period, on an average?

A. I will have to say I don't know. We have the inventory, and I would much rather——

Q. Those books will show then, the audit?

A. Yes.

Mr. Jewell: The number of rods? [177]

The Court: No. Probably it wouldn't show the number but it would show the value.

A. The value, yes.

By Mr. Jewell:

Q. You rebabbitt about 400 rods a day down in your Los Angeles plant? A. Yes.

Q. There was introduced a catalog, 1933, which you stated you sent around to the various supply

(Testimony of J. Leslie Morris.)

houses. Is that your method of advertising,—to distribute the catalog to the various supply houses?

A. Yes, to those who are dealing with us. We don't usually send our catalog promiscuously to everyone, but to those wholesale supply houses who are sending their rods to us for rebarbitting; we keep them supplied with information data.

Q. What methods do you use for expanding your business, Mr. Morris, for getting new customers?

A. Well, in the past we have depended very largely just on the service we have rendered. We haven't employed a salesman, if that is what you mean, for Los Angeles and the Coast plants, and the salesmen who represent these warehouse stocks we have referred to are rather active in their territory in which the warehouse stock is located. It is very frequently a combination of the salesmen, and a place to carry stock. Of course, he is working for a great many [178] other accounts besides ours. He is a combination commission salesman, and probably represents three or four different automotive people with services, and he calls on these wholesale accounts, but at no particular direction from us, because he is independent, on a commission.

Q. Who does the solicitation?

A. We don't use solicitation at all. These folks here I have done business with almost 20 years, and I contact them every once in a while on the phone,

(Testimony of J. Leslie Morris.)

or they contact me. We don't find it necessary. I make a trip occasionally around in the machine, but it is more or less in the nature of a visit.

Q. You don't go out and solicit new customers?

A. No; there have been very few customers who have come into existence in the last few years; among wholesalers, I am speaking of, which, I said represent about 85 per cent of our business.

Q. Is your firm, or are you yourself a member of any manufacturers' association? A. No.

Mr. Meserve: I object to that as immaterial, your Honor. I don't know what purpose that can serve, whether he belongs to an association of manufacturers, or the Chamber of Commerce, or anything else. I can't see that that means anything.

Mr. Jewell: I think the cases have held, your Honor, [179] that the whole manner of general conduct of a corporation, how they do business, and whether or not they hold themselves out as manufacturers, are all material things.

The Court: Overruled.

By Mr. Jewell:

Q. Are you, Mr. Morris—is your corporation, or are you a member of any manufacturers association? A. Any manufacturers association?

Q. Or association of people connected with your same line of business.

The Court: Trade association.

The Witness: Yes, we belong to the L. A. Automotive Trade Association.

(Testimony of J. Leslie Morris.)

By Mr. Jewell:

Q. Any other association?

A. Yes, I think the branch in Portland is affiliated with the Automotive Trade Association.

Q. What type of membership make up the L. A. Automotive Trade Association?

A. Garages, wholesale merchants and suppliers.

Q. In one of these illustrations the legend states that on about half of the rods, in order to prevent the nuts and bolts from becoming tinned, it is necessary to use auxiliary nuts and bolts while the rod is being tinned? A. Yes.

Q. And that the rods and nuts and bolts are removed [180] and thrown into a box and later replaced in the place of the auxiliary nuts and bolts? A. Yes.

Q. When that is done there is no effort to keep the nuts and bolts separated so that they go back into the exact same car or rod, is there?

A. No.

Q. No effort whatsoever?

A. No. They have to go back to Chevrolet rods because they fit Chevrolet rods, but they don't go back into the same Chevrolet rod. I might add that there is no identification mark on the bolt; it would be very difficult to do it anyway.

Mr. Jewell: For the purpose of the record, that is Plaintiff's Exhibit No. 5 to which I refer.

The Court: The same bolts, however, and nuts, however, that are taken off of the appliance and

(Testimony of J. Leslie Morris.)

thrown into the receptable, when the process is finished, or is completed, so far as that particular movement is concerned, are replaced?

The Witness: Yes.

The Court: But they might not get into the same thread or the same hole?

The Witness: That is right. [181]

By Mr. Jewell:

Q. I believe you testified on direct examination many times that garagemen come to your place and leave the rod and come back and pick up the same rod. It is my understanding that you very rarely do business with garagemen; that all your business is with either jobbers or large firms who have truck or auto fleets of their own, and dealers?

A. That is true. Invariably this garageman brings a requisition from the wholesaler. He goes to the wholesaler's place and expresses his wishes, and wants, and they send him over to our place, and he presents a requisition from the wholesaler to perform the work on this rod.

Q. I understand, Mr. Morris, that some of the rods which you rebabbitt need shims, and a certain type of rod comes originally with a shim, and when you rebabbitt it you remove the shim. Do you replace that shim with a new shim?

A. We replace it with a new shim. There are not a great many rods using shims. Shims are ten years or more back, but there are a few rods which

(Testimony of J. Leslie Morris.)

use shims. When that happens, we put the shim in the place of the one we remove.

Q. Who are these people you speak of, from whom you obtain your supply of used rods? Give me the name of a few of them. You said Mr. LaVine?

A. Yes, of used rods; A. L. Klein, Chicago, I think, sell quite a few used rods. Let me see if I can think of another one. Yes, we have a man by the name of Wilson here [182] in the city of Los Angeles; his initials I cannot give you without reference to the book. He brings in some rods occasionally.

Q. Does he have a wrecking business?

A. No, he is a broker, you might say. The rods he knows we will buy are rods that have come out of insurance wrecks because, in other words, it is only a wrecking establishment which handles cars that are wrecked on the streets, late model cars are usually covered by insurance, and he knows what these are, and those we are anxious, for instance, to buy such as some 1940 Chevrolet connecting rods. The reason that he gets that type of rod is because he knows we will pay more for it than a rod back five or six or seven years.

Q. Is Mr. LaVine also a con. rod broker?

A. That's right.

Q. He is located here in the city?

A. Here in the city, yes

Q. I show you Plaintiff's Exhibit 43, being bills from Mr. LaVine, and ask you whether or not

(Testimony of J. Leslie Morris.)

these numbers on the left, those three digit numbers are your code numbers.

A. They are our identifying numbers in the catalog, yes.

Q. That is the way his bills are made up to you?

A. The way his bills are made up, yes. [183]

Q. By taking your price sheets, a comparison can be established between the price that you pay for the old rod and what you get for it?

A. That is right.

Q. I believe you testified that the automobile manufacturers also do rebabbitting? A. Yes.

Q. For their dealers? A. Yes.

Q. Do you know whether or not they do rebabbitting for anybody else?

A. No, I do not. I couldn't answer that.

Q. Do you know whether or not, when they rebabbit a rod which is sent to them, whether or not they treat it as a new rod?

Mr. Meserve: I object to that as calling for a conclusion of the witness, as to what somebody else does with their rods.

Mr. Jewell: I asked him if he knew, if the Court please.

Mr. Meserve: It is still a conclusion; it is immaterial.

The Court: What does that mean, is that treated as a new rod?

Mr. Jewell: Are they sold and boxed—sold at the same price that they sell a new rod? [184]

(Testimony of J. Leslie Morris.)

The Court: You mean separate and apart now from the vehicle that they did sell originally with the rod in it?

Mr. Jewell: Yes.

The Court: A replacement part, do you mean?

Mr. Jewell: That is right.

The Court: Overruled.

Mr. Jewell: Will you read the question?

(The question referred to was read by the reporter, as set forth above.)

The Witness: I would say that most of the car manufacturers keep the division of stock divided very definitely. The rebabbitted rods in their stocks are spoken of and sold as used and rebabbitted rods. You will find many requisitions from us to car dealers which stipulate across the bottom: These must be new factory rods; so that's why I know; we want to get those rather than rebabbitted rods.

Q. Have any dealers ever sent you any rebabbitted rods?

A. Yes, sometimes they have sent some of our own, which we have rebabbitted for them.

Q. That occurred on occasions when you wanted to purchase rods to keep your supply built up to facilitate your exchange service?

A. That's right.

Q. They have shipped you one of your own rods?

A. They have shipped us a great many of them. We have [185] got them back many times.

(Testimony of J. Leslie Morris.)

Q. Sometimes the rod is rebabbitted by you for a Ford or a Chevrolet? A. Yes.

Q. So, so far as a sale to a customer is concerned, they made no distinction between the rod which you rebuilt and the rod which was not?

A. I would say they did, sir; they keep these rods that have not been rebabbitted as new stock in most cases. Now, I am only speaking of my knowledge, that is all; I wouldn't say definitely, but my knowledge is that when you want a new connecting rod from the factory you must ask for that particular thing, and in a great many instances they are not readily obtainable, because they don't carry new stock. There is no occasion for it. A rod does deteriorate, and they constantly babbitt them over; they have for the last ten years or so. Most of the car dealers have their rods rebabbitted locally; they don't attempt to send them back to the factory at all, because they have a lot of freight to take care of.

Q. On those occasions when they send them to you in response to one of your orders, when you were trying to build up your exchange stock by outright purchase of rods from the dealer, when they sent them to you, did they charge you the same price for those rods which they did for others that had not been rebabbitted? [186]

A. That would vary with the manufacturer. I did not know I was going to be asked these questions. I think as a rule the prices are the same.

(Testimony of J. Leslie Morris.)

Q. Whether they rebabbitt or not?

A. As a matter of fact, they sell very few connecting rods. It is always the exchange items. When they exchange a new one for a rebabbitted one, the charge of rebabbiting is just the same. If in a Chevrolet you happen to get a new one you are just lucky. That is all in the exchange process.

Q. I was speaking, and I assume that you were speaking, of an occasion not when you were exchanging a rod with one of the dealers which, of course, you would not do, but an occasion when you had no rod and you needed a rod so that you would have one to deliver to one of your customers, and you went to the dealer and you made a purchase, and he gave you, in response to that purchase order, when there was none turned in on your part, of an old rod—he gave you a rebabbitted rod—at that time did he charge you the same price as he would for a new one?

A. Yes, I think it would be just the same.

Q. I haven't looked through all your catalogs here, and price lists. Do you give any guarantee with your product?

A. Yes, we guarantee the bearing.

Q. What type of guarantee?

A. Against defective workmanship and material. That [187] is a very characteristic guarantee in this industry.

Q. When you go to an automobile dealer to purchase rods, to supply your stock inventory, and

(Testimony of J. Leslie Morris.)

you purchase new rods, or rebabbitted rods, whichever they deliver to you, could you, if you so chose, as part of the price you pay for those rods, give to them a used connecting rod?

A. Do you mean they exchange rods?

Q. Yes.

A. Oh, yes, they exchange rods every day; the car dealers do.

Q. They will exchange them with you as well as with anyone else? A. Oh, yes.

The Court: When you say, "car dealer," do you distinguish dealers in new cars from the others?

The Witness: Yes, I always mean the new car, sir, because that is the only place where there is a reservoir of parts kept. Second-hand dealers do not carry any new parts at all. I am speaking of people like the Howard agency, the Buick agency, and the Chevrolet.

Q. What would be the occasion or necessity for the new car dealer to have a rebabbitted connecting rod?

A. Because the cost of rebabbiting a connecting rod is—I don't know how to get the average, but let us say a Studebaker costs, for rebabbiting a Studebaker connecting rod about one-third of the cost of the whole unit. [188]

Q. I am speaking of the car that comes from the factory to the local salesman, of the new product, what would be the reason for that salesman, seeking an exchange of a connecting rod that is in

(Testimony of J. Leslie Morris.)

the vehicle as it comes to him from the factory— what would be the occasion of exchanging that for rebabbitting?

A. It may have failed in the service. I don't think you are clear on it. The car dealer, in addition to selling new cars, has a parts department, where he has the component unit of every one of his automobiles over the various years. The usual practice in the trade is about three or four years to carry all those component units. He is selling them every day to the garagemen, even to the consumer who wants to install his own frequently, he will sell a man a part of his automobile. So the garageman can go to a car dealer with a broken connecting rod, just as he can go to Chanslor & Lyon, or the Western Auto Supply Company and exchange the connecting rod with the car dealer.

Q. That is limited, however, to the stock of the individual appliance he has in his business; it does not pertain to these used vehicles he sells?

A. No, the vehicle he sells is a unit of itself. The only time one of these connecting rods is exchanged is when there is a failure, and he finds it necessary to replace it.

Q. If one is buying a new car, the presumption is [189] that he buys it new.

A. The connecting rod, and everything that goes with it.

Q. He doesn't buy a revamped connecting rod?

A. No, definitely no.

(Testimony of J. Leslie Morris.)

Q. So he buys what pertains to those in stock, not as part of the car, is that right?

A. As you buy an automobile, it has, of course, all new parts throughout. It is all brand new. Now, you can go to the parts department in that same car dealership from which you bought the new car. The new parts department is not on the sales floor, where they sell new automobiles, but it is a parts department, where they stock connecting rods for that car. A man has a failure of a connecting rod. Let us assume that his automobile was purchased two or three months previous to the time he had the failure of the connecting rod. He can go back to the same dealer from which he purchased his new car, and offer the connecting rod in exchange, and the car dealer will give him an exchange, just the same as the wholesaler, for a single unit.

Q. To replace one that has been damaged or injured or affected in some way which counsel has described?

A. Yes. So the car dealer maintains the same exchange service as the wholesaler does for the garageman.

(Whereupon, at 4:30 o'clock p. m. an adjournment was taken until Wednesday, May 29, 1940, at 10.00 o'clock a. m.) [190]

(Testimony of J. Leslie Morris.)

Los Angeles, California
Wednesday, May 29, 1940
10:00 O'Clock A. M.

J. LESLIE MORRIS

the witness on the stand at the time of adjournment, having been previously duly sworn, was examined, and further testified as follows:

Cross Examination
(Continued)

By Mr. Jewell:

Q. Mr. Morris, do you recall in the building up of your supply bank of rods, when you purchased some of the rods new from people like J. V. Baldwin, and so forth, and purchased some of the rods on which the babbitt had been worn out, do you recall about what percentage you purchased from each of each type, the new and the worn out rods?

A. I would rather refer to the records, but I would say roughly about half.

Q. You testified yesterday that during this particular tax period that you used some methods of aligning rods. Will you describe that method?

A. The different ones? There were several different ones.

Q. You tried several different methods?

A. Yes.

Q. In other words, you were attempting to align [191] rods?

A. Yes, we were attempting to align rods.

Q. What were those methods?

(Testimony of J. Leslie Morris.)

A. We used just the ordinary aligning features which are commonly in use in all garages.

Q. What are they?

A. They consist of a surface plate, we call it, and you place the rod in the middle, and that oscillates the same as a crank shaft in an automobile in which it is going to be installed. The idea is to have the piston side—the side of the piston at right angles to the axis to this member which clamps the connecting rod on. It is a little testing stand, which is commonly used in garages.

Q. In these tests, when it was out of alignment, how did you realign it?

A. In this test, if it is out of alignment, there is a tool that comes with it, with the aligning jigs, and it looks very much like a wrench, and you give it a twist to correct the few thousandths it may be out of alignment; just twist it over beyond the point, and it comes back to the point.

Q. What other method is used?

A. We always used the same method, except to determine if you have gone far enough. It was not very successful, the one where we introduced the switch; we had a light, and when you got it right—it was an apparatus, instead of [192] going in with a feeler gauge and checking it, we would go in with the light. That was not successful, because in the contact with electricity the point burned off, and the rod wouldn't be in perfect alignment. We realized all of a sudden that the garagemen had to

(Testimony of J. Leslie Morris.)

repeat the same operation exactly when he attached the piston to it, so there was no need for us to align them.

Q. I believe you testified on direct examination, when you sold one of your rebabbitted rods to a person or company, who did not have any exchange rods to turn in, that you charged them for the rebabbiting, and also for the shank, but that you took the amount of the purchase money allocable to the payment on the shank, and placed it in a deposit fund; is that or is that not correct?

A. That went in with our general receipt, but we wrote up the invoice to show that the rod was either used, or the word "complete," which meant they were to collect the refund when they brought in the exchange connecting rod. We always do that. As a matter of fact, it is all a charge account. We don't put it into the fund, because 98 per cent of our business is done on open account with the account with whom we deal, so there is actually no fund. We receive the cash. We receive very little cash during the month. Cash comes in in the form of checks and is usually paid around the tenth of the month following the purchase.

Q. In that case, when the payment was made at the end [193] of the month, you take the whole amount and put it in a general sales fund at the end of the month?

A. As a matter of fact, the whole amount wouldn't come in, because we would have issued a

(Testimony of J. Leslie Morris.)

credit against the rods. In most instances, the last few days of the month, the payment you make might be applicable still during the month. Generally we would issue a credit, so the net amount would be the only amount which stood on the books.

Q. When you received payment for the net amount on the books, you put it all in one fund?

A. We put all our receipts in one fund.

The Court: Do you set up a separate fund to take care of the contingencies that might arise on the credit you extend generally?

The Witness: You might say the whole fund takes care of contingencies. We do not receive cash. The cash we receive is usually for rebabbitting we have done for the connecting rod because the customer who has been charged two or three dollars, or whatever the book shows, in addition to the rebabbitting charge, invariably hastens to get those rods right back to you.

The Court: Would the whole transaction be entered as one transaction, or as separate items?

The Witness: No, we always deposit our money to the bank account, and issue a credit.

The Court: I think counsel is trying to get at the [194] segregation of those two features of the deal, the transaction.

The Witness: It is practically all bookkeeping. We charge out for the babbitting, and the deposit, as we call it, to insure the return of similar forgings that we may have in stock, that charge is placed

(Testimony of J. Leslie Morris.)

against the account, and invariably before the end of the month, within two or three days the corresponding forging, exactly alike, corresponding to the connecting rod, will come back to us for credit. In most instances they won't pay the bill unless all the credits due on the returned connecting rod are applied to the payment.

The Court: So far as your accounting is concerned, you set it up as one transaction; you don't segregate your potential refund or credit from the amount of the sale you make?

The Witness: No, we just make a full charge, and refer the invoice number to the customer. That invoice number states a certain amount against the customer, and when we make the credit, we refer back to the invoice number, and credit four or six connecting rods, and return the refund, two or three dollars, or whatever it may be. It is all bookkeeping. It is the net amount on the payment the customer makes at the end of the month, when he cleans it up.

The Court: I don't know whether that clears up what is in your mind. It does in the Court's mind.

[195]

Mr. Jewell: I believe it is clear. I would like to ask this question: In a case where one of your customers doesn't return as many rods as he has received; that is, where he has actually purchased not only the reabbutting and the shank and everything, and hasn't turned any back, so his net amount at the end of the month includes the price for some

(Testimony of J. Leslie Morris.)

shanks, do you take that net amount and put it into one account? A. Yes.

Q. And you keep no separate deposit?

A. No.

Q. I show you, Mr. Morris, several invoice slips, —four to be exact, which are clipped together, and ask you to identify them.

A. That is the invoice as we render it to the customer.

Q. The invoices reading: “Moroloy Bearing Service,” four of them clipped together, I would like to introduce on behalf of the Government.

The Clerk: Government’s Exhibit A in evidence.

(The document referred to was received in evidence and marked “Government’s Exhibit A.”)

INVOICE

MORLOY BEARING SERVICE

J. LESLIE MORRIS CO., INC.

1361 S. HOPE ST.
LOS ANGELES, CALIF.

2714-16 S. STATE ST.
CHICAGO, ILL.

1934 BROAD ST.
REGINA, SASK.

10 S. DAVIS ST.
JACKSONVILLE, FLA.

310 N. LAUREL ST.
RICHMOND, VA.

1520 TENTH AVE.
SEATTLE, WASH.

606 SANTA FE DRIVE
DENVER, COLO.

2354-56 VALLEY ST
OAKLAND, CALIF.

162 N. FOURTH ST.
COLUMBUS, OHIO

655 W. 55TH ST.
NEW YORK, N. Y.

296 IVY ST., N. E.
ATLANTA, GA.

221 N.W. TENTH AVE.
PORTLAND, ORE.

1516 THIRTEENTH AVE. W.
VANCOUVER, B. C.

Branch

Date

Sold to

Address

Ship to

Via

Customer's
Order No.

QUANTITY	STOCK NO.	DESCRIPTION	REBAB.	EXTENSION	FORGING	EXTENSION	TOTAL
1	57	Roller		45			
1	64			55			
2	200		45	90			
2	422		70	140			
				(3.30)			
							3.30

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

MAR 27 1941

PAUL P. O'BRIEN,
CLERK

No. 433-14 Cir
Morris Co.
vs.
USA
U.S. EXHIBIT
No. A
Filed 5/29/1940
R. S. ZIMMERMAN, Clerk
By [Signature]
Deputy Clerk

ENTERED

THIS IS YOUR INVOICE. WE DO NOT ITEMIZE AGAIN

No goods will be accepted for credit unless returned with our permission. Transportation charges must be paid and date of invoice accompany goods. A 10% charge to cover handling will be made on all returned goods unless returned on account of being defective or error on our part. Goods made to order are unreturnable. No claims allowed after 15 days from date of invoice.

120233



(Testimony of J. Leslie Morris.)

The Court: These items on the invoices, Exhibit A, Mr. Morris, I observe on two of them there are items: "Extension" only, and on the others, "Rebab." What is the difference between those two transactions? For instance, [196] the last one has under "description," "Complete."

A. "Rebab" indicates the article. "Extension" means that the rods were received by us to be rebabbitted. We rebabbitted them and returned the rods to the customer. That was the only transaction. Now this is complete.

The Court: That is the last one?

The Witness: That is the last one. We have listed the same parts exactly as we would have charged had the rods come in before the rebab. He gave us a deposit, because the rods did not come in. We segregated it that way, and so the customer can readily check his credit memorandum when he gets them back later on. This rod will come in; presumably 98 per cent do. This rod will come in for credit. We refer to the invoice number so-and-so, and say, "Crediting your account \$1.80." This indicates that the connecting rod went out of our stock without exchange. This indicates the rod was handed to us to be rebabbitted.

The Court: What is the difference under the description "Complete"?

The Witness: "Complete" means the connecting rod and the labor operation we have done on it. We have some accounts we loan rods to and so state,

(Testimony of J. Leslie Morris.)

“Rods loaned.” But that is the only point. Is that clear?

The Court: Yes.

By Mr. Jewell:

Q. Yesterday, Mr. Morris, I believe you testified [197] concerning certain other plants which you have in various cities in the United States, and I notice here on the top of the invoice, Defendant’s Exhibit A, that there are several places listed which you did not mention yesterday; more specifically, Denver, Colorado.

A. An affiliated one, that we never owned.

Q. Vancouver, B. C.

A. Another of the same sort.

Q. Saskatchewan?

A. No, we never owned that at all.

Q. Regina, Saskatchewan?

A. Affiliated only. They pay no royalties at all. The others have paid royalties. I think one plant paid us a royalty—that is, similar to a royalty. They paid for the plant one per cent on what they did; in other words, the terms of it were based on the percentage of what they did. That was the one in Denver; but the only affiliation was, we sold them the mold, and stuff like that, to cast bearings, way back in the ’20’s.

Q. Did you build any of the plants in Denver?

A. No; we furnished some of the stuff, like molds, and things like that. That was in ’27, I think.

Q. Did you build any of the other plants?

(Testimony of J. Leslie Morris.)

A. Of the affiliated plants?

Q. Yes.

A. No, we didn't build them and sell them, if that [198] is what you mean. We just sold them certain tools.

Q. After you sold them certain tools, what were your business relations with them which justified their name being on your invoices?

A. They bought tools from us. It was rather an inducement to get them to buy our tools. We were trying to build, with a small capital, what would look like a national service. That was the purpose of it, and why we adopted the word "Moroloy," meaning "Morris" and "alloy." That was the purpose of it.

Q. Did you sell them any rods?

A. No rods.

Q. Their names then were merely on these invoices because of the fact that they were using the method you had designed?

A. Yes, and they were using the word "Moroloy" which had probably some national value; and they were using it.

The Court: You spoke about a royalty. I didn't quite understand what you mean.

The Witness: In the sale of the Denver plant—I guess I shouldn't have mentioned it—the deal at the Denver plant was that the young man from Los Angeles had very little funds, and rather than having a definite amount each month, he agreed to pay

(Testimony of J. Leslie Morris.)

a percentage on what he did until the amount of the sale was complete. We kind of called that a royalty for a while. There was one plant, the Oakland plant, which [199] we sold earlier, which pays us definitely a royalty of two per cent on their rebabbing each month. Those are the two. The Denver plant has long since paid out, and pays us no more. During this period, however, the only period we are speaking of, the only plant from which we were collecting royalty was the Denver plant. We were not collecting any royalty from the Oakland plant at that time.

The Court: At the time with which we are concerned here, was this process patented?

The Witness: No, sir.

The Court: Or was the method patented?

The Witness: No, sir. We used common tools, the same as anyone else uses for the same purpose. There are three or four concerns in town that use the same type of tools.

Q. This compound word "Moroloy," was there a patent on that product?

A. The name was copyrighted, sir.

Q. But the process you utilized in servicing was not a patented process?

A. No, sir, and the name, I might say, was originated around '20 or '21, when we had no thought of babbitting connecting rods at all. We were making an entirely different article, a little detachable bearing that was detached from the connecting rod;

(Testimony of J. Leslie Morris.)

in fact, that was the usage at that time among car dealers. We started babbitting connecting rods about '22 or '23, as I recall it. [200]

By Mr. Jewell:

Q. Do you know, Mr. Morris, in setting up your inventory, what price you evaluated the stock at, which you have on hand?

A. Roughly, I know.

Q. Was it at the price at which you sold wholesalers?

A. No, we discounted that, of course. Very few people carry inventory at the selling price. It is usually the cost.

Q. At what price do you carry yours, do you know?

A. I couldn't answer that. I would have to ask our accountant to help me out.

Q. Are you familiar, Mr. Morris, with the methods of doing business of various rebabblers?

A. More or less, yes.

Q. Would you say that rebabblers, whose business you are familiar with, handle their sales and exchanges more or less in the same manner?

Mr. Meserve: I object to that, your Honor, as incompetent and immaterial; not proper cross examination, and of no evidentiary weight in this case.

The Court: Well, it may be. There are some features of the business under scrutiny here that are unique, I think, and in fact, matters we have a right

(Testimony of J. Leslie Morris.)

to make comparison of relative to other activities that are similarly engaged in the business. It is no conclusion, of course. The problem [201] here is to determine whether this is a manufacturer or something else, but analogies are helpful in tax matters, because there is supposed to be uniformity of levy. The theory of the tax laws is to bring about uniformity; every citizen must be treated the same with reference to the same character of activity. Overruled. Read the question.

(The question referred to was read by the reporter, as follows:

“Q. Would you say that rebabblers, whose business you are familiar with, handle their sales and exchanges more or less in the same manner?”)

The Witness: Yes.

By Mr. Jewell:

Q. In other words, most rebabblers will take in the old in exchange?

A. Yes. We were all drawn very closely together during the N. R. A. days, and virtually the method of procedure which Baudet used in San Francisco was the same as mine; same as Hempe-Cooper, in Kansas City; Conrad Exchange; Seattle Exchange; there were some shops, of course, which did not come into the N. R. A., and I wouldn't presume to state what their methods were; but we got a very good insight into each other's business at that time.

Q. With respect to the particular method of

(Testimony of J. Leslie Morris.)

handling customers, most rebabbiters did that in the same way?

A. Yes. The Federal Mogul, one of the largest in [202] the United States, they handled them in exactly the same way we did.

Q. These automobile manufacturers, when they did rebabbiting, as I believe you testified, they also handled their rebabbiting on an exchange basis?

A. Yes.

Q. I believe you testified a moment ago, in response to a question from the Court, that about 98 per cent of the time the customer returned an old rod. Not to be quibbling, but merely to determine if there is some other element which has not been directed to your attention, you also testified that about five per cent of the rods which you sold per month were ones which you had to purchase.

A. I think I said "about" in each instance.

Q. Ordinarily those two—

A. They should very nearly tally. I left a gap there of about two per cent.

Q. Mr. Morris, would you tell us what babbitt consists of—the type of babbitt that you use?

A. The kind of babbitt we use consists of from 88 to 90 per cent tin, and the other two component parts, copper and antimony, in varying proportions; from 88 to 90 per cent tin, and the two other component parts, being the copper and antimony, varying; in other words, 88 per cent of tin would have

(Testimony of J. Leslie Morris.)

about six per cent of copper; 90 per cent of tin about three and a half per cent of copper, and the balance, antimony. [203]

The Court: But in all babbitt there are those three elements?

The Witness: In all the babbitt we use.

The Court: That was not my question.

The Witness: Babbitt is a very much abused word. They call anything babbitt from 95 per cent lead to 5 per cent antimony. There are different uses for the cheaper babbitt. Some may be composed of lead, antimony, tin and copper. There are four kinds of babbitt metals.

By Mr. Jewell:

Q. During the taxable period here involved, how much did the babbitt that you used cost you per pound, delivered; the approximate price during that period? A. Can I answer generally?

Q. Yes.

A. Babbitt—our babbitt, which, of course, was 90 per cent tin, is affected entirely by the tin market. We consider it low in price when it is below 40; high in price when it is above 60 cents a pound. There is a range of fluctuation every day. We had to give during this period—that is, the bottom price, around 45 or 40, and the top price of 65 or 60. That is due to the daily fluctuation of the tin market.

Q. How many pounds of babbitt would you say you averaged per month during this taxable period, in your purchases? [204]

(Testimony of J. Leslie Morris.)

A. I am afraid that would be more of a guess. You will have that on the statement of raw materials. I think we have a statement of operations that will show the cost of the materials. That is much better than I can tell you, unless you wish me to give an opinion.

Q. Your raw materials will also include bushings? A. Yes.

Q. From whom do you purchase those bushings?

A. For many years from Bunting Brass and Bronze, Toledo, Ohio.

Q. All the bushings? A. Yes.

Q. From whom do you purchase shims?

A. From the National Motor Bearing Company, Oakland, California.

Q. Approximately what do you pay for bushings?

A. Bushings will range in price from three cents to fifty cents each, depending upon the amount of brass in them, the diameter, and so on. Some might be even higher than fifty cents.

Q. How about shims?

A. Shims would almost cover the same thing; two or three cents.

Q. You have testified that you used the old babbitt which comes off of the rods which are brought in to you. Will you tell me approximately what percentage of that old [205] babbitt you use as compared with new babbitt which you purchase? Can you give an opinion on that?

(Testimony of J. Leslie Morris.)

A. Oh, I would say that to replace what is removed when the rods come in to us—because the babbitt is exactly the same; the analysis of the old babbitt will be exactly the same as the analysis of the new babbitt; approximately the same—so much so that we mix the two together and go right ahead and use it—I would roughly say possibly half.

Q. So on most of the bearing rods that come in to you about half the babbitt—

A. Still remains in it, yes. Then too, you must remember that babbitt, from melting it over and over, oxidation takes place, and when you scrape off the top we lose in weight about five per cent, to melt the babbitt off—you skim about that much off the top.

Q. When the average rod is brought in to you nearly half the babbitt is burned off or worn away?

A. About, I would say. I wouldn't want to be kept right to the point.

Q. Mr. Morris, I show you a document entitled "Articles of Incorporation of J. Leslie Morris Co., Inc.," and ask you if that is a true copy. That is a copy that came from your files?

A. Yes, that's right. That is a true copy.

Mr. Jewell: I would like to introduce this into evidence on behalf of the Government. [206]

Mr. Meserve: I am going to object to it, your Honor, upon the ground it is incompetent, irrelevant, and immaterial. It can't serve any purpose in

(Testimony of J. Leslie Morris.)

this case. I anticipate the argument is made that the corporation's articles may indicate what it is authorized to do, by its charter, but as we know, and I think the Court takes judicial notice, many corporations are authorized to do many things that they never enter into or upon, and I think the fact that they may be incorporated to do a manufacturing enterprise would not serve to prove that they did it, if that is the purpose for which it is being introduced.

The Court: It might serve to prove it; it wouldn't prove it, if that is what you mean. It would be an item in the scheme of proof looking to that conclusion. If a man says he is engaged in the manufacturing business, it is some evidence against him, that he is so engaged; it is not conclusive, of course. Let me read it before ruling. Objection overruled.

The Clerk: Government's Exhibit B in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit B.")

RESPONDENT'S EXHIBIT B
ARTICLES OF INCORPORATION
OF

J. LESLIE MORRIS CO., INC.

Know All Men by These Presents: That we, the undersigned, all of whom are citizens and residents

(Testimony of J. Leslie Morris.)

of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

We Hereby Certify:

First: That the name of said corporation shall be J. Leslie Morris Co., Inc.

Second: That the purposes for which it is formed are as follows:

To own, maintain and operate a business for the manufacture, sale and distribution of Automotive and Industrial Bearing Metals and products.

To own, maintain and operate branch plants and offices in the State of California and elsewhere for the manufacture, sale and distribution of such metals and products.

To acquire land, buildings and personal property in the State of California and elsewhere for the purposes of establishing, maintaining and operating such plants and offices as may be necessary for the manufacture, sale and distribution of such metals and products.

To acquire, by purchase, lease, or assignment, patents and patent rights bearing on the manufacture of such metals and products.

To acquire, by purchase, lease, or assignment, plants or businesses of other persons, firms or corporations for the further development of the business of this corporation, and to acquire and hold shares of stock and bonds of other corporations,

(Testimony of J. Leslie Morris.)

and to sell, exchange and otherwise dispose of or trade in such shares and bonds.

To do any and all things necessary to properly carry on the business of the corporation, and to do any and all things necessary or incident to the carrying on of the various lines of business in which this corporation may now or hereafter be engaged.

* * * * *

[Endorsed]: Respondent's Exhibit B. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy.

Mr. Jewell: If the Court please, I would like to confer with counsel.

Q. Mr. Morris, I show you what purports to be a copy of the 1933 return of capital stock tax for the J. Leslie Morris Corporation, and ask you if you identify that as a [207] true copy of the return, or is that the one which you furnished the Government out of your file?

A. You will have to ask our accountant to pass on that. I don't recall of having seen it before.

Mr. Meserve: We will make no point of the fact that it is not a copy of the original.

Mr. Jewell: Thank you. Then I would like to offer this in evidence on behalf of the Government as Defendant's Exhibit C.

The Clerk: C.

(Testimony of J. Leslie Morris.)

Mr. Meserve: We will object to it upon the ground it is incompetent, irrelevant, and immaterial.

Mr. Jewell: It is offered for the same purpose, as were the articles of incorporation.

The Court: Objection overruled.

The Clerk: Government's Exhibit C in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit C.")

RESPONDENT'S EXHIBIT C

1933 RETURN

OF

CAPITAL STOCK TAX

For Year Ending June 30, 1933

Domestic Corporations

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1933, and the tax must be paid on or before that date.

1. Name—J. Leslie Morris Co., Inc.

2. Address—1361 So. Hope St., Los Angeles, Calif.

3. Name of parent company, if any— (District filed—)

4. Name of subsidiary, if any— No. shares held— (District filed—)

5. Nature of business in detail—Manufacture Motor Bearings.

(Testimony of J. Leslie Morris.)

6. Incorporated or organized in State of—California. Month—October. Year—1925.

* * * * *

[Endorsed]: Respondent's Exhibit C. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Jewell: I wish to confer with counsel again, please. With the consent of counsel, and no objection to the fact that these are not the originals, I offer a copy of the State of California Bank and Corporation Franchise Tax Return, of J. Leslie Morris Co., Inc., for the calendar year 1932, as Defendant's Exhibit D.

The Clerk: Government's Exhibit D.

Mr. Meserve: We are objecting to it upon the ground [208] that it is incompetent, irrelevant, and immaterial, but not incompetent because it is not the best evidence.

Mr. Jewell: It is introduced for the same purpose as the articles and capital stock tax return. We are offering it merely for the purpose, your Honor, as an answer to Question 5 at the top of the return, as to the kind of business, where it is stated, "Mfg. Motor Bearings."

The Court: Objection overruled.

The Clerk: Government's Exhibit D in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit D.")

(Testimony of J. Leslie Morris.)

RESPONDENT'S EXHIBIT D

State of California

BANK AND CORPORATION FRANCHISE
TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days after the close of taxable year, together with remittance payable to State Treasurer.

[Space for Name and Address.]

1. Exact corporate title, J. Leslie Morris Co., Inc.
2. Mail address, 1361 So. Hope Street, Los Angeles, Calif.
3. Date of incorporation, Oct. 14, 1925.
4. Under laws of California.
5. Kind of business, Mfg. Motor Bearings.
6. Date began business in California, Oct. 14, 1925.
7. Is this a consolidated return? No.
8. Consolidated with.

Copy Statement of Net Income From Corporation
Federal Income Tax Return for the Calendar
Year 1932, or the Fiscal Year Commencing.....
.....and Ending.....

Gross Income

* * * * *

[Endorsed]: Respondent's Exhibit D. Filed 5/29/
1940. R. S. Zimmerman, Clerk. By B. B. Hansen,
Deputy Clerk.

(Testimony of J. Leslie Morris.)

Mr. Jewell: I offer the same return for the calendar year 1933, for the same purpose.

Mr. Meserve: Same objection.

The Court: Same ruling.

Mr. Meserve: With the same understanding, that I am not objecting to their being incompetent by reason of their not being the best evidence.

The Clerk: Government's Exhibit E.

(The document referred to was received in evidence and marked "Government's Exhibit E.")

RESPONDENT'S EXHIBIT E

State of California

BANK AND CORPORATION FRANCHISE TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days after the close of taxable year, together with remittance payable to State Treasurer.

[Space for Name and Address.]

1. Exact corporate title, J. Leslie Morris Co., Inc. Corporate number, 116056.
2. Mail address, 1361 So. Hope St., Los Angeles, Calif.
3. Date of incorporation, Oct. 14, 1925.
4. Under laws of California.
5. Kind of business, Mfg. Motor Bearings.

(Testimony of J. Leslie Morris.)

6. Date began business in California, Oct. 14, 1925.

7. Is this a consolidated return? No.

8. Consolidated with.

Copy of Statement of Net Income From Corporation Federal Income Tax Return for the Calendar Year 1933, or the Fiscal Year Commencing.....and Ending.....

Gross Income

* * * * *

[Endorsed]: Respondent's Exhibit E. Filed 5/29/1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Jewell: I also offer in evidence a copy of the same return for the calendar year 1934, for the same purpose.

Mr. Meserve: Same objection.

The Court: Same ruling.

The Clerk: Government's Exhibit F in evidence.

[209]

(The document referred to was received in evidence and marked "Government's Exhibit F.")

RESPONDENT'S EXHIBIT F

State of California

BANK AND CORPORATION FRANCHISE
TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days

(Testimony of J. Leslie Morris.)

after the close of income year, together with remittance payable to State Treasurer.

[Space for Name and Address.]

1. Exact corporate title, J. Leslie Morris Co., Inc.

2. Mail Address, 1361 S. Hope St., Los Angeles, Calif.

3. Date of incorporation, Oct. 14, 1925.

4. Under laws of California.

5. Date began business in California, Oct. 14, 1925.

6. Kind of business, Mfg. Motor Bearings.

Copy Items 1 to 27 From Page 2, Corporation Federal Income Tax Return for the Calendar Year 1934 or the Fiscal Year Commencing..... and Ending.....

Gross Income

* * * * *

[Endorsed]: Respondent's Exhibit F. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

By Mr. Jewell:

Q. Mr. Morris, to reiterate the figures, I believe you testified that approximately ten per cent of the rods which you sold went back to the same person; the same rods went back to the same person who turned them in. That percentage figure is correct? A. Roughly, yes.

(Testimony of J. Leslie Morris.)

Q. To the best of your knowledge?

A. To the best of my knowledge, yes.

Q. You stated, in response to a question from counsel for the plaintiff, that when rods were injured or damaged, you did not take them in. Will you explain to us what you meant by injured or damaged?

A. We mean that when the connecting rod is, in our opinion, unfit for further service.

Q. What would make it unfit for further service?

A. A crack in the surface of the rod which, although it was not broken, that crack is there, and we would be fearful of putting it in automobiles—so fearful that we return it. If it is badly bent, or bent at all, for that matter, so it is easily noticeable to the eye, straightening might jeopardize its safety for further use.

Q. But during the taxable period here involved you did straighten them? [210]

A. Aligning, yes. Aligning is a little bit different from straightening. Straightening is when the rod obviously is bent or cracked. Aligning is to correct a slight adjustment of three-thousandths to five-thousandths of an inch. On the shaft it has twisted to that extent and that is designated as aligning.

Q. In other words, straightening a rod is correcting a longitudinal curvature?

A. Yes. Sometimes they come in bent double and nobody would attempt to straighten a rod of that sort.

(Testimony of J. Leslie Morris.)

Q. Aligning a rod is where you adjust the cap or the shank end of the rod?

A. No, it is still a bending operation, but such a slight bending operation; it is still a straightening operation, I mean. We still straighten the bend that is in the rod, but that is so small, one-thousandth or two-thousandths of an inch, that it could not possibly affect the structure of the steel and imperil its ability to function further.

Q. Mr. Morris, it is not clear to me just exactly what the difference is between straightening and aligning. For the purpose of the record, at least, I am sure it is not quite clear, and I would like to have you explain the difference, if you can.

A. I am speaking in the parlance of the trade; in the parlance of the trade we call straightening a rod when [211] you would possibly stick it into a vise on the bench, with no thought of alignment at all, but probably trying to correct it with the eye, to look straight. That is what we call straightening a connecting rod. Aligning is something you cannot possibly determine with the eye. You must mount it on a fixture, which is a common fixture in all garages, and by a surface plate, determined by a feeler gauge. A feeler gauge is a thin sheet of steel, with designations of a thousandth or two-thousandths, usually grouped together like a fan, so that you can select one-thousandth or two-thousandths, or three-thousandths. It is determining a very, very fine adjustment in the perfect alignment of the connect-

(Testimony of J. Leslie Morris.)

ing rod bearing with the wrist pin, and invariably now it is done when it is assembled. Aligning is a very fine adjustment whereas straightening is just hitting with a hammer and pulling to make it straight to the eye.

Q. After straightening you would further refine the straightening by aligning?

A. Yes, we do not do straightening, because we do not want to take the responsibility.

Q. What you mean is, alignment, in common parlance, is a fine degree of straightening?

A. Yes.

The Court: A degree of straightening?

The Witness: Yes; it requires instruments to deter- [212] mine how much it is out.

The Court: Instruments of precision?

The Witness: Yes.

The Court: You did aligning during the taxable period?

The Witness: Yes, we frequently have rods brought to the counter, and they say, "Please align them for us." We align them and hand them back the same connecting rod. That is a practice that obtains in the industry.

By Mr. Jewell:

Q. That is your custom?

A. Yes, because some garages do not have this equipment, some of the very smaller ones, and they send them to us to have the rods aligned. That is common practice in the trade, to have one of these

(Testimony of J. Leslie Morris.)

stands for aligning, but it is a very expensive tool. Most of the garages are provided with them, but some few are not.

The Court: Have you finished that line?

The Witness: Yes.

The Court: I want to ask you a question about this prospectus. I am calling the catalog a prospectus, referring to Plaintiff's Exhibit 49, which is the one marked 1933. I call your attention to the following language appearing on the inner side of the first page: "Features of 1933. Jobber's Inventories Reduced. Rights and Lefts now Interchange. Jobbers Need No Longer Stock both Rights and Lefts to Service Off-set. Pressure Feed Connecting Rods. [213] By our exclusive manufacturing practice, developed for 1933 conditions—Jobbers now reduce inventories 50% on these numbers. Obsolescence protection and stock control. Again 1933 conditions demand protection of jobbers' investments. Moroloy has met the situation with an Obsolescence and Stock Control Plan, which guarantees complete and continuous protection of the Jobbers Connecting Rod Investment. Details on request."

On the next page the following: "Casting. Moroloy Certifugally Processed Rods Meet Engineering Specifications of Original Car and Motor Manufacturers. This process deposits babbitt on the tinned surface under extreme centrifugal pressure, assuring an absolute bond between babbitt and steel, that

(Testimony of J. Leslie Morris.)

is not obtainable by the old fashioned hand poured method. Centrifugally processed connecting rods are endorsed by the Society of Automotive Engineers and are used exclusively by the following manufacturers:”—mentioning a number of them.

Then this legend: “If it’s not centrifugally cast—it’s not a factory duplicate.”

Under the heading: “Machining and Finishing: Moroloy machining and finishing is accompanied with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers. * * * Moroloy processed rods are straightened, cleaned and serviced with new bolts, nuts, shims and piston pin bushings. Oil [214] clearance allowed. No scraping nor reaming required. Electrical alignment is an exclusive Moroloy feature.”

A. Under the whip of extreme competition that was sales talk. We thought we had hit on something which was very good when we put the electric light on the aligning fixture. We found it was a failure and used it no more. I can explain the obsolescence feature.

The Court: After I finish it all I will ask you.

“Service. Fifteen manufacturing plants, located at strategic points over the United States and Canada, render a coast-to-coast service, convenient to every jobbing center. Ample stocks at all branches assure same day shipment. Telephone and telegraphic orders receive instant attention.” Now you may make any explanation you deem pertinent.

(Testimony of J. Leslie Morris.)

The Witness: In 1933, your Honor, the conditions were not any too good. Everybody was fearful of their investment. We thought we had hit upon a very wonderful scheme when this catalog was brought out, to save, if possible, the number of connecting rods that the wholesaler kept on his shelf. There is what we term a bleeder hole on the side which sprays the oil. We refer to it in the legend under the picture. That sprays the oil on the cylinder wall. Now, the new rods,—in fact, all the connecting rods, the ones that are in the original car, are all set around in one way so that the oil hole extends, say, on the [215] right-hand side of the motor, and flows oil to spray on the cylinder wall of the right-hand side. There is no hole on the other side as they originally come to us. There was no reason why you couldn't reverse the connecting rod. So in referring to obsolescence we meant that we drilled the hole the same size on the opposite side so that you could put the rod in, despite the fact that it was a trifle off-set, and instruct that the garageman plug the hole he did not use. In other words, we drilled a hole on each side. We found that was not practical, because the garageman very shortly would put it in without reading any instructions at all, and would leave both holes open so it would burn out, and it wouldn't give the oil pressure; so that was one of the things in 1932 to 1933 we were all struggling very hard to do, without en-

(Testimony of J. Leslie Morris.)

tailing any more investment than was necessary.

By Mr. Jewell:

Q. Will you explain which end of the rod the bleeder hole is in? A. The babbitting.

Q. In the upper end?

A. In the upper end, yes. Do you want that explained as to the fifteen manufacturing plants?

The Court: If you want to explain that.

The Witness: Yes, I would be very glad to do it, because Moroloy service is rendered in places other than [216] rebabbitting establishments. For instance, in Regina, Saskatchewan, when you walk up to their business, you find it is a machine works. They are rendering Moroloy service. You find a regular manufacturing plant. I think they manufacture instruments. They bought the equipment, and have added the business of manufacturing connecting rods. Frankly, we did not know it was such an important word at the time. In other places, take for instance, Atlanta, Georgia, their Moroloy bearing service is a part of a wholesale automotive establishment. In Jacksonville, Florida, that is a machine shop where they do crank shaft regrinding, engine boring, and so they use the word "Moroloy" to distinguish that service rather than the machinery. It is a place where repairs were generally done, and in some instances, manufacturing was done. Of course, in our own plants, we do nothing but babbitt connecting rods.

The Court: What is it that produces or enables

(Testimony of J. Leslie Morris.)

one to practice this Moroloy system, so called? Is it tools?

The Witness: Yes, they bought molds from us. We had a whole string of little molds and patterns to have cast iron molds made from which we could sell cheaper than they could produce the patterns, and have each made individually. As I recall it, we sold the outfit for \$2900.00. That was the whole string of molds, to compensate for the various types of oil patterns we used. This was started back in '25 when practices were a little bit different. As a matter [217] of fact, all that we sold are no longer used by virtue of the conditions in the automobile industry. We had those patterns made, and from those patterns cast iron molds were made that they would pour the babbitt against, in every instance following, just as the book says, the design and practice of the original car manufacturer. In other words, we wanted to put babbitt in our babbitted rod to conform to their recommendations, because we felt the engineers knew what they were doing. That was the analogy that we were trying to accomplish all the time; that our repair job would be just as serviceable to the customer as it was originally.

The Court: Was that the only commercial advantage? For instance, in Saskatchewan, Canada, where labor conditions would be different—assuming they would be different, was that the only commercial advantage that a man desiring to engage

(Testimony of J. Leslie Morris.)

in this business would have in using your system, the Moroloy system, would be the mechanism whereby he practiced this system?

The Witness: Yes, it was more or less the thought of getting us all under the same trademark name; under the name we copyrighted; the same name, so that it would give a semblance of national organization, national service, we might say; not to hold out as a national organization or a national service.

The Court: I am speaking of Saskatchewan, the international service. [218]

The Witness: That is the only place we cross any boundary, however.

The Court: Was there something in the system that indicated an efficient babbitting of a connecting rod that had been used and was not unfit for use, but imperiled the efficient use of the vehicle—wasn't the system designed to change the connecting rod so that it would function just as efficiently as it did when it came from the factory?

The Witness: That is exactly right; so it would function just as efficiently as the rod had originally with the bearing in it; in other words, our rebabbitting service followed the line of a new connecting rod at the factory, that would be babbitted the same as ours. They are made of steel, and have to be babbitted. That is what is called original babbitting. That is why we referred to using the same process in our rebabbitting as they did on the original rod

(Testimony of J. Leslie Morris.)

to babbitt it. That was the point we were trying to get across; trying, naturally, to make it appear that we did it better than anyone else, and which was natural in business advertising.

The Court: You say, quoting again from the same Exhibit 49: "Moroloy machining and finishing is accomplished with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers." What did you mean by saying "original manufacturers"?

The Witness: The people I mentioned yesterday. When [219] you drive an automobile off the floor, we would say that everything in that automobile was original; that is to say, the babbitting is original, the wrist pins are original, and so on. As you see 500 or 5,000 more down the road, some parts of the automobile would fail; in this instance, the babbitt, for want of oil, or excessive use, or failure of the operator to put oil in, and this bearing is impaired; that is, it begins to make a noise; you hear a clicking; it begins to make a noise, and it indicates that it should be replaced. It doesn't stop the automobile, but it does mean that it should be replaced so at the first opportunity, when you have a valve ground, or something like that, the garage-man invariably finds it and suggests to you while he is in the automobile, repairing it, "Hadn't you better get this rod exchanged." It is common parlance of the industry. That is a distinguishing feature. When we say "original," we mean a new

(Testimony of J. Leslie Morris.)

automobile as delivered to the customer. Later on, when some part fails, just exactly as a tire is replaced, or something of that sort, so it is with a connecting rod. The rod is all right, but the bearing needs rebabbiting, and as the garageman frequently says, "Go over and get the rod exchanged for this," or "This bearing is cracked," and "we have an extra for it." I hope I have made myself clear.

By Mr. Jewell:

Q. I show you Plaintiff's Exhibit 46, a price list [220] effective April 15, 1933. When was your next price list after this one?

A. From memory, sir, I couldn't say, but we have got them all here. We went through the files and picked them out very carefully. We only had one or two, but the ones we have, to the best of my knowledge, are the ones in sequence as they came out.

The Court: Here is one effective September 24, 1934: Exhibit 47.

The Witness: The dates on them indicate the sequence in which they were issued.

The Court: This Plaintiff's Exhibit 47, being a price list effective September 24, 1934, is the last of the price lists which are placed in evidence, to the best of your knowledge, that covers up through the taxable period here involved?

The Witness: Yes.

Q. Mr. Morris, I see on Exhibit No. 21, in the legend, you have stated that the rod is now placed

(Testimony of J. Leslie Morris.)

in the lathe and babbitt is bored, faced and chamfered. Explain the meaning of that word.

A. Chamfered?

Q. Yes.

A. It is the little oval edge on the side we faced perpendicularly. If we bore a hole, we have square corners, and we knock off the square corners, and the oval, the rounded [221] effect is called chamfering.

Q. Similar to beveling?

A. Yes. It is oval, rather than flat. They are frequently just beveled though. In this instance we do the same operation.

Q. You state on the legend of Picture 26 that about one-half the connecting rod rebabbitts require new bushings in the small end of the shank. What happens to the other end of the rods?

A. They are so designed that they clamp the wrist pin tight with a screw. I can show you the distinction. There is a clamp, and that doesn't require a bushing, because when the clamp screw is put down, it pulls down tight on the wrist pin that is loose in the piston.

Q. Referring to what exhibit?

A. Exhibit 41. It is just the design of the connecting rod. It doesn't take a bushing. That shows plainly, because that has a new bushing in it.

Q. Plaintiff's Exhibit 34?

A. Yes. Those are the two types. They run just about equal, I would say.

(Testimony of J. Leslie Morris.)

Q. I notice on Plaintiff's Exhibit 34, in the bushing in the shank end of the rod, the small bushing, a groove around the center of the bushing. Is that made by you, that groove?

A. No, the groove is in the bushing when we buy it. [222]

The Court: Let me see that exhibit. You buy the bushing?

The Witness: Yes, we buy the bushing.

The Court: Do you babbitt it?

The Witness: We buy the bushing from the Bunting Brass at Toledo, and there are several other manufacturers of bushings.

By Mr. Jewell:

Q. Mr. Morris, on Plaintiff's Exhibit No. 29 you state in the legend that certain Pontiac Bearings require a continuous oil groove around the center. What other model automobiles also require that?

A. The very late 1939 and 1940 Chevrolet. I believe those are about the only two,—the Chevrolet, and the Pontiac; but I believe that we cut the same oil groove in the '40 Chevrolet.

Q. I notice that Plaintiff's Exhibit 32, in the legend, it ends the statement with respect to the procedure involved in the plaintiff corporation. What occurs to the rods after this operation is completed, as described in Plaintiff's Exhibit No. 32?

A. What happens to the connecting rod?

Q. Yes.

(Testimony of J. Leslie Morris.)

A. It is packed and shipped; put in boxes and shipped. We unfasten the nut to see that the thread in the bolt has not slipped during the time it was tightened [223] up while we were rebabbiting it. We check it, and then it goes in the little red box we spoke of, and is sent back to the customer. In many instances they are waiting at the counter for them, and we don't put them in the box.

Q. When a con. rod comes in to you, and it is of the type shown in Plaintiff's Exhibit No. 34, it requires that small bushing at the shank end of the rod, you automatically remove that bushing, do you not? A. The old bushing?

Q. Yes. A. Yes, we take it out.

Q. Whether it is damaged or is not?

A. The supposition is it is worn or it wouldn't come in. We always replace the bushing, unless the order reads "Do not replace bushings," and we have orders to show. The reason of that is they have an oversize wrist pin that they put in there; in other words, something special about the wrist pin, and the order frequently reads, "Do not change the bushing"; but unless it is ordered that way, we invariably change the bushing and put in a new one.

Q. Most of the rods which come in to you need a new bushing at the shank end of the rods, do they not? A. Yes.

Q. That is worn? A. Yes.

Q. It is necessary for the rod to properly perform its [224] function, that the bushing, as well

(Testimony of J. Leslie Morris.)

as the bearing, at the bearing end of the rod, be in first class shape? A. Yes.

Mr. Jewell: You may take the witness.

Redirect Examination

By Mr. Meserve:

Q. Mr. Morris, before rebabbitting connecting rods became a specialized service, how was a burned out connecting rod repaired, prior to 1910 or 1911?

Mr. Jewell: If the Court please, I object to that question. That was asked on direct examination. I haven't touched on it in cross examination.

The Court: He said it was done manually, by the garageman.

The Witness: Yes.

By Mr. Meserve:

Q. You referred, Mr. Morris, to a guarantee that you give or make in some form. Just what did you refer to, and what do you guarantee?

A. We guarantee the rebabbitting job; guarantee the babbitt against defective workmanship and material; that is, the labor and material that goes into the service of rebabbitting the connecting rod.

Q. And it has nothing to do with the rod itself?

A. No. There is no guarantee on the forging, the connecting rod itself, because we did not make that, and we [225] couldn't guarantee it.

Q. In discussing in your cross examination the matter of exchange with automotive or automobile dealers who sell new cars from their showroom

(Testimony of J. Leslie Morris.)

floors, of various types and models and makes, you referred to the fact that they also maintained an exchange of connecting rods. It is true, is it not, Mr. Morris, that practically each of these institutions maintain a repair shop? A. Yes.

Mr. Jewell: If the Court please, I object to the question as leading the witness.

Mr. Meserve: All right, I will withdraw it.

Q. Do each of the dealers in new cars, automotive dealers, maintain a repair shop for their cars and other cars?

Mr. Jewell: One moment, please. I object to the question upon the ground that it calls for a conclusion on his part as to whether or not the type of establishment maintained by the automobile manufacturer amounts to a repair shop.

The Court: I don't know whether it calls for a conclusion or not. I am assuming he is not going to answer a question that he cannot answer. Overruled.

The Witness: As a matter of fact, they all have repair shops. All of the larger dealers and distributors. I am speaking about people like Hoffman and Howard; they all [226] maintain a repair department, and they use connecting rods of their own make, and use connecting rods which are babbitted from many other makes, representing repairs on anything that comes into their shop to be repaired; used cars, and such.

By Mr. Meserve:

Q. Do you know it to be a fact, Mr. Morris, that

(Testimony of J. Leslie Morris.)

the larger or more principal dealers of the popular type of cars repair cars that they take in in exchange, whether of the same make or of other makes? A. They do.

Q. And in referring to the exchange with certain dealers, you are referring to the connecting rods used in that type of operation?

A. They bring rods over from any make of car, and ask for a babbitted one, or have them babbitted.

Q. You used the statement, Mr. Morris, in your cross examination, that very frequently you get back in your exchange operation one of your own rods. What did you mean by the statement "one of my own rods"?

A. Did I make that statement?

Q. I wrote it down and understood it to be that. Maybe I misunderstood it. You said very frequently, when you referred to your five per cent differential that you had to replace them in the exchange operation through jobbers, that very frequently you got back one of your own [227] rods. What did you mean by that statement?

A. I certainly didn't intend to, sir, because I wouldn't be able to recognize my own rod if it came back. May I have the question read?

Q. I will restate it again. As I understood it—it might not be important; I want to be certain.

A. I will be glad to help.

Q. Referring to the fact that at certain times, Mr. Morris, you may have to go to a jobber, or to

(Testimony of J. Leslie Morris.)

an automobile dealer and get a rod of a particular type that you want to serve some customer that may be asking for it, and you might not have it on hand, or he did not send you a rod to rebabbitt of that type—my understanding was that in response to the inquiry made in that particular you used the phrase, “we frequently have gotten back from the jobber one of our own rods.”

A. I certainly want to correct it if I did, because I wouldn't be able to determine our own rod after it was babbitted unless, of course, it was not used. They frequently send them back, if they don't use them, and we give them credit for the babbitt and all. I don't recall having said that, but if I did, I want to correct it.

Q. I may be the one who is confused. I want to be sure it was myself, and not the record or the Court. If you did use that statement in your testimony, I assume you meant one of the rods that you had rebabbitted and not any [228] rods of your own make or manufacture.

A. Of course, that is what I would mean, yes.

Q. Now, during the time in question in this suit, Mr. Morris, did you have or maintain any warehouse or service? A. No.

Q. You have verified that?

The Court: Warehouse or service?

Mr. Meserve: Warehouse service.

The Court: What is the answer to that?

The Witness: No.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. You have verified that since yesterday by examining your records, is that correct?

A. That's correct.

Q. Referring, Mr. Morris, to Government's Exhibit A, can you explain in a little more particularity, the method of billing, taking Sheet 1, and the first item in Column 1 on Sheet 1, 3 in quantity. What does that refer to?

A. That C. E. Encell, Los Angeles, sent to us three No. 422 connecting rods to have rebabbitted, for which we charged him 70 cents each, \$2.10.

Q. So that the 70 cents is the rebabbitting price?

A. This 70 cents is the price for each, yes.

Q. 70 in the column under the word "Rebab." on page 1 of Exhibit A, is the rebabbitting charge per item? [229]

A. Per item, yes.

Q. And under "Extension" is the total?

A. The total.

Q. And in the instance which you are looking at on page 1 of Exhibit A of your invoice, there is no charge made at all for any rods?

A. No, those rods were received before we rebabbitted them.

Q. What is the difference, if any, on page 2 of Exhibit A?

A. That is an identical transaction.

Q. An identical transaction, except a different amount?

A. A different concern, yes. This is the Hartman Auto Parts Co., instead of Encell.

(Testimony of J. Leslie Morris.)

Q. And the quantity? A. Yes.

The Court The last one is the one that shows the difference?

The Witness: Yes, the last one.

By Mr. Meserve:

Q. This is the one I want to get, turning to page 3 of Exhibit A as it is now bound, and referring to the one to the Mission Auto Parts Company, is that right? A. That is correct.

Q. Explain the difference in that one as to the ones [230] you have previously explained.

A. This records the rebabbitting charge on one 0529 connecting rod, and the order indicates that we took a babbitted connecting rod and sent it in advance of receiving this. We made a deposit charge under "Forging" of \$1.80, and the sum of the two is \$2.85. We segregate that sum. Then when we issue a credit against this \$1.80, the bookkeeper there can instantly determine that we have credited him with the proper amount.

Q. The \$1.05 shown on page 3 was a babbitting charge? A. Yes. That remains, of course.

Q. On page 4, the explanation is the same?

A. The same as page 1.

The Court: Evidently when they were detached here, the order was changed.

Mr. Meserve: That was why I wanted to get the matter straight, your Honor.

Q. Reference was made, Mr. Morris, to an engine business that you are conducting, or have an

(Testimony of J. Leslie Morris.)

interest in in East Los Angeles. That has nothing to do with the J. Leslie Morris Company in any particular? A. No, it hasn't.

Q. The J. Leslie Morris Company does not have any ownership in it, directly or indirectly, except that you may be personally interested?

A. That is all. [231]

Q. When you refer to a mechanic in Saskatchewan that wants to do rebabbiting in the repair of connecting rods, there is nothing to prevent him from making or having made the molds and building and adapting machinery to do exactly what is done, without any permission from you whatsoever?

A. Nothing in the world, no.

Q. Except that he cannot use the words "Moro-loy" unless you desire to let him?

A. That's right.

Q. But there is nothing to prevent him from getting any of the apparatus to do it? It is standard?

A. He could duplicate every bit of the equipment, if he saw fit.

Q. The only advantage to him is, you having had the dies and patterns made, you can furnish them cheaper? A. Yes.

Q. You have seen these two letters?

Mr. Jewell: Yes.

Mr. Meserve: You are not making any objection to their not being originals?

Mr. Jewell: No.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. Mr. Morris, I show you copies of two letters that were transmitted to you from the deputy commissioner of Internal Revenue, dated March 25, 1938, and April 7, 1939, which letters are in substance the notice by the Government [232] of the refusal or declination to concede to your claim for a refund.

Do you remember receiving the originals of those letters? A. I do, yes.

Mr. Meserve: We will offer the copies of the two letters together, one of March 25, 1938, and of April 7, 1939, from the Commissioner of Internal Revenue, as Plaintiff's Exhibit next in order.

Mr. Jewell: No objection for not being originals.

The Clerk: Plaintiff's Exhibit 61 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 61.")

PLAINTIFF'S EXHIBIT No. 61

Mar 25 1938

MT:ST:JNG

Cl:S-61906

J. Leslie Morris Company, Inc.,
1361 South Hope Street,
Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$500.00, representing tax paid under the provisions of section 606(c) of the Revenue Act of 1932.

(Testimony of J. Leslie Morris.)

The claim is based on the contention that rebabbitted connecting rods are not subject to the tax imposed by section 606(c) of the Revenue Act of 1932. In this connection you refer to the decision rendered in the case of the Hempy-Cooper Manufacturing Company vs. the United States and other decisions.

You are advised that this office has consistently held that rebabbitted connecting rods which are placed in stock are subject to the tax imposed by section 606(c) of the Revenue Act of 1932, when sold or exchanged, and that the allowance granted for the unserviceable article taken in trade should be included as a part of the sale price on which the tax is computed.

With respect to the decision rendered in the District Court for the Western District of Missouri, Western Division, in the case of the Hempy-Cooper Manufacturing Company vs. the United States, you are advised that the Bureau has taken the position that the decision is confined to that case and will not be considered as a precedent for other cases where similar facts are involved. The decisions cited are regarded as making no change in the position heretofore taken by the Bureau with respect to the taxability of rebabbitted connecting rods and will not be considered as a basis for the adjustment of claims filed by other taxpayers.

(Testimony of J. Leslie Morris.)

In view of the above, the claim is rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By (Signed) D. S. BLISS

Deputy Commissioner.

CC:Los Angeles, Cal.

CC:Files

JNG:MR

Apr 7 1939

MT:ST:JNG

Cls. S-65530 & 67956

J. Leslie Morris Company, Inc.,

1361 South Hope Street,

Los Angeles, California.

Gentlemen:

Reference is made to your claims for the refund of \$500.00 and \$500.00, representing tax paid under the provisions of section 606(c) of the Revenue Act of 1932 for the period June 1932 to August 1935, inclusive.

The claims are based on the contention that you are not a manufacturer of connecting rods. In this connection you refer to the decisions rendered in the cases of J. C. Skinner v. the U. S., Monteith Brothers Company v. the U. S., Hempy-Cooper Mfg. Company v. the U. S., and Pioneer Motor Bearing Company v. the U. S.

(Testimony of J. Leslie Morris.)

This office takes the position that a person who produces connecting rods, etc., from used or scrap materials or from both new and used material by a manufacturing process which produces serviceable products, is subject to the manufacturer's excise tax imposed by section 606(c) of the Revenue Act of 1932 on his sales thereof. Cases on this point which support the Bureau's position and decline to follow the J. C. Skinner Company, Monteith Brothers Company, Hempy-Cooper Mfg. Company and Pioneer Motor Bearing Company's decisions are *Clawson and Bals Inc. v. Harrison*, decided November 26, 1938 by the United States District Court for the Northern District of Illinois, and *E. Edelman and Company v. Harrison*, decided March 16, 1939 by the same Court.

In view of the above the claims are rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By:

(Signed) D. S. BLISS

Deputy Commissioner.

cc-Los Angeles, California.

cc-Files.

JNG:EPM

[Endorsed]: Plaintiff's Exhibit No. 61. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

Mr. Meserve: Mr. Jewell, I understood in our conference a moment ago that you would agree that the copies of the 1934 and 1935 capital stock tax returns of J. Leslie Morris Company, Inc., which I have in my hand are copies——

Mr. Jewell: I will not object to them upon the ground that they are not the best evidence.

Mr. Meserve: I call your attention to the one in 1935, that it doesn't even bear a copy of the signature.

Mr. Jewell: I will stipulate that the signature is the same as it is on the 1934.

Mr. Meserve: We offer in evidence the capital stock tax return of the Plaintiff corporation for the year 1934 as Plaintiff's Exhibit next in order. [233]

The Clerk: Plaintiff's Exhibit 62 in evidence.

Mr. Meserve: And the one of 1935 as Plaintiff's Exhibit 63, is that correct?

The Clerk: Plaintiff's Exhibit 63 in evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 62 and 63," respectively.)

PLAINTIFF'S EXHIBIT No. 62

1934 Return

of

Capital Stock Tax

For Year Ending June 30, 1934

Domestic Corporations

This return must be filed with the Collector of Internal Revenue for your district on or before

(Testimony of J. Leslie Morris.)

July 31, 1934, and the tax must be paid on or before that date.

1. Name—J. Leslie Morris Co., Inc.
2. Address—1361 So. Hope St., Los Angeles, Calif.
3. Name of parent company, if any— (District Filed—)
4. Name of subsidiary if any— No. shares held— (District filed—)
5. Nature of business in detail—Rebabbitting Connecting Rods.
6. Incorporated or organized in State of California.

[Endorsed]: Plaintiff's Exhibit No. 62. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 63

1935 Return

of

Capital Stock Tax

For Year Ending June 30, 1935

Domestic Corporations

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1935, and the tax must be paid on or before that date.

1. Name—J. Leslie Morris Co., Inc.

(Testimony of J. Leslie Morris.)

2. Address—1361 So. Hope St., Los Angeles, Calif.

3. Name of parent company, if any— (District Filed—)

4. Name of subsidiary if any— No. shares held— (District filed—)

5. Nature of business in detail—Rebabbitting Connecting Rods.

6. Incorporated or organized in State of California.

[Endorsed]: Plaintiff's Exhibit No. 63. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Meserve: The same understanding or stipulation, Mr. Jewell, as to the State of California Bank and Franchise Tax Return for the calendar year 1935?

Mr. Jewell: No objection that it is not the best evidence.

Mr. Meserve: We will offer it as Plaintiff's Exhibit next in order.

The Clerk Plaintiff's Exhibit 64 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 64.")

(Testimony of J. Leslie Morris.)

PLAINTIFF'S EXHIBIT No. 64

State of California

BANK AND CORPORATION FRANCHISE
TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days after the close of the income year, together with Remittance Payable to State Treasurer.

(Space for name and address)

1. Exact corporate title—J. Leslie Morris Co., Inc. Corporate number— .

2. Mail Address—1361 So. Hope St., Los Angeles, Calif.

3. Date of Incorporation—Oct. 14, 1925.

4. Under laws of Calif.

5. Date began business in California—Oct. 14, 1925.

6. Kind of business—Motor Bearings

Copy Items 1 to 27 From Page 2, Corporation Federal Income Tax Return for the Year 1935, or the Fiscal Year Commencing.....and Ending.....

Item No.	Gross Income					
*	*	*	*	*	*	*

[Endorsed]: Plaintiff's Exhibit No. 64. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Meserve: That is all.

(Testimony of J. Leslie Morris.)

Recross Examination

By Mr. Jewell:

Q. Mr. Morris, you stated that during the taxable period you had no warehouse service. What did you mean?

A. No warehouse service; that we did not have the warehouses you referred to yesterday during that period. Your question yesterday read: Do you have them? The answer was in the present tense.

Q. Are you referring to warehouses in Boston, Kansas [234] City, Minneapolis, New Orleans?

A. Yes.

Q. At that time you had no warehouse service of the type described?

A. Yes, I had a chance to look it up overnight.

Q. And all you did have were your own plants?

A. Those six that you mentioned.

Q. That's New York, Chicago, Columbus, Portland, Seattle, and Los Angeles?

A. Yes.

Q. Mr. Morris, when you stated that you had a guarantee only as to materials and workmanship, you were referring to a guarantee that could be found where?

A. I don't think we ever mentioned it, sir. It is common practice for the industry to guarantee material and workmanship on any work that is performed. I am very sure we never advertised it, because it is not necessary. If we did, that is what it would cover. It is the practice of the repair industry to guarantee the materials they use, and the labor that is necessary to perform it.

(Testimony of J. Leslie Morris.)

Q. And to your knowledge, there is no such guarantee in any prospecti or advertising that you have?

A. I don't recall it at the moment.

Mr. Jewell: That is all.

Mr. Meserve: That is all from this witness.

The Court: I want to ask a question on the warehouse [235] feature counsel asked about this morning.

In these six units that have been mentioned here this morning, do you ship from Los Angeles to them any of these red boxes containing processed connecting rods?

The Witness: Yes, we do.

The Court: So then the only difference between the situation as it existed during the taxable period and that which later came up was that you had no warehouse in the sense that the receptacle did not do any processing itself, but simply received the product from you?

The Witness: May I get that clear?

The Court: Read it.

(The question referred to was read by the reporter, as follows:

“Q. So then the only difference between the situation as it existed during the taxable period and that which later came up was that you had no warehouse in the sense that the receptacle did not do any processing itself, but simply received the product from you?”)

The Witness: Yes.

(Testimony of J. Leslie Morris.)

The Court: Received the product from your manufactory here in Los Angeles, or one of these other six manufactories you have testified to? I am not using "manufacture" in any technical sense at all.

The Witness: Yes; we did not have the six which I mentioned doing babbitting work right on the premises. We [236] had no warehouse stocks. That we did develop later on, after the taxable period.

The Court: In these establishments that were doing babbitting on the premises, was the product that they sold or distributed to the trade exclusively the product which you fabricated on the premises, or did they receive some of your stock which had been fabricated?

The Witness: No, fabricated on the premises.

The Court: They did not receive any stock from the Los Angeles stock?

The Witness: No. I might qualify that. I believe the New York branch toward the latter part of this taxable period did receive some shipments from Columbus, but that was all. Substantially they all did their own babbitting service.

The Court: Then was there any difference, essential difference, between the method of distribution through the warehouse than there was when you had no warehouse facilities?

The Witness: No. Do you mean the conditions today? We had no warehouses at all at that time,

(Testimony of J. Leslie Morris.)

other than in connecting with the babbitting establishment.

The Court: But you did have a warehouse in connection with the babbitting establishment?

The Witness: We had what might be termed a shipping room, with stock on the shelves.

The Court: I am differentiating between a shipping [237] room per se and a warehouse. By "warehouse," I mean this: A depository that receives a product from the place where it is manufactured or produced, and simply has it there for storage purposes to deliver as the occasion requires, as distinguished from the place where the product is actually produced.

The Witness: We had none during the taxable period.

The Court: But you did have, as I understand your testimony,—you did have, in connection with these branch organizations that you have testified to, these six, in addition to the tools that were present there with which to practice the method, a receptacle, or a place, where the product as made, or as processed in Los Angeles, or in other factories, was stored for the purposes of emergency.

The Witness: Yes, we sold it from that room, just as we have here. We have an accumulation of connecting rods babbitted, and the answer to your question, I think, is yes, we did. We had a shipping room, a stock room, with the stock in it, in connection with each one of these babbitting plants.

The Court: But wouldn't it be as I said? I might not make the distinction, but what I am try-

(Testimony of J. Leslie Morris.)

ing to ascertain is whether, regardless of what we call it, whether we call it a warehouse or a branch factory, or a branch processing place, or a machine shop or a garage, I am trying to ascertain whether there is any difference, insofar as the business [238] activity was concerned, when you used the facilities of a warehouse—what you call warehouse service,—I think counsel used that term.

The Witness: Yes.

The Court: The Court understands by warehouse service, a service where the connecting rod itself, and the parts that you process on it—the work isn't done there?

The Witness: No.

The Court: The instrumentality itself is there in a box and is stored in the warehouse?

The Witness: Yes.

The Court: Where does that instrumentality come from to the warehouse?

The Witness: It is shipped from the nearest plant.

The Court: During the taxable period did you have that same facility in connection with the machine shop that also practiced the method?

The Witness: Yes, sir.

The Court: So that the machine shop in Chicago, we will say, had a warehouse into which is stored connecting rods that had been serviced by units of the business organization other than Chicago, is that right?

(Testimony of J. Leslie Morris.)

The Witness: No, sir, because Chicago was the plant that had its own babbitting equipment, and they would have no rods in stock that they didn't babbitt right at Chicago.

The Court: Would that be true with all of the other [239] places?

The Witness: That would be true with all of the other places.

The Court: All of the six?

The Witness: All of the six that we spoke of, yes.

The Court: That is all.

Mr. Meserve: Mr. Jewell, would it be acceptable as a statement, by the Government, that connecting rods, as manufactured by the maker whose name appears on the rod, were subject to the tax provided by Section 606 of the Revenue Laws at the time of their original manufacture, if manufactured after the effective date of the Act?

Mr. Jewell: I would have no objections to the statement, but whether or not they were taxed is a matter I don't know.

The Court: Taxable.

Mr. Meserve: I said taxable; were subject to the tax. I am not asking the Government to stipulate that the manufacturer paid the tax, because they may have evaded it.

Mr. Jewell: I hesitate to state which particu-

lar taxing statute was used by the particular Collector as to General Motors, Ford, or any of the automobile manufacturers. I am not familiar with the levying of that type of tax, because I have never happened to have the occasion to have a case of that type.

The Court: It would not make any difference about the [240] activity of the Collector or Commissioner. He isn't the law. He is speaking about the effect of the law, of the statute.

Mr. Jewell: I am not the Court. I can't give a legal opinion about the matter.

The Court: He isn't asking you about that at all. He is trying to save a lot of time, which I think is perfectly proper, if he can be saved. Section 606 as it appeared at the applicable time, as I read it here, reading from Title 26 U. S. C. A., denominated Manufacturers' Excise Taxes; Act of 1932, Section 606. Tax on Automobiles, etc. "There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) Automobile truck chassis and automobile truck bodies (including in both cases parts or accessories therefor sold or in connection therewith or with the sale thereof.), 2 per centum. A sale of an automobile truck shall, for the purposes of this sub-section, be considered to be a sale of the chassis and of the body."

The remaining portions of the Act, as they are found in this volume which I am reading from, relate to amendments which occurred subsequently. Is it conceded by both of you that the provision which I read was the selling provision that was in effect during the applicable taxable times involved in this case? [241]

Mr. Meserve: There is Section (c), Section 606.

The Court: Is (c) the same as the old Act, as it now is?

Mr. Jewell: I believe it was.

Mr. Meserve: That is correct.

The Court: That reads:

“(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in Sub-Section (a) or (b), 2 per centum. For the purposes of this sub-section and Sub-Sections (a) and (b), sparkplugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in Sub-Section (a) or (b), shall be considered parts or accessories, for such articles, whether or not primarily adapted for such use. This sub-section shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this sub-section shall not apply to the case of sales of parts or accessories by the manufacturer, producer, or im-

porter to a manufacturer or producer of any of the articles enumerated in Sub-Section (a) or (b). If any such parts or accessories are resold [242] by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in Sub-Section (a) or (b), and manufactured or produced by such vendee, then for the purposes of this section, the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

Now, is it conceded that these three sections in the statute, as they appear in this volume, were the statutes that were in effect at the time of the applicable taxable period?

Mr. Jewell: That's conceded.

Mr. Meserve: That is conceded.

The Court: What is the other part of your request for a stipulation?

Mr. Meserve: That the tax on connecting rods that were used in connection with Plaintiff's business, that bore the name of a manufacturer, either by identification number or name, were subject to the tax as to the rods that were manufactured, after the effective date of the Act, my point being, in explanation, that the connecting rods were taxable. We don't know whether the tax was paid that was issued. We are not asking the Government to say that. They may have evaded it. I have talked this over with Mr. Jewell, but we want it understood that there was tax collectible and levied on that

connecting rod, as an automotive part, [243] by the manufacturer thereof before it came in to us for rebabbiting by the Plaintiff corporation, and that connecting rod had actually been manufactured after 1932, or the effective date of the Act. Do I make myself clear?

The Court: I understand what you say.

Mr. Jewell: I have no right to make any such concession. I don't think it would be much of a concession. All he is asking me for is a legal opinion by way of stipulation or concession. I assume that they were taxed, and are taxable or were taxable.

The Court: I think you are correct. I think it is a legal conclusion.

Mr. Jewell: Furthermore, it has no materiality unless it was taxed. Merely being taxable is not sufficient.

Mr. Meserve: If we accept it as a legal conclusion, I am perfectly satisfied.

The Court: You can accept this from the Court, that it was taxable.

Mr. Meserve: Thank you.

Mr. Jewell: But not from counsel.

Mr. Meserve: Plaintiff rests.

The Court: I want it understood, in connection with that last statement, so that both of you will not be misled, that the Court is referring to what it calls new connecting rods and is not referring to reconditioned or reprocessed or later assembled connecting rods; but it is referring to the [244] instrumentality as it either comes in the vehicle or as it comes separate and apart from

the vehicle, from the manufacturer to its dealers, whoever they may be, or to the consumer, whoever he may be.

Mr. Meserve: That is correct. That's the way we understand it.

The Court: All right.

(Discussion as to time of argument and briefs, omitted from transcript.)

The Court: There is only one point which Mr. Morris discussed, where he felt he had not expressed himself as Mr. Meserve thought he had. I think that should be cleared up, and the record transcribed as to that.

Mr. Meserve: I think it has been cleared up by the correction.

The Court: It has been cleared up so far as Mr. Morris is concerned. It has not been cleared up so far as the Court is concerned. Over the noon hour you probably can get the reporter to give you the portion of the testimony—either read his notes to you, or have them transcribed so that they can be used. I think we will have the oral argument this afternoon for such time as I feel I should have, with the limitation by the Court as to what is reasonable. I want to say this now, so that you can marshal your arguments within the scope that is in the Court's mind: Of course, the burden is on the taxpayer in this case, because [245] he has brought the action and he must show, so far as the factual situation is concerned, by a preponderance of the evidence, that he was not a manufacturer or producer within the meaning of the statute which has

been read. On the other hand, if there is a question where factually there is a very close balance, the Court is going to give the taxpayer the benefit of it. I don't know whether that question will arise or not, but those are two questions of fact that you gentlemen should address yourselves to. The legal situation can be argued as you desire, with particular attention paid to these conflicting decisions that have been cited by the Commissioner. We will meet at 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same date.)

[246]

Los Angeles, California

Wednesday, May 29, 1940

2:00 O'Clock P.M.

Mr. Meserve: With your Honor's permission, I would like to have the case reopened on behalf of the plaintiff corporation to clear one matter we discussed with reference to the use of the phrase "Your own rods," as we were discussing this morning.

The Court: No objection.

Mr. Jewell: No objection.

LESLIE J. MORRIS

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination

By Mr. Meserve:

Q. Mr. Morris, on cross examination you were asked the following question by Mr. Jewell on be-

(Testimony of J. Leslie Morris.)

half of the Government: "Q. Have any dealers ever sent you any rebabbitted rods?"

And your answer was: "A. Yes, sometimes they have sent some of our own, which we have rebabbitted for them."

I attempted this morning to have you inform us what you meant by that phrase, "some of our own." Will you explain that answer?

A. Yes, it is perfectly clear to me now. I meant [247] when we went over to purchase a connecting rod to send to some person who had bought them from us, and we did not have them in our stock, that they would quite frequently sell to me a connecting rod which I had rebabbitted for them just previously, or possibly a month previous or a week. That is what I meant. I did not mean they were rods I had ever furnished them. They had sent them to me to rebabbitt and they took them back, of course, when I rebabbitted them; and when I needed it for some other customer, they would send it back. I have heard the clerk say, "You can't complain about the rebabbitting on these rods, because you did it yourself."

Q. What price did you pay on that occasion?

A. Paid exactly the same price as if taken out of stock, which had come from the factory; in other words, I paid the retail price on the connecting rod, because I was buying from them; both the connecting rod itself, and the babbitting service.

The Court: You paid to them your list price?

The Witness: Yes, our list price, because that was just about the same as theirs.

(Testimony of J. Leslie Morris.)

The Court: Just about the same?

The Witness: I paid their list price, not ours for the sale of the connecting rod.

The Court: How did their list price compare with yours?

The Witness: About the same. I am speaking of the [248] complete unit. That would be our service for the babbitting, and a deposit for the connecting rod; those two added would be just about what you would pay the agents for the connecting rod.

By Mr. Meserve:

Q. Referring further, Mr. Morris, to the same examination, this question was asked:

“Q. That occurred on occasions when you wanted to purchase rods to keep your supply built up to facilitate your exchange service?”

And your answer was:

“A. That is right.

“Q. They have shipped you one of your own rods?”

In using that same phrase, “one of your own rods,” you had the same reference to that same arrangement you have just now explained?

A. One which we have babbitted.

The Court: That was the question.

Mr. Meserve: The answer was “A. They have shipped us a great many of them. We have gotten them back many times.”

The Witness: I mean the rods that we have babbitted for them they sold to us.

The Court: That is all. [249]

(Testimony of J. Leslie Morris.)

Cross Examination

By Mr. Jewell:

Q. You indicated that the rods which you obtained in that fashion from the dealer were rods which they had sent to you, and you had rebabbitted and sent them back. You don't mean to imply that those were necessarily the same rods which they sent to you, but they were rods which they had merely, perhaps, received back in place of the rods which they had sent to you of the same size.

The Court: That is too involved. Can't you simplify that?

The Witness: It would mean the same thing.

By Mr. Jewell:

Q. You implied there that the rods that you have purchased from the dealer were rods which they had sent to you, which you had rebabbitted and sent back? A. Yes.

Q. Did you mean exactly that?

A. For this reason, to visualize the transaction as it would happen: The rods which we had to get from them would be invariably later model rods, rods that were hard to get; that they had not sold yet. In fact, I would send over an order for two sets, and they would give me one, and would telephone and say, "Morris, we have only two. We can't let you have them. We need one." But they would send that one over willingly, to have me babbitt that, and [250] put it back in stock.

Q. The connecting rods you would have occa-

(Testimony of J. Leslie Morris.)

sion to purchase would fall within the 10 per cent?

A. Yes. If it was a rod which I had plenty of, I would probably not be buying over there. I couldn't determine whether I had babbitted them myself or not.

Mr. Jewell: That is all.

The Court: Is that all, gentlemen?

Mr. Meserve: That is all.

(Witness excused.)

[Endorsed]: Filed Mar. 25, 1941. [251]

[Endorsed]: No. 9746. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. J. Leslie Morris Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 17, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9746

(District Court—No. 433-M)

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC.,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON AP-
PEAL.

Pursuant to Rule 19, subdivision 6 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, the following is the statement of points upon which appellant intends to rely on appeal:

I.

The court erred in determining that the sales of connecting rods by the appellee, during the taxable period involved herein, were not sales of automobile parts or accessories by a manufacturer within the purview of Section 606 (c) of the Revenue Act of 1932.

Dated: February 5, 1941.

WILLIAM FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

ARMOND MONROE JEWELL,
Assistant United States Attorney.

By ARMOND MONROE JEWELL,

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE MA-
TERIAL PORTIONS OF THE RECORD ON
APPEAL WHICH ARE, THEREFORE, TO
BE PRINTED.

Pursuant to the provisions of Rule 19, Subdivision 6, of the Rules of the United States Circuit Court Of Appeals For The Ninth Circuit, Appellant hereby designates those portions of the Record On Appeal in above entitled cause which it desires printed in the Transcript Of Record, as follows:

1. Complaint (R. pp. 2 to 15, inclusive)
2. Answer (R. pp. 17 to 25, inclusive)
3. Substitution of Attorneys (R. pp. 27 and 28)
4. Order for Judgment (R. p. 32)
5. Conclusions of the Court (R. pp. 33 to 36, inclusive)
6. Findings of Fact, and Conclusions of Law (R. pp. 37 to 55, inclusive)
7. Judgment (R. p. 56)
8. Notice of Appeal (R. p. 57)

9. Orders Extending Time To File Record And Docket Cause On Appeal (R. pp. 58 and 59)

10. Order Permitting Originals To Be Sent To Circuit Court In Lieu Of Copies (R. p. 60)

11. Designation of Record On Appeal (R. pp. 61 and 62)

12. Plaintiff's Exhibits 1 to 32, inclusive

Note: Please print these exhibits in the same manner as in the case of United States of America vs. Armature Exchange Inc., No. 9469.

13. Plaintiff's Exhibit 43, print: one invoice (the second from the top).

14. Plaintiff's Exhibit 45, print: all of the top page; and first inside page down to and including the line commencing with Stock No. 25; and the statement at the bottom of the last page.

15. Plaintiff's Exhibit 47, print: all of the top page.

16. Plaintiff's Exhibit 49, print: all of the outside of the top cover; all of the inside of the top cover; and all of both sides of the next page which follows the top cover; and "Page 1" down to and including the line containing the listings opposite the name "Ajax"; also the inside of the back cover.

17. Plaintiff's Exhibit 50, print: picture of box showing the label on its end.

18. Plaintiff's Exhibit 55, print: the heading at

the top merely down to and including the line opposite the word "Assets".

19. Plaintiff's Exhibit 61, print: all.

20. Plaintiff's Exhibit 62, print: top page down only to and including the line opposite Item 6.

21. Plaintiff's Exhibit 63, print: top page down only to and including the line opposite Item 6.

22. Plaintiff's Exhibit 64, print: top of the first page of the printed form down to the words "Gross Income" which are printed in the center of the page in large type.

23. Defendant's Exhibit A, print: the invoice that is second from the top.

24. Defendant's Exhibit B, print: down through paragraph "Second".

25. Defendant's Exhibit C, print: top page down only through the line opposite Item 6.

26. Defendant's Exhibit D, print: top page of printed form down only to the words "Gross Income" which are printed in the center of the page in large type.

27. Defendant's Exhibit E, print: top page of printed form down only to the words "Gross Income" which are printed in the center of the page in large type.

28. Defendant's Exhibit F, print: top page of printed form down only to the words "Gross Income" which are printed in the center of the page in large type.

29. All of the Reporter's Transcript, Excepting and Omitting the following portions: p. 70, l. 13 to p. 84, l. 5; p. 85, l. 20 to p. 97, l. 11; p. 98, l. 10 to p. 102, l. 1; p. 103, l. 8 to p. 105, l. 21; p. 189, ls. 13 and 14.

Dated: February 5, 1941.

WILLIAM FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

ARMOND MONROE JEWELL,
Assistant United States Attorney.

By ARMOND MONROE JEWELL.

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF MATERIAL
PORTION OF THE RECORD TO BE
PRINTED IN ADDITION TO PORTION
OF RECORD DESIGNATED BY APPEL-
LANT.

Pursuant to the provisions of Rule 19, Subdivision 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, appellee hereby designates that portion of the record on appeal in the above entitled cause which it desires printed in the transcript of record in addition to the portions of the record designated by appellant, as follows:

1. That portion of the Reporter's Transcript, to wit: p. 85, l. 20 to p. 97, l. 11, said portion of the Reporter's Transcript having been omitted by appellant in its designation. (see l. 20, p. 3, appellant's designation)

Dated: February 24, 1941.

DARIUS JOHNSON AND
MESERVE, MUMPER &
HUGHES.

By E. AVERY CRARY

Attorneys for Appellees.

[Endorsed]: Filed Feb. 25, 1941. Paul P. O'Brien,
Clerk.

No. 9746. 2

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

BRIEF FOR THE UNITED STATES.

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United States Post Office and Court House
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FILED

SEP 24 1941

PAUL P. O'BRIEN,
CLERK



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No. 9746.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The memorandum opinion of the District Court [R. 32-36] is unreported.

Jurisdiction.

This is an appeal from a judgment of the District Court entered August 21, 1940 [R. 61-62], in favor of appellee for the refund of \$1,500 assessed and paid as manufacturer's excise taxes. Notice of appeal was filed November 19, 1940. [R. 62-63.] Orders extending the time for filing and docketing the record on appeal were duly obtained. [R. 63-64.] The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended February 13, 1925.

Question Presented.

Whether sales of automobile connecting rods by appellee were taxable under Section 606(c) of the Revenue Act of 1932, which imposed a tax upon automobile parts "sold by the manufacturer, producer, or importer" thereof.

Statute and Regulations Involved.

These are set forth in the Appendix, *infra*, pp. 1-2.

Statement.

The case was tried to the court without a jury upon evidence consisting of the testimony of two witnesses offered by appellee and numerous exhibits offered by each of the parties. The court rendered a memorandum opinion [R. 32-36] and filed findings of fact and conclusions of law [R. 36-60] in favor of appellee. The facts, as disclosed by the undisputed evidence, may be summarized as follows:

Appellee was incorporated in 1925 [R. 77], under the laws of California to "operate a business for the manufacture, sale and distribution of automotive and industrial bearing metals and products" and to "operate branch plants and offices in the State of California and elsewhere for the manufacture, sale and distribution of such metals and products." [R. 37.] Its principal place of business was in Los Angeles. [R. 37.] During the taxable period, it was engaged in producing [Pltf's Ex. 49] and selling [R. 39, 45, 59] automobile connecting rods, under the copyrighted trade name "Moroloy" [Pltf's Ex. 49; R. 193, 218], throughout the United States to wholesalers, known also as jobbers [R. 79, 102, 172] on the exchange basis

of sale [Pltf's Ex. 49; R. 84, 197], for replacement [R. 177] purposes in connection with the repairing of automobile motors by garage men and mechanics [R. 83, 85].

A connecting rod is the means of transmitting energy created by the explosion of gas and air in the cylinder in the piston head, to the crank shaft. It connects the piston (by being attached to the crank pin) to the crank shaft. [R. 89.] There is a babbitt bearing (known as the crank shaft bearing) in the large end of the connecting rod. [Pltf's Ex. 34.] The babbitt bearing is within the parts of the rod known as the cap and shank which are held together by two bolts and nuts. [R. 108.] The smaller end of all rods is known as the wrist pin end. At least half of the rods produced by appellee during the taxable period had bronze bushings in the smaller end of the shank [Pltf's Ex. 26], such as in the case of Ford rods [Pltf's Ex. 31], and some of the rods were of the type which required shims [R. 174-175].

Appellee owned and operated plants or factories in Los Angeles, New York, Chicago, Columbus, Portland, and Seattle, for the carrying on of its connecting rod operations and sales [R. 163, 239, 241] and was affiliated with various other plants throughout the United States and Canada which it did not own [R. 43-44, 189, 192-193]. One of the affiliated plants is at 2354 Valley Street, Oakland, California.¹ [R. 189, 194.] The Oakland plant pays appellee a monthly royalty of 2% on its operations. [R. 194.] Appellee handled its customers in exactly the same way as did the Federal Mogul Corporation and auto-

¹This is the Moroloy Bearing Service of Oakland, Ltd., which is appellee in a similar case now pending in this Court on the Government's appeal, No. 9786.

mobile manufacturers who engaged in similar business on the exchange basis of sale for automobile replacement parts. [R. 197.]

This case is concerned only with sales by appellee of automobile connecting rods during the period June 21, 1932, to August 21, 1935. [R. 39, 45, 59.] It involves appellee's stock of connecting rods produced from a combination of new and used materials and sold to jobbers on the exchange basis of sale for use by garage men and mechanics in repairing automobiles. [Pltf's Exs. 1-32; R. 84, 197, 242.]

At Los Angeles, appellee had 12 to 14 persons engaged in its production processes, including shipping and receiving. [R. 168.] There were about 20 employees in the shop and office, together. [R. 167.] It employed about 18 persons at its Chicago plant and fewer persons at the four remaining plants. [R. 168.] It did not employ salesmen directly but did on a commission basis. [R. 171.] The latter represented three or four different automotive people and would sell to wholesalers. [R. 171.] Since the taxable period, appellee has conducted part of its sales through warehouses on consignment in various cities where it has no plants.

In its operations, appellee uses divers pieces of equipment, tools and machinery, including among other things lathes, drill presses, arbor presses, milling machines, grooving machines, hydraulic broaching machines, specially built centrifugal casting machines, molds, slotting tools, circular saws, cutting tools, babbitt pots, grinding wheels and chamfering tools. [R. 40, 42, 43; Pltf's Exs. 1 to 32.]

At its Los Angeles plant appellee produced about 400 rods a day. [R. 170.] Its Chicago plant produced about the same number. [R. 164.] The Moroloy rods followed the same line of operations as did rods comprised of entirely new materials, so far as appellee's operations were concerned. [R. 218.]

In connection with its processes, appellee purchased and used new babbitt metal (consisting of tin, copper and antimony), new shims, new nuts, new bolts and new bronze bushings. [R. 138, 174, 197, 199, 214, 221, 223.] It also used solutions of hydrochloric acid, oakite and rust preventives. [Pltf's Exs. 8, 14 and 20.] The used shanks and caps, known also as forgings, which were utilized in its processes either were purchased by appellee from people who made it their business to obtain them from wrecked cars for the purpose of reselling them to appellee and others engaged in similar business [R. 175, 183], or were obtained by appellee from its jobbing customers who turned them in on their purchases from appellee of completed rods of similar type on what is known in the trade as the exchange basis of sale for replacement parts [R. 119-121, 196-197; Pltf's Ex. 49].

Appellee maintained a stock of hundreds of different types of connecting rods and assigned to each a stock number of its own, such as Stock No. 525, Stock No. 526, etc., covering nearly all makes of automobiles. [Pltf's Ex. 49; R. 242.] Appellee's connecting rods were known by and sold to the trade under appellee's own stock numbers and copyrighted trade name "Moroloy." [Pltf's Ex. 49.] The connecting rods sold by appellee functioned just as efficiently as a rod of original manufacture. [R. 218.] The rods were sold in appellee's own boxes, which con-

tained its stock number which conformed to the number in appellee's catalogs and price lists. [R. 128-129, 144-146.] Appellee guaranteed its product against defective workmanship and material in the same manner as did others in the industry. [R. 179.] If someone ordered a rod which appellee did not have in stock, appellee purchased either an entirely new rod or one comprised of both new and used materials from a nearby dealer or distributor for the purpose of filling the order. This occurred only now and then with respect to the latest models. [R. 104.]

The following is a summary of appellee's processes and operations which culminated in the production of Moroloy connecting rods from a combination of used forgings of dismantled connecting rods and new materials:

Automobile wrecking brokers² [R. 104, 175; Pltf's Ex. 43, R. 124-126] and jobbers were appellee's source of supply for the used forgings [R. 106, 196-197]. A very few were received from automobile dealers. [Pltf's Ex. 1.] They were received by appellee in lots averaging from twenty to sixty rods per package and were brought either by the shippers' own delivery service, by parcel post, trucking companies, or other delivery services. [Pltf's Ex. 1.] About half of the babbitt bearing of the average used rod was burned off or worn away when received by appellee. [R. 200.] Half of the used rods had bronze bushings at their smaller end and these, too, were worn when they were received. [R. 223; Pltf's Ex. 26.] Both the bronze bushing and the babbitt bearing are bearings and it is necessary in order for a rod properly to perform its function that the bushing, as well as the babbitt bearing, be in first-class shape. [R. 223-224.]

²Automobile wreckers are known in the trade as "junkies."

Upon arrival, the used rods were checked against the shipper's invoice and the boxes in which shipped and any accompanying identification tags were discarded. [Pltf's Ex. 2.] If any of the rods were cracked, bent, or broken, appellee would not accept them but would return them to the sender. [R. 107.] The shank and cap had to be in good condition. [R. 107.] The used rods were segregated according to their respective sizes or types and the thin type bronze pin bushings were removed by means of a cold chisel and hammer [Pltf's Ex. 3], whereas the heavier type of bushings was removed on an arbor press [Pltf's Ex. 4]. The two nuts and two bolts which fastened the cap to the shank of each rod were removed. A power driven socket wrench was used to remove the nuts. [Pltf's Ex. 5.] The nuts and bolts which were in good condition were thrown into a box for later use. [R. 173.] No effort whatsoever was made to keep the nuts and bolts separated so that thereafter they could be placed back on the identical rod forging. [R. 173.] Auxiliary bolts and nuts, which previously had been dipped in solder, then were placed temporarily on the rods for the purpose of subsequent operations. Otherwise, the salvaged nuts and bolts would become immersed in solder during the centrifugal casting operations and it was desired that the appearance of the completed Moroloy rod should resemble as nearly as possible the original condition. [Pltf's Ex. 5.] Both loosening and tightening of all nuts and bolts were accomplished by means of a power driven socket wrench.

Two operations were involved in removal of the used babbitt bearing. The babbitt bearing end of the rod was placed in a pot of molten babbitt of low temperature pre-

pared each day by lighting a gas oven at five o'clock in the morning in preparation for the day's run. [Pltf's Ex. 6.] Such of the babbitt as was removed by placing the unit in the low temperature pot was salvaged for the purpose, subsequently, of mixing it with newly purchased babbitt in proportions of half and half. [R. 200; Pltf's Ex. 6.] The analysis of the old babbitt, thus salvaged, was exactly the same as that of the new babbitt. [R. 200.] After most of the babbitt was removed by the first operation, the remaining babbitt clinging to the large opening in the cap and shank was removed by dipping the large end of the forging into pots containing a solution of molten babbitt of a higher temperature. [Pltf's Ex. 6.] The reason for removal of the babbitt by two operations was that the babbitt in the low temperature receptacle could be used again while the babbitt subjected to the higher temperature became spoiled for further use. [Pltf's Ex. 6.]

After removal of all babbitt, the large end of the rod was cleaned by dipping it into a vat containing a solution of hydrochloric acid. [Pltf's Ex. 8.] Then a flux was applied to the large end of the rod by dipping it into molten tin or solder which served thereafter as a bond and caused the new babbitt metal to stick to the steel forging so as to become a part thereof. [Pltf's Ex. 8.]

Then the nuts were removed from the bolts holding the cap to the shank and by means of a sharp blow the cap itself was removed and two steel separators were inserted between the cap and shank, one on each side. [Pltf's Ex. 9.] These separators prevented the rod and cap from casting together when the molten babbitt thereafter was poured. A power driven socket wrench was used both for removing and tightening the nuts in connection with

the insertion of the separators. [Pltf's Ex. 9.]³ The oil holes in the large end of the forging were caulked with asbestos wicking, or other stoppers, to prevent the babbitt from plugging up the oil holes during the subsequent babbitt casting operation. [Pltf's Ex. 10.]

The forgings then were taken to the centrifugal casting machines specially built by appellee for its own use. One operator could run two of these machines because it took the babbitt about 15 seconds to cast. [Pltf's Ex. 11.] Each machine had a revolving shaft on which was mounted a mold holder which was opened by means of a foot lever. [Pltf's Ex. 11.] The large end of the rod forging was placed between molds which cupped over each side thereof. The mold holder was encased in a pan-caked shaped container mounted perpendicularly to the floor. [Pltf's Ex. 12.] The center of the door to the container had an aperture through which a small trough was affixed. The end of the trough led down into the outer face of the mold which was open. After the rod forging had been set in the mold holder, as stated above, the door of the container was closed and, by means of a foot lever, the shaft and mold started to revolve spinning the rod with the large bearing end of an axis. [Pltf's Ex. 12.] As the shaft, mold and rod revolved, an operator poured molten babbitt into the trough. The babbitt would run down into the large bearing end of the rod and the centrifugal force caused the molten babbitt to spread evenly

³Exhibit 9 states that in the case of rods for Model A Ford engines the cap is cast to the bearing end of the rod. This is obviously an error because the cap and shank must be severable in order to attach or detach the rod to the crank shaft. However, Exhibit 24 states that the babbitt is cast in Ford A connecting rods without the use of separator shims, but the babbitt is thereafter cut through the center so as to free the cap from the shank.

against the inside circular surface. [Pltf's Ex. 12.] Appellee babbitted about 20% of the rod forgings by a hand-casting operation. [Pltf's Ex. 13.] A man would dip the rods in the acid and tin. Then the cap and shank were put separately into a fixture with the proper sized mold, between which mold and the cap on the one hand, and the mold and the shank on the other, an operator poured molten babbitt metal. [Pltf's Ex. 13.] The parts then were removed from the fixture and the surface babbitt protruding as a result of the hand operation was chipped off. [Pltf's Ex. 13.]

Thereafter, a number of rods were placed in a basket which was lowered into a tank containing oakite where they were cleaned. [Pltf's Ex. 14.] All auxiliary nuts and bolts previously inserted together with steel separator shims then were removed. [Pltf's Ex. 15.] All ragged edges of the newly cast babbitt at the point where the separator shims had separated the cap from the shank were removed by holding the open face of the cap, or the shank, as the case may be, against a revolving sandpaper disk. [Pltf's Ex. 16.] The cap then was placed on the rod and either new nuts and bolts, or salvaged nuts and bolts which had been commingled, were inserted for the purpose of clamping the cap to the arm or shank and were tightened by a power driven socket wrench. [Pltf's Ex. 17; R. 173, 214.]

In assembling the cap and shank, two new metal shims were inserted, one on each side, if it was the type of rod which required a shim. Only new shims were used by appellee. [R. 174, 199; Pltf's Ex. 49.]

The operator then cleaned out the oil holes wherever they occurred in each of the units by using a drill press.

[Pltf's Ex. 18.] Because all oil holes were not of the same size, a second drill press with a larger drill also was used to perform the same operation, thus removing the necessity for frequently changing drills. [Pltf's Ex. 19.]

The rods, in groups, then were dipped in a tank containing a solution of rust preventative and thereafter hung on a rack to dry. [Pltf's Ex. 20.] After the drying process, each unit was placed in a lathe where the newly cast babbitt was subjected to three operations. It was bored, faced and chamfered. The latter two operations finished the babbitt to standard width. [Pltf's Ex. 21.] If special undersizes were required the babbitt would be finished on a lathe to the desired undersize. [Pltf's Ex. 22.]

Approximately 50% of the connecting rods have oil pockets in their babbitt bearings. Consequently, appellee subjected the babbitt portion of the rod to an operation on a hand milling machine whereby the necessary oil pockets, or grooves, were cut. [Pltf's Ex. 23.]

All Model A Ford and six cylinder Chevrolet connecting rods required an oil groove on the face of the babbitt bearing which was cut in the shape of a figure eight by a hand operated oil groover. [Pltf's Ex. 28.] Certain Pontiac models required a continuous oil groove around the center of the babbitt bearing. [Pltf's Ex. 29.] This groove was cut by what was known as a center oil groover operated by an electric motor. [Pltf's Ex. 29.]

On rods for Model A Ford engines in which the babbitt was cast without the use of separator shims, it was necessary to cut the babbitt through the center in order to sever the cap from the shank. [Pltf's Ex. 24.] This

operation was performed with the aid of a slotting tool and rotating saw. The application of the slotting tool resulted in leaving a groove which would serve to facilitate lubrication. [Pltf's Ex. 24.] After being grooved, the Model A rods were placed on a saw table where a rotating saw blade completely severed the babbitt flange and the cap and shank became separate units. [Pltf's Ex. 25.]

The next operation was to install new bushings in the smaller end of the shank through the medium of a hand-operated arbor press. [Pltf's Ex. 26.] Model A Ford connecting rods were fitted with a very thin bushing which would become somewhat damaged when pressed in by the arbor press. [Pltf's Ex. 31.] This was corrected by placing the rods in a bench drill press and using a chamfering tool. [Pltf's Ex. 31.] The Ford rods required a further operation of grooving or severing on the inside of the bronze bushing. Half of the rods were of the type that required the facing of the outer edge of the babbitt flange by means of a special tool placed in a drill press. [Pltf's Ex. 27.]

Thereafter, all babbitt bearings excepting only those which were finished to special undersizes were finished to final size by an hydraulically operated broaching machine. The machine had a number of horizontal cutters, each removing about .0005 of an inch as the tool was forced through the babbitt bearing opening by hydraulic pressure. [Pltf's Ex. 30.] All bearings then were given a final inspection and the nuts holding the connecting rod caps

in place were loosened by a power operated socket wrench, to enable the operator to ascertain whether or not the threads of the bolts had been stripped. [Pltf's Ex. 32.] New nuts and bolts were replaced where necessary. [Pltf's Ex. 43.]

Each rod then was put in a cardboard carton and placed in appellee's stock room. It had a stock room with stock in it in connection with each of its six plants. [R. 104, 105, 242.] Appellee guaranteed its finished product against defective workmanship and material. [R. 179.] This is a characteristic guarantee in the industry. [R. 179.] Each carton containing a Moroloy connecting rod had appellee's trade name and stock number at one end. The number conformed to appellee's printed price sheets and catalogs. [R. 144; Pltf's Exs. 44, 45, 47, 49.] The label on the end of the carton also contained a picture of a connecting rod and the words "Rebabbitted Connecting Rods, Centrifugally Cast, Accurately Machined" and "MOROLOY bearing service".

When appellee found it necessary to obtain a so-called "rebabbitted" rod from a local dealer, appellee had to pay the same price as it would for a "new" one [R. 179]; that is, appellee paid its own retail list price (outright price) which was just about the same for the complete unit as the retail price of new rods taken out of stock which had come from an automobile factory. [R. 251.] If appellee found it necessary to obtain an entirely "new" rod from a local dealer, it sold it to its customers on the exchange basis for the same price as it would its own rods

which it had processed by combining used forgings with new materials. [R. 104-105.]

The following occurred between appellee's chief witness, J. Leslie Morris, and the court [R. 106]:

The Court: The other ninety-five per cent [of appellee's monthly sales] would consist of taking the used and damaged rod and processing it, as you have described, and delivering that identical rod so processed back to your customer?

The Witness: No, sir; not the identical rod; a rod exactly like it.

The Court: That is what I am talking about.

The Witness: Yes. Not the identical rod, but a rod exactly like it.

The witness further testified [R. 120]:

* * * it would be physically impossible for us to tell who they came from, except we have the others waiting in the stockroom to go out.

On the side margin of each page of the printed catalog which appellee distributed to the trade (wholesale supply houses) there was conspicuously displayed in large type on a red background the trade name for its product "MOROLOY CONNECTING RODS". [Pltf's Ex. 49; R. 171.] On the second and third pages of appellee's 1933 catalog [Pltf's Ex. 49] the following statements, among others, appear: "By our exclusive manufacturing practice, developed for 1933 conditions. . . . Jobbers Now Reduce Inventories 50% on These Numbers * * *

MOROLOY CONNECTING RODS
Are Centrifugally Bonded and Automatically
MACHINED TO DUPLICATE ORIGINAL EQUIPMENT

CASTING

Moroloy Centrifugally Processed Rods meet engineering specifications of original car and motor manufacturers.

This process deposits babbitt on the tinned surface under extreme centrifugal pressure, assuring an absolute bond between babbitt and steel, that is not obtainable by the old fashioned hand poured method.

Centrifugally processed connecting rods are endorsed by the Society of Automotive Engineers and are used exclusively by the following manufacturers: [naming 25 automobile manufacturers].

“If It’s Not Centrifugally Cast—It’s Not A
Factory Duplicate

AUTOMATIC PYROMETERS

To regulate the temperature of rods, tin and babbitt, the MOROLOY CENTRIFUGAL PROCESS eliminates human element entirely. Heat control is obtained by approved automatic pyrometers.

MACHINING AND FINISHING

Moroloy machining and finishing is accomplished with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers.

Modern high compression engines demand close tolerances, both in bearing diameter and width. Of equal importance is proper length spacing. Moroloy precision tools are automatic in maintaining exact

length dimensions between center of piston pin and center of crankshaft.

Moroloy processed rods are straightened, cleaned and serviced with new bolts, nuts, shims and piston pin bushings. Oil clearance allowed. No scraping nor reaming required.

Electrical alignment is an exclusive Moroloy feature.

For Quick, Simple and Proper Installation,
Insist on Moroloy

The extra quality built into every rod means longer life, trouble free operation and OWNER SATISFACTION, the factors most important in building your business.

SERVICE

Fifteen manufacturing plants, located at strategic points over the United States and Canada, render a coast to coast service, convenient to every jobbing center. Ample stocks at all branches assure same day shipment. Telephone and telegraphic orders receive instant attention.

For the period June 21, 1932, to August 1, 1935, the Commissioner of Internal Revenue assessed against appellee \$6,800.59 as manufacturer's excise tax under Section 606(c) of the Revenue Act of 1932, with respect to sales to jobbers of Moroloy connecting rods. [R. 45.] Appellee paid thereon to the Collector of Internal Revenue only the total sum of \$1,500 in three installments of \$500 each, on September 1, 1937, April 22, 1938, and August 13, 1938, respectively. [R. 44, 49-50, 55.] The \$5,300.59

balance of the assessment remained unpaid and appellant set up a counterclaim therefor [R. 28-29] which the court denied. [R. 62.] Appellee filed separate claims for the refund of each of the three \$500 payments [R. 45-49, 50-54, 55-58] on the grounds that it “is engaged in the business of rebabbitting worn automobile connecting rods” and that its “process is only a repair” [R. 46], and that it is not a manufacturer. The claims were rejected by the Commissioner of Internal Revenue [R. 49, 54, 58, 233-234] and this suit was timely commenced.

Statement of Points to Be Urged.

The main point upon which appellant relies [R. 255] is that the District Court erred in determining that the sales of connecting rods by appellee, during the taxable period involved herein, were not sales of automobile parts or accessories by a manufacturer or producer thereof within the purview of Section 606(c) of the Revenue Act of 1932. Included as part and parcel of the reasons for the making of this error are the following more specific points:

(a) The court erred in finding (Fdg. III) that all of the connecting rods in respect of the sale of which the tax in question was assessed were manufactured by persons, firms, or corporations other than appellee and, before their acquisition by appellee, had been used as operating parts for automobile motors, for the reason that the finding is clearly erroneous and unsupported by the evidence.

(b) The court erred in finding (Fdg. IV) that none of the articles sold by appellee, on which the tax in suit was assessed and paid, were manufactured or produced by appellee, and that appellee was engaged in the business of repairing and rebabbitting worn and damaged automobile connecting rods, for the reason that this alleged finding, if it is such is clearly erroneous and without support in the evidence. Although purporting to be a finding of fact, appellant claims it constitutes a conclusion of law or, at best, involves a mixed question of fact and law.

(c) The court erred in making a finding (Fdg. IV) that appellee's process "did not change the identity of the parts in any manner", for the reason that such finding, if material, is clearly erroneous and without support in the evidence.

(d) The court erred in failing to find that the sales by appellee were of automobile parts or accessories.

Summary of Argument.

The transactions involved constituted sales of automobile parts within the meaning of the statute, which is a revenue measure exclusively and is to be construed accordingly. The automobile parts involved were fashioned by combining new materials with salvaged materials and subjecting them to machine and hand operations which clearly constituted manufacturing and/or production processes. The completed articles were stocked, cartoned, labelled, numbered, catalogued and marketed by appellee under its own copyrighted trade name "Moroloy" and were

sold chiefly to jobbers for resale to garage men and mechanics for use in repairing automobile motors for individual car owners. From the standpoint of production and distribution in the trade, appellee performed the function of a manufacturer or producer of automobile connecting rods in the true sense, and not the repairing of used or worn connecting rods for owners or users.

The better reasoned and recent decisions, including the decision of this Court in the *Armature Exchange* case,⁴ support the view that appellee is a manufacturer or producer of automobile parts within the meaning of the taxing statute. Likewise, under the applicable Treasury Regulations which have been in effect for a long period of time, during which the statute has been reenacted many times without material change, appellee is taxable as the producer or manufacturer of the articles it sold.

The judgment, ultimate findings and conclusions of the court below are not supported by the evidence, are clearly erroneous and should be reversed with a direction that judgment be entered in favor of appellant for the balance of the unpaid assessment, only \$1,500 of which was paid and forms the basis for this suit.

⁴*United States v. Armature Exchange*, 116 F. (2d) 969, certiorari denied May 5, 1941.

ARGUMENT.

I.

The Transactions Involved Constituted Sales of Automobile Parts Within the Meaning of the Statute, Which Is a Revenue Measure Exclusively, and Is to Be Construed Accordingly.

By Section 606(c) of the Revenue Act of 1932 [Appendix, *infra*], an excise tax equivalent to 2% of the sales price is imposed with respect to automobile parts or accessories on the manufacturer, producer, or importer thereof. No imports are involved here.

Clearly, the Moroloy Connecting Rods involved are automobile parts or accessories. No argument seriously can be advanced to the contrary. It is equally clear that the Moroloy rods were *sold* by appellee and were not the subject matter of contracts of *repair* for others. No contention was made by appellee to the effect that the transactions did not involve *sales* of connecting rods. The complaint affirmatively alleges [R. 3] that the taxes sued for were assessed and imposed in respect of *sales* by appellee, and the court expressly found that the taxes were assessed and imposed in respect of *sales* of connecting rods by appellee. [R. 39.] The court also found [R. 59] that the tax involved was not included by appellee in the *sale price* of the connecting rods.

Thus, under the pleadings, undisputed evidence, and findings, there can be no doubt that the transactions which were taxed constituted *sales* of automobile parts as distinguished from transactions involving repair jobs upon

articles belonging to others who retained the title thereto and who received the return thereof after the furnishing of materials and the performance of labor thereupon by appellee.

No question was raised by appellee in its claims for refund or pleadings concerning the propriety of whatever price basis was used in the computation of the total tax assessment of \$6,800.59 of which only \$1,500 was paid on account. The evidence does not disclose whether the outright price, consisting of part cash plus the amount of allowance made for the used article taken in trade as part payment, or merely the cash portion of the sales price which appellee contends represented the cost of the alleged “rebabbiting” or “repairing” was used in computing the tax in dispute.

It follows that the inquiry resolves itself solely into the question of whether appellee’s sales of the Moroloy connecting rods for automobiles were taxable to it as the manufacturer or producer thereof within the meaning of the Act. The court reached its decision against the Government by pyramiding one erroneous view upon another; first, it assumed and concluded that the characterization “rebabbiting” was truly descriptive of the processes of appellee; second, that the “rebabbiting” process by appellee constituted a process which was one of repair only and, third, having reached the latter conclusion, it necessarily followed (irrespective of appellee’s position in the trade from the standpoint of production and distribution) that it could not be a manufacturer or producer. In

reaching its decision, the District Court obviously was influenced by the fact that competitors of appellee engaged in similar business had been held by some of the District Courts, in similar fact situations, not to be manufacturers. In this connection, the trial court, in its memorandum opinion, stated [R. 34-35]:

For the sake of uniformity, if for no other reason, taxpayers identically situated and doing precisely the same thing in relation to tax laws should be treated alike. Our inquiries and investigations have failed to disclose that the government has taken appeal in the cases referred to, and we are therefore justified in assuming that refunds have been made to the respective taxpayers situated as is the plaintiff taxpayer in this action.

We are not unmindful of the decision of the Seventh Circuit Court of Appeals in *Clawson & Bals, Inc., v. Harrison, Collector*, 108 F. 2d 991, reaching a contrary conclusion as to the meaning of the terms “manufacturer” and “producer” *as applied to re-babbitting activities similar to those shown by the record before us.* * * *

* * * * *

Inasmuch as our Circuit Court of Appeals has not considered or decided the question under consideration in this action, we are justified in formulating and reaching our own conclusions under the record before us and in the light of other identical situations considered and determined uniformly by the federal courts of the Ninth Circuit. (Italics supplied.)

We submit that the decision below is clearly erroneous. However, it is apparent from the foregoing excerpts that the District Court followed the decision in a similar type of case in the Northern District of California chiefly for

the sake of uniformity in the absence of a decision by this Court. It did not have the benefit of this Court's opinion rendered eight months later in *United States v. Armature Exchange*, 116 F. (2d) 969, certiorari denied May 5, 1941. Had the *Armature Exchange* case been decided by this Court prior to the decision below, it is safe to assume that the District Court would have reached a different conclusion, particularly in view of its expression that the record here presents "rebabbiting activities similar" to those in the case of *Clawson & Bals v. Harrison*, 108 F. (2d) 991 (C. C. A. 7th), certiorari denied, 309 U. S. 685. The latter case was cited and followed by this Court in the *Armature Exchange* case.

We make the same contention here as was made before this Court in the *Armature Exchange* case, *supra*, and in our brief in *United States of America, Appellant v. Moroloy Bearing Service of Oakland, Ltd., Appellee*, No. 9786, this Court, and in *Clawson & Bals v. Harrison, supra*, involving sales of alleged "rebabbitted" connecting rods, namely, that appellee was engaged in the manufacture and/or production and sale of connecting rods and not in the business of repairing used, discarded and worn-out connecting rods; that it had factories, made connecting rods, and sold them—it did not enter into contracts for the performance of labor and supplying of material with respect to articles owned by others who retained ownership and sought merely to prolong the life thereof by having the articles repaired for their own use; that in connection with the production of its article, appellee purchased used and worn-out connecting rods which had been discarded and relegated to the junk heap, *i. e.*, it used in part scrap having a value essentially as raw material; that it stripped and dismantled the used and dis-

carded connecting rods and salvaged and prepared the usable shanks and caps for its manufacturing and production processes; that by machine and hand operations, cleaning, cutting, grinding, grooving, polishing, manipulating, assembling, heating, chemically treating, adding and combining with the prepared salvaged parts new materials and industry, it processed and fashioned such materials into articles of merchandise which it stocked and marketed under its special copyrighted trade name "Moroloy"; that all of such articles were the equivalent of connecting rods processed, fashioned and fabricated entirely from materials which previously had not been utilized in similar manufactured articles. In other words, we contend that all of the essential elements of manufacture and/or production exist for the purpose of the taxing statute.

The statute is very broad and comprehensive and indicates a Congressional intent to bring within its reach all persons placing automobile parts and accessories on the market for sale in the United States.

An example of the broad scope of the taxing provisions, as intended by Congress, is furnished by Section 623 of the Revenue Act of 1932, which provides:

SEC. 623. SALES BY OTHERS THAN MANUFACTURER,
PRODUCER, OR IMPORTER.

In case any person acquires from the manufacturer, producer, or importer of an article, *by operation of law or as a result of any transaction not taxable under this title*, the right to sell such article, the sale of such article by such person shall be taxable under this title as if made by the manufacturer, producer, or importer, and such person shall be liable for the tax. (Italics supplied.)

The applicable Treasury Regulations (Regulations 46) broadly define the terms used in the Act. They provide in part as follows:

ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term “producer” *includes* a person who produces a taxable article by processing, manipulating, or changing the form of an article, *or produces a taxable article by combining or assembling two or more articles.*

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer. (Italics supplied.)

ART. 41. *Definition of parts or accessories.*—The term “parts or accessories” for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article * * *.

Section 1111(b) of the Revenue Act of 1932 provides that the term “*includes*”, when used in a definition in the Act, shall not be deemed to exclude other things otherwise within the meaning of the term defined, and Article 2 of Treasury Regulations 46 provides that the “terms used in these regulations have the meaning assigned to them by section 1111”.

Thus, it was obvious that Congress intended to impose the tax upon the sale of each and every automobile part or accessory produced and sold to wholesalers, jobbers and distributors, as well as sales by the producer or manu-

facturer directly to the retailer or ultimate consumer. However, the decision below, if allowed to stand, would nullify such Congressional intent by permitting the production of automobile parts from a combination of new materials with salvaged parts of worn-out articles having no other value than that of junk, and the sale thereof in competition with similar automobile parts produced entirely from new materials, without being subjected to tax upon sale to the wholesale trade.

Our contention is consistent with the definition of a manufacturer or producer as used in the Treasury Regulations which have been in effect for a long period of years, during which time the statute has several times been reenacted without change, so far as here material. Article 4, *supra*, of Treasury Regulations 46, provides that a producer includes a person who "produces a taxable article by combining or assembling two or more articles". Although this definition seemed amply clear, it has been made even clearer by Section 316.4 of the 1940 Edition of Treasury Regulations 46 which were promulgated under Section 3450 of the Internal Revenue Code with respect to excise tax provisions covering automobile parts, tires, tubes, and other taxable articles. (See Section 3400, *et seq.*, Internal Revenue Code.) Section 316.4, *supra*, provides:

Who is a manufacturer.—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

The decisions of this Court in the *Armature Exchange* case, *supra*, and of the Seventh Circuit Court of Appeals

in the *Clawson & Bals* case, *supra*, are squarely in point and accord with the views and reasoning hereinabove expressed.

It should be remembered that the excise tax is a revenue measure exclusively. Thus, the facts must be considered in the light of such statutory object and purpose.

The tax is on each transaction at the rate of 2% of the manufacturer's or producer's sale price of the article sold. It is not imposed upon repair jobs⁵ involving mere contracts for labor and material with respect to articles owned and used by another. Yet, despite the undeniable fact that appellee realized its business profit from the sale of its product, the court below erroneously concluded [R. 39-40] that appellee was "engaged in the business of repairing and rebabbitting worn and damaged automobile connecting rods". An effective answer to this conclusion or finding was furnished, we believe, by the Seventh Circuit Court of Appeals in *Clawson & Bals v. Harrison*, 108 F. (2d) 991, 994, wherein it said:

The fact that the taxpayer could perform for the owner of used connecting rods all of the mechanical operations which it does perform under the facts of this case, and still properly be classified as a repairer, does not require a holding that the taxpayer is a repairer when it purchases discarded rods to be used as materials for combination with other materials of the taxpayer, and by means of mechanical operations prepares what are, for all practical purposes, new connecting rods for sale in the trade.

⁵As a matter of administrative policy, the revenue officials eliminate from their excise tax computations all repair job transactions, if any, which may be found, or which the taxpayer may have overlooked.

Because of the hundreds of thousands of transactions occurring daily throughout the country, which are subject to the excise tax provisions, the method of ascertainment of such taxes must be possible of accomplishment without being fettered by technical refinements which tend to defeat the purpose of the statute as a means of raising revenue. The following quotation from *Raybestos-Manhattan Co. v. United States*, 296 U. S. 60, 63, is apropos here:

The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

See, also:

Founders General Co. v. Hoey, 300 U. S. 268, to the same effect.

In *Tyler v. United States*, 281 U. S. 497, the Court stated (p. 503):

The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fiction * * *.

Taxation, as it many times has been said, is eminently practical * * *.

In the *Tyler* case the Court held that the Congressional intent to tax decedent's interest at date of death in a tenancy by the entireties could not be restricted by the technical incidents of such common law tenancy. Likewise, the terms "manufacturer" or "producer", used in the statute, should not be treated as words of art, but rather construed so as to effectuate the evident broad intent

of Congress with respect to the taxation of automobile parts. In *Turner v. Quincy Market Cold Storage & Warehouse Co.*, 225 Fed. 41, 43 (C. C. A. 1st), it was held that the term manufacture “is a very broad word, which it is not safe to limit in a general way”. See *Hughes & Co. v. City of Lexington*, 211 Ky. 596, 277 S. W. 981, 982, wherein the court, in holding that appellant was engaged in manufacturing, stated:

That the definition of the term is a question of law and for the courts is plain, but the courts are practically agreed that it is incapable of exact definition, and that there is no hard and fast rule which can be applied, but that *each case must turn upon its own facts, having regard for the sense in which the term is used and the purpose to be accomplished.* [Citing cases.] (Italics supplied.)

In *Carbon Steel Co. v. Lewellyn*, 251 U. S. 501, it was held that the rule of strict construction will not be pressed so far as to reduce the taxing statute to a practical nullity by permitting easy evasion. The court stated (p. 505):

It is, of course, the contention of petitioner that this was furnishing, not *manufacturing*, and that the literal meaning of words can be insisted on in resistance to a taxing statute. We recognize the rule of construction but it cannot be carried to reduce the statute to empty declarations. And, as we have already said, petitioner’s contention would so reduce it.

It may be added that the proper guide for the interpretation and construction of Section 606(c)—as for all internal revenue laws—was furnished by the Supreme Court in *Stone v. White*, 301 U. S. 532, 537:

It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, which is lacking here.

It follows from what has been said that the first question for determination in a case of this kind is whether there has been a *sale* of the articles under consideration, for if there has been no sale the statute does not apply. If the articles have been sold, the only remaining inquiry is whether the seller was also the manufacturer, producer, or importer thereof, within the meaning of the applicable statute and regulations. In passing upon the latter question, it should be borne in mind that the idea of one repairing an article for another is opposed to the idea that the repairer may be simultaneously the seller of the article itself upon completion of his contract for the performance of labor and supplying of materials. Yet, conversely, the appellee contends in substance that although it was the seller of the articles in question, it should be held to be only the repairer thereof. There is no question but that the "MORLOY" Connecting Rods were sold by appellee for use by ultimate vendees in repairing automobile engines.

II.

Appellee Is the Manufacturer or Producer of the Moroloy Connecting Rods Sold by it and Not Merely a Repairer of Second-hand, Damaged and Worn Out Connecting Rods.

Appellee was incorporated for the defined purpose of operating a “business for the manufacture, sale and distribution of automotive * * * products” and to “operate branch plants” therefor. [R. 37.] It actually engaged in the business of selling automobile parts to automotive jobbers throughout the United States and, through an affiliate, in Canada. It operated six plants or factories, had considerable machinery and equipment for its operations, produced an estimated amount of more than 240,000 connecting rods each year, maintained a stock for sale of connecting rods for nearly all makes of automobiles, and cartoned or boxed each article in a container marked with appellee’s own trade name and stock number. In its printed trade catalogs, it unmistakably represented its function and processes as those of a manufacturer.

The taxing statute does not discriminate between automobile parts produced entirely from new materials and those produced by combining new materials with usable materials salvaged from discarded articles, scrap or junk purchased and dismantled for such purpose. Neither do the definitions of the words manufacturer, producer, manufacture, or produce, require that a manufactured article shall consist entirely of new or virgin raw materials. In fact, it has been held that a manufactured article need

not be made wholly or even in part of raw material. (*The King v. Biltrite Tire Co.*, 1937 Canada Law Rep. (Ex. C. R.) 1, 14.)

In the *Armature Exchange* case, *supra*, this Court stated (p. 971):

We cannot find any justification for reading into the statute involved here, as taxpayer would have us do, the qualification that the articles "manufactured or produced" must have been so manufactured or produced entirely from new or virgin raw materials.
* * *

The Government contends, and we think correctly, that the discarded armatures purchased by the taxpayer, having lost their function as a useful article as well as their commercial value as such, when acquired for use in the manufacturing and production of an article of commerce, bear the same relation to the completed armature as the purchase of unused materials would bear to the completed article. See *Cadwalader v. Jessup & Moore Paper Co.*, 149 U. S. 350 * * *. The article resulting from the use of the discarded core with new materials, and through the employment of skill, labor and machinery, is, as it seems to us, a manufactured and produced article of commerce. Such an article produced in quantities under a trade name and placed in stock for future sale must be classified as a manufactured or produced article. It is our opinion and we hold that these operations constituted "manufacture or production" within the meaning of the statute involved. See opinion in *Clawson & Bals, Inc. v. Harrison*, 7 Cir., 108 Fed. (2d) 991.

The use of the term “rebabbitted” is without material significance, for it appears to have been acquired in the early days of the automotive industry and obviously was borrowed from the garage man or mechanic who originally used to “rebabbitt” the connecting rods of an owner who brought in his car for repairs. [R. 85.] Appellee’s function, and that of its competitors, has not only supplanted the former limited undertaking of the individual mechanic but, by a process of industrial evolution, both mechanically and economically, has become an integral part of the automotive replacement parts manufacturing industry, so much so that today all the mechanic need do is purchase a new set of connecting rods at reasonable cost from the nearest parts jobber and install them, instead of attempting to repair the babbitt bearings of his customer’s connecting rods. [R. 85.]

Appellee obviously considered itself the producer of the connecting rods it stocked and sold, otherwise it is not likely that it would have adopted the trade name under which it advertised and catalogued its product. The rods were placed by appellee in marketable or merchantable form with the usual standard guarantee for such articles.

The court below, as stated in its opinion, considered that the so-called “rebabbitting” activities of appellee, as shown by the record before us, were similar to those considered by the Seventh Circuit Court of Appeals in the *Clawson & Bals* case, *supra*. Appellee’s chief witness testified [R. 196-197] that appellee handled its customers

in the same way as did most “rebabblers”, including the Federal Mogul Corporation, which is one of the largest in the United States.

In view of the information contained in the *Federal Mogul*⁶ and *Clawson & Bals* findings and decisions, this Court will take notice of the fact that the loosely used trade characterization “rebabbitted” does not furnish an accurate or complete description of the processes undertaken by persons who sell articles of the disputed type to wholesale automotive jobbers. Consequently, and in view also of the evidence in this case, we submit that the court below erroneously held [R. 39] that the connecting rods (which were sold by appellee) were manufactured by others. In view of the processes disclosed by the evidence, it is not possible correctly to so find. The court might have found that the caps and shanks and some of the nuts and bolts used in appellee’s processes originally had been made by others but such a finding would not detract from our contention herein.

Likewise, the court erred in finding that the used connecting rods sold by appellee formerly had been used as operating parts for automobile motors. Appellee did not sell formerly used connecting rods but sold a product which it assembled from materials salvaged from formerly used connecting rods and other materials. As disclosed by the evidence here and by the finding in the *Federal*

⁶*Federal Mogul Corp. v. Smith* (S. D. Ind.), decided February 23, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,510.

Mogul and *Clawson & Bals* cases, *supra*, the babbitting process is not the chief operation in the production of connecting rods. This is particularly true where the rods are equipped with bronze bushings. In such cases the bronze bearing and babbitt bearing, as stated, are equally important and, in addition, there is the requirement of shims and new nuts and bolts so that the only used materials involved in such a rod may consist merely of formerly used cap and shank.

Although appellee's witness Morris testified that the same cap was put back on the same shank, it appears from the *Federal Mogul* findings that it is not necessary to do this in all cases. This is especially true in the case of Ford rods. Thus, it frequently may occur that upon completion of a rod it may contain a cap from one formerly used rod, a shank from another used rod, and the balance thereof entirely of new materials.

Appellee's own evidence refutes the idea that it merely "rebabbitted" connecting rods for others. In its printed catalog (Pltf's. Ex. 49), it represented that Moroloy processed rods contained "new bolts, nuts, shims and piston pin bushings". Consequently, the Moroloy rods which were sold by appellee were not rods originally manufactured by others than appellee, or rods which previously had been used as operating parts of automobile motors, as found by the court. As stated, these findings clearly are erroneous.

We believe that the foregoing discussion aptly demonstrates that appellee did not sell what were in fact "re-

babbitted" connecting rods but sold to the trade connecting rods which it fashioned, assembled and processed from commingled scrap and new materials.

The evidence definitely established that appellee was the producer of the connecting rods it sold because the essential elements of manufacture or production were shown to exist. It acquired worn-out connecting rods which it dismantled and from which it salvaged the usable parts and then, by machine and hand operations, together with the addition of new materials, it assembled and fashioned an automobile part which it marketed under its own trade name in competition with similar products manufactured by the Federal Mogul Corporation, Clawson & Bals, Inc., automobile manufacturers and others. It made a serviceable and salable product from scrap and raw materials. Whether appellee itself manufactured the shank and cap used in producing Moroloy connecting rods would appear to be immaterial. The essential fact is that appellee combined the salvaged individually useless items with new materials and, through the employment of skill, labor, and machinery, produced a valuable item of commerce which it sold to the trade. Thus, from the standpoint of production and distribution in the trade, appellee performed the function of a producer or manufacturer rather than a repairer.

III.

The Applicable Decisions Support the Contention That Appellee Is a Manufacturer or Producer of Automobile Parts Within the Purview of the Taxing Statute.

The Government's position that persons engaged in selling automobile parts processed by them from a combination of usable parts (salvaged and prepared from dismantled formerly used parts) and new materials are producers and/or manufacturers of automobile parts and accessories within the meaning of the taxing statute is supported by the following decisions:

United States v. Armature Exchange, decided by this Court, involving automobile generator armatures processed from a combination of new and used materials. The taxpayer sold its armatures in boxes bearing the legend "Armex Rebuilt Armatures". 116 F. (2d) 969, 970, certiorari denied May 5, 1941.

Clawson & Bals v. Harrison, 108 F. (2d) 991 (C. C. A. 7th), certiorari denied, 309 U. S. 685, involving alleged "rebabbitted" connecting rods made by taxpayer from a combination of used caps, shanks, nuts and bolts and new materials.

Edelman & Co. v. Harrison (N. D. Ill.), decided April 7, 1939, not officially reported but published in 1939 Prentice-Hall, Vol. 1, par. 5.379, involving so-called "re-wound" armatures and "rebuilt" generators for automobiles made by taxpayer from a combination of new and used materials.

Federal-Mogul Corp. v. Smith (S. D. Ind.), decided February 23, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,510, involving automobile connecting rods made by taxpayer from a combination of new and used materials in a manner similar to that involved in the *Clawson & Bals* case, *supra*, and the instant case.

Moore Bros., Inc. v. United States (N. D. Tex.), decided May 14, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,676, involving so-called “rebuilt” automobile armatures.

The case of *Motor Mart v. United States* (N. D. Tex.), (involving generators and armatures) was decided for the Government on May 14, 1940, without opinion (Civil Action #239).

Bilrite Tire Co. v. The King, 1937 Canada Law Rep. 364, arising under the Canadian War Revenue Act of 1927, involving language similar to that used in Section 606(c) of the United States Revenue Act of 1932, and involving so-called “retreaded” automobile tires.

The King v. Bilrite Tire Co., 1937 Canada Law Rep. 1, being the immediately preceding case in the Exchequer Court of Canada, at first instance and in the exercise of its appellate jurisdiction.

The King v. Boulton, Ltd. [1938], 3 Dominion Law Rep. 664, involving so-called “retreaded” automobile tires made by taxpayer on a small scale. Taxpayer also did considerable retreading of tires for customers to whom the tires were returned. The latter transactions were not sought to be taxed because they did not involve a sale of the completed article but merely a contract for the furnishing of materials and labor.

In *Foss-Hughes Co. v. Lederer* (E. D. Pa.), 287 Fed. 150, an assembler of truck parts was held to be taxable as a producer of trucks within the meaning of the excise tax law of October 3, 1917. The law provided for a tax on automobile trucks sold by the manufacturer, producer, or importer. The taxpayer was a dealer who neither imported nor manufactured but purchased the chassis from the manufacturer and then employed a contractor to add the body. He was held liable as a producer of trucks in these circumstances. In this case, the court, apparently recognized that the term "producer" is broader than the term "manufacturer".

In *Klepper v. Carter*, 286 Fed. 370, 371, this Court cited and relied upon the *Foss-Hughes* case, *supra*. In the *Klepper* case this Court held a retail salesman liable under the 1919 version of the 1932 excise tax law as a manufacturer or producer of automobile trucks. The salesman merely purchased automobile truck bodies from one manufacturer and chasses from another, and assembled the two parts. The Court directed attention to the fact that Article 7 of the December, 1920, revision of the Regulations defined the word "manufacturer" as generally a person who (1) actually makes a taxable article; or (2) by changes in the form of an article produces a taxable article; or (3) *by the combination of two or more articles produces a taxable article*. This Court said that the retail salesman, Klepper, saved the purchaser all the trouble of assembling the chassis and body, and made it his business to retail the product of his purchases as an automobile truck that he thus produced or manufactured the truck.

In *Cadwalader v. Jessup & Moore Paper Co.*, 149 U. S. 350, the recovery of customs duties was sought on the

ground that old india-rubber shoes imported by Jessup and Moore were valuable only as a substitute for crude rubber and, therefore, were exempt from duty under the free classification "India-rubber, crude and milk of". A duty of twenty-five per cent *ad valorem* had been collected on the old shoes as (p. 351) "articles composed of india-rubber, not specially enumerated or provided for in this act". Another section of the act provided for a duty on non-enumerated articles equal to that imposed upon the enumerated articles they most nearly resembled, and where they resembled two or more enumerated articles, that taking the highest duty was to be used as the basis. The Supreme Court, in holding the articles to be non-dutiable, held that the old shoes had lost their commercial value as such articles, and substantially were merely the material called "crude rubber". Thus, the principle of the *Cadwalader* case supports the contention that a taxpayer engaged in the production of automobile parts in the manner herein disclosed is a manufacturer and producer since, because of the loss of their commercial value, the used connecting rods are essentially raw material.

Although we contend that the patent infringement decisions and some of the tariff cases are not in point, the two following cases are of interest:

In *Cotton Tie Co. v. Simmons*, 106 U. S. 89, the Court held that one who bought used cotton-bale ties, consisting of a metal buckle and a band, which were patented, and who rolled and straightened the pieces of the ties, riveted the ends together, and cut them into proper lengths and sold them with the buckles to be used again as ties, had "reconstructed" and not merely "repaired" the bale-ties in the patent law sense and was guilty of

infringement even though no new material parts were added.

In *Davis Electrical Works v. Edison Elec. Light Co.*, 60 Fed. 276 (C. C. A. 1st), the court held that the making of a hole in the bulb of an Edison incandescent lamp, in which the filament has been destroyed by use, and the putting in of a new filament and closing the hole by fusing a piece of glass over it and then exhausting the air, constituted "reconstruction" and not merely repairing as matter of patent law.

There can be no dispute but that when appellee acquired the used and worn-out automobile parts, they were classifiable as scrap and junk. The following definitions and authorities concerning scrap and junk seem clearly applicable:

56 *Corpus Juris.*, 884-885, states:

Scrap. (Sec. 1)A. *As Noun.* The word originally meant what was scraped off. It has come to have an extended meaning and includes anything that is thrown aside. The word has reference to the antecedent history of the article and not to the use that a new owner might make of it.

* * * * *

(Sec. 2)B. *As Adjective.* On the form of scraps; also valuable only as raw material.

In *Ward, Ltd. v. Midland R. Co.*, 33 T. L. R. 4, 6 (Eng.), "scrap" was defined as follows:

An article was scrap if it was no longer useful to its owner; the word had reference to the antecedent history of the article and not to the use that a new owner might make of it.

The word "junk" has been held to include discarded parts of machinery. *City of Duluth v. Bloom*, 55 Minn. 97, 100, 21 L. R. A. 689, 690. Discarded automobile fixtures were held to be within the definition of "junk" in *Melnick v. City of Atlanta*, 147 Ga. 525, 94 S. E. 1015. In *City of Chicago v. Reinschreiber*, 121 Ill. App. 114, 120, the court defined the word "junk" as (pp. 118-119)—

worn out or discarded material in general, that still may be turned to some use, especially old rope, chain, iron, copper, parts of machinery, bottles, etc., gathered or bought up by persons called "junk dealers" * * *

In the instant case, the used parts were nothing more than "junk" when received by appellee. The principal purpose of its business was to produce and sell automobile connecting rods for numerous makes of automobiles from a combination of new or prepared raw materials and essentially raw material which appellee prepared. The acquisition of second-hand material was merely incidental to its production and/or manufacturing business.

In *City of Louisville v. Zinmeister & Sons*, 188 Ky. 570, 222 S. W. 958, the court stated (pp. 575-576):

Courts here experienced much difficulty in determining what is a manufacturing establishment and what is included in the term "manufacture." There is no hard and fast rule by which to determine whether a given establishment is a "manufactory," but *all the facts and circumstances must be taken into consideration* in determining whether the establishment is or is not to be so reckoned. *Whether it is such an establishment does not depend upon the size of the plant, the number of men employed, the nature of the business or the article to be manufactured, but upon all these together and upon the result accomplished.*

If raw material is converted at a factory or plant into a finished product, complete and ready for the final use for which it is intended, or so completed as that in the ordinary course of business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it, the plant which turns it out is a manufacturing establishment within the meaning of the statute * * *. (Italics supplied.)

Likewise, in the instant case it is important to consider all the surrounding facts and circumstances and not limit consideration of the question involved to any single factor, or to the narrow confines of an antiquated literal interpretation of the word "manufacture" as understood prior to the advent of modern machinery and industrial methods of salvaging for manufacturing purposes.

If the terms "manufacturer" and "producer" are to be whittled away by fine distinctions, the intent and purpose of Congress to impose a tax upon automobile parts produced and sold to jobbers and wholesalers will necessarily be defeated. *In re First Nat. Bank*, 152 Fed. 64, 67 (C. C. A. 8th).

If appellee had imported used connecting rods and done nothing whatsoever to them and then had sold them, it would have incurred an excise tax under the statute in question as an "importer".

In addition to the foregoing decisions, it may be noted that the taxpayers in the following cases voluntarily dismissed their refund actions after the action of the Seventh Circuit Court of Appeals in the *Clawson & Bals* case, *supra*:

S. & R. Grinding & Machine Co. v. United States (W. D. Pa.) (involving connecting rods), voluntarily dismissed on plaintiff's motion, despite the fact it earlier had obtained a favorable ruling on the Government's motion to dismiss. The ruling on the motion to dismiss is reported in 27 F. Supp. 429.

Federal-Mogul Corp. v. Kavanagh (E. D. Mich.) (involving connecting rods), voluntarily dismissed by taxpayer as the parties were about to proceed to trial.

The foregoing Canadian decisions⁷ are particularly applicable because they involved a consideration of contentions similar to those advanced herein by appellee, under a revenue statute containing similar provisions. The taxpayer there contended that the old tires had not lost their identities as such during the "retreading" operations, that the names and numbers of the original manufacturers were not marred or obliterated, and that the taxpayer was merely the repairer of second-hand tires and not the manufacturer or producer thereof. However, each of the contentions was rejected by the Supreme Court of Canada and the Exchequer Court on reasoning similar to that followed by the American decisions upon which we rely.

It cannot be disputed that the used rods had lost their commercial value as connecting rods and, after the dismantling thereof, the salvaging of the usable forgings

⁷*Bilrite Tire Co. v. The King*, 1937 Canada Law Rep. 364;
The King v. Bilrite Tire Co., 1937 Canada Law Rep. 1.

therefrom and the preparation of the forgings for taxpayer's operations, there remained prepared materials for manufacturing processes. Such prepared materials were not then connecting rods but mere forgings on which appellee thereafter performed grinding operations, machining operations, added other materials, assembled the same and employed skill before completing its marketable product and placing it in stock for sale to wholesalers. The position of appellee is the same as if it had purchased forgings salvaged (from old or worn-out articles) and prepared by the vendor for babbitting, bushing, machining, assembling and finishing operations. If then appellee had purchased from a third party the remaining necessary materials, consisting of babbitt, shims, nuts, bolts and bushings, and continued with all subsequent steps, it could hardly be suggested that the article in its final condition had not been produced or manufactured by appellee. And the mere fact that appellee has itself performed the defined operations on the old forgings cannot exclude it from the operation of the taxing statute.

It is suggested that the old or worn-out rod did not lose its identity *qua* rod and that, therefore, the appellee could not be said to have manufactured or produced a rod. However, when one bears in mind the various steps taken by appellee and particularly the state of the article when the babbitt bearing, bronze bearing, bolts, nuts and shims were removed, it would appear that appellee cannot be any less the manufacturer of a connecting rod because it started with something that had once been

a usable rod than if, as suggested above, it had commenced with several substances purchased from different sources.

The following decisions, all of which are of District Courts, are against the Government. However, most of them have been, in effect, overruled by the later decisions of the Seventh Circuit Court of Appeals and of this Court, as hereinafter indicated:

Monteith Brothers Co. v. United States (N. D. Ind.), decided October, 1936, not officially reported but published in 1936 Prentice-Hall, Vol. 1, par. 1710 (involving armatures and connecting rods), overruled by the Seventh Circuit Court of Appeals in the *Clawson & Bals* case, *supra*.

Hempy-Cooper Mfg. Co. v. United States (W. D. Mo.), decided May 6, 1937, not officially reported but published in 1937 Prentice-Hall, Vol. 1, par. 1461 (involving connecting rods).

Bardet v. United States (N. D. Cal.), decided May 18, 1938, not officially reported but published in 1938 Prentice-Hall, Vol. 1, par. 5507 (involving connecting rods). This case was overruled by the decision of this Court in the *Armature Exchange* case, *supra*.

Becker-Florence Co. v. United States (W. D. Mo.), decided December 27, 1938, not officially reported but published in 1939 Prentice-Hall, Vol. 1, par. 5161 (involving armatures).

Con-Rod Exchange, Inc. v. Henricksen, 28 F. Supp. 924 (W. D. Wash.) (involving connecting rods). This

case was overruled by the decision of this Court in the *Armature Exchange* case, *supra*.

Armature Rewinding Co. v. United States (E. D. Mo.), decided September 30, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,887 (involving generators and armatures). This case is now pending on the Government's appeal before the Eighth Circuit Court of Appeals.

The *Con-Rod* case, *supra*, was not appealed because both it and the *Armature Exchange* case, *supra*, were decided at about the same time by Judge Yankwich and it was deemed by the Solicitor General that the appeal in the *Armature Exchange* case would suffice, especially when a successful appeal in the *Con-Rod* case would have resulted in a judgment for considerably less than the cost of appeal. The remaining cases which were not appealed did not present satisfactory records. However, we contend that the several adverse District Court decisions were erroneous.

The case of *Hartranft v. Wiegman*, 121 U. S. 609, relied on by the court below in its opinion, is not in point. It, and other Supreme Court decisions usually urged by taxpayers in these cases, were rejected in the *Armature Exchange* case as being inapplicable.

IV.

The Government's Position Is Also Supported by the Treasury Regulations Which in the Light of the History and Reenactment of the Taxing Provisions Without Material Change Have Been Given Congressional Approval.

The Government's position is consistent with Treasury Regulations 46, 1932 Edition:

ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term “producer” includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article *by combining or assembling two or more articles.* (Italics supplied.)

Section 316.4 of Treasury Regulations 46, 1940 Edition, is to the same effect as Article 4, *supra*, except that the later Regulations are even more specific, namely:

SEC. 316.4. *Who is a manufacturer.*—the term “manufacturer” includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material (1) by processing, manipulating, or changing the form of an article, or (2) *by combining or assembling two or more articles.* (Italics supplied.)

Article 7 of the applicable Treasury Regulations, as revised in December, 1920, defines a manufacturer as generally a person who—

(1) actually makes a taxable article; or (2) by changes in the form of an article produces a taxable article; or (3) *by the combination of two or more articles produces a taxable article.* (Italics supplied.)

The italicized part of the 1920 revision of the Regulations was carried forward in Regulations 47, revised March, 1926, as Article 6 thereof, also in the 1921 and 1924 Regulations under the 1921 and 1924 Revenue Acts.

The same definition of manufacturer was also carried forward in Regulations 46, under the Revenue Act of 1932, as Article 4 thereof as shown above.

The following is a history of the enactment and re-enactment of the excise tax law with respect to automobile parts and accessories:

The Revenue Act of 1918, c. 18, 40 Stat. 1057, Section 900(3), was the first to impose a tax on automobile parts and accessories as distinguished from automobiles themselves which were first taxed under the 1917 Act. The rate, under the 1918 Act, on such parts and accessories was 5%. The tax was reenacted by Section 900(3) of the Revenue Act of 1921, c. 136, 42 Stat. 227, and the rate was the same, effective as of January 1, 1922.

Under Section 600(3) of the Revenue Act of 1924, c. 234, 43 Stat. 253, the tax was carried forward and the rate was reduced to 2½%.

The Revenue Act of 1926, c. 27, 44 Stat. 9, Section 600, taxed "automobile chasses and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof" at 3%. Therefore, under the 1926 Act, parts and accessories sold separately were not taxed.

The Revenue Act of 1928, c. 852, 45 Stat. 791, Section 421, repealed, as of the date of its enactment, May 29, 1928, the taxes on automobiles.

By Section 606 of the Revenue Act of 1932, the tax again was placed on automobiles, parts and accessories, among other things.

The 1932 Act remained in effect during the passage of all subsequent Revenue Acts and was reenacted in the subsequent Acts or extended by resolution, and was reenacted in the Internal Revenue Code as Section 3403.

Section 3403 was amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sections 209 and 216 of the Revenue Act of 1940, c. 419, 54 Stat. 516, but was not changed so far as here material.

Section 210 of the 1940 Act amends the Internal Revenue Code by adding a new section thereto, the effect of which is to change the rate on automobile parts and accessories from 2% to 2½% for the period after June 30, 1940, and before July 1, 1945.

If, in addition to Article 4 of Treasury Regulations 46, approved June 18, 1932, providing that as used in the Act the term "producer" includes a person who produces a taxable article by combining or assembling two or more articles, more were needed, attention is directed to the fact that this provision has appeared in the Treasury Regulations since 1920, during which time the taxing statute has been reenacted several times without material change. Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law. *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, 115; *United States v. Armature Exchange*, *supra*.

See, also, S. T. 896, 1940-2 Cum. Bull. 252, published February 19, 1940, to the effect that persons who manufacture or produce connecting rods from used or worn-out connecting rods and new material are manufacturers and producers within the meaning of Section 606 of the Revenue Act of 1932, and are subject to tax thereunder upon the sales of such rods.

By S. T. 896, the following earlier rulings were modified to accord with the principles laid down in the *Clawson & Bals* decision:

S. T. 606, XI-2 Cum. Bull. 476 (1932), relating to rebuilt taxi meters.

S. T. 648, XII-1 Cum. Bull. 384 (1933), and S. T. 812, XIV-1 Cum. Bull. 406 (1935), relating to retreaded and rebuilt tires.

Thus, under any view of the case, the evidence brings appellee squarely within the definition of a manufacturer or producer as set forth in the Regulations for the past twenty years, namely, that "a person who * * * produces a taxable article by combining or assembling two or more articles" is included in the term "producer" as used in the Act.

In conclusion, it is submitted that under the applicable statute, decisions, Regulations, and undisputed evidence the court below should have made ultimate findings of fact and entered judgment in favor of appellant for the amount of its counterclaim, and dismissing appellee's complaint.

Conclusion.

It is submitted that the law and undisputed evidence do not support the ultimate findings, conclusions, and judgment below. The judgment should be reversed.

Respectfully submitted,

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September 26th. 1941.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 606. TAX ON AUTOMOBILES, ETC.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. * * *

[Note: Subsections (a) and (b) refer to automobiles, automobile trucks and motorcycles.]

Treasury Regulations 46, approved June 18, 1932:

ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term “producer” includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnished materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knock-down condition, but complete as to all component parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.

ART. 41. *Definition of parts or accessories.*—The term “parts or accessories” for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term “parts and accessories” shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis or motorcycles, are considered parts or accessories for such articles whether or not primarily designed or adopted for such use.

No. 9746

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

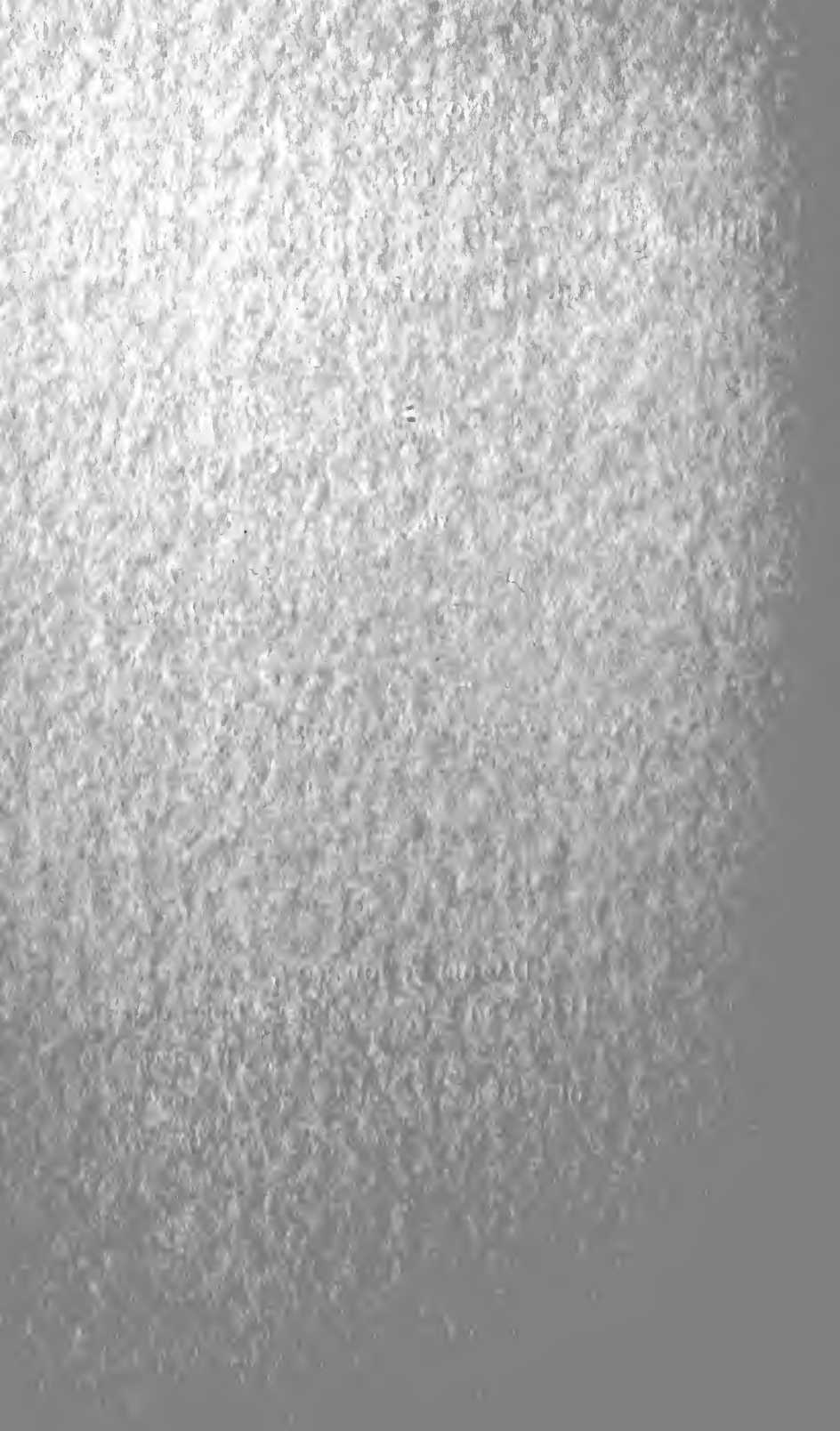
Appellee.

BRIEF FOR THE APPELLEE.

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No. 9746

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The memorandum opinion of the District Court [R. 32-36] is unreported.

Jurisdiction.

The statement as to the jurisdiction of this Court contained in appellant's opening brief is accepted by appellee.

Question Presented.

Whether sales of rebabbitted connection rods by appellee were taxable under section 606(c) of the Revenue Act of 1932, which imposed a tax upon automobile parts "sold by the manufacturer, producer, or importer" thereof.

Statutes, Regulations and Rulings.

The applicable statutes, regulations and rulings involved will be found in the appendix to this brief.

Statement.

The case was tried to the court without a jury upon evidence consisting of two witnesses offered by appellee and numerous exhibits offered by each of the parties. The court rendered a memorandum opinion [R. 32-36] and findings of fact and conclusions of law [R. 36-60] in favor of appellee.

The practice of rebabbitting worn or damaged automobile connecting rods has existed for many years prior to the enactment of the Revenue Act of 1932. Originally the individual repair shops performed this operation, in fact this is true in certain instances today. However, because of the volume of business and the expense involved it has become the practice for this work to be performed by repair shops specializing in this work.

A connecting rod is the mechanical means by which the piston is connected to the crankshaft. It transmits the energy created by the explosion of gasoline vapor in the cylinder to the crankshaft. [R. 89.] In order to minimize the wear created by the friction there must be bearings provided at each end of the rods. At the large or lower end of the connecting rods there are thin layers of babbitt metal which separate the rod from the crankshaft journal which absorbs the wear. [R. 109.] The rods are divided at the center of the large end to permit installation on the crankshaft journal. The lower part or cap, being fastened to the upper part or shank, with two bolts and nuts. [R. 108.]

During the period herein involved the appellee owned plants in New York, Columbus, Chicago, Los Angeles, Portland and Seattle. [R. 163.] The Los Angeles and Chicago plants were the largest. [R. 164-165.] It is

the practice of automobile repair men to send worn or damaged rods to jobbers in exchange for rebabbitted rods of the same type. The jobbers in turn send these rods to appellee or others in the same business to have them rebabbitted or exchanged for rods of the same type which have previously been rebabbitted. [R. 102-103.]

In order to prevent delay which would result if each customer's rods were rebabbitted and returned, appellee has acquired a stock of used rods which have been rebabbitted and placed on the shelf for immediate exchange for worn or damaged rods of the same type. [R. 166.]

Ninety-five per cent of the rods sold by appellee were used rods sent in by jobbers in exchange for rebabbitted rods or to be rebabbitted and returned. The remaining five per cent were received from dealers in used rods or were purchased from automotive representatives. [R. 120.]

In order to economically handle the large volume of business which appellee enjoyed it was necessary to maintain shops utilizing considerable machinery. Appellant devotes much space in the opening statement in it's brief to the discussion of the number of employees, the machinery used and the process through which the rods passed. Appellee contends that the number of employees, amount of machinery and process has no bearing on the taxability of the parts sold. That the test of taxability is whether this appellee was or was not a manufacturer or producer within the meaning of section 606(c) of the Revenue Act of 1932.

ARGUMENT.

I.

The Rebabbiting of Used Second Hand Connecting Rods Is Not the Manufacture or Production of Connecting Rods, But Is Only the Repair, Restoration or Reconditioning Thereof.

(a) MANUFACTURING OR PRODUCTION CONSISTS OF THE APPLICATION OF LABOR OR SKILL BY HAND OR MACHINERY SO THAT AS A RESULT THEREOF A NEW, DIFFERENT AND USEFUL ARTICLE OF COMMERCE IS PRODUCED.

In this case appellee seeks a refund of manufacturer's excise taxes paid by it upon the sale of used, second hand automobile connecting rods which it had rebabbitted. All of the connecting rods sold by appellee were parts of automobile engines and over ninety-five (95%) per cent of them had been used and as a result of such use had become worn or damaged. The evidence by the testimony of J. Leslie Morris which was uncontradicted is that the connecting rods sent to appellee's plant for rebabbing could continue to operate in an internal combustion engine. [R. 123.] It was further testified by Mr. Morris that the rebabbing was the building up of the bearing so that it would operate more efficiently. [R. 123.] In fact the witness stated [R. 123]:

“Preserve the oil pressure, and things of that sort. It will function. In fact, I suppose 95 per cent of the automobiles that pass this building right now, the bearings are too loose, but they are still running just the same.”

The appellee herein merely repaired used connecting rods which had been worn or damaged through use as component parts of automobile engines. The Court made a finding of fact to the effect that appellee had not manufactured any connecting rods. In paragraph III of the findings of fact the Court found in part [R. 39]:

“ . . . All of said connecting rods were manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff had been used as operating parts for automobile motors, and by reason of such use the babbitt metal lining constituting a part of said connecting rods had become worn, chipped, roughened and otherwise impaired;”

Unrefuted testimony was to the effect that appellee never manufactured any new rods and did not have the equipment to manufacture them. [R. 98.] The same evidence also established that appellee never removed the manufacturer's identification marks from any rods rebabbitted by it or put on any identification marks of its own. [R. 99.] The method of acquisition and repairing of the connecting rods was fully set forth in the record. (Plaintiff's Exhibits 1 to 32.)

If appellee's rebabbitting process commenced with a connecting rod and ended with a connecting rod, it is obvious that nothing has been manufactured or produced. No new article of commerce has been produced by the process, no new thing has been brought into existence. When the rebabbitter commenced his work he had a connecting rod and when his work was completed he still had the same connecting rod. It makes no difference how long it took him to do the work, or how many different

pieces of machinery he employed in the process, or whether he worked alone in a small shop, or whether he employed many other workmen in a large plant, or whether after the process was completed, he immediately reinstalled the connecting rod in the automobile from which it was taken, or whether he laid it upon a shelf and subsequently exchanged it for another used, second-hand connecting rod of the same type. The question is, "What did the re-babbitter do?" Did he produce or manufacture a new article? Did he merely repair an article which someone had previously produced or manufactured? Manifestly, he has repaired a connecting rod. His work commenced after the manufacture or production of that connecting rod had long since been completed and the rod had actually seen service as an operating part of an automobile engine.

The meaning of the words, "manufacturer" and "producer" is clear. A manufacturer is one who makes something new, according to Webster's New International Dictionary:

"1. To make (wares or other products) by machinery or by other agency; as to manufacture cloth, nails, glass, etc., to produce by labor, esp., now, according to an organized plan and with division of labor, and usually with machinery."

2. To work, as raw or partially wrought materials, into suitable forms for use, as to manufacture wool, iron, etc.

3. To fabricate; to invent; also, to produce mechanically;

The terms manufacture and produce must be compared with the word "repair", a word which is repugnant to and exclusive of manufacture or produce.

To repair, defined by Webster's New International Dictionary, is to restore to a sound or good state after decay, injury, dilapidation, or partial destruction; as to repair a house, a road, a shoe, also to renew, revive or rebuild.

The principles involved in this case were recognized and stated by the court in *Thurman, Collector v. Swisshelm* (C. C. A. 7), 36 Fed. (2d) 350. In that case the taxpayer dealt in automobiles. They bought completed Ford automobiles from the Ford Motor Company or its agents. They bought from the Ames Company automobile bodies so constructed that they would fit the Ford chasses. They would remove the Ford bodies from the automobiles and replace them with the Ames bodies. The question was whether the taxpayer by that process became the manufacturer or producer of automobiles so as to become liable for the manufacturer's excise tax on the automobiles. The court held that they were not manufacturers or producers of automobiles. The court then distinguished the case of *Klepper v. Carter*, 286 Fed. 370, which is cited by appellant as authority, and said l. c. 351:

"The facts are different in that there was no truck figured in the transaction until the parts had been assembled and connected; while here appellees bought the completed automobile upon which the tax had already been paid."

The principles underlying the *Swisshelm* case is in no wise different from the case at bar. *Swisshelm* commenced his process with automobiles completely manufactured and tax paid by the manufacturer; the appellee in

this case commenced its work with connecting rods previously manufactured and tax paid by a manufacturer. When Swisshelm finished his process, he still had an automobile—he *had created nothing new*; when appellee in this case completed its process, it still had connecting rods—it *had created nothing new*.

The courts have been frequently called upon to define, and apply the definition of, manufacture. A leading and often cited case is *Hartranft v. Wiegmann*, 121 U. S. 609. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether they were or were not “manufactured”. The question involved and the facts are stated in the opinion by Mr. Justice Blatchford, as follows, l. c. 613-14:

“The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufacturers of shells, within the meaning of the statute.”

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion, l. c. 615:

“We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In ‘Schedule M’ of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on ‘coral, cut or manufactured’; and, in Section 2505, page 484, ‘coral, marine, unmanufactured’, is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazer v. Moffit*, 20 Blatchf. 267, it was held that hay pressed bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen*, 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article because it

was capable of use in that shape as a shoe, and had been put into a new form, capable of use and design to be used in such new form. In *United States v. Potts*, 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson*, 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

“We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, ‘as duties are never imposed on citizens upon vague or doubtful interpretations’. *Powers v. Barney*, 5 Blatchf. 202; *U. S. v. Isham*, 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumn. 384.”

In *Anheuser-Busch Brewing Association v. U. S.*, 207 556, the plaintiff sued to recover certain import duties which it had paid on corks designed for use in bottling beer. Under the act there involved plaintiff was required to prove as the basis of its refund or “drawback” that the corks involved were not manufactured corks, but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks when imported into this country from Spain had already been cut by hand to the required size. It was

further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company's plant to various processes and treatment consuming several days of time, during which the corks were treated, processed, sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

“The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of ‘imported materials’ within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.

“The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.

“In opposition to the judgment of the Court of Claims counsel have submitted many definitions of ‘manufacture’, both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article

is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'*. This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

In *Hughes v. City of Lexington*, 277 S. W. 981, the appellant was a corporation engaged in the business of making and selling ice cream. Nevertheless, the City of Lexington contended that the corporation was not engaged in manufacturing within the meaning of the state statutes which exempt from city taxes machinery, material and supplies used in manufacturing. In the opinion by Clark, C. J., it is said, l. c. 982:

"The sense in which the term is here used, as well as the purpose intended to be accomplished by the act, is quite plain. Obviously, the term 'engaged in manufacturing' was not employed in any technical sense, but must be accorded its ordinary meaning as commonly understood. And, while incapable of exact definition, nevertheless it is true, as was stated in several of the above cases, that according to common understanding and generally speaking, manufacturing consists in the application of labor or skill by hand

or machinery to material so that as a result thereof, a *new, different* and useful article of commerce is produced.”

The foregoing cases emphasize and reiterate the principle that whether a given process constitutes manufacturing depends upon whether the process results in the creation of a new thing. If that which emerges at the conclusion of the process is the same thing which entered the process at its beginning, notwithstanding some labor and some new materials have been expended upon it during the process—in other words, if the thing retains its identity during the course of the process and after it is completed—then no manufacturing or production has occurred. If the article before the process commenced was a cork and it emerged from the process still a cork, there has been no manufacture. By the same token, the principle as applied to the case at bar leads inevitably to the conclusion that since the connecting rods in question did not lose their identity during the rebabbiting process, but were connecting rods when they entered plaintiff’s plant and were still connecting rods when they left the plant, there was no manufacture.

(b) THE MERE REPAIR, RESTORATION OR RECONDITIONING OF AN ARTICLE DOES NOT CONSTITUTE MANUFACTURING OR PRODUCTION.

An essential distinction must be preserved between manufacture which, as above shown, results in the creation of a new article, and mere repair which results only in the restoration of partial injury but does not create a new article. When an article which consists of several component parts sustains wear or suffers injury to one of

those parts, the plain economics of the situation dictate that the injured part, if possible, shall be replaced or repaired, rather than that the entire article shall be wastefully discarded. A man may drop his watch and break the balance staff so that its usefulness as a timepiece is, for the time being, destroyed. But in such a case the owner does not throw his watch away and buy another. Instead, he takes it to a skilled mechanic who replaces the broken or damaged part and restores the watch to its former condition of usefulness. No one would argue in such a case that the jeweler had manufactured a watch. The admitted fact is that the owner took a watch to him. True, the watch was damaged and would not operate, but it was, nevertheless, a watch. After the jeweler had repaired the balance staff, it was still a watch—the same watch. It never lost its identity as a watch. Such is the process of repair or restoration as distinguished from the process of manufacture.

The distinction between repair or restoration, on the one hand, and manufacture or construction, on the other hand, is often called in question and decided in patent cases.

Perhaps the leading case in this field is *Wilson v. Simpson*, 9 How. 109. In that case the owner of a patented planing machine had repaired or reconditioned his machine by placing therein certain new parts, particularly the knives or cutting tools which were the important operative agency of the machine or, as it is sometimes said,

the ultimate effective tool. Notwithstanding the fact that the cutting tools were the most vital and important part of the machine and did the very work for which the machine was designed, the court had no difficulty in finding that their replacement constituted only repair of the machine and not manufacture or production of a new machine so as to infringe the patent. In the opinion by Mr. Justice Wayne it is said, l. c. 123:

“But it does not follow, when one of the elements of the combination has become so much worn as to be inoperative, or has been broken, that the machine no longer exists, for restoration to its original use, by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration and not reconstruction.

“Illustrations of this will occur to anyone, from the frequent repairs of many machines for agricultural purposes. Also from the repair or replacement of broken or worn-out parts of larger and more complex combinations for manufactures.

“In either case, repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine; and when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which everyone may use to give duration to that which he owns, or has a right to use as a whole.”

In *Hess-Bright Mfg. Co. v. Bearing Co.*, 271 Fed. 350, the court considered a case involving the alleged infringement of a patent upon a ball bearing. The bearing consisted of a groove of a certain depth with balls exactly fitting it. The vendee of this patented bearing reground or smoothed up the groove, an operation which necessarily resulted in somewhat enlarging the groove. This necessitated installing larger balls to fit the enlarged groove. The question was whether or not the owners of the bearing had constructed a new bearing so as to infringe the patent or whether he had merely repaired his bearing. The court found that there was no manufacture involved in the process and that the patent had not been infringed. In the opinion by Dickinson, district judge, it is said, l. c. 351:

“Council for plaintiff does not, of course, formulate the claim of right as defendant states it. He does not deny to the vendee of plaintiff the right to repair. What he does deny is any right, by using plaintiff’s bearing as a model, to make a new bearing from the raw material of the old one. It is obvious that all this is nothing more than opposing statements of the effect of what the defendant had done. The defendant calls it the repair of old bearings. The plaintiff calls it new construction or reconstruction. Omitting the name properly to be applied to what was done, the fact finding is made that what was done was the regrinding of the groove of old bearings, and, when required, the substitution of new balls to fit the grooves enlarged by the regrinding.

“The dividing line between repairs and a making over cannot be verbally located. What has been done can with more or less confidence be pronounced to be one or the other, but neither the one nor the

other can be defined. The judgment pronounced must in consequence partake of the *ipse dixit* or rescript character. A further consequence is that the adjudged cases provide us with little for our guidance. With no thought of finding a better mode of expression for the clearly presented views of counsel for plaintiff, it may be premised that a feature of the patented bearing is the metallic pathway provided in the form of a groove, which calls for the use of balls of a certain size. The nicety of adjustment required can be most emphatically expressed by the statement that the unit of measurement employed is the ten-thousandth part of an inch. This groove may, from use or abuse, be in need of being remade by regrinding. The lightest repolishing, almost, is such.

“The argument that this is not repair, but a new construction, may be thus expressed: A bearing with a groove of a certain depth, with balls exactly fitting it, is sold by the plaintiff to A. Another bearing, with a different groove, calling for the next larger size balls, is sold to B. The first vendee smooths up the groove in his bearing, thus adopting it to the next larger size of balls. By so doing he has not repaired the bearing sold to him, but out of the material in this old bearing he has made a new one, which is not his old bearing, but a different bearing of the B type. In other words the old A bearing has lost its identity by destruction, and a new bearing, B, has been made. In a sense this is, of course, true; but it is only true in a sense. Identity is not lost by a mere change in size. The rule of which we are in search is a practical rule for the guidance of practical men in practical business. What the patentee sells is a concrete thing. It is a bearing. As long as it remains the bearing of the patent, it is what the patentee sold. The moment it becomes something else the patentee

is not concerned with it. The groove of the patent is still the groove of the patent, although enlarged. It no more loses its identity by enlargement than a river does by the change of the volume, due to the flow and ebb of the tide, or by the shoaling or deepening of its channel by the wash of its current.

“The balls are no part of the groove, but something used with it. There is no thought of denying the right of a vendee to repair balls. His right is not limited to any size of ball. The balls may be replaced without thought of infringement of any patent right. To deny vendee the right to smooth up a groove is to deny him all right to make repairs to the patented features of what was sold to him. The right cannot be limited to the use of the same balls as before. The only limitation is that he may repair, but cannot make a new bearing out of the material of the old. What is the one and what the other the facts of each case must determine. The line, as before observed, is most difficult to draw in words of description; it is by no means so difficult to draw in fact.

“In the instant case our fact finding is that what defendant has done is to make repairs, and that it has not infringed upon the patent rights of plaintiff. The name given to anything is not necessarily indicative of what the thing is. A fact upon which defendant lays much stress has some interest as a coincidence, but no other value. The fact referred to is that the plaintiff itself did what the defendant has done, and the department in charge of such work was called by plaintiff its ‘Repair Department’. We attach as little importance to the distinction between repairing and selling second-hand bearings after they have been repaired.”

In *Foglesong Machine Co. v. Randall Co.* (C. C. A. 6), 239 Fed. 893, the defendant, being the owner of a patented machine for the stuffing of horse collars, was accused of infringing the patent by making certain repairs upon the machine. The court found that certain parts of the machine were perishable in that they were subject to greater wear than other parts. In that connection the court said, l. c. 895:

“The question for decision is: Did the defendant repair or reconstruct the machine which it purchased from the Grand Rapids Company? In supplying a new hopper, stuffing rod nose, and disc, the defendant merely returned to use the injured or lost portions of the mechanism. This constitutes repairing, and not reconstruction.”

At another point the court said, l. c. 896:

“The machine was not so broken and worn out as to require replacement. The wear and injury were but partial. Under such circumstances, repair is not reconstruction, but restoration, that the mechanism may be kept up to the full performance of its duty.”

In *Goodyear Shoe Machine Co. v. Jackson* (C. C. A. 1), 112 Fed. 146, it is said in the opinion by Colt, C. J., l. c. 151:

“Where the patent is for a machine, which commonly embraces the combination of many constituent elements, the question of infringement by the purchaser will turn upon whether the machine is only partially worn out or partially destroyed, or is entirely worn out, and so beyond repair in a practical sense. In the case of a patent for a planing machine composed of many parties it was held that the re-

placement of the rotary knives, 'the effective ultimate tool' of the machine, was repair, and not reconstruction, *Wilson v. Simpson*, 9 How. 109."

A further statement of the principle involved, together with a citation of many cases, is found in *Miller Hatcheries v. Incubator Co.* (C. C. A. 8), 41 Fed. (2d) 619.

In *State v. J. J. Newman Lumber Co.* (Miss.), 59 So. 923, the distinction between manufacture and repair is clearly stated by the Supreme Court of Mississippi as follows, l. c. 926:

"A reasonable definition may be given to 'manufacturing' (Century Dictionary) as the system of industry which produces manufactured articles, and to 'manufacture' as the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, and properties, or combinations, whether by hand labor or machinery, used more especially of production in a large way by 'Repair' is to make whole or restore an article or thing to its completeness. In the general knowledge of the affairs of business and life, it will hardly be difficult to class those persons who are engaged in such employment."

Applying the principles announced and reiterated in the foregoing cases to the facts of the case at bar, it is clear that the injury to the used, second-hand connecting rods which the plaintiff acquired and rebabbitted was but partial. Only the babbitt lining was injured or destroyed. They were not "entirely worn out, and so beyond repair in a practical sense" (*Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. 146, 151), is conclusively proved by the fact that the plaintiff did restore them to their former

condition of usefulness by the simple expedient of rebabbiting them.

The physical facts speak for themselves. This Court has before it a box of connecting rods in various stages of rebabbiting. These exhibits themselves are the most eloquent testimony obtainable that the rods before rebabbiting were not entirely worn out and were not beyond repair in any sense, but had sustained only partial wear or injury. These rods were not “junk”, and had not been discarded by their former owners as is contended by the appellant. On the contrary, they had been carefully preserved and had been sent to this plaintiff either directly or through jobbers so that they might be rebabbitted or exchanged for other rods of a similar type which had already been rebabbitted.

J. Leslie Morris, testifying for the plaintiff, when asked what percentage of the connecting rods were procured from jobbers, stated [R. 119]:

“A. Approximately 95 per cent.”

If these connecting rods were so far worn out and so beyond repair that they ceased to have any value over and above the melting pot value of the metal contained in them, why did appellee value them as high as \$12.00 each [R. 113], when the top price for that kind of scrap steel was \$11.00 a ton?

There was no evidence that the used, second-hand connecting rods which the plaintiff rebabbitted were, prior to the rebabbiting, so worn out and beyond repair that they had ceased to be connecting rods. On the contrary, under the undisputed evidence in this case, it is conclusively proved and established that these connecting rods had a

commercial value to the plaintiff and to other concerns engaged in the rebabbiting business far in excess of their “junk value”. It is obvious that the comparatively great commercial value of used rods in excess of the melting pot value of the metals contained therein is due entirely to the fact that these rods may be restored to their former condition of usefulness and mechanical efficiency by a process of repair. This is the principle which underlies the decision of the Supreme Court in *Cadzwalader v. Jessup & Moore*, 149 U. S. 350. In that case the Supreme Court was called upon to decide whether certain imports of old india rubber shoes were dutiable as crude india rubber or as articles composed of india rubber. The shoes were so worn as to be beyond repair and for that reason they had ceased to be shoes and were valuable only for the rubber which they contained. It is said in the opinion by Mr. Justice Blatchford at page 354:

“The uncontradicted testimony is to the effect that the only commercial use or value of the old india rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone*; that they could not fairly be called ‘articles composed of india rubber’, and as such dutiable at 25 per centum *ad valorem*; and that, although the shoes may have been originally manufactured articles composed of india rubber, they had lost their commercial

value as such articles, and substantially were merely the material called 'crude rubber'. They were not india rubber fabrics, or india rubber shoes, because they had lost substantially their commercial value as such."

The appellant herein compares the above case to the case at bar, stating that the india rubber shoes had lost their commercial value as such articles, and substantially were the material called "crude rubber". It is agreed that they are correct in reference to the shoes, because they were not imported as used shoes to be repaired, but only for their value as crude rubber. In the instant case the connecting rods are repaired to restore them to their former condition of usefulness. If the appellee had converted the connecting rods into some other automobile part then there might be some color of right in the appellant's contention; in fact, this action would never have been instituted.

The appellant bases great emphasis upon the decision in the case of *Clawson & Bals v. Harrison*, 108 Fed. (2d) 991. In order to get a clear picture of this case it is necessary to refer to the findings of fact and conclusions of law as found by the trial court. This case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, Paragraph 9219.

Clawson & Bals had new connecting rod forgings made for them, which they machined and babbitted. During part of the period covered by their suit, they removed all

marks of identification from rods manufactured by General Motors Corporation and subsidiaries. They also rebabbitted used and second-hand connecting rods. At paragraph 10 of the findings of fact the trial court found:

“Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the articles made from scrap as equivalent to any similar products made entirely from virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guaranty or otherwise.”

As stated before, Clawson & Bals dealt in three kinds of connecting rods; newly-manufactured ones, rebabbitted rods on which the identification marks had been removed and other rebabbitted rods. They at all times held themselves out as manufacturers, as in truth they were. As manufacturers they paid excise tax on all sales of rods, but did not include as part of the sale price the exchange value of the old rods received as part of the selling price. Later the Government assessed a total of \$54,232.02, representing tax and interest on the additional selling price as represented by the value of the old rods received in exchange. Immediately Clawson & Bals objected on the ground that they were only rebabbits

of a part of the rods sold by them and that the additional tax paid by them of \$54,232.02 should be refunded as representing the tax on the sale of rebabbitted connecting rods.

It is submitted that the facts in the Clawson & Bals case are entirely different from the facts in the case at bar. Clawson & Bals did manufacture new connecting rod forgings from virgin metal, they removed identification marks from a part of the rods rebabbitted by them, they were manufacturers and held themselves out as such, whereas the appellee herein never manufactured a connecting rod, or held itself out as a manufacturer, never removed any identification marks from the rods and, in fact, never did more than repair used and damaged connecting rods.

The appellant also cites as authority *The King v. Bilt-rite Tire Co.*, 1937 Canadian Law Reports 1, and *The King v. Boulbee, Ltd.* (1938), 3 Dominion Law Reports 664. However, it is contended by appellee that our courts must give precedent to the cases decided in our own country and must consider as law the overwhelming authorities therein established before resorting to cases decided in foreign courts.

In view of the uncontradicted testimony in the case at bar that the used, second-hand rods which appellee acquired and rebabbitted by reason of the preparation and manufacture which they had previously undergone, had a commercial value as connecting rods which was far in excess of the junk value of the metals therein contained. It is respectfully submitted that the findings and judgment of the learned trial court were correct and should be affirmed.

Taxing Statutes Must Be Strictly Construed and Should Be So Construed as to Produce Uniformity and Equality in Their Application. Their Provisions Cannot Be Extended by Implication.

There was no dispute at the trial of this case as to the methods employed by the plaintiff in rebabbiting automobile connection rods. In fact the method was covered by a series of 32 pictures and an explanatory statement for each, which were introduced as Plaintiff's Exhibits 1 to 32.

The Government produced no direct evidence whatever that the rebabbiting of connecting rods is a manufacturing process or that the rebabbiting of connecting rods constitutes the manufacture of connecting rods.

Being totally without any direct evidence that rebabbiting is a manufacturing process, the Government apparently attempted to prove its case by the use of a syllogism which runs something like this: All large establishments employing many men, using many machines and turning out a large volume of work, doing business on a large scale and publishing catalogues in which their product is described, are manufacturing establishments; plaintiff has all these characteristics; therefore, plaintiff is a manufacturing establishment. The major premise of this syllogism is, of course, untrue, and the conclusion is, therefore, completely false. Size and extent and volume of business do not constitute the test of manufacture. It is common knowledge that there are many machine shops much larger than plaintiff's which manufacture nothing, but are engaged only in repair work.

If the taxing statute here involved is to be applied and administered by testing whether a company is a manufacturer or a repairman by determining whether it does

business on a large scale or on a small scale, and whether it employs many men or few men, then the administration of the taxing statute will result in the greatest inequality and lack of uniformity. The rebabbitter who sells several thousand connecting rods a month will be taxed because he is large and the rebabbitter who sells only a few connecting rods a month will not be taxed because he is small.

The mere fact that ownership of the connecting rods was vested in the appellee does not affect its status as a repairer. There is nothing to prevent appellee from acquiring title to used connecting rods or other automobile parts and repairing them before offering them for sale. Certainly there is no conflict here between the repairman being also the owner and vendor or only the repairman of the used connecting rods for others.

The true test, and the only test, is whether the rebabbitting process itself results in the creation of a new article, or whether it only accomplishes the restoration of an article already created. That is the test which can be applied to every rebabbitter and will result in absolute equality and uniformity of administration of the taxing statute.

In *City of Louisville v. Zinmeister* (Ky.), 222 S. W. 958, l. c. 959, the Supreme Court of Kentucky said:

“In the recent case of *Lorrillard Co. v. Ross, Sheriff*, 183 Ky. 217, 209 S. W. 39, we held that the word ‘manufacture’, in the sense in which it is employed in the statutes quoted above, does not import the

means or methods employed, or the nature or number of processes resorted to, or the size of the factory or the number of hands it employs, or the value of machinery in use, but the result accomplished, whether the article is manufactured or not.”

It is elementary that taxing statutes are to be construed strictly in favor of the taxpayer. This means that the tax must be based upon express statutory authority and cannot be imposed by implication. In *Hartranft v. Wiegmann*, 121 U. S. 609, it is said in the opinion by Mr. Justice Blatchford, at page 616:

“We are of the opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, ‘as duties are never imposed on a citizen upon vague or doubtful interpretations’. *Powers v. Barney*, 5 Blatchf. 202; *United States v. Isham*, 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumn. 384.”

In *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, it is stated in the opinion by Mr. Justice Butler, at page 508:

“It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers. *United States v. Merriam*, 263 U. S. 179, 188, 29 A. L. R. 1547, 44 S. Ct. 69; *Bowers v. New York & A. Lighterage Co.*, 273 U. S. 346, 350, 47 S. Ct. 398.”

In *Erskine v. United States* (C. C. A. 9), 84 Fed. (2d) 690, 691, it is said:

“Such revenue acts must be construed strictly in favor of the appellant sought to be charged as importer. He is ‘entitled to the benefit of even a doubt.’ Tariff Act 1897, 30 Stat. 151; *United States v. Riggs*, 203 U. S. 136, 1939, 27 S. Ct. 39, 40, 51 L. Ed. 127; *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 S. Ct. 1240, 30 L. Ed. 1012; *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422.”

In *Bankers Trust Co. v. Bowers* (C. C. A. 2), 295 Fed. 89, 96, it is said that the construction placed on a statute should avoid unjust consequences unless the act compels such a result. This is particularly true of a taxing statute where absolute uniformity and equality are to be preserved.

In *Alaska Consolidated Canneries v. Territory of Alaska* (C. C. A. 9), 16 Fed. (2d) 256, l. c. 258, it is said in the opinion by Rudkin, C. J.:

“Of course there is a presumption that laws, and especially tax laws, will have a prospective operation only; but there is a like presumption that they are intended to operate uniformly and equally upon all and, in the end, the question is one of legislative intent.”

The contention of the Government that some distinction may be made predicated upon the fact that the appellee is a large operator would seem to be specifically refuted by the case of *Spreckels Sugar Refining Co. v. McClain* (C. C. A. 3), 113 Fed. 244, opinion by Circuit Judge Dallas. In that case the statute imposed an excise

tax on all gross receipts in excess of the sum of \$250,000.00 per annum. A monthly return was required by the law, which did not specifically require anything but an annual payment of tax. The Spreckels Company filed a return for the first month, showing receipts in excess of the sum of \$250,000.00, and it was contended that the law should be construed so as to force the company to pay the tax monthly. The court held that the construction of the act contended for by the Government was “so questionable as to render it inadmissible to impose a duty upon a citizen”, citing the *Hartranft* case, and further held that such an inequality in the administration of the law could not be imposed upon the plaintiff simply because the returns were so large that its first monthly return exceeded \$250,000.00. The court said in the opinion, l. c. 247:

“We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration and, except by necessity, no such interpretation could be justified.”

Thus it can be seen that the court weighed the very points which are here urged by the appellant and specifically decided that large size of the plant, number of employees and magnitude of operations would not constitute the test of the application of the statute.

It is a cardinal principle of tax law that any doubt shall be resolved against the taxing authority. To do otherwise in this action would be to work great hardship upon the appellee and controvert all established law on that point.

The Bureau of Internal Revenue has no authority to attempt to amend any congressional act or extend the meaning thereof by regulation. This principle is clearly pointed out by the Supreme Court in *Koshland v. Helvering*, 298 U. S. 441, 446; *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 134.

Had Congress intended the tax herein involved to attach to the sale of repaired automobile parts such provision would have been put in the Internal Revenue Act of 1932. Failure to put such provision in that act shows clearly that it intended for the tax to attach to the sale of only newly-manufactured parts.

Appellee respectfully submits that, in the public interest, as well as to prevent injustice to this appellee, the judgment of the learned trial court should be sustained to the end that fairness, equality and uniformity in the administration and collection of federal manufacturer's excise tax shall be insured.

Conclusion.

It is submitted that the evidence supports the findings of fact, conclusions of law and opinion of the trial court, and that the judgment should be affirmed.

Respectfully submitted,

DARIUS F. JOHNSON and
MESERVE, MUMPER & HUGHES,
Attorneys for Appellee.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 606. TAX ON AUTOMOBILES, ETC.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsections (a) or (b), 2 per centum. * * *

Treasury Regulations 46, approved June 18, 1932:

Art. 4. Who is a manufacturer or producer.—As used in the Act, the term “producer” includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

No. 9746.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

PETITION FOR REHEARING ON BEHALF OF
THE APPELLEE, J. LESLIE MORRIS COM-
PANY, INC., A CORPORATION.

DARIUS F. JOHNSON,
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FILED

JAN 14 1942



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No. 9746.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

**PETITION FOR REHEARING ON BEHALF OF
THE APPELLEE, J. LESLIE MORRIS COM-
PANY, INC., A CORPORATION.**

*To the Honorable Circuit Court of Appeals for the Ninth
Circuit:*

Appellee J. Leslie Morris Company, Inc., a corporation, respectfully petitions for a rehearing of this appeal and urges the court to reconsider its decision in this case for the following reasons and upon the following grounds:

I.

The Decision Is in Conflict With the Law, the Statute and Decisions of the Supreme Court and Circuit Court of Appeals for Other Circuits.

The Supreme Court of the United States has announced in its decision in the case of *Cadwalader v. Jessup & Moore*, 149 U. S. 350:

'The uncontradicted testimony is to the effect that the only commercial use or value of the old india

rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone*; that they could not fairly be called 'articles composed of india rubber,' and as such dutiable at 25 per centum *ad valorem*; and that, although the shoes may have been originally manufactured articles composed of india rubber, they lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not fabrics or india rubber shoes, because they had lost substantially their commercial value as such." (Italics supplied.)

It is respectfully submitted that the connecting rods which are the subject under discussion in the instant case had a value far in excess of their value as raw material because of the manufacturing processes they had previously undergone. Under the rule established by the above case it is essential that the only value be that of raw material. That if the value of the article results from the manufacturing process previously undergone, then the value is because of that manufacturing process, and not as raw material. The record indicates that the appellee herein paid from \$1.60 to \$1.90 for each connecting rod, which was far in excess of the junk or raw material value. [R. 124.]

Appellee cites *Hartranft v. Wiegmann*, 121 U. S. 609, as an additional authority on the question of who is a manufacturer and what is manufacturing. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether they were or were

not “manufactured.” The question involved and the facts are stated in the opinion of Mr. Justice Blatchford, as follows, 1 C. 613-14:

“The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, and that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufactures of shells, within the meaning of the statute.”

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion l. c. 615:

“We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of

labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In 'Schedule M' of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on 'coral cut or manufactured'; and in Section 2505, page 484, 'coral marine, unmanufactured', is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee v. Moffit*, 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen*, 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and designed to be used in such new form. In *United States v. Potts*, 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson*, 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of trans-

portation was not manufactured marble, but was free from duty, as being unmanufactured.

“We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, ‘as duties are never imposed on citizens upon vague or doubtful interpretations.’ *Powers v. Barney*, 5 Blatchf. 202; *U. S. v. Isham*, 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumn. 384.” (Italics supplied.)

The third case cited is *Anheuser-Busch Brewing Association v. U. S.*, 207 U. S. 556, in which the plaintiff sued to recover certain import duties which it paid on corks designed for use in bottling beer.

Under the act there involved plaintiff was required to prove as the basis of its refund or “drawback” that the corks involved were not manufactured corks but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks imported into this country from Spain had already been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company’s plant to various processes and treatment consuming several days of time, during which the corks were treated, processed,

sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

“The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of ‘imported materials’ within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.

“The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.

“In opposition to the judgment of the Court of Claims counsel have submitted many definitions of ‘manufacture,’ both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture

implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

Appellee contends that the preceding cases are directly in point and are authority supporting the contention that said appellee is not a manufacturer. Under the rule laid down in *Hartranft v. Wiegmann* and *Anheuser-Busch Brewing Association v. U. S.*, *supra*, it is necessary that a new and different article of commerce emerge in order for "manufacturing" to exist.

In defining the meaning of words used in statutes imposing excise taxes it is always the practice of the courts to look to other cases, including cases arising under the tariff and patent laws for guidance. In this regard the petitioner herein also relies on *American Fruit Growers, Inc. v. Brogdex*, 283 U. S. 1; *Goodyear Shoe Machinery Company v. Jackson*, 112 Fed. 146 (C.C.A. 1, 1901); *Foglesong Machinery Company v. J. D. Randall Company*, 237 Fed. 893 (C.C.A. 6, 1917); *Ely Norris Safe Company v. Mosler Safe Co.*, 62 Fed. (2d) 524 (C.C.A. 2, 1933); and *Hess-Bright Mfg. Co. v. Bearing Co.*, 271 Fed. 350 (D. C. Pa., 1921).

II.

Treasury Regulations 46, Article 4, Approved June 18, 1932, Regulating Taxation of Automobile Parts and Accessories, Under Paragraph 606(c) of the Revenue Act of 1932, Does Not Purport to Levy a Tax on the Sale of Rebabbitted Automobile Connecting Rods.

Regulations 46, Article 4, was adopted for the purpose of clarifying the Revenue Act of 1932. Otherwise it would be claimed that certain operations which in themselves involved no manufacturing whatever, were not subject to the act, even though automobile parts or accessories were produced. For instance, it would be possible to purchase various items which are not taxable and assemble them into automobile parts or accessories and sell them tax free because there was no manufacturing. However, there was certainly production, and the person so combining or assembling them would certainly be a producer.

It is conceded by the appellant that there is no tax on immediate repairs. However, this Honorable Court holds that because of the fact that appellee operates on a large scale, places quantities of rebabbitted connecting rods in stock and sells them under the trade name "Moroloy" and issues cataogues, that it is a "manufacturer or producer." This places an undue burden on this petitioner because of the size of its operations and the service it is prepared to render.

Even though this petitioner conceded, which it does not, that the above regulations had the force and effect of law, they would be too vague and incomplete to impose a tax upon the operations of appellee. This Honorable Court is well aware of the rule that literal interpretations can be insisted on in resistance to taxing statutes.

This Honorable Court places great emphasis on *Clawson & Bals v. Harrison* (C.C.A. 7), 108 Fed. (2d) 991, in reaching its conclusions herein. However, that case differed in many respects from the instant case, notably in that Clawson & Bals were manufacturers of new connecting rods in addition to being rebabblers. They commingled new and rebabbitted connecting rods and sold them all as C & B rods, making no difference in guaranty, cataloging or pricing. The purchasers had no way of telling if they were getting entirely new connecting rods or rebabbitted ones. Under the circumstances there existing the court could not reach any other conclusion than that they were manufacturers. It is conceded that had this appellee forged new connecting rods or contracted with a foundry for their forging, that it would rightly be classed as a manufacturer. However, that was not the case. Ninety-five per cent of the connecting rods rebabbitted by appellee were received from wholesale automobile parts jobbers in exchange for rebabbitted rods of the identical type. The remaining five per cent were purchased from new car dealers and dealers in used parts. [R. 119-120.]

Petitioner cites *Thurman, Collector v. Swisshelm* (C. C. A. 7), 36 Fed. (2d) 350. The principles underlying the *Swisshelm* case do not differ from the instant case. Swisshelm commenced his process with an automobile, completely manufactured and tax paid by the manufacturer; the plaintiff in this case commenced its work with connecting rods previously manufactured and tax paid by the manufacturer. When Swisshelm finished his process, he still had an automobile—he had created nothing new; when appellee herein completed the rebabbling process, it still had connecting rods—it had created nothing new.

There is no evidence in the record to sustain the court's statement that the connecting rods rebabbitted by appellee had been discarded prior to acquisition by appellee. In fact the record indicates that the rods had been carefully saved by the wholesale automobile parts jobbers and sent to appellee so that they might be rebabbitted and thereby restored to their original condition of usefulness.

Conclusion.

By reason of the fact that the question involved herein is of grave importance to not only the appellee, but also to many other companies throughout the United States engaged in the same business, and because certain misunderstandings have already arisen wherein some of them claim not to be affected by the decision because their operations differ somewhat from those detailed in the opinion and findings of the trial court, it is respectfully submitted that this Honorable Court grant a rehearing of this appeal in order that the full import of the decisions of the Supreme Court and Circuit Courts of Appeals involving patent and tariff laws may be applied by this Honorable Court in its decision of this appeal.

Respectfully submitted,

DARIUS F. JOHNSON and
MESERVE, MUMPER AND HUGHES,
Attorneys for Appellee.

Certificate of Counsel.

I, Darius F. Johnson, of counsel for the above appellee, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not interposed for the purpose of delay.

DARIUS F. JOHNSON.

No. 9779

United States
Circuit Court of Appeals

For the Ninth Circuit.

FANCHON & MARCO, INC., a Corporation,
Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Southern District of California,
Central Division

FILED

JUN - 3 1941

PAUL P. O'BRIEN,
CLERK



No. 9779

United States
Circuit Court of Appeals

For the Ninth Circuit.

FANCHON & MARCO, INC., a Corporation,
Appellant,

vs.

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Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court in and for the
Southern District of California, Central Division

No. 658—M Civil

HAGENBECK-WALLACE SHOWS COMPANY,
a Corporation,

Plaintiff,

vs.

FANCHON & MARCO, INC., a Corporation,
Defendant.

COMPLAINT

For Damages for Breach of Contract

Comes now plaintiff and for cause of action complains and alleges as follows:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, authorized and licensed to do business in the State of California; that defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of California, authorized and licensed to do business and doing business in the County of Los Angeles, State of California.

II.

That plaintiff is a corporation incorporated under the laws of the State of Indiana and defendant is a corporation incorporated under the laws of the State of California; that the matter in controversy

herein exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3000.00) Dollars.

III.

That on the 22nd day of May, 1939, plaintiff and defendant entered into a written contract, the terms of which are more particularly set forth in Exhibit "A" attached hereto and made a part hereof as if set forth verbatim herein. [2]

IV.

That plaintiff has at all times done and performed all of the stipulations, conditions and agreements stated in said contract to be performed on its part at the time and in the manner therein specified; that in connection therewith on the 23rd day of May, 1939 at its own expense, plaintiff delivered from Baldwin Park, California, and turned over to defendant all of the property described in Paragraph 1 of Exhibit "A" attached hereto, in good condition, ready for use, at the City of Inglewood, State of California; that defendant at said time accepted said property and thereafter commenced the operation of "The Great American Circus" throughout the State of California as in said contract provided; that thereafter on or about May 31, 1939, defendant returned said property to the grounds of plaintiff at Baldwin Park, California, and refused to further continue operation of "The Great American Circus"; that plaintiff made every endeavor during the remainder of the term of said contract, to let said property to others but was un-

able so to do; that plaintiff fed and cared for the animals and equipment for a period of four (4) weeks at a cost to plaintiff of Four Hundred (\$400.00) Dollars per week or a total of Sixteen Hundred (\$1600.00) Dollars.

V.

That defendant has failed and refused and still fails and refuses to perform said contract on its side, and in particular in connection therewith has failed and refused to pay in cash on delivery of said property to defendant at Inglewood, California, the sum of Twenty-five Hundred (\$2500.00) Dollars, and failed to deliver the four certain promissory notes referred to in Paragraph V of said Exhibit "A" attached hereto, at the time and place stated in said contract as required for the delivery thereof, to-wit, Inglewood, California, on the 23rd day of May, 1939. [3]

VI.

That by reason of the default of defendant in the terms and conditions of the contract and agreement by and between the parties hereto, plaintiff has been damaged in the sum of \$12,809.14 comprising the sum of \$2500.00 cash due and unpaid on the 23rd day of May, 1939, together with interest thereon at the rate of 7% from the 23rd day of May, 1939, to and until the date of the filing of this suit, being the sum of \$2,569.02; the sum of \$2500.00 due and payable on the 31st day of May, 1939, together with interest thereon at the rate of 7% to and until the date of the filing of this suit, being the sum of \$2,-

565.13; the sum of \$2500.00 due and payable on the 7th day of June, 1939, together with interest thereon at the rate of 7% per annum to and until the date of the filing of this suit, being the sum of \$2,561.73; the sum of \$2500.00 due and payable on the 14th day of June, 1939, together with interest thereon at the rate of 7% to and until the date of the filing of this suit, being the sum of \$2,558.33; and the sum of \$2500.00 due and payable on the 21st day of June, 1939, together with interest thereon at the rate of 7% to and until the date of the filing of this suit, being the sum of \$2,554.93; and the sum of \$66.00 paid by plaintiff herein for defendant for insurance, as particularly provided under the terms and conditions of paragraph 12 of Exhibit "A" attached hereto.

VII.

That although repeated demand has been made for the payment of the sums of money due plaintiff under the terms and conditions of its contract with defendant herein, as particularly set forth hereinbefore, no part thereof has been paid and the whole thereof is past due, owing and unpaid.

For a second, separate and distinct cause of action, plaintiff herein complains and alleges as follows:

I.

Realleges and restates all the allegations contained in [4] Paragraph I to VII inclusive of its First Cause of Action, and makes the same a part hereof as if set forth verbatim herein.

II.

That within two years last past, defendant was indebted to the plaintiff in the sum of \$15,475.14 for rentals due by defendant to plaintiff and for monies advanced by plaintiff for and on behalf of defendant; being so indebted, the defendant in consideration thereof then and there promised the plaintiff to pay it the said sum of money on request.

III.

That the defendant although requested, has not paid the same or any part thereof to the plaintiff, but refuses to do so.

For a Third, separate and distinct cause of action, plaintiff herein complains and alleges as follows:

I.

Realleges and restates all the allegations contained in Paragraphs I to VII inclusive of its First Cause of Action, and makes the same a part hereof as if set forth verbatim herein.

II.

That within two years last past defendant was indebted to the plaintiff in the sum of \$15,475.14 upon an open book account, and being so indebted defendant in consideration thereof then and there agreed and promised plaintiff to pay it the said sum of money on request.

III.

That defendant though requested, has not paid the same or any part thereof to the plaintiff, but refuses to do so.

Wherefore, plaintiff prays judgment against defendant for the sum of \$15,475.14, with interest as allowed by law, for costs of suit, and for such further relief as to the Court seems meet and just.

COMBS & MURPHINE,
By LEE COMBS,
Attorneys for Plaintiff. [5]

State of California,
County of Los Angeles—ss.

Lee Combs, being by me first duly sworn, deposes and says: that he is one of the attorneys for plaintiff in the above entitled action; that he has read the foregoing Complaint—for damages for breach of contract and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it be true that the reason why said Complaint is not verified by an officer of plaintiff corporation is that its place of business is in the State of Indiana and that none of its officers are now within the County of Los Angeles, State of California, where affiant resides.

LEE COMBS.

Subscribed and sworn to before me this 10 day of November, 1939.

(Seal) JESSIE WOODRUFF,
Notary Public in and for the County of Los Angeles, State of California. [6]

EXHIBIT "A"

Agreement made this 22 day of May, 1939 between The Hagenbeck-Wallace Shows Company, a corporation organized and existing under the laws of Indiana, hereinafter referred to as "Lessor" and Fanchon & Marco, Inc., a corporation organized and existing under the laws of California, hereinafter referred to as "Lessee",

Witnesseth:

1. The Lessor hereby leases to the Lessee, and the Lessee hereby hires from the Lessor the following property:

One circus train consisting of seven flat cars, two stock cars, two coaches and two sleepers; big top seats, ring curbs; rails; chandeliers; ticket boxes; one air caliope; blocks, falls and cables; one public address system; cash registers; one concession department complete with stands, counters, etc.; twenty circus wagons; stake drivers, howdahs; complete wardrobe for animals and performers; reserved seats for big top including chairs and blue plank seats for end sections; side show platforms; one 25 kilowatt light plant and booster on wagon; ten elephants, twelve ponies, six dogs (collies), one bucking mule, four camels, and one orangoutang, together with harness and trappings for the animals,

all of which property is now stored and quartered at Baldwin Park, California.

2. This lease is for a term of five weeks beginning May 24, 1939, with an option to the Lessee to renew the same at the end of said term of five weeks for successive periods of one week each, but not to extend beyond August 16, 1939, upon the same terms and conditions as herein stated. Said option shall be exercised by the Lessee by giving written notice thereof, either by letter or telegram, addressed to the Lessor, during the last week of said term of five weeks and during each week thereafter.

3. The Lessor shall, at its own expense, deliver all of the foregoing property, in good condition and ready for use, to the Lessee at Inglewood, California, by May 23, 1939.

4. The said property shall be used by the Lessee in connection with its operation of a circus under the name of "The Great American Circus" and for no other purpose. Such use thereof is hereby restricted to the State of California and none of said [7] property shall be removed from or used outside of the State of California without the Lessor's written consent thereto being first given.

5. The rental for said term of five weeks beginning May 24, 1939 shall be \$12,500 which shall be paid as follows: \$2,500 in cash on the delivery of said property to the Lessee at Inglewood, California, and \$10,000 by the delivery to the Lessor at the same time of the Lessee's four promissory notes, each for \$2,500, the first of said four notes to be payable May 31, 1939, the second note to be payable June 7, 1939, the third note to be payable June 14,

1939, and the fourth note to be payable June 21, 1939. All of said notes shall be payable at the main office of the Bank of America at Los Angeles, California. In the event that the Lessee shall exercise its option to renew this lease, the Lessee shall pay to the Lessor each week for the use of said property the sum of \$2,500 in cash for each and every week of such renewal, until the property shall have been returned by the Lessee.

6. If default shall occur in the punctual payment of any of said promissory notes, or in payment of any other obligation of the Lessee hereunder, or in the performance of any of the conditions herein on the part of the Lessee to be performed, all of the said promissory notes, without previous notice or demand, shall, at the option of the Lessor, become and be immediately due and payable, and the Lessor shall have the right immediately to terminate this lease, and thereupon said lease shall be at an end as fully as if it had expired by limitation, and the Lessor shall have the right to enter upon the premises where said property or any of it is stored or kept and take possession thereof and of every part thereof, by force or otherwise, without being liable to prosecution or damages therefor, and shall have the right to retain all payments and promissory notes which up to that time may have been made and delivered under any of the provisions of this agreement. [8]

7. The Lessor warrants that all of the said property is free and clear of liens, encumbrances or valid claims of ownership of any person or persons what-

soever, and that it has full power and right to lease the same.

8. ~~The Lessee has examined the said property and the Lessor makes no representation as to its condition or fitness for the use thereof intended by the Lessee.~~ [WPD JP.]

9. All increase of animals by birth shall be and remain the property of the Lessor.

10. The Lessee hereby assumes all risks in the use and operation of the said property and will hold the Lessor harmless from any and all claims arising out of or by reason of the Lessee's use and operation of said property.

11. The Lessee shall take good care of all of said property and shall provide all necessary veterinarian services and medicines for the animals. At the expiration of this lease the Lessee shall, at its own expense, return and deliver to the Lessor, at Baldwin Park, California, all of the said property, as well as any increase thereof, in the same condition in which it was delivered by the Lessor, reasonable wear and tear excepted.

12. The Lessor agrees to procure a policy or policies of insurance in the amount of \$30,000 to cover the said property against the risks of fire, lightning, collision or derailment of railroad cars, overturning of trucks or wagons and stranding, sinking, burning or collision with another vessel while on ferries or in cars on transfers in connection therewith, for a period of four months, and the Lessee agrees to pay to the Lessor, upon demand, the amount of the premium charged for such insurance but not to exceed three hundred dollars.

In the event that the Lessee shall not use the property hereby leased for said period of four months, the Lessor shall, after the Lessee shall have returned all of said property to the Lessor at Baldwin Park, California, relinquish to the Lessee all [9] interest in the said policy so that the Lessee may recover the unearned premium thereon.

13. The Lessor and its agents shall at all times have the right to enter upon any premises occupied by the Lessee for the purpose of inspecting and examining the property hereby leased.

14. The Lessee shall not assign this agreement or sublet the said property or any portion thereof.

15. Within one week from the date hereof, the Lessee will, at its own expense, deliver to the Lessor a bond of a surety company, satisfactory to the Lessor, in the sum of \$30,000 conditioned upon the return by the Lessee to the Lessor, at the expiration of this lease, of all of the property hereby leased, as well as any increase thereof, in the same condition in which it was delivered by the Lessor, reasonable wear and tear excepted.

In Witness whereof, the parties have caused their respective corporate seals to be affixed and these presents to be executed by their respective corporate officers, the day and year first above written.

(Seal Affixed) THE HAGENBECK-WAL-
LACE SHOW COMPANY,

(Signed) By W. P. DUNN, JR.,
Sect'y & Treas.

(Seal Affixed) FANCHON & MARCO,
INC.,

(Signed) By J. A. PARTINGTON,
President. [10]

State of New York,
County of New York,
City of New York—ss.

On the 22nd day of May, 1939, before me came W. P. Dunn, Jr., to me known, who, being by me duly sworn, did depose and say that he resides at 311 Gregory Ave., West Orange, N. J., that he is Secy.-Treas. of The Hagenbeck-Wallace Shows Company, the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) SAMUEL SHAYON,
Notary Public.

Commission expires March 30, 1940.

State of New York,
County of New York,
City of New York—ss.

On the 22nd day of May, 1939, before me Jack A. Partington, to me known, who, being by me duly sworn, did depose and say that he resides at 400 Park Ave., N. Y., that he is the President of Fanchon & Marco, Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Di-

rectors of said corporation, and that he signed his name thereto by like order.

(Signed) SAMUEL SHAYON,
Notary Public.

Commission expires March 30, 1940.

[Endorsed]: Filed Nov. 10, 1939. [11]

[Title of District Court and Cause.]

ANSWER

In defense of plaintiff's claim (designated causes of action in plaintiff's complaint), defendant alleges:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in paragraphs I, II, and III; and denies each and every other allegation in the complaint, except that in paragraph I of plaintiff's Second and Third Claim, defendant admits the paragraphs realleged from plaintiff's First Claim which defendant heretofore admitted.

Third Defense

I.

That the consent of this defendant to the making, entering into and execution of that certain agreement referred to in the complaint dated the 22nd

day of May, 1939, a copy of which is attached to the complaint marked "Exhibit A", was not free, and the apparent consent of this defendant thereto was obtained through and by means of actual fraud on the part of said plaintiff.

II.

That the actual fraud on the part of said plaintiff by [12] which the apparent consent of this defendant to said contract was obtained, consisted in the following acts committed by the plaintiff with intent to deceive this defendant, and to induce it to enter into said contract, to-wit:

(a) That said plaintiff knowing that defendant intended to use immediately all of the equipment described in said contract for and in connection with the operation of a circus, under the name of the Great American Circus, and knowing that the defendant had entered into certain written contracts with various parties for the performance of said circus in various places, suppressed from the defendant information or knowledge that said equipment was not in good condition and ready for use for the purpose for which intended as aforesaid, and that certain of said equipment was not available for delivery to the defendant, and that other portions were incomplete, the said plaintiff did then and there have knowledge or belief of the fact that said equipment was not in good condition and ready for use, and some of which was not available for delivery and some of which was incomplete, and

(b) Said plaintiff in said contract promised and agreed

“The Lessor shall, at its own expense, deliver all of the foregoing property, in good condition and ready for use, to the Lessee at Inglewood, California, by May 23, 1939.”

and said promise was so made by the plaintiff without any intention of performing it.

III.

That the actual fraud on the part of plaintiff, as herein alleged, was perpetrated by said plaintiff with the intent and for the purpose of deceiving this defendant, and of inducing this defendant to enter into the said contract and transactions. That the defendant relied upon the acts and fraudulent misrepresentations of the plaintiff herein alleged, and in reliance thereon consented to and entered into and executed the said contract. That the said [13] equipment was not in fact in good condition and ready for use, but was defective, badly in need of repair and reconditioning, and was deficient, and certain parts thereof were missing, and other parts were incomplete, in the following particulars:

15 wagons were in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons were without brakes, making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public and employees;

Train flat decks and runs in unusable condition;

The calliope broken down and entirely unfit for use;

The elephant howdahs, either not in plaintiff's possession or unfit for use and consequently never delivered;

Wardrobe incomplete, and that which was delivered in bad condition and much of it unusable;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

That had the defendant known of the defective character of said equipment, and that much of said equipment was incomplete and large portions entirely missing, as herein alleged, it would not have entered into said contract.

IV.

That on or about the 31st day of May, 1939, and after this defendant had obtained possession of part of the equipment described in said contract, and attempted to use the same, this defendant for the first time learned and discovered the permanent defective character of certain equipment and of its need of repair and reconditioning, as herein set forth, and did thereupon redeliver all of said equipment to the plaintiff and gave written notice to the plaintiff of its rescission of said contract, a copy of which written notice of rescission is attached hereto marked "Exhibit A", and made a part hereof. [14]

Fourth Defense

I.

That after the making and execution of the contract referred to in plaintiff's complaint, a copy of which is attached thereto, marked "Exhibit A" and made a part thereof, the consideration for the obligation of this defendant under said contract failed in whole or in part through the fault of the plaintiff.

II.

That the failure of consideration for the obligation of this defendant consisted in the following:

That under the terms of said contract the plaintiff, designated therein as Lessor, covenanted and agreed as follows:

"The Lessor shall, at its own expense, deliver all of the foregoing property, in good condition and ready for use, to the Lessee at Inglewood, California, by May 23, 1939."

That said plaintiff knew at the time of the execution of said contract that defendant contemplated the immediate use of said equipment for the purpose of the conduct and operation of a circus, under the name of the Great American Circus, and that it had obligated itself by written contract with various sponsors to immediately produce the circus. That the said plaintiff did not deliver all of the said equipment, described in said contract with this defendant, and that which was delivered was not in good condition and ready for use by May 23, 1939, in that the said equipment was defective, badly

in need of repair and reconditioning, and in particular the following deficiencies existed:

15 wagons were in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons were without brakes, making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public and employees;

Train flat decks and runs in unusable condition; [15]

The calliope broken down and entirely unfit for use;

The elephant howdahs, either not in plaintiff's possession or unfit for use and consequently never delivered;

Wardrobe incomplete, and that which was delivered in bad condition and much of it unusable;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

III.

That shortly after taking possession of said equipment, the defendant for the first time ascertained the defective character of the equipment and the fact that it was not in good condition and ready for use, in the particulars hereinabove set forth, and that certain of said equipment was missing, and did thereupon on or about May 31, 1939, rede-

liver all of said equipment to the plaintiff and gave to the plaintiff written notice of its rescission of said contract of May 22, 1939, a copy of said written notice of rescission being hereto attached, marked "Exhibit A", and made a part hereof.

IV.

That the failure of consideration for the obligation of this defendant was occasioned wholly by and through the fault of the plaintiff, and plaintiff could have prevented said failure of consideration by diligently correcting the defects in said equipment, repairing and reconditioning the same and placing it in good condition and ready for use, and by supplying such equipment as was missing.

Fifth Defense

I.

That at the time of the making and execution of the contract referred to in plaintiff's complaint, a copy of which is attached thereto marked "Exhibit A", defendant informed plaintiff that it proposed to use the equipment described in said contract in the immediate production of a circus, under the name of the [16] Great American Circus, and that it had made contracts and proposed to make additional contracts with sponsors on whose behalf it would produce such circuses, and that the same would be used for such purposes during the period of said contract, and that such hiring of said equipment under the terms of said contract was for such purposes.

II.

That the said plaintiff failed and refused to put the equipment, described in said contract, in a condition fit for the purpose for which it was let by plaintiff to defendant, and in particular failed to correct defects, and items requiring repair in the following particulars:

15 wagons were in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons were without brakes, making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public and employees;

Train flat decks and runs in unusable condition;

The calliope broken down and entirely unfit for use;

The elephant howdahs, either not in plaintiff's possession or unfit for use and consequently never delivered;

Wardrobe incomplete, and that which was delivered in bad condition and much of it unusable;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

III.

That the defects and deteriorations herein described were not occasioned by the fault of this de-

fendant, and were not the result of the natural use by this defendant, but said defects existed at the time of the delivery of said equipment by the plaintiff to the defendant. [17]

COUNTERCLAIM

I.

That plaintiff and defendant entered into a written contract, a copy of which is attached to plaintiff's complaint and marked "Exhibit A". That by the terms of said contract, defendant agreed to lease from plaintiff for an agreed rent, certain equipment which was to be used by the defendant for the express purpose of conducting a circus. That the plaintiff agreed to deliver said equipment to defendant in good condition and ready for use.

II.

That plaintiff failed and refused to comply with the terms of said agreement in that the said equipment was not in good condition, but was wholly inadequate for the purpose intended to be made thereof by the defendant as contemplated by the contract, and that the plaintiff failed and refused to deliver all of the equipment as specified in said contract.

III.

That because of the failure of the plaintiff to comply with the covenants contained in said con-

tract, the defendant was unable to operate the circus as contemplated by the parties. That the equipment was in such a dangerous condition that it was hazardous for the employees to use said equipment, and to the members of the public who were in attendance upon performances wherein the said equipment was used. That because of such deficiencies and because of the condition of the equipment it became necessary for defendant to discontinue the operation of the circus, whereupon defendant re-delivered all of said equipment theretofore delivered to it to the plaintiff; and defendant was, therefore, wholly deprived of any use or benefit from the subject matter of said contract and was prevented from complying with its terms.

IV.

That in reliance upon plaintiff's performance and with [18] the knowledge of plaintiff, defendant entered into certain written contracts with third parties wherein defendant agreed to produce a circus which was to be sponsored by said third parties. That because of plaintiff's breach as aforesaid, defendant was prevented from performing said contracts and became liable in damages to said third parties in amounts as yet not fully ascertained. That when said amount of damages are ascertained, defendant will respectfully ask leave of court to amend *it's* counterclaim to insert the same.

VI.

That due to the condition of the equipment as aforesaid, it was necessary for defendant to expend the sum of Two Thousand Five Hundred Dollars (\$2,500.00) for repairs and replacements of missing articles which plaintiff agreed to furnish. That all of the repairs made by defendant were not attributable to ordinary wear and tear, but were made in an attempt to put said equipment in a good and usable condition.

VII.

That by reason of plaintiff's breach in failing and refusing to comply with the terms of the agreement as aforesaid, defendant has been damaged to the extent of Fifty Thousand Dollars (\$50,000.00) as loss of profits from the operation and use of the equipment as agreed to be furnished by plaintiff.

Wherefore, defendant demands:

1. That plaintiff be awarded no relief under its complaint;
2. That defendant have judgment in the sum of Fifty-Two Thousand Five Hundred Dollars (\$52,500.00), and such further damages as may be ascertained;
3. *It's* costs in said action.

MacFARLANE, SCHAEFER,
HAUN & MULFORD

By HENRY SCHAEFER, JR., and
JAMES H. ARTHUR, and
WILLIAM GAMBLE,
Attorneys for defendant. [19]

“EXHIBIT A”

NOTICE OF RESCISSION

To: Hagenbeck-Wallace Shows Company,
a corporation

You Will Please Take Notice that the undersigned, Fanchon & Marco, Inc., a corporation, hereby rescinds and terminates that certain agreement of lease entered into between the said undersigned and you on the 22nd day of May, 1939, wherein and whereby certain circus equipment therein described was purportedly leased to the undersigned by you.

This rescission is made on the ground that the consideration for this obligation has failed in a material respect, and particularly because the equipment set forth in said lease agreement was not at the time of the delivery of said equipment to the Lessee, or now, in proper form or order to use in the manner for which it was intended to be used, and such use up to date has been had only by the expenditure of large sums of money by the Lessee; said defects being as follows:

15 wagons being in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons without brakes, thus making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public;

Train flat decks and runs in unusable condition;

In addition the Calliope does not operate;

Elephant howdahs never delivered;

Wardrobe incomplete, and that which was delivered was in bad condition;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

These items and others have caused delays, resulting in losses estimated to be \$6000.00, and in repairs spent to date in excess of \$2000.00, and causing the Lessee to become liable to suits for unfulfilled contracts.

The Lessee herewith tenders and returns to you all the equipment that it has procured delivered at your premises.

Yours truly,
FANCHON & MARCO, INC.
By J. A. PARTINGTON
President

[Endorsed]: Filed Dec. 7, 1939. [20]

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiff for its reply to the counterclaim contained in defendant's Answer to the Complaint herein, says:

First Defense

I.

Plaintiff admits the allegations contained in Paragraph I of defendant's counterclaim.

II.

That plaintiff has no knowledge or information sufficient to form a belief concerning the allegation contained in Paragraphs IV and VI of defendant's counterclaim.

III.

Plaintiff denies each and every allegation contained in Paragraphs II and III and VII of defendant's counterclaim, except that in Paragraph III of defendant's counterclaim plaintiff admits that said equipment was redelivered to plaintiff herein on or about the 31st day of May, 1939.

Second Defense

I.

That said counterclaim fails to state facts sufficient to constitute a counterclaim against plaintiff upon which relief can be granted. [21]

Third Defense

I.

That defendant is estopped from maintaining this counterclaim by reason of its conduct in itself being in default upon a dependent and concurrent obligation, in that defendant failed and refused to make payment of \$2500.00 upon delivery of said equipment as provided for in the contract, and further failed and refused to deliver any of the notes as in said contract provided.

Fourth Defense

I.

That defendant is estopped from maintaining this counterclaim for damages for repair by reason of its conduct in not giving plaintiff such notice as required by Section 1957 of the Civil Code of California.

Fifth Defense

I.

That defendant is estopped from maintaining this counterclaim for damages for breach of said contract by reason of its conduct in rescinding and terminating said contract in writing, as set out in the Third Defense of defendant's Answer as Exhibit "A", on file herein.

Wherefore, plaintiff demands that defendant be awarded no relief under its counterclaim and that plaintiff have judgment as prayed for in its complaint.

COMBS & MURPHINE

By THOS. F. MURPHINE,

Attorneys for plaintiff.

[Endorsed]: Filed Dec. 19, 1939. [22]

[Title of District Court and Cause.]

AMENDED COUNTERCLAIM

Now comes the defendant, Fanchon & Marco, Inc., and by leave of Court first had, files this its Amended Counterclaim, and alleges as follows:

I.

That plaintiff and defendant entered into a written contract, a copy of which is attached to plaintiff's complaint and marked "Exhibit A". That by the terms of said contract, defendant agreed to lease from plaintiff for an agreed rent, certain equipment which was to be used by the defendant for the express purpose of conducting a circus. That the plaintiff agreed to deliver said equipment to defendant in good condition and ready for use.

II.

That plaintiff failed and refused to comply with the terms of said agreement in that the said equipment was not in good condition, but was wholly inadequate for the purpose intended to be made thereof by the defendant as contemplated by the contract, and that the plaintiff failed and refused to deliver all of the equipment as specified in said contract.

III.

That because of the failure of the plaintiff to comply with the covenants contained in said contract, the defendant was [23] unable to operate the circus as contemplated by the parties. That the equipment was in such a dangerous condition that it was hazardous for the employees to use said equipment, and to the members of the public who were in attendance upon performances wherein the said equipment was used. That because of such deficiencies and because of the condition of the equipment it became

necessary for defendant to discontinue the operation of the circus, whereupon defendant redelivered all of said equipment theretofore delivered to it to the plaintiff; and defendant was, therefore, wholly deprived of any use or benefit from the subject matter of said contract and was prevented from complying with its terms.

IV.

That in reliance upon plaintiff's performance and with the knowledge of plaintiff, defendant entered into certain written contracts with third parties wherein defendant agreed to produce a circus which was to be sponsored by said third parties. That because of plaintiff's breach as aforesaid, defendant was prevented from performing said contracts and became liable in damages to said third parties in amounts as yet not fully ascertained. That when said amount of damages are ascertained, defendant will respectfully ask leave of court to amend *it's* counterclaim to insert the same.

V.

That immediately upon discovering that the equipment furnished by the plaintiff was not in good condition and ready for use in compliance with the terms of the contract between the plaintiff and defendant, the defendant notified the plaintiff that said equipment was not in good condition and ready for use and specified the particulars wherein said deficiencies and need of repairs in said equipment

existed. That thereupon the defendant was informed by the plaintiff, through its agents, that the defendant should assume to make such repairs and additions as were necessary to restore the equipment in such a condition as to comply with the [24] terms of the contract. That thereupon this defendant proceeded to make necessary repairs and additions to said equipment and expended therefor the sum of Two Thousand Five Hundred Dollars (\$2,500.00). That although defendant expended the sum as aforesaid, it was impossible for this defendant to restore the equipment in a condition suitable for use for the purpose for which it was intended, and that it was necessary in consequence that defendant return said equipment and rescind the contract as hereinbefore alleged.

VI.

That by reason of plaintiff's breach in failing and refusing to comply with the terms of the agreement as aforesaid, defendant has been damaged to the extent of Fifty Thousand Dollars (\$50,000.00) as loss of profits from the operation and use of the equipment as agreed to be furnished by plaintiff.

Wherefore, defendant demands:

1. That plaintiff be awarded no relief under its complaint;

2. That defendant have judgment in the sum of Fifty-Two Thousand Five Hundred Dollars (\$52,500.00), and such further damages as may be ascertained;

3. *It's* costs in said action.

MacFARLANE, SCHAEFER,
HAUN & MULFORD

By HENRY SCHAEFER, JR. and
JAMES H. ARTHUR and
WILLIAM GAMBLE,
Attorneys for defendant.

[Endorsed]: Filed Nov. 23, 1940. [25]

[Title of District Court and Cause.]

REPLY TO AMENDED COUNTERCLAIM

Plaintiff for its reply to the amended counterclaim contained in defendant's amended counterclaim on file herein, says:

First Defense

I.

Plaintiff admits each and several the allegations contained in Paragraph I of the amended counterclaim.

II.

Denies each and several all the allegations contained in Paragraphs II, III and IV of said amended counterclaim, excepting that this plaintiff admits that defendant deposited and left at Baldwin Park, California, on or about June 1st, 1939, all of the equipment referred to in Exhibit "A" attached to plaintiff's complaint on file herein.

III.

Answering Paragraph V, this plaintiff admits that certain minor repairs were made by plaintiff on said equipment; admits that certain minor repairs were made by defendant on said equipment with the understanding that plaintiff reimburse for same; alleges that all of said repairs were of a minor nature; deny each and several all the remaining allegations in said Paragraph V contained.

IV.

Denies each and several all the allegations contained in Paragraph VI of said amended counterclaim. [26]

Second Defense

I.

That said amended counterclaim fails to state facts sufficient to constitute a counterclaim against plaintiff upon which relief can be granted.

Third Defense

I.

That defendant is estopped from maintaining this counterclaim by reason of its conduct in itself being in default upon a dependent and concurrent obligation, in that defendant failed and refused to make payment of \$2500.00 upon delivery of said equipment as provided for in the contract, and further failed and refused to deliver any of the notes as in said contract provided.

Fourth Defense

I.

That defendant is estopped from maintaining this amended counterclaim for damages for repair by reason of its conduct in not giving plaintiff such notice as required by Section 1957 of the Civil Code of California.

Fifth Defense

I.

That defendant is estopped from maintaining this amended counterclaim for damages for breach of said contract by reason of its conduct in rescinding and terminating said contract in writing, as set out in the Third Defense of defendant's Answer as Exhibit "A" on file herein.

Sixth Defense

I.

That upon the facts as alleged in said amended counterclaim, defendant is not entitled to recover \$50,000.00 or any sum whatsoever as loss of profits from the operation and use of the equipment referred to, or otherwise, in connection with the contract referred [27] to herein or at all, by reason of its attempting to stand upon a rescission of the contract in this case, and that said defendant cannot recover both on rescission and on breach of contract.

Seventh Defense

I.

That the equipment referred to in the contract set forth in plaintiff's complaint in this action was

selected, inspected and examined by defendant itself before execution of the contract referred to herein and the specific items referred to in said contract were all known to and examined by defendant before execution of the contract, and that said equipment was accepted in the condition, quantities, amounts and description prior to its delivery at Inglewood, May 23, 1939.

Wherefore, plaintiff demands that defendant be awarded no relief under its Amended Counterclaim, and that plaintiff have judgment as prayed for in its complaint.

COMBS & MURPHINE

By LEE COMBS

Attorneys for plaintiff.

[Endorsed]: Filed Nov. 27, 1940. [28]

[Title of District Court and Cause.]

ORDER ON PRETRIAL RULE No. 16.

Pursuant to citation for Pretrial under Rule 16, Lee Combs, Esq., attorney for the plaintiff Hadenbeck-Wallace Show Company, and Henry Schaefer, Esq., attorney for the defendant Fanchon & Marco, appeared in the chambers of this Court on this 14th day of November, 1940, at 10:30 a. m.

The Pretrial conference was opened by the undersigned Judge, and after discussion of the pleadings and the issues, it was stipulated by the attorneys, that the contract attached as Exhibit "A" to the

plaintiff's complaint was executed; there was sharp differences between the attorneys, as to the delivery of the property enumeratd in the contract, and of the condition of the wagons, tent rigging, blocks, falls, chairs, or any of the other property including animals, wardrobes, sleeping cars, etc.; and after discussion between counsel and the Court, it was suggested by the Court, that this was one of the cases where it appeared the attorneys and their respective clients could compromise and settle the difference, composing the issue in this case, in a more satisfactory way than could the Court, and suggested to the attorneys that they undertake such conference with a view of reaching an amicable settlement. The attorneys expressed a willingness to undertake a compromise and settlement, and thereupon a further hearing was continued until the 18th day of November, 1940, at 10 o'clock a. m. at the Court's chambers for further Pretrial conference.

Dated this 14th day of November, 1940.

JEREMIAH NETERER,

U. S. District Judge.

[Endorsed]: Filed Nov. 15, 1940. [29]

[Title of District Court and Cause.]

CERTIFICATE OF PRETRIAL HEARING
UNDER RULE No. 16

Pursuant to adjournment of Pretrial herein on the 14th day of November, 1940, appeared Thomas

Murphine, Esq., and Lee Combs, Esq., attorneys for the plaintiff Hagenbeck-Wallace Shows Company, a corporation, and Henry Schaefer, Esq., Attorney for the defendant Fanchon & Marco, Inc., a corporation.

On opening of the conference the attorneys for the respective parties announced that they could not arrive at a compromise agreement, It was thereupon stipulated that the plaintiff is a corporation organized under the laws of the state of Indiana and licensed to do business in the State of California; that defendant is organized under the laws of the state of California and licensed to do business in said state; that the matter in controversy is in excess exclusive of interest and costs the sum of \$3000.00; that on the 22nd day of May, 1939, plaintiff and defendant entered into a written contract, the terms of which is set forth in Exhibit "A" attached to plaintiff's complaint; that on the 23rd day of May, 1939, the plaintiff delivered to the defendant properties described in said contract; that on the 31st day of May, 1939; the defendant returned said property to the plaintiff and a copy of the notice of rescission attached to the answer was delivered to plaintiff and the defendant refused to continue with the operation of the Great American Circus; the defendant admits that the \$2500.00 cash payment provided by the contract was not paid, but contends that said sum was expended in rehabilitation of the equipment delivered. Defendants admits that in addition to the \$2500.00 cash payment it agreed to give

to the *defendant* four notes of \$2500.00 each to be paid as alleged in the complaint together with interest thereon as therein provided; that demand has been made for the payment of the said sums and demand has been refused. It is agreed that the 2nd and 3rd causes of action are *predictated* upon the first and that failure of the first cause of action would defect the 2nd and 3rd causes of action; upon this stipulation it is ordered that the [31] 2nd and 3rd causes of action be dismissed. Exception is noted to the plaintiff.

It is agreed that the open issue is the condition of the equipment in that the 15 wagons had axels that were bent, and out of line, which caused them to burn; that it delayed putting up of the tent and caused the defendant to miss performance (i.e.) the *mantinee* in San Diego, and at Santa Ana and Pasadena; the Pasadena engagement was on Memorial Day. Delay at Pomona so that the *mantinee* could not begin until 4 o'clock instead of 2 o'clock, which in turn delayed the evening performance. The condition of the rope and lines are an open issue; likewise the missing of the elephant howdahs.

It is admitted that the sponsors contracts were executed by the person purporting to have executed the same, being 13 in number marked Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and filed with the Clerk; that the San Diego contract is in form the same as Exhibit "3" and on the same terms. Exhibits 3, 4, 6, 7 & 8 were executed subsequent to the date of the delivery of the equipment at Inglewood;

Exhibit "3" on May 27th, and the other four on May 29th, 1939; that expense of maintaining the animals was \$400.00 a week; that the telegram sent on May 31st, 1939, marked Exhibit #14 is a copy of the telegram sent to the parties listed on Exhibit #14 and filed with the Clerk.

The issue will be limited to the condition of the equipment when delivered to the defendant and to losses, if any, recoverable that were occasioned by the deficiency of the equipment if any.

This statement to be read in evidence upon the trial thereof.

Dated this 25th day of November, 1940.

JEREMIAH NETERER,

U. S. District Judge.

[Endorsed]: Filed Nov. 25, 1940. [32]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF ORAL
FINDINGS OF THE COURT. [33]

Los Angeles, California,

Friday, November 29, 1940, 1:45 P.M.

The Court: The court adopts the certificate of facts filed in the pre-trial order as a part of the court's findings. The court further finds that, before executing the contract in issue, Clawson, the caretaker of plaintiff's circus at winter quarters at Baldwin Park, saw Nelson and one or two other

persons as well, and told them that the plaintiff would like to let some or all of its circus. Nelson took the matter up with the defendant, and thereafter, on the 22nd day of May, the contract was executed in New York by defendant's sponsor and the plaintiff pursuant thereto. The property described in the complaint of plaintiff is set forth in the contract attached thereto, by which the use of the property was leased to the defendant for the period of five weeks, at a rental of \$2500 per week.

This property had been used in the show business, some of it for a number of years. The ropes had been used for one or two years, perhaps two years. The defendant is familiar with the show business, and had been in such business for some time. He knew about the ropes, and must have known how long those ropes would likely continue in use. The defendant had in its employ a practical staff of efficient showmen, who had been engaged in the show business, some for many years. Some had been [34] employed by the defendant. Eagles and Nelson and Daillard were the defendant's special representatives in selecting, or at least looking over the property and paraphernalia for the defendant's use and the properties of the plaintiff at the winter quarters in Baldwin Park. From about 48 wagons, 15 wagons were finally selected. All of the property that was delivered and accepted at Inglewood was in good, usable condition. Some of it was in need of some repairs, which the defendant had made and charged to the plaintiff's

account, to be deducted from the first payment due the plaintiff. The railroad cars needed repairs to bring them within the Interstate Commerce requirements. These repairs were made to the cars, and after reconditioning, the cars were delivered at Inglewood. Nelson said all of the property named in the complaint was delivered except the howdahs. Nelson, who was in the defendant's employ, said they did not need the howdahs then, but knew where they were, and when needed he would get them, and that he, Nelson, was advised where they were and could receive them when he needed them. Eagles likewise was present at the receipt of this property, and he said they did not need them, and, if needed, knew where to get them.

All of the property was viewed by the defendant, through its agents. Everything was open and obvious. Nothing was concealed from them. The sleeping cars were old. They [35] had slat beds. There were no springs on the beds. Some of the pillows and sheets were gone. No blankets were furnished, but these were afterward purchased by defendant and charged to the plaintiff. These cars were not modern in any sense of the word, but their condition was fully exposed and known by the defendant, and the defendant saw the condition that the cars were in. A suggestion was made with relation to painting the cars, and the cars were painted, at plaintiff's cost. Something was said about the calliope. The calliope was delivered at Inglewood, but in unloading there is some testimony that it was

turned over, and it was afterwards removed to some other place by the defendant. There is no evidence that the calliope was impaired when it was delivered at Inglewood.

Something was said about the runways. The runways were in good condition. At one place where an exhibition was made one of the wagons did overturn. The testimony is that the runways should have been, or usually are, of steel, now. It is not material what the runways are, if they are safe. This runway was safe if it was supported by the under-support. There is no testimony that this runway was placed in the situation which its construction required. If the supports had been placed under it, it perhaps would not have broken, but if the runway was sufficient, with the support under it, then no complaint could be made.

The wagons in this case are shown to have been heavily [36] loaded, but that is neither here nor there. It is not shown that the heavy loading had anything to do with it, except that the wagon did overturn. I do not find from the evidence that that was due to the runway.

The defendant was advised by Austin, who was in its employ in a responsible position, and who was an old showman, that it would require at least a week or two weeks, I think perhaps he said two or three weeks, but a week or two weeks before the show would move smoothly and at all satisfactorily.

The ropes were examined by the defendant's representatives. A coil of 1500 feet was bought at In-

glewood by defendant on plaintiff's account. The defendant knew the time the ropes had been used. There is no evidence as to what use they had been placed to or what elements they had been exposed to, nor the continuous use to which they had been adopted. But all this was known to the defendant at the time.

The rope used at Pasadena broke. This was occasioned by the rope catching in the block fall, and when the tent was sought to be raised, they tried to raise it by elephant power, and when it faulted and the elephant pulled, the rope broke. This rope was then spliced, and was used in raising the tent.

No part of the broken rope is produced in court as evidence, nor is its absence explained. There is testimony [37] that the weakness in the rope was dry rot, but little weight can be attached to those statements, because a rope so afflicted could not be detected by a person merely looking at it, as the testimony shows these witnesses did. They had no special knowledge with relation to it. And the witness who spliced the rope testified in this case, but he did not say anything about any dry rot or any appearance at the broken place of the rope of any unusual condition. The non-production of that, of course, would indicate the contrary idea to the dry rot.

At the time of the breaking of the rope the man who was in charge of that department was an old showman. He was working in his line of business in making this exhibition. If that had broken because of dry rot, he would have discovered it, and

he would have reported it to the defendant, and a part of the rope, or the broken part, would have been saved as a matter of protection to the defendant. But this was not done.

At Santa Ana the distance from the station to the showgrounds was three and a half miles. The wagons were drawn by gas motor power. In moving the wagons from the railroad yards to the grounds the spindle on the hub of one of the wheels became heated. These wagons had been exhibited at Inglewood and San Diego, and there is no evidence that they had been greased or oiled at any time since the delivery of the wagons. The wagons were likewise, [38] I will not say overloaded, but they were loaded beyond the normal capacity that they usually bore. Heat in a spindle, it is common knowledge, is caused by friction, and a dry spindle will readily heat, but if greased or oiled the friction is eliminated, and heat will not be created.

Upon the organization of the show the defendant employed a staff of efficient showmen as heads of the several departments. The helpers, however, were not experienced men. They were what were known as green men at the work. They were unfamiliar with the business. And changes were made constantly by persons being in the employ leaving it and by taking on new men.

At Santa Ana the defendant was approached by a union labor organizer and asked to sign a closed shop contract. He did not do so, but this was postponed, and the request was renewed at Pasadena, but it was not signed. The organizer said that if it

was not signed in Pomona the show could not open at San Francisco, as he would call a strike, call out the men, that the defendant would not be permitted to show in San Francisco, where it was scheduled to be within a few days. The contract was not signed, and the show was closed.

The defendant then returned the property to the place where it had been received and gave notice of rescission of the contract. [39]

The defendant, during the week's performance or operation of the show, had a net loss of \$23,323.93.

The conclusion from these facts: When the defendant accepted the property, after examination and after exposition of the property to him, without discovering any fault of any sort or fashion, and assumed to make reconditioning for such needed repairs as were apparent, and charged it to the plaintiff's account with the plaintiff's consent, he waived such reconditioning as is shown to have been necessary and to have been made, and may not, after operating the show for a week at a loss, as is shown, and when threatened with a closed shop by the labor unions at Pomona, and then closing the circus, and by his telegram, as is shown by the evidence, saying that the show will close because of labor conditions, the court cannot now say that he has been unfairly dealt with, and the findings and judgment will be in favor of the plaintiff, and it will recover the amount claimed in the complaint except \$400 for each week for four weeks animal food and except the defendant should be and will

be given credit for all of the sums which it expended upon rehabilitating any part of this show. From this exhibit which is in the case there should be eliminated the rental of stake driver, and garbage cans and hammer, the truck hire to Ted Ducey, dining car equipment, blacksmith equipment, the 120 yards of burlap, and an item of tools, being the next to the last item in this exhibit. You can total these items [40] and deduct that from the total amount, and you can prepare your decree. Unless formal findings are presented, these findings will be adopted as the court's findings in the case.

JEREMIAH NETERER

Judge.

[Endorsed]: Filed Dec. 2, 1940. [41]

In the United States District Court in and for the
Southern District of California, Central Division.

No. 658-M Civil

HAGENBECK-WALLACE SHOWS COMPANY,
a corporation,

vs.

FANCHON & MARCO, INC., a corporation,
Defendant.

JUDGMENT

Be it remembered that this cause came on regularly for trial before the Honorable Jeremiah

Neterer, Judge presiding in the United States District Court in and for the Southern District, Central Division thereof at Los Angeles, California, jury having been waived by the parties hereto. The plaintiff Hagenbeck-Wallace Shows Company, a corporation appeared being represented by Combs and Murphine, Lee Combs, Thos. F. Murphine and John F. Reddy, Jr. its attorneys and the defendant Fanchon & Marco, Inc., a corporation appeared being represented by MacFarlane, Schaefer Haun & Mulford by Henry Schaefer Jr. and William Gamble its attorneys; the matter was duly and as by law provided after due and lawful notice thereof on for trial on November 14, 18, 22, 27, 28, 29, 1940 and evidence both oral and documentary having been presented by both plaintiff and defendant and received by the court in the above-entitled cause, and arguments of counsel on behalf of both of the parties hereto having been made by their respective attorneys and the same having been heard and considered by the court, and the court having made its findings and stated the same in its Certificate of Pretrial Hearing under Rule No. 16 and in its findings of fact transcribed herein by the reporter in the matter and duly adopted and made its findings by the court herein, further and other findings of fact and conclusions of law having been waived by attorneys for the respective parties [42] hereto in open court, and the court being fully advised in the premises.

Now therefor it is hereby ordered adjudged and decreed that plaintiff Hagenbeck-Wallace Shows Company have and recover of defendants Fanchon & Marco Inc. the sum of Fifteen Thousand, six dollars (\$15,006.07) and seven cents together with its costs of suit taxed herein in the sum of \$356.43 and the plaintiff have execution therefor.

Done in open Court this 3rd day of December 1940.

JEREMIAH NETERER

Judge of the United States
District Court.

Approved as to form except that no findings are waived.

**MacFARLANE, SCHAEFER,
HAUN & MULFORD**

By **HENRY SCHAEFER, JR.**

[Endorsed]: Judgment entered Dec. 3, 1940. Docketed Dec. 3, 1940. Book C. O. 4—Page 87. R. S. Zimmerman, Clerk. By Theodore Hocke, Deputy. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States, in and for the Southern District of California, Central Division:

Notice is hereby given that Fanchon & Marco, Inc., defendant above named, hereby appeals to the

Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this case on the 3rd day of December, 1940, and from the Order of said Court denying its motion for a new trial.

Dated: January 13th, 1941.

MacFARLANE, SCHAEFER,
HAUN & MULFORD and
JAMES H. ARTHUR and
WILLIAM GAMBLE

By HENRY SCHAEFER, JR.

Attorneys for Fanchon &
Marco, Inc.

1150 Subway Terminal Bldg.,
Los Angeles, California.

Copy of foregoing Notice mailed to Combs & Murphine, Esqs., attorneys for plaintiff Jan. 16, 1941.

R. S. ZIMMERMAN,
Clerk.

By E. L. S.,
Deputy.

[Endorsed]: Filed Jan. 16, 1941. [44]

National Automobile Insurance Co.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Fanchon & Marco, Inc., a corporation, as Principal, and National Automobile Insurance

Company, a corporation organized and existing under and by virtue of the laws of the State of California, are held and firmly bound unto Hagenbeck-Wallace Shows Company, a corporation, in the above entitled suit in the penal sum of Twenty Thousand and no/100 Dollars (\$20,000.00), to be paid to the said Hagenbeck-Wallace Shows Company, their successors and assigns, which payment well and truly to be made, the National Automobile Insurance Company, bind itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 16th day of January, 1941.

The condition of the above obligation is such that:

Whereas, the said Defendant, Fanchon & Marco, Inc., a corporation, in the above entitled suit has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment rendered and entered on the 3rd day of December, 1940, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause:

Now, Therefore, the condition of this bond is for the satisfaction of the judgment in full, together with costs, interests and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of judgment and such costs, interests and damages as the appellate court may adjudge and award, and in case of default or contumacy on the

part of the principal or surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, in accordance with their obligation and award execution thereon.

In Witness Whereof the corporate seal of said surety is hereby affixed and attested to by its duly authorized Attorney-in-Fact at Los Angeles, California, this 16th day of January, 1941.

[Seal] FANCHON & MARCO, INC.,

a corporation

By MARCO WOLFF V. P.

NATIONAL AUTOMOBILE INSURANCE COMPANY

By [Seal] R. L. TRAVISS

Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 16th day of January A. D. 1941, before me, Margaret Murphy a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared R. L. Traviss, Attorney-in-Fact of the National Automobile Insurance Company, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company

aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles County of Los Angeles the day and year first above written.

[Seal] MARGARET MURPHY

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Dec. 23, 1942.

Examined and recommended for approval as provided in Rule 13.

HENRY SCHAEFER, JR.

Attorney for Defendant

I approve the foregoing dated Jan. 16, 1941.

PAUL J. McCORMICK

U. S. District Judge.

[Endorsed]: Filed Jan. 16, 1941. [45]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The Appellant herewith files its Designation of Record on Appeal and requests that the Clerk in-

clude for transmission to the Circuit Court of Appeals the following:

Complaint

Answer and Counter Claim of defendant

Reply of plaintiff to defendant's counter claim

Amended Counter Claim of defendant

Reply of plaintiff to Amended Counter Claim

Order on Pre Trial (filed Nov. 15, 1940)

Certificate of Pre Trial Hearing (filed Nov. 25, 1940)

Order of November 18th, Dismissing Second and Third Cause of action of plaintiff

Findings of Fact and Conclusions of Law, with the direction for the entry of judgment thereon—Reporter's trans. pp. 417-424

Judgment

Notice of Appeal with date of filing

Following Exhibits not included in the Order and Certificate on Pre Trial

Bills for repairs on Railroad cars from Santa Fe Railroad to defendant—photostats

All of the Reporter's Transcript

Dated: March 12, 1941.

MacFARLANE, SCHAEFER,

HAUN & MULFORD

JAMES H. ARTHUR and

WILLIAM GAMBLE

By HENRY SCHAEFER, JR.

Attorneys for Defendant

Received copy of the within Designation this 13 day of March, 1941.

COMBS & MURPHINE
By THOS. F. MURPHINE
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 12, 1941. [47]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD ON
APPEAL

The Appellant herewith files its Amended Designation of Record on Appeal and requests that the Clerk include for transmission to the Circuit Court of Appeals in addition to the record heretofore designated, all the exhibits admitted in evidence in said case.

Dated: March 13, 1941.

MacFARLANE, SCHAEFER,
HAUN & MULFORD
JAMES H. ARTHUR and
WILLIAM GAMBLE
By HENRY SCHAEFER, JR.
Attorneys for Defendant

Received copy of the within Amended Designation of Record on Appeal this 13th day of March, 1941.

COMBS & MURPHINE
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 13, 1941. [48]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

On application of Henry Schaefer, Jr., and good cause appearing therefor,

It is hereby ordered that the time for filing the transcript on appeal, and the time in which the designation of the contents of the record on appeal may be filed, is extended to and including the 7th day of April, 1941.

Dated: February 11th, 1941.

PAUL J. McCORMICK

Judge of the District Court

[Endorsed]: Filed Feb. 11, 1941. [49]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 49, inclusive, contain full, true and correct copies of the Complaint; Answer to Complaint; Reply to Counterclaim; Amended Counterclaim; Reply to Amended Counterclaim; Order on Pre-trial Rule No. 16; Order Dismissing Second and Third Causes of Action; Certificate of Pre-trial Hearing; Decision and Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Order for Transmittal of Ex-

hibits on Appeal; Designation of Contents of Record on Appeal; Amended Designation of Contents of Record on Appeal; and Order Extending Time to File Record on Appeal; which, together with the original Exhibits and the original Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the Clerk's fee for comparing, correcting and certifying the foregoing record amounts to \$8.70, which fee has been paid to me by the Appellant.

Witness my hand and the seal of said District Court, this 28th day of March, A. D., 1941.

[Seal] R. S. ZIMMERMAN,
 Clerk.

By EDMUND L. SMITH,
 Deputy Clerk. [50]

[Title of District Court and Cause.]

Los Angeles, California,
Wednesday, November 27, 1940

TESTIMONY

Mr. Combs: In connection with the amended counterclaim, although we are not certain that it is required under the rules of court, we deem it advisable to file an answer to the counterclaim, in case it should be construed as a cross-complaint.

The Court: It may be received.

Mr. Combs: I will come back to that matter in a moment. I want to make some further argument in connection with the [54] counterclaim, but at this time I would like to call the court's attention—

The Court: Let me see the counterclaim.

Mr. Combs: It is served now in connection with the memorandum of stipulations under the pre-trial rule. There are several matters that I would like to take up. Our information is that the matinee at San Diego took place on time, and that that at Pomona began at 3:00 o'clock, not 4:00 o'clock, as stated in the memorandum, and therefore counsel may disagree with me on that fact. Whatever the cause for it is, now, from our standpoint, that constituting a misstatement in the memorandum of the pre-trial, we would like to be relieved from such commitment, and ask that those matters may rest upon the proof. I think the proof will be very simple upon the subject.

The Court: There will be no proof upon the matter upon which the pre-trial certificate is filed. I understood at the pre-trial that that was the time agreed upon, and so did the clerk, and it was therefore certified. I don't know that that makes very much difference, however.

Mr. Combs: I want to call the court's attention to the fact that there are, according to our viewpoint, two erroneous facts, as just stated, in that connection, and there is a further erroneous fact that I know that I did not state, as the pre-trial memorandum has recited, to-wit, "That expense of

maintaining the animals was \$400 a month.” [55] I stated \$400 a week, if your Honor please.

The Court: Yes. You are right about that. The word “month” should be “week,” and it will be so amended. You understand that, Mr. Schaefer?

Mr. Schaefer: Yes, your Honor, that is a fact.

The Court: I realize that that is an error, and you will make note of the change, Mr. Clerk. Make that “week” instead of “month.”

Mr. Combs: There is one other slight matter, to-wit, that the notice of rescission was served on the 31st of May, but our understanding is that it was served on the 1st of June.

The Court: It was so stipulated or so understood at the pre-trial, and that will be the date that will control.

Mr. Combs: I have stated those matters, then, now, and that is all I have to state in that connection. I want to go on in connection with the amended counterclaim in this matter. According to our construction of the same, counsel has pleaded facts which show that he has no right to a rescission in this matter, and we are at this time, by motion, raising the point in the form of a motion to strike the counterclaim, and our causes of the motion are also set forth in our answer to the amended counterclaim. I call the court’s attention to paragraph V on page 2:

“That immediately upon discovering that the equipment furnished by the plaintiff was not in good condition and [56] ready for use in compli-

ance with the terms of the contract between the plaintiff and defendant, the defendant notified the plaintiff that said equipment was not in good condition and ready for use and specified the particulars wherein said deficiencies and need of repairs in said equipment existed. That thereupon the defendant was informed by the plaintiff, through its agents, that the defendant should assume to make such repairs and additions as were necessary to restore the equipment in such a condition as to comply with the terms of the contract. That thereupon this defendant proceeded to make necessary repairs and additions to said equipment and expended therefor the sum of Two Thousand Five Hundred Dollars. That although defendant expended the sum as aforesaid, it was impossible for this defendant to restore the equipment in a condition suitable for use for the purpose for which it was intended, and that it was necessary in consequence that defendant return said equipment and rescind the contract as hereinbefore alleged.”

It is our understanding of the law that if a contracting party assumes and agrees to make corrections or repairs, if they are necessary, that it therefore or thereby, in any event, waives its right to rescind, if it ever had any right to rescind, and it is our view that this counterclaim does not state sufficient facts to constitute a cause of action, because it, on the face of it, shows that the defendant waived any right to rescission. And the counterclaim does [57] not state sufficient facts to

constitute a cross-complaint or counterclaim for damages for breach of contract, because the allegations are insufficient in that respect. And again we renew our request that the defendant be required to state or elect whether it is proceeding on rescission or on damages for breach of contract, and if they are proceeding on these pleadings on either of these grounds, that this counterclaim be dismissed.

Mr. Schaefer: If the court please, on the question of election as set forth in our points and authorities, the very case which counsel cited is set forth. We have each served our points and authorities, your Honor, and filed them.

The Court: Are they in the record? Have you them, Mr. Clerk?

The Clerk: There is a statement of facts, your Honor, there. Whether the authorities are there I don't know.

Mr. Schaefer: They are attached to it, your Honor. In answer to counsel's remarks as to an election, if your Honor has read my points and authorities, I have answered that in the points and authorities. The case he cites, of *House v. Piercy*, doesn't go as far as counsel's argument, but it only says that one can only recover on one ground, and alternately, but not on both, and of course that is true. I acknowledge that. But it doesn't require the election to be made at this time. The evidence may go in [58] and then the determination has to be made as to which cause of action is sustained.

And, as I say, the case counsel cites in his brief doesn't go——

The Court: Let me make this observation. I understood at the pre-trial hearing that you elected to proceed on the contract, or that you were proceeding on the contract. Am I in error on that?

Mr. Schaefer: I understood the matter wasn't settled, and that you said I was not required at that time to make an election.

The Court: I stated that the action is on the contract, and you said, "That is correct," and I said, "The action being on contract, it is obvious that election is required."

Mr. Schaefer: That is true. The action is on the contract.

The Court: Yes.

Mr. Schaefer: But I think that is on the question of counsel's other causes of action. He has, I think, three, and your Honor ruled at that time——

The Court: The others were disposed of, dismissed.

Mr. Schaefer: Yes.

The Court: The others were dismissed because of the determination that the action was on the contract.

Mr. Schaefer: That is correct.

The Court: So the other causes were dismissed.

Mr. Schaefer: That is correct. Now, with respect to [59] the argument that the acts of the defendant in making repairs, I take it that the force of his argument is that that is a waiver, but I

don't see that the court can rule on that matter now. The most that can be shown is that it was an indulgence by the defendant in an attempt to preserve the ownership. There is in evidence before your Honor a certain sponsored contract, and the defendant was bound by these contracts, and the evidence will develop, and I don't see how your Honor can rule until there are before your Honor the conditions under which those repairs were made. It is alleged that they were made and charged against the plaintiff. That is not a matter that can be passed upon at this time, because it is a matter of proof, and we are prepared to offer proof on that particular point.

The Court: The question is, whether you have stated an issue which requires proof under the law, and that is what pleadings are for, is to fix the issue and save the time of counsel and the parties and the court in exploring the whole field, to find out what the real facts are. The parties are supposed to know what the facts are, and then to present the issue so that it is concise.

Mr. Schaefer: That is correct, and I understand that that is one of the purposes of the pre-trial.

The Court: Yes.

Mr. Schaefer: And we settled that matter, and your Honor ruled at that time that the counter-claim might be [60] amended, and that amendment has been filed, and I think it follows the outline of your Honor at that time. And we think the matter

is now properly before the court and that the counterclaim is sufficient.

The Court: You think you have stated facts that avoid the rule?

Mr. Schaefer: Yes; we are satisfied on that.

The Court: I will hear the testimony on that and reserve the matter for the future.

Mr. Combs: At this time we would like to call Mr. Paul Eagles as an adverse witness.

The Court: Call him.

Mr. Combs: For cross examination under the—

The Court: Call him. We will find out.

Mr. Combs: Yes. Mr. Eagles. [61]

PAUL EAGLES,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Paul Eagles.

Direct Examination

Q. By Mr. Combs: Where do you reside, Mr. Eagles?

A. In Los Angeles, 3523 West Olympic.

Q. What is your occupation?

A. I am a merchant.

Q. During the past years of your life have you had any connection with circuses or a circus?

A. Yes.

Q. Will you relate to the court what that connection was?

(Testimony of Paul Eagles.)

A. I have been purchasing agent and had various jobs, and also business manager, and manager.

Q. For what period of time?

A. Well, over a period of approximately 25 years.

Q. And for what circuses did you engage in those activities during that period of time?

A. Well, Al G. Barnes.

Q. Relate to the court approximately what years, and what you did for Al G. Barnes.

A. Well, I was purchasing agent and I was business [62] manager.

Mr. Schaefer: I am sorry. I can't hear, your Honor.

The Court: Speak so that all of us can hear you.

A. I was purchasing agent and I was business manager.

Q. By Mr. Combs: And for what years, Mr. Eagles? A. The last year was 1938.

Q. What was the first year?

A. Oh, about 1915 or 1914, in there.

Q. Subsequent to 1938 what circus did you work for, if any? Did you say 1928 or 1938?

A. 1938.

Q. Subsequent to that year—

A. Mostly with Al G. Barnes.

Q. Did you ever work for the Great American Circus? A. Yes.

Q. What year? A. In 1939.

Q. In what connection? A. Manager.

(Testimony of Paul Eagles.)

Q. Who employed you?

A. Wayne Daillard.

Q. Do you know who paid your salary?

A. Fanchon & Marco or Great American Circus.

Q. How long did you work for them in that capacity?

A. A little over two weeks.

Q. When did you first begin to work for them in that [63] capacity?

A. About the 19th or 20th of May.

Q. 1939? A. 1939, yes.

Q. Relate to the court the circumstances of your employment, that is to say, was it in writing, or by oral employment?

A. I was called out to Fanchon & Marco's office by Wayne Daillard, and he told me they wanted me to manage the circus, go out and get it ready and take it over to Inglewood and open it.

Q. Who was present at that conversation?

A. Ben Austin and, I believe, Marco.

Q. Were those all the persons present other than yourself? A. I think so, at that time.

Q. And that took place at the offices of Fanchon & Marco?

A. Yes, sir, in Wayne Daillard's office.

Q. What did you say in response to Mr. Daillard's statement?

A. I told him I would go to work.

Q. Was anything discussed regarding your salary? A. Yes, sir.

(Testimony of Paul Eagles.)

Q. What were the terms of that?

A. They handed me a budget list, and it had in it a [64] manager at \$100 a week.

Q. And you took it that that was your salary?

A. Yes, sir.

Q. And that is the amount you were paid?

A. That is the amount I was paid.

Q. Did you begin work immediately?

A. The next morning.

Q. And that was approximately the 19th of May, 1939?

A. Yes, somewhere in there. It was on a Friday morning, just prior to the 24th.

Q. Upon the 19th you went to Baldwin Park, did you? A. I went to Baldwin Park, yes.

Q. What is Baldwin Park? What significance has that in relation to this circus?

A. That is where the Hagenback-Wallace circus was wintering.

Q. That was the winter quarters of the Hagenback & Wallace circus property? A. Yes, sir.

Q. Was the equipment of the Hagenback & Wallace Show there at that place, or at least for the most part?

A. For the most part, except some things down in the city proper.

Q. Was the equipment, including the howdahs, there or elsewhere?

A. I think they were over at the studio. [65]

Q. What studio? A. M. G. M.

(Testimony of Paul Eagles.)

Q. What did you do upon your arrival at Baldwin Park?

A. I met Mr. Clawson there, who was in charge of the property of the Hagenbeck-Wallace circus shows.

Q. That was your first act upon your arrival, that you met him? A. Yes.

Q. Was anyone with you when you arrived other than you and Clawson there? A. No.

Q. Did anyone join you during that day?

A. Wayne Daillard came out.

Q. What time did he arrive?

A. Oh, some time in the forepart of the morning; I would say somewhere around 9:00 o'clock.

Q. What time did you arrive?

A. About 7:30 or 8:00 o'clock.

Q. What was the first thing that you and Mr. Clawson did?

A. I told him I was going to be the manager of the new circus, and I was going to help him get the stuff out.

Q. What did he say?

A. He said all right.

Q. There were just the two of you present at that conversation? [66]

A. I believe so. There could have been other people. I believe Brown, the caretaker, was there.

Q. Harvie Brown? A. Yes.

Q. What did you do then?

A. We started to lay out what we were going to take.

(Testimony of Paul Eagles.)

Q. What did you lay out first, if you recall?

A. Wagons and poles and tents, and stuff like that.

Q. Did you examine those items at that time?

A. Generally, yes. I didn't personally examine them.

The Court: You didn't what?

A. Personally examine them all—just generally.

The Court: Let me understand. You say you didn't personally examine them—just generally?

A. The wagons were sitting in the yard, and I walked by them and looked at them, that is all, and figured the ones we were going to take. There were some 55 or 60 pieces there, and I knew we were not going to take that many.

Q. By Mr. Combs: At that time did you pick out the wagons you were going to take?

A. Yes.

Q. How many did you pick out?

A. Around 25 or 26 wagons, somewhere in there.

The Court: Let me ask you: How many wagons were there altogether?

A. I would say 48 to 50. [67]

The Court: And you had the pick, and picked 23; is that the idea?

A. Yes. 26 was the exact number that I finally ended up with.

The Court: 26? A. Yes.

(Testimony of Paul Eagles.)

Q. By Mr. Combs: Now, after that, after you picked out the wagons, what did you do?

A. Well, I started employing people around there for different positions, bosses.

Q. And in that connection whom did you employ? Do you have any record of that?

A. Well, yes. I employed a boss property man, a head porter, and a—

Q. Who was the boss property man?

A. Oh, I don't know. I would have to look at the records.

Q. But you recall that Pat Graham was the head porter? A. The head porter.

Q. Who else did you employ, Mr. Eagles?

A. All the general bosses there. Singleton was there, but he had been employed by Charlie Morgan, of Fanchon & Marco.

Mr. Schaefer: I move to strike that out as a conclusion of the witness.

Mr. Combs: This man was manager of the circus, and [68] would be able to say.

The Court: Do you know?

A. He was working there, and he told me he was employed by Fanchon & Marco.

The Court: That will be stricken. The court will not consider it.

Q. By Mr. Combs: What else did you do that first morning, the 19th?

A. We ordered the tent down, I believe, that morning, from storage, at Baldwin Park.

(Testimony of Paul Eagles.)

Q. That tent belonged to whom?

A. It belonged to Baker & Lockwood.

Q. What did you do with the tent?

A. Took it down at the back lot, and Singleton took the poles and his men and started laying them out, getting ready to erect the tent back there. I also hired a painter to paint all the title of this circus off and put "Great American Circus" on the side of them.

Q. Was this all done on that first day?

A. Yes; we started.

Q. Was there anything else you did on that first day, that you recall?

A. Got all the stuff together and started putting it all together.

Q. Did you lay out the tent rigging, blocks and falls? A. Singleton did. [69]

Q. Did you direct him to do it on that day?

A. Yes.

Q. Did you examine the poles for the circus?

A. Yes.

Q. All of this equipment was second-hand or used circus equipment, was it not?

A. It was.

Q. You knew that fact at least as early as the 19th of May, did you not? A. Yes.

Q. In fact you knew it prior to that time, did you not?

A. I had it under sub-lease from November of 1938 until around the middle of March, or later, possibly.

(Testimony of Paul Eagles.)

Q. Of 1939? A. Yes, sir.

Q. You were very familiar with all of this equipment? A. Yes, sir.

Q. Including both what was taken by Fanchon & Marco for the Great American Circus and that which was not taken; is that correct?

A. That is right.

Q. What did you do when you arrived at Baldwin Park with relation to examining and making such repairs as were necessary to the wagons?

A. Well, I believe that first day I hired a mechanic who was on the Barnes Show, Forbes—I am sure it was the [70] first day—and another man who handled the tractors, and I told them to look over the wagons that we were selecting, one of them to look them over for the rings, to let them up and down off the train to see if they were all sound, and, if they were not, to get them repaired.

Q. Under your direction and supervision?

A. That is so.

Q. Did he report back to you in that connection? A. Yes.

Q. What did he report to you?

A. He reported to me that the wagons were usable.

Q. And were there any repairs that were made on those wagons?

A. Yes. I told him to make any necessary repairs on the wagons.

(Testimony of Paul Eagles.)

Q. Were they in such condition as used circus wagons would normally be in, at such a time?

A. Yes.

Mr. Schaefer: I object to that as calling for the conclusion of the witness.

The Court: I think, after what he has stated, his conclusion is proper.

Q. By Mr. Combs: And were they, in your opinion, in good condition and ready for use in the business of the production of a circus at that time? I will withdraw that. At the time of May 23rd, when delivery was made at Inglewood? [71]

A. Well, I had used them and we hauled the show out with them.

Mr. Schaefer: I move to strike that answer as not responsive, your Honor.

Q. By Mr. Combs: In your opinion. Just answer the question.

The Court: Answer the question as propounded.

Q. By Mr. Combs: In your opinion.

A. They were in usable condition, yes.

Q. Now, was that also true of the tent rigging, blocks, falls and chairs?

A. I didn't make a personal examination of those, except the chairs, and I had had them on rental before.

Q. What was the condition of the chairs?

A. They were in good condition. I had rented them on a number of occasions, even over at the Tournament of Roses parade.

(Testimony of Paul Eagles.)

Q. They had been used in January of that year, on that occasion?

A. That is so. And I used them after that at Wrigley Field for the Angelus Chair Company, I believe it was.

Q. In your opinion were they usable?

A. The chairs were in good condition.

Q. Did they constitute a hazard to the business when they were used? A. No. [72]

Q. With relation to the tent rigging, blocks and falls, in your opinion did they constitute a hazard to the business at the time of their being used at the Inglewood show?

A. I didn't personally have my hands on them or examine the rigging, only just generally seeing that everything was in its place.

Q. Did you have occasion to examine the train flat decks and runs that were rented under this contract?

A. I selected the cars themselves, with Clawson.

Q. Did you select the calliope?

A. That is the only calliope on the show, and it was there.

Q. You saw it there and knew what calliope it was, did you not? A. Yes.

Q. Now, did you have occasion to examine the condition of or the existence of the wardrobe?

A. I hired a fellow by the name of George King to look that over, who used to be a wardrobe man on the Barnes Show.

(Testimony of Paul Eagles.)

Q. Did he look it over, in your employ?

A. Yes.

Q. Did he report back to you? A. Yes.

Q. What did he report to you?

A. Well, he was short on white pants, and he said some of it, some of the stuff, needed cleaning, and I believe it [73] was cleaned.

Q. Did you direct it to be sent out?

A. I took that up with Clawson and he agreed to clean it.

Q. Did you direct the purchase of wardrobe and garments to fill out the band equipment?

A. I left that to Mr. Daillard, and I don't know. They were there when we opened.

Q. Do you know whether or not the band was completely equipped with white caps?

A. They were when we opened, I am sure.

Q. Referring to the sleeping cars, do you know whether or not there were any blankets, sheets or pillow cases or curtains in those cars at Inglewood?

A. There was some blankets, some sheets, some pillow cases; no berth curtains.

Q. When you were at Baldwin Park, subsequent to the 19th and prior to the 23rd of May, did you know of the fact that there were no berth curtains in the sleeping cars? A. Yes, I knew it.

Q. You knew there were none there then?

A. Yes.

Q. Was anything done about acquiring those four items just named, berth curtains, pillow cases, sheets and blankets?

(Testimony of Paul Eagles.)

A. Yes. I called the United Tent & Awning up and got a price on some blankets, and told Mr. Daillard what it was, [74] and he ordered some.

Q. Was that also done respecting pillow cases and sheets?

A. I don't remember how they were purchased.

Q. There were, however, pillow cases and sheets when the train arrived at Inglewood?

A. I couldn't say as to that.

Q. Berth curtains were ordered from some other organization, were they not, or company?

A. Pat Graham bought them in San Diego, the head porter.

Q. Did you direct him to do so?

A. I was at the discussion. Daillard was the one that authorized him to buy them.

Q. Did you hear Mr. Daillard authorize or direct Graham to buy the curtains? A. I did.

Q. Did you ever have any discussion respecting elephant howdahs?

A. None that I can remember.

Q. Did you ever observe the absence or presence of elephant howdahs during the course of your occupation as manager of this circus?

A. We wouldn't have had any use for them.

Q. Why wouldn't you have had any use for elephant howdahs?

A. The only place they would have been useful was in [75] the grand entry, and that wouldn't fit in with the show.

(Testimony of Paul Eagles.)

Q. You had no grand entry?

A. Yes, but we just put the elephants in with blankets on.

Q. Did you ever make a request to Hagenback-Wallace Circus for elephant howdahs? A. No.

Q. Did anyone, to your knowledge, make such a request? A. No, not to my knowledge.

Q. Did you know where the elephant howdahs were? Did you have occasion to use elephant howdahs?

A. Yes, because I had rented them to M. G. M. Studio.

Q. And you would have known where to get them if you wanted them; is that right?

A. That is correct.

Q. Did you have occasion to use elephant howdahs? A. No.

Q. I have just referred, Mr. Eagles, to a number of items, which include wagons, tent rigging, howdahs, calliope, etc., and a few other items. It is a fact, isn't it, Mr. Eagles, that a circus of the size of the Great American Circus needs a vastly greater quantity of equipment than those few items I have just referred you to? A. Yes.

Q. In other words——

The Court: You don't need the other words.

[76]

Mr. Combs: All right. That is sufficient along that line.

(Testimony of Paul Eagles.)

Q. By Mr. Combs: You have referred to your activities on or about the 19th of May, 1939. Do you recall any other of your activities from that date until the date of May 23, 1939, in connection with your service as manager of the circus?

A. We just continued our painting the show, painting out the titles and lettering them, and getting it put together, and putting up the tent. And we were supposed to have a rehearsal, and we didn't have it out there.

Q. Your time was engaged during that period from May 19th until the stuff arrived in Inglewood in getting it sorted and passed upon and putting in condition this equipment?

A. That is right.

Q. You were out there most of that entire time, were you? A. All during the day, yes.

Q. That, in fact, was your entire activity during that period of time? A. Yes, sir.

Q. During that time did you lay out the tent and rigging? A. George Singleton did the job.

Q. And did you examine it?

A. I saw it when it was up.

Q. Did he do so under your direction and supervision? [77] A. Yes, sir.

Q. And that is true of every bit of equipment in connection with the Great American Circus?

A. Yes.

Q. In other words, you selected it, laid it out, and examined it before it ever left Baldwin Park?

(Testimony of Paul Eagles.)

A. That is true.

Q. And you knew, as a matter of fact, either from your own knowledge, or from those subordinate to you, the exact status, condition and extent of all that equipment?

A. As near as it is possible for anybody to know, with that much stuff that they are loading up in three days.

Q. Either yourself personally, or through employees of Great American Circus whom you directed to ascertain the facts for you?

A. Yes. Daillard went over some of the stuff with us too.

Q. Do you know what capacity Daillard went over the stuff in?

A. Well, he was my boss. That is all I know.

Q. He was your boss, and you were responsible to him; is that correct?

A. That is right.

Q. Now then, the equipment was delivered at Inglewood, was it not?

A. Yes, sir. [78]

Q. On or about the 23rd of May?

A. That is right, the morning of the 23rd.

Q. Were you present at Baldwin Park when it left there on the railroad cars?

A. I rode the train out.

Q. You rode the train right to Inglewood?

A. Yes, sir.

Q. Then you were present when it arrived at Inglewood?

A. That is right.

(Testimony of Paul Eagles.)

Q. Were you present when the equipment was taken off the cars? A. Yes.

Q. And present when it was set up at Inglewood? A. Yes, sir.

Q. Was it all completely set up?

A. Yes, and we had some left over that we sent back.

Q. You sent back some equipment? A. Yes.

Q. Do you know about what that equipment was?

A. No, but I got a truck out there and they loaded it on those stock cars. We didn't have any stock going over except elephants and camels, and we loaded a lot of stuff in that stock car to send it back.

Q. Now then, the tent was erected and you were then ready for the first performance at Inglewood, was it not? A. Yes. [79]

Q. And have you in your possession any records which will give, or from which we can obtain a resume of the items constituting the equipment delivered at Inglewood?

A. I have a list of the wagons and their numbers.

Q. Will you be good enough to hand me that list for a moment?

A. Then I have the general total here in my handwriting of the stuff that was on the train.

Q. All right. Now, referring to this document—

The Court: Let it be marked, if it is going to be referred to, as an exhibit.

(Testimony of Paul Eagles.)

Mr. Combs: May we have it marked for identification as Plaintiff's Exhibit A?

The Court: Mark it A-1, and make them A's with numerals after them.

Mr. Combs: Counsel, I will show you A-1 for identification.

Q. By Mr. Combs: I show you Exhibit A-1 for identification, and ask you whether or not you can identify that document as the list to which you just referred.

A. Yes, it is a list I made out at Baldwin Park.

Q. Will you state what these figures on the sheet mean?

A. At the top it says, "Cook House," and then three wagon numbers, which are the wagons the cook house was loaded in. The next two are the light plants, that the light plants were in. [80]

Q. Next under "Lights"?

A. Yes, sir. One of the wagons belonged to the American Circus Corporation, and the other was a wagon furnished by Hagenback & Wallace. The next one is the sound wagon. And the next one is the white ticket wagon. The next one is the train light plant, and the next two are chair wagons. The next one is a property wagon. The next one is a blue plank wagon. The next one is a sideshow wagon. We loaded the menagerie in that. And a wardrobe wagon. Another property wagon. Two more plank wagons. A jack wagon, and another wagon for the padroom canvas. An elephant wagon, for property

(Testimony of Paul Eagles.)

of elephants. A pole wagon, and two padroom trunk wagons. A candy wagon. A red ticket wagon. An orang-outang cage. This next one is a private wagon that belonged to Goebel, and the usual tigers and lions loaded in it. Then there are two trucks on there.

Q. The figures that appear in this second column comprise the footage of the wagons; is that right?

A. That is right.

Q. How many wagons were delivered at Inglewood?

A. All these wagons, to the best of my recollection.

Q. 33 in number?

The Court: Everything on that exhibit was delivered?

A. That is right.

The Court: That answers the question.

A. There was 26 Hagenback wagons, and there was some [81] other stuff on the train too.

The Court: Is that totaled in the exhibit?

A. No.

Q. By Mr. Combs: These wagons were Hagenback-Wallace wagons? A. Yes.

Q. And the others belonged to other individuals?

A. That is right.

Mr. Combs: We offer the document in evidence as Plaintiff's Exhibit A-1.

The Court: Admitted.

(Testimony of Paul Eagles.)

PLAINTIFF'S EXHIBIT A-1

Cook House	[Footage]	
51	17½	
52	19	
53	17	
54	13	
Lights		
112	18	
60	18	
Sound		
74	15	
41	18	White Ticket
1200	10	Cross Light Plant
C88	22	Chair
73	18	"
72	18	Props
85	16	Blue Plant
50	18	Side Show and Menagerie
70	19	Wardrobe
84	16	Props
86	16	Plank
80	16	"
87	22	Jack
78	18	Padroom Canvas & Dogs
38	18	Elephant
100	38	Pole Wagon
75	20	Pad Room Trunk
71	20	" " "
76	18	Candy Wagon
40	18	Red Ticket Wagon
	16	Orang
	34	Bert Nelson 2 trucks
	526½	
	80	Four 20' trucks
	606½	

[Endorsed]: Filed Nov. 27, 1940.

(Testimony of Paul Eagles.)

Q. By Mr. Combs: Now, did anything occur at Baldwin Park shortly before your departure for Inglewood, with reference to a shortage of wagons?

A. We had the light plant loaded in a wagon we had rented from the Springfield Wagon Works representative in Alhambra. We had the light plant all put in there, and then they sold them to the United Tent & Awning Company.

Q. So you had to change and get another wagon from Hagenbeck-Wallace for the light plant?

A. Yes. This was an Al G. Barnes Circus wagon. And we took the 50 kilowatt plant out and put it in this wagon.

Q. Was that done under your direction and supervision? A. Yes, sir.

Q. I note that 26 Hagenbeck-Wallace wagons were [82] delivered at Inglewood, whereas the contract called for 20. Do you know the occasion for that? A. I didn't see the contract.

Q. You never saw the contract yourself?

A. Away afterwards. I didn't read the particulars of it.

Q. All right. Then so far as you knew there were 26 wagons to be taken at that time?

A. That is what my list showed.

Q. That is what you gathered together as necessary to take this show over to Inglewood?

A. Yes.

Q. Now, at Inglewood was there anything particular that occurred with relation to the perform-

(Testimony of Paul Eagles.)

ance that was extraordinary or did not go off on schedule and in a normal manner?

A. In Inglewood?

Q. Yes.

A. Well, no. I had to hold the show a little bit there on account of the actors hadn't had a rehearsal.

Q. How long did you hold the show for that cause?

A. To the best of my recollection, about 40 minutes.

Q. But it went on about 40 minutes late at that time? A. Yes.

Q. Was that delay in any way caused by faulty or defective equipment? [83] A. No.

The Court: He said because the actors hadn't rehearsed.

Q. By Mr. Combs: Did the evening show go off on schedule and in order? A. Yes, sir.

Q. What did you do after you completed the performance at Inglewood?

A. Well, we tore the show down and got ready to move. It took us all night to tear it down, and we got out that morning and loaded it on the Santa Fe, and went to San Diego.

Q. Was there anything extraordinary about the length of time necessary to tear the show down?

A. We had all green help.

Q. Would you say it was competent or incompetent circus help?

(Testimony of Paul Eagles.)

A. Some of them were all right, competent help, and others, the working men, were new and inexperienced.

Q. Where did you get the workmen for this performance?

A. I sent Pat Graham out, and he —

The Court: Do you care where he got them?

Mr. Combs: The only point on that, if your Honor please, is that I would make this offer of proof in that connection, that these men were just general working people that they picked up from employment places on Main Street, and not efficient, capable circus hands.

Mr. Schaefer: It is immaterial where they got them, [84] if they were green men.

The Court: If you go into that, it would open the field for cross examination that would consume considerable time.

Q. By Mr. Combs: Directing your attention to a stage upon which the Fanchonettes performed, was there anything extraordinary in so far as the circus was concerned about that piece of equipment?

A. Yes. It was not suitable for quick movement.

Q. How long did that take to construct and tear down?

A. Well considerable time. The first day we set it up the men that built it should have been——

Q. That was in Inglewood?

A. That was in Inglewood.

(Testimony of Paul Eagles.)

Q. Who tore it down?

A. I would say it took four or five hours to put it up. And then our men struck it, and we loaded it on the pole wagon that night.

Q. You loaded it on the pole wagon?

A. Yes.

Q. And took it to the railroad cars and shipped the whole of the equipment to San Diego?

A. That is right.

Q. When did you arrive in San Diego?

A. Along in the afternoon. I don't remember the exact time. [85]

Q. That would be the afternoon of the 24th of May?

A. No, that was—we showed in Inglewood the 24th of May, and that would be the 25th of May. It took us all night to load out, and we traveled on the 25th.

Q. And arrived there on the 25th? A. Yes.

Q. Did anything occur at Inglewood in relation to setting up the show out of the ordinary—I mean at San Diego—out of the ordinary?

A. No, at San Diego we moved right along.

Q. You got the show set up in order and nothing out of order occurred?

A. We hired some tractors there to pull us on the lot.

Q. In connection with that, relate to the court what the occasion for hiring the tractors was.

(Testimony of Paul Eagles.)

A. It was a soft, sandy lot, and we didn't have any power.

Q. What happened when the wagons were pulled out on the soft, sandy lot?

A. We just pulled them in off the street as far as they could go on hard ground, with the show's trucks, and then the hired caterpillars pulled them over and spotted them.

Q. What was the occasion for using caterpillars? Was it because the lot was so difficult to negotiate with heavy wagons?

A. That is right. [86]

Q. And these wagons stood up under the strain of hauling around with caterpillars, did they?

A. Yes.

Q. All of them at that time?

A. Yes. I can't remember of any breakage.

Q. How many shows did you have at San Diego?

A. We gave five shows, I believe.

Q. And they all went off on schedule?

A. One was at night, the night of the 26th, and then we was in San Diego the 27th and 28th.

Q. Five shows, and all on schedule? A. Yes.

Q. And as expected? A. Yes, sir.

Q. Nothing extraordinary occurred?

A. Not that I know of.

Q. The performance normal and up to standard? A. Yes.

A. Yes.

Q. And equipment normal and up to standard at that time? A. It was all satisfactory.

(Testimony of Paul Eagles.)

Q. What did you do after completing those five performances in San Diego?

A. We hired another tractor that night to come off with, and we tore the show down and hauled it off.

Q. And where did you go?

A. Back to the train again, and loaded it on the flat [87] cars. And from there we went to Santa Ana.

Q. Did anything occur at Santa Ana with relation to the equipment that was out of the ordinary?

A. Yes. We had a long hill there, and I think the pole wagon went over the side of the run.

Q. What was the occasion for that?

A. I wasn't there. All I know is the report that it was so.

Q. Who reported it to you?

A. The trainmaster—or Pat Graham came down and told me it was reported to him by the trainmaster.

Q. Are you able to say whether or not it went over the side of the run because of some faulty construction of either the wagon or the run?

A. I don't know.

Q. Have you ever had opportunity to observe a wagon slip off a run before, in the conduct of a circus? A. Yes.

Q. In fact, that is usually an accident that occurs as a result of wrong turning?

(Testimony of Paul Eagles.)

A. It could be, if he didn't handle the pole of the wagon properly coming across the platform.

Mr. Schaefer: I move to strike that out, your Honor. He wasn't there, and he has given what might be a reason.

The Court: He is giving his ideas as a man familiar with this sort of business, and I think it is proper. The [88] court will only give it such weight as it ought to have, anyway.

Q. By Mr. Combs: Now, in other words, it is a more or less common accident——

The Court: The other words do not help us any.

Mr. Combs: All right. Withdraw the question.

Q. Then was there anything else that occurred at Santa Ana out of the ordinary, in the production of this circus?

A. We were late, to start with, getting in there. If I remember correctly, it was about 9:30 when we got into San Diego, in the morning.

Q. What time were you due there?

A. We was off the lot a little after 2:00 o'clock in San Diego, and should have been—about 3:00 o'clock—and we should have ben there about 6:30 to 7:00.

Q. Do you know what the occasion for that lateness was? A. No, I didn't even ask.

Q. Just a case of the train not getting there?

A. Not arriving.

Q. You arrived at 9:30 instead of about 6:00 o'clock? A. That is my recollection.

(Testimony of Paul Eagles.)

Q. What did you do after it arrived?

A. We unloaded the show, and took it up to the lot, which was about three or three and a quarter miles, and started erecting our tents.

Q. In your experience as a showman, is three [89] to three and a quarter miles a long or a short haul?

A. That is considered a long haul.

Q. What is considered a normal or ordinary haul?

A. A mile to a mile and a half.

Q. Do you know anything with respect to the manner in which the equipment was operated on that long haul from the railroad to the lot?

A. Well, they had difficulty—they reported to me that they had difficulty with one wagon.

Q. What was reported to you with relation to that wagon?

A. That they had a hot box. One of the hired trucks was hauling it.

Q. Do you know anything about the speed at which that wagon was being hauled?

A. I do not.

The Court: A hot box on one of the wagons?

A. On one of the wagons, the plank wagon, I believe it was.

Q. By Mr. Combs: It was a plank wagon?

A. I believe it was.

Q. That was the only one that was reported to you as out of order at that time?

A. It is the only one we had trouble with.

(Testimony of Paul Eagles.)

Q. At Santa Ana? A. At Santa Ana.

Q. Now, what did you do after you learned that the wagon [90] had a hot box?

A. Sent the shop man up to find out about it, Forbes, and a fellow that he had.

Q. Did you get any report from them?

A. They reported back to me that the wagon was on the way up there.

Q. How soon did they make that report?

A. Within 15 or 20 minutes.

Q. Within 15 or 20 minutes? A. Yes.

Q. Then will you state that the wagon arrived at the lot in Santa Ana prior to and preparatory to erecting the equipment?

A. I don't remember accurately.

Q. Approximately an hour or so after the arrival of the train?

A. After the arrival of the train, yes.

Q. I am just guessing on that.

A. Approximately an hour and a half.

Q. Did anything abnormal occur in the erection of the equipment at Santa Ana that day?

A. Not that I can remember.

Q. Did the show go on on schedule that day?

A. No.

Q. How long did it take that day, if you recall, to erect the Fanchonette stage? [91]

A. Well, considerable time.

Q. Will you say that it took as much as from four to seven hours to erect that stage?

(Testimony of Paul Eagles.)

A. Not seven, no. I would say it would take an average of two and a half hours.

Q. Two and a half hours, an average?

A. Yes.

Q. The Fanchonette stage was no part of the equipment belonging to Hagenback-Wallace, was it?

A. No.

Q. That belonged to Fanchon & Marco, did it not?

A. It was provided for by them. I have who it belongs to here, because I returned it to them, I believe. No, I haven't. It was somebody they rented it from.

Q. In Inglewood, and it was not upon the circus train?

A. It was loaded on the circus train every night.

Q. I mean prior to your arrival in Inglewood?

A. No.

Q. Did you take over a large quantity of the equipment in addition to that at Baldwin Park, on your arrival at Inglewood?

A. We made some swinging ladders there, and we cut the big ring curbs up, reduced them in size, so we could load them in the wagon. They were great big wide ring curbs, and we just cut them in size.

Q. Back to Santa Ana again: Did anything occur in the [92] production of that circus that delayed or interfered with the thing?

A. All the things we talked about. I was ready to show at 5:30.

(Testimony of Paul Eagles.)

Q. What time was the show supposed to be produced?

A. It was supposed to be at 2:15 in the afternoon.

Q. Then you were about two hours and fifteen minutes late? A. That is right.

Q. What was the occasion for that lateness?

A. Everything in general.

Q. What do you mean by that?

A. I mean late arrival, long haul, and the floor held us up a little.

The Court: 15 or 20 minutes, you said?

A. Something like that, and the laying of the stage. That is about it.

Q. By Mr. Combs: What about the men?

A. Yes, the men were still green. They were coming and going. We had a tremendous turnover in labor every day.

Q. Hard to manage, and hard to get others to work efficiently and fast?

A. That is right. They didn't know what to do, and we didn't have enough bosses to show them.

Q. In your experience with circuses, do you very occasionally or rarely have a hot box in the equipment? [93]

A. It is not uncommon.

Q. It is not uncommon? A. No.

Q. What did you do after the performance in Santa Ana?

(Testimony of Paul Eagles.)

A. After the night performance, we tore down in the usual manner and loaded the stuff in the wagons and hauled them back to the train.

Q. Was there anything abnormal about that on that occasion?

A. The same wagon gave us trouble going back, although we had greased it.

Q. But you greased it and it did operate all right?

A. No. It gave us trouble. It had another hot box.

Q. Did that delay you any in getting the equipment on the train? A. It delayed us some.

Q. How much? A. Oh, 30 minutes or so.

Q. Then what occurred after you got the stuff loaded in Santa Ana?

A. We went to Pasadena.

Q. When did you arrive in Pasadena?

A. We were late getting into Pasadena, very late.

Q. How late?

A. I don't recall the time, but I know it was late.

Q. Several hours? [94] A. Yes.

Q. Was that due in any way to the condition of the equipment, or was the cause of it the transportation of the railroad?

Mr. Schaefer: I object to that. Let him tell what it was.

(Testimony of Paul Eagles.)

The Court: What was the cause of the delay?

A. I was asleep. I don't know.

Q. By Mr. Combs: You don't know?

A. I was on the train. I went to sleep, and I know we were late into Pasadena.

The Court: Do you know what time you arrived in Pasadena.

A. I can't recollect exactly. It was in the late morning some time, I would say around 9:30 to 10:00 o'clock.

The Court: What time should you have arrived?

A. We should have arrived there possibly at 8:00 o'clock or 8:30.

Q. By Mr. Combs: What time did you leave Santa Ana?

A. I believe it was about 6:30. I am not very clear on it.

Q. What occurred when you arrived at Pasadena?

A. We hauled the stuff out to the lot, all the wagons and everything, and started to erect the tent and the main falls, and the rope on the third pole, I believe, was the one that broke. It snapped about three times when we were [95] pulling the peaks.

Q. Did anything else occur other than that at Pasadena? A. We lost the afternoon show.

Q. Did you get the main fall repaired?

A. Yes; they spliced the rope, I am sure.

Q. Do you know who spliced it?

(Testimony of Paul Eagles.)

A. I believe Singleton or one of his sail-makers. I couldn't say.

Q. Had you ordered any rope prior to that time for the main falls? A. Yes.

Q. How much rope? A. 1500 feet.

Q. From whom?

A. Wired the order in to Daillard.

Q. When did you do that?

A. At Inglewood.

Q. At Inglewood? A. Yes, sir.

Q. An extra or spare rope for the main fall, is that right? A. Yes.

Q. And it had not arrived by the time you got to Pasadena? A. No.

Q. Was there anything else in relation to the equipment [96] that was abnormal or unusual on that day at Pasadena?

A. I don't think so. We showed that night.

Q. You showed that night? A. Yes.

Q. Did the show go on normally or in order that night?

A. Yes. I had a complaint from a couple of actors, but that was straightened out.

Q. The performers all went on and performed their acts? A. That is right.

Q. In fact they did so at all of the productions of the circus that were given, did they not?

A. That is right.

Q. Then after Pasadena what did you do?

(Testimony of Paul Eagles.)

A. Tore down and loaded up and went to Pomona.

Q. Did anything abnormal happen on that occasion?

A. The men left the dog wagon on the lot, and after we were ready to load they come down to that place where the dog wagon was, and they found it was off the lot.

Q. And you had to go back and get it?

A. Yes, we had to go back and get it.

Q. That delayed your departure slightly, didn't it?

A. It did.

Q. But there was nothing in connection with the equipment that caused that or any other delay there at Pasadena?

A. No. They just overlooked it in the dark.

The Court: What kind of a wagon did you say?

[97]

A. A dog wagon. We had a dog act.

Q. By Mr. Combs: Then when did you arrive in Pomona?

A. We arrived in Pomona about 8:30, if I remember correctly.

Q. On what day?

A. On the 1st of June; the 30th at Pasadena, and the 1st at Pomona.

Q. Wasn't it the 31st day of May?

A. Pomona, that is right, the 31st day of May, on a Wednesday.

(Testimony of Paul Eagles.)

Q. Did you get the show up in order on that day? A. Yes.

Q. On time?

A. We were just a little late. I would say 3:00 o'clock we opened the doors.

The Court: That was Pomona? A. Yes.

Q. By Mr. Combs: What was the occasion for being that late?

A. The usual thing, just that the men didn't function properly, although we were better organized there than we had been at any other time.

Q. Green labor? A. That is right.

Q. And not the equipment?

A. I don't remember of any failure of equipment in [98] Pomona.

Q. Did you put on the matinee? A. Yes.

Q. In order? A. Yes.

Q. Did you put on the evening show?

A. Yes.

Q. In order? A. Yes.

Q. Nothing abnormal occurred at either of those shows? A. Not that I can recall.

Q. Subsequent to that what did you do?

A. That is the night we had the labor trouble. And we were billed to go to Glendale, and at the last minute Daillard, who had been away all day—I think it was around 10:00 o'clock or 10:30—he came back and told me that the A. F. A. had pulled out some acts.

Q. What is the A. F. A.

(Testimony of Paul Eagles.)

A. American Federation of Actors.

Q. A union? A. That is right.

Q. Did Daillard say anything else at the time?

A. We had our transportation paid to Glendale, and somebody went down and changed the destination to Baldwin Park.

Q. Did you do that? [99] A. I did not.

Q. Did you go to Baldwin Park?

A. I went to Baldwin Park.

Q. When did you arrive there?

A. In the early morning.

Q. On the 1st of June, in the early morning?

A. Yes.

Q. What occurred when you arrived at Baldwin Park?

A. We unloaded the train and took it back in winter quarters, and I stayed there with the crew and put the show away and returned all the rented stuff to the different people. We had horses from some people; we had tents from others, Baker & Lockwood.

Q. Under whose direction did you do that?

A. Wayne Daillard's.

Q. And there was no further performance of the circus after that? A. No.

Q. Back again, Mr. Eagles, to Pasadena: Did you have any extraordinary or unusual trouble with the laying of the stage in Pasadena?

A. In Pasadena is where Red Forbes started to lay that stage, and the property boys never laid it,

(Testimony of Paul Eagles.)

and he brought his crew over there and thought possibly he could get some of them to lay it, but he didn't and we had to put a lot of extra men on there to lay the stage, and it was quite a [100] problem.

Q. The loss of time in the laying of that stage must have been of concern to you prior to that time, because you called in Forbes to assist?

A. That is right.

Q. And you had already noted that it was a hazard or obstacle to getting the equipment erected in time for performance; is that right?

A. That is right.

Q. Again at Pasadena, did anything occur there with relation to the refund of admissions?

A. No—at Santa Ana.

Q. Was it at Santa Ana? A. Yes.

Q. Isn't it true that at Pasadena you were ready to put on the show and——

A. No; that was Santa Ana. We missed the afternoon show in Pasadena.

Q. But at Santa Ana you were ready to put on the afternoon show, and did anything occur in that connection?

A. I had all the performers ready, and notified Mr. Clawson, who was the equestrian director, that we would show that afternoon, and the committee who were showing there wanted the return of some money, and in the meanwhile they went out to the wagon with Mr. Daillard, and I believe he turned back some money. [101]

(Testimony of Paul Eagles.)

Q. About \$90?

A. I believe so. And there wasn't any customers there, so I called it off.

Mr. Combs: That is all.

The Court: Cross examine.

Mr. Schaefer: I understand that Mr. Eagles has been called as an adverse witness. Is that right?

Mr. Combs: That is right.

Cross Examination [102]

Q. You say you didn't personally examine all the equipment? A. That is true.

Q. And you didn't personally examine the wagons? [107] A. Only in a general way.

Q. How carefully did you make the examination?

A. I probably walked around them and looked at them in a general way.

Q. You made no examination of the axles or the boxings? A. No.

Q. There were probably 48 or 50 wagons there?

A. That is right.

Q. And you selected wagons merely for their size, or what you thought would be their ability for carrying the loads? A. That is right.

Q. And out of that group you picked out 26?

A. That is what my record shows.

Q. Now, the men you employed, were they what might be called the heads of departments? You employed a porter?

A. A head porter, yes. They were heads of de-

(Testimony of Paul Eagles.)

partments, yes, with the exception of George Singleton. [108]

A. Well, generally speaking, they were in good condition. There were some repairs made on them in Inglewood, and they passed the test there. There was some decking on one or two of the cars that I fixed in San Diego, spliced in some lumber around the decking.

Q. Were there any other repairs made to the cars other than in San Diego?

A. Yes, at Inglewood. We had an inspection at Baldwin Park.

Q. Who made those repairs?

A. The Santa Fe Railroad mechanics.

Q. And were you there when they made them?

A. I was at lunch with Mr. Clawson when the two of them come down and reported that there was a couple of minor repairs they wanted to make on the outside of the cars, and [116] he agreed to take us over to Inglewood if we had air, if the valves were in good shape, the air lines, and the air was all right when the Pacific Electric coupled on to us. And then they took the train back to Los Angeles and made two or three hundred dollars worth of repairs.

Q. Did I understand you to say they were minor repairs?

A. Yes. They gave the train a general going over. They even repaired a step on one of the coaches.

(Testimony of Paul Eagles.)

Q. Were there any blankets or sheets or pillow cases? A. There were some.

Q. How many?

A. I didn't count them. Mr. Graham did. I haven't the count here in front of me.

Q. By the way, Mr. Clawson was the representative, so far as you knew, of Hagenbeck-Wallace out there?

Mr. Combs: He was your employee, too.

Mr. Schaefer: He was an employee when he came over in the circus. I am not denying that.

The Court: Proceed.

Q. By Mr. Schaefer: Mr. Clawson was the man in charge of the winter quarters? A. Yes.

Q. Did you have any conversation with Mr. Clawson with respect to the blankets and sheets and pillow cases?

A. Yes. I believe I asked him if he was going to furnish them—or Daillard was there, and I can't remember [117] the conversation, but I know that Mr. Daillard asked me to call up the United Tent & Awning Company, or somebody, and get a figure on some blankets, used army blankets.

Q. What I am asking you now is for your conversation with Mr. Clawson.

A. I can't recall it, exactly what the conversation was.

Q. I don't want it exactly. I want only the substance.

(Testimony of Paul Eagles.)

The Court: Was it with Clawson?

A. Yes.

Q. By Mr. Schaefer: What did he say to you about it?

A. I can't recall that.

Q. Do you remember the substance of it?

A. No, I don't.

Q. Did you talk to him about it?

A. The three of us were there, Daillard and Clawson and myself.

Q. Did you or Daillard say anything to Mr. Clawson about the shortage?

A. I believe we asked him if he was going to furnish them.

The Court: What did he say?

A. I think he said no, because we ordered them again too; Fanchon & Marco ordered them.

Q. By Mr. Schaefer: Isn't it a fact that Mr. Clawson said that he would get them, and attempted to get them, and telephoned to someone and couldn't procure them? Don't you [118] recall that?

A. No, I don't. I say, I am a little hazy on that, Mr. Schaefer. [119]

A. Well, it was second-handed stuff. I wouldn't want to venture a guess on whether it was good or bad. I know what use it had had, and so on. It was in condition equal to the use it had had. [120]

Q. On your arrival at San Diego, you say you showed in San Diego on schedule. How much time did you have to erect the equipment at San Diego?

(Testimony of Paul Eagles.)

A. We had from the time we arrived in there on the 25th, and all the rest of that day.

Q. An entire day; is that right?

A. Yes.

Q. You arrived at what time on the 25th?

A. Some time in the afternoon.

Q. When did you leave Inglewood?

A. We left Inglewood the morning of the 25th.

Q. And you arrived the afternoon of the 25th?

A. Arrived in the afternoon, whatever time it took the Santa Fe to run us down there.

Q. When was your first performance in San Diego?

A. Our first performance was on the night of the 26th.

Q. Then you had approximately a day and a half to erect your equipment; is that right?

A. Yes.

Q. You said that the performance went off in San Diego according to schedule? [122]

A. That is right.

Q. Were there any acts that were not performed?

A. Well, I have the performances right here, and I am sure they all went off.

Q. They all were performed? A. Yes.

Q. What time did you leave San Diego?

A. It was a little after 2:00 o'clock when we pulled off the lot, and I imagine an hour or two hours after that we left San Diego.

Q. Did you leave San Diego late?

(Testimony of Paul Eagles.)

A. I don't know. I paid off the tractors, and it was pretty well loaded when I went down to my stateroom, and I don't remember whether we got out of there late or not. I am sure we must have gotten out rather late, because it was after 2:00 when we got off the lot.

Q. Did you have some difficulties?

A. The tractors we had pulled us off the lot, a very difficult lot. We had four tractors taking us off of there.

Q. When did you arrive in San Diego?

A. About 9:30.

Q. Was that early or late?

A. That is a little late.

Q. Now, a wagon went off the runs. Will you explain what runs are?

A. The runs are the things that come from the street [123] up to the flat car, made out of wood with cross pieces, just like a driveway, without any floor in them.

Q. It is a driveway off of the flat car?

A. Yes.

Q. And it was a pole wagon that went off the runs?

A. It went off the side of the gunwales of the flat car.

Q. I will ask you if you didn't say to me then, "This was due to the faulty condition of the runs"?

A. I don't believe I did.

Q. You don't believe you did?

A. No.

(Testimony of Paul Eagles.)

Q. The faulty condition of the runs—

A. Those were repaired in San Diego.

Q. Who repaired them? [124]

A. Whitey Beeson.

Q. At whose expense? A. I don't know.

[125]

Q. What was the condition of the rope in Pasadena? Was it good or bad?

A. Just like any second-hand rope.

Q. Would that be good or bad? [134]

A. It would be medium.

Q. Do you remember telling me on the occasion mentioned, "The ropes were all in very poor condition"? Did you so state to me?

A. I can't recall it.

Q. Do you remember stating to me, "While we had some green labor, yet the equipment itself delayed us tremendously"? Did you so state?

A. I don't recall that part of the conversation.

Q. Did you state to me at the time mentioned, "I know that the elephant howdahs never arrived; that the wardrobe [135] was in bad condition, some entirely unusable"? Did you so state?

A. I might have. I probably told you that.

Q. Did the calliope operate on any occasion?

A. I don't know about that.

Q. Did you hear it operate?

A. I didn't hear it operate. I heard it previous to this time. I don't think it ever operated on the Great American Circus.

(Testimony of Paul Eagles.)

Q. But it was delivered to the Great American Circus?
A. Yes. [136]

Redirect Examination

Q. By Mr. Combs: How much of a wardrobe was there at Baldwin Park, that is to say, for use by the circus?
A. A 25 or 30-car show.

Q. In other words, there was a vast quantity of wardrobe out there?

The Court: We don't care about the other words.

Q. By Mr. Combs: A quantity that wasn't necessary for use on your show?

A. That is right.

Q. And the unusable portion was what you left behind at Baldwin Park; is that right?

Mr. Schaefer: I object to that as the testimony of counsel.

The Court: Yes.

Mr. Combs: No I am not testifying.

The Court: Let him testify. This is not before a jury, and I will instruct myself to disregard it, but it takes up time unnecessarily.

Q. By Mr. Combs: The portion of the wardrobe that was [137] left at Baldwin Park was the unusable portion that you did not need for the Great American Circus; is that right?

A. We left some at Baldwin Park. I couldn't say as to that. The wardrobe man took what he wanted.

Q. And what he took was the usable portion, in usable condition; is that right?

A. Yes; they used it.

(Testimony of Paul Eagles.)

Q. The kind of rope involved, on the main fall, which broke at Pasadena, was available for purchase here in Los Angeles, was it not?

A. Yes.

Q. And, in fact, had actually been ordered from the hardware company?

A. Well, I don't know. It was delivered in Pomona.

Q. But you had directed Daillard to order it from Inglewood?

A. That is when I asked for it, yes.

Q. And it could have been purchased immediately, and for immediate delivery, in Los Angeles; isn't that right?

A. I don't know myself. I didn't make any inquiries.

Q. The stage that was carried by this Great American Circus, was it like all stages, or different from them?

A. Entirely different than any I knew.

Q. In what respect?

The Court: I understood that this wasn't a part of the paraphernalia. [138]

Mr. Combs: On cross examination counsel asked——

The Court: So we need not have that.

Mr. Combs: All right.

Q. You related in your cross examination that the show was not ready for performance in Inglewood. In saying that, did you mean the equipment,

(Testimony of Paul Eagles.)

or the personnel of the show, as distinguished from the equipment?

A. The personnel of the performance was not ready.

Q. That is what you meant when you referred to the show? A. Yes.

Q. When you referred to a test that the cars had passed, who gave that test?

A. The railroads. We passed a test transferring from one railroad to another. We transferred from the Pacific Electric Railroad to the Santa Fe, to go to Inglewood.

Q. And cars that were in unusable condition would not be passed?

A. They won't use them.

Q. The seats that were used in this show, were they passed by the seat inspector at Pasadena?

A. Yes.

Q. And at other places? A. Yes.

Q. They all passed inspection of the local authorities on seating capacity, or the use of seats of that nature?

A. As to their strength and so on and so forth, yes. [139]

Q. And safety factors?

A. Yes, sir.

Q. The condition of the lot in San Diego, can you relate a little more about that?

A. Well, it was a filled sandy lot, very soft.

The Court: Where did that fill come from—dredged from the—

(Testimony of Paul Eagles.)

A. Yes, from the sea. They pump it back over. It was right across from the Marine Base.

Q. By Mr. Combs: Was it a suitable or unsuitable place for the performance of a circus?

A. Not very suitable.

Q. What about the overloading of the wagons? Can you state to the court anything respecting that?

A. We loaded most of the paraphernalia of a 25-car show on 33 wagons, or a 15-car show.

Q. In other words, you were over overloaded at least 40 per cent; is that right?

A. I don't know what percentage, but I think we were overloaded. We had a big top the same as a 25-car show.

Q. You testified that you employed certain experienced men as heads or bosses of certain departments. Were those the only experienced men that were working on this show, as laborers or as equipment men?

A. That list you have reference to that Mr. Schaefer [140] read over?

Q. That is right.

A. I think it was. The experienced ones were the only experienced ones, with the exception of a front door man and a sideshow manager, something like that, but all of the labor was green.

Q. Now, when the equipment was delivered in Inglewood to you, a great quantity of material and equipment was added to it by Fanchon & Marco; isn't that correct? A. That is right.

(Testimony of Paul Eagles.)

Q. Which increased your overloading, rather than decreasing it, at that point; is that right?

A. Yes; some big poles from over there that the Fanchonettes worked on, and wardrobe. [141]

PLAINTIFF'S EXHIBIT No. A-2

June 28, 1939.

Mr. Marco,
Fanchon & Marco, Inc.,
5600 Sunset Blvd.,
Los Angeles, Calif.

Dear Mr. Marco:

As per our telephone conversation this morning, I am inclosing herewith a copy of a statement which was made by a Stenographer in Mr. Henry Schaefer's office.

This statement does not meet with my approval as it is just a recitation of events that happened while the Great American Circus was on the road and I believe it should be more complete if it is to be submitted to use in the settlement of a claim.

At this time I want you to feel that no information will be withheld and that I will be glad to go over the facts at any time with anybody.

With kindest regards, I am,

Very Truly Yours,

[Written in ink]

Schaefer's Letter June 16.

[Endorsed]: Filed Nov. 27, 1940.

(Testimony of Paul Eagles.)

Recross Examination

Q. By Mr. Schaefer: You spoke of overloading, counsel says 40 per cent. You discussed this matter with Mr. Clawson and laid out the whole circus with him, didn't you?

A. With Mr. Clawson and Mr. Daillard.

Q. And at that time the items of equipment and the cars were selected, were they not?

A. With the exception of Inglewood, I wanted more cars and to distribute the loads over more wagons.

Q. I am talking about Baldwin Park now.

A. Baldwin Park.

Q. The equipment was gone over and the number of cars, isn't that right?

A. That is true.

Q. And you had 50 wagons out there at Baldwin Park, didn't you? [143]

A. Yes, about 50.

Q. And there were four trucks that Fanchon & Marco got that they used to carry equipment, in addition? A. Yes.

Q. Isn't it the custom of all circuses to employ some green labor from town to town?

A. Well, yes, organizing, and when they first open it is, some green labor.

Q. And from town to town they take some labor?

A. They usually have the same crews come back, and they add to them.

Mr. Schaefer: All right. That is all.

(Testimony of Paul Eagles.)

Redirect Examination

Q. By Mr. Combs: How many laborers did you have on the circus, other than foremen?

A. Well, roughly, a couple of hundred

The Court: A couple of hundred?

A. Yes. [144]

CHARLES W. NELSON,

Called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Charles W. Nelson.

Mr. Combs: We are calling Mr. Nelson for cross examination as an adverse witness.

The Court: Proceed. We will find out where he is.

Direct Examination

Q. By Mr. Combs: What is your present employment?

A. I am in business myself in the producing and booking of circus acts.

Q. How long have you been engaged in that business?

A. Practically a period of 35 years.

Q. Were you engaged in that business in connection with the Great American Circus in 1939?

A. Yes, sir. At that time I was in association with Fanchon & Marco as the manager of their

(Testimony of Charles W. Nelson.)

Fair Booking Department.

Q. In that connection did you have the management of the booking of the Great American Circus?

A. I did.

Q. When did you first undertake your duties in that respect?

A. I am not certain of just the definite length of time [145] prior to the opening of the show, but several months, I assume.

Q. Relate how it occurred.

A. Mr. Ralph Clawson came to me and told me that the equipment of the Hagenback & Wallace Show was on the market for sale or hire.

Mr. Schaefer: I don't like to interrupt, but I am objecting to this examination as an adverse witness. I thought counsel was trying to find out whether he is entitled to do that.

The Court: But I haven't told him that he was. I said we would find out.

Mr. Schaefer: I understand the witness is going into the circus——

The Court: He has a right to do that with his own witness. We will see whether he can cross examine him, after we get started.

A. Mr. Clawson suggested to me that the equipment was for sale or hire or rental, or any basis on which it could be disposed of, and I told him that I would bear that in mind, and if I found anybody that was interested I would contact him. In the course of conversation in the Fanchon & Marco

(Testimony of Charles W. Nelson.)

office I happened to mention it to Mr. Bren and several associates, and they evidenced interest in it, and somehow or other brought it to Mr. Marco's attention. And Mr. Marco sent for me and discussed the matter, and asked [146] me to proceed and investigate how it could be purchased. Originally Mr. Clawson set a figure of some forty some odd thousand dollars, and Mr. Clawson went into detail, and we negotiated with respect to the property, which initially was to be a 10-car show. And in the course of further negotiations it developed — Mr. Marco then took it out of my hands, after the contact had been made, and Mr. Daillard came into the picture, and from there on they contacted Mr. Marco, with Mr. John Ringling North, who was president of Ringling Brothers and Barnum & Bailey Shows, and in the course of events I was instructed to get the show together, which I did. That was the extent of my activities, just the performance proper.

Q. Did you go out to Baldwin Park before the 23rd of May?

A. Yes, I did. I went out one day with Mr. Daillard, when the matter was first broached, and I suggested that some of the wheels of the wagons appeared to me as though they had been drying out in the sun, and Mr. Clawson said, "If they have, they will be replaced and put in perfect condition before they are moved off the lot."

Q. When did this conversation take place?

A. This was at least six or eight weeks before the show was opened.

(Testimony of Charles W. Nelson.)

Q. But you didn't go out there just before the show was opened? [147]

A. No, I didn't.

Q. The next thing you had to do with the show was when it was put on at Inglewood?

A. Yes, that was my next contact with the show.

Q. Did you make any observations with respect to the condition of the equipment at that time?

A. For used equipment, it seemed to me it was in a condition that would be average.

Q. Was it usable or unusable?

A. I thought it was usable, from observation and my slight knowledge of what technical details are necessary for the production of a performance.

Q. Excepting for the time the main fall broke in Pasadena, which was then chained to the bail ring, was there any time when the performers were unable to perform by reason of the condition of the equipment? A. Not to my knowledge.

Q. And the same performers did perform after the men had chained the block and tackle to the bail ring in Pasadena?

A. Yes, they gave the full performance, also the performance that night.

Q. Did you employ George Singleton as an employee of the circus?

A. Yes; I employed him as boss canvas man with the show.

Q. When? [148]

(Testimony of Charles W. Nelson.)

A. Oh, his duties were to start, as I recall it, approximately a week before the show opened.

Q. When did you first employ him prior to a week before the show opened?

A. I talked to him approximately about 10 days prior to that.

Q. Did you have any conversation with him in that connection?

A. Yes, I did. He called at my office a few times.

Q. Who was present?

A. Mr. Clawson was present one time, and I believe Mr. Daillard was at another.

Q. What was said the first time by you, and what was said by Mr. Singleton?

A. The exact details of the conversation I can't recall. But George told me then that he had a chance to go north with some show up in Canada and was waiting word from them then. I told him we were going out, and if he thought he would rather be with us, I thought it was advisable for him to wait around and get the job.

Q. And what did he say?

A. He agreed to do this.

Q. Did you have any other conversation with him?

A. Probably four or five days later he came and said he had transportation from this show in Canada, and that he was sending it back, to stay over and work with us. [149]

(Testimony of Charles W. Nelson.)

Q. Did you employ him at that time?

A. Yes, I did.

Q. What was his pay?

A. His salary was to be \$75 a week.

Q. Then shortly after that he went to work, did he? A. Yes.

Q. Did he go to Baldwin Park?

A. He went to Baldwin Park and did a little preparatory work there.

Q. Did you direct him out there?

A. Yes. I told him to straighten up whatever he thought was necessary so we wouldn't lose time getting started when we decided to go.

Q. Now, Mr. Nelson, did Mr. Singleton ever report back to you about the condition of the equipment out there?

A. Well, George told me once or twice that he thought he needed a few pieces of rope here and there. And I said, "Well, that is just a minor detail. Mr. Clawson may have some on hand that he will give to you."

Q. Where did you office during that time?

A. With the Fanchon & Marco organization, in their own office.

Q. Did you pay any rent there? A. No.

Q. And you used their equipment?

A. Yes. [150]

GEORGE SINGLETON,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: Your occupation, Mr. Singleton?
A. Boss canvas man.

Q. Your residence?

A. 210 North Main Street, Baldwin Park, California.

Q. How long have you been engaged in the business of boss canvas man?
A. About 40 years.

Q. In that connection what experience have you had?

A. I have always been a boss canvas man.

Q. With what circuses, and during what years?

A. I can give you back from 1902 or 1903.

Q. All right. Start and list them.

A. Well, there was Sun Brothers; Sparks Circus for 20 years; there was Young Buffalo, 5 years; Al G. Barnes; Sells-Forepaugh; Pawnee Bill; Hagenback-Wallace; Great American; Lewis Brothers.

Q. And other circuses?

A. Cole Brothers, and others.

Q. Many others? [153]
A. Many others.

Q. Did you have any connection with the Great American Circus at about the time of its exhibition to the public involved in this law suit?

A. Only in the mechanical department.

Q. Will you state when you first undertook your connection or engagement with the Great American Circus?

(Testimony of George Singleton.)

A. It was along the latter part of April when I first talked to Mr. Nelson.

The Court: What year?

A. 1939. He sent for me and hired me. I had contracted to go to Canada, and he advised me to cancel my contract and take their show. He said he would be ready in a few weeks. And the 18th of May he sent for me again and told me the show was ready, to have it in Inglewood the following Tuesday. That was on Thursday, and I had maybe five days to get it ready. So Thursday afternoon I went back and proceeded to get out the wagons and the paraphernalia. In the meantime I hired some men that was around the quarters, labor, and I even sent a man to Los Angeles to pick up whatever men he could for me, and he brought out the next morning about 25 or 30 men that were absolutely no good, so I sent them all back. So then he picked up two or three men, such as assistants, sail makers, and the like, altogether experienced men. When the show moved on the lot at Inglewood I had about 16 men, that is, all told, and the [154] night we moved off all the new men walked away, and I had about eight men left to pack the show. It was 8:00 o'clock in the morning when we got the last wagons to the train. And the show was loaded and moved the same as any other time, loaded light, ready to move, as it had been in the past, but we moved on the lot in Inglewood about five wagon loads of baggage and paraphernalia from

(Testimony of George Singleton.)

Hollywood, so that we had to overload all the wagons. The pole wagon, that had about three loads; it had about 25 tons, where it ought to have had about 10, and we packed all the wagons overloaded leaving there.

Q. That was due to the fact that you had received a quantity of paraphernalia at Inglewood that had not been transferred from Baldwin Park?

A. Mr. Nelson, when he sent me out to quarters, to Baldwin Park, he wanted the show fitted out with a capacity of 5,000 people, and he wanted it loaded on 10 cars, and I told him it was impossible. And he said, "What is the nearest you can figure?" And I said, "I will have to take time to figure." And I figured about 15 wagons.

Q. Cars, you mean?

A. 15 cars, that would take about 26 wagons. And when we finished loading the stuff we had it all loaded in good shape, except the motor power and trucks to move the show with. So we decided to—Mr. Nelson or Mr. Daillard rented four trucks that the Hagenback Show had formerly, [155] and that was the transportation we had.

Q. They were not, however, rented from Hagenback-Wallace, were they?

A. No, sir. They was rented from the Pacific Freight Lines, the people that owned them then. And we had 10 elephants, and they helped, and four head of stock, and even at that we never had half enough motive power. We had a 30-car show load-

(Testimony of George Singleton.)

ed on 15 cars. I had handled the same show, with the same amount of material and stuff, with the Hagenback Shows, with 35 cars, and they allowed me 60 men, working men, besides the other help around, whereas I was moving this show, you might say, with 8 or 10 men. That is where the trouble come. And when we got to Pomona the show had just begun to click and move like it should move; it was just beginning to move, and the railroad train-master told me that night, "You are going to quarters tonight," and I said, "That is impossible," and the next morning—that was about 11:30 or a quarter to 12:00 that night, and when I was called the next morning I was in Baldwin Park. So the next move was to unload the train and take the show back to quarters. And through Mr. Daillard—he says, "Just hold your men together the best you can." He was going to reorganize and finish these dates. So I did. And finally, a day or two after, I was called to Mr. Marco's office, and I went into his office, and he had a lawyer and stenographer waiting to take an affidavit from me with [156] relation to the paraphernalia, whereas I thought all the time that it was to re-open the show, and as soon as I found out what they was trying to do, I didn't have much more to say, and I walked out. So they mailed me an affidavit to sign, which I turned over—I refused to sign it, and turned it over to Mr. Clawson, and it was altogether wrong; some of the stuff that was in there I never even

(Testimony of George Singleton.)

thought of. The next move I made, I went back to quarters, where I was in charge out there, my time ceased, and a man by the name of Dusty Rhodes finished putting the show away. And I think the second day after they paid off the working men. Of course, I drew time for the time I was in their employ and gave a receipt for, I think, \$122, for the time I was employed. Then I asked the cashier about by contract for the season. Well, he says I would have to take it up with the office. So I went out to find Mr. Nelson, and he was out of town or somewhere, and I spoke to someone else in the office, and "Well, you have to see Mr. Nelson." So finally it went on and I tried two or three times, and I would have to see Mr. Nelson, and that is the way my case stood, and I was out of the picture.

Q. When you went out to Baldwin Park when Mr. Nelson first employed you, what did you do out there?

A. I proceeded to get the wagons out and get material out, etc., chairs, poles, rigging, canvas; I proceeded to get the show together, to load it in wagons to go to [157] Inglewood. Then I had an order to put the show up in winter quarters.

Q. Let me ask you about putting it up in winter quarters. Do you mean that you set it all up and tested it and tried it out?

A. Do you know just exactly how much wagon space it would take to load——

(Testimony of George Singleton.)

Q. Did you lay out the falls?

A. I put the big top up. It was all up in the air, and they came out and stopped me and had me tear it down and load it to go to Inglewood.

Q. When did you put it up?

A. I think it was Friday, finished it Friday night some time after dark.

Q. That was the same equipment you loaded to go to Inglewood? A. Yes.

Q. And the same equipment the Great American Circus used? A. Yes.

Q. And it was all up there, and you looked at it in the air, set up, before you left Baldwin Park?

A. Yes, sir.

Q. Did anyone else look at it with you?

A. Why, Mr. Clawson went over some of this stuff, and Mr. Daillard was around there, and Mr. Marco was all around, [158] looking at the wagons, but I personally supervised the sorting and loading of all the stuff myself.

Q. Did you look at the wagons before they left?

A. Yes, I helped pick them out.

Q. What was the condition of those wagons?

A. Ordinarily speaking, they was in fairly good shape, good for the purposes used for.

Q. Were they in such condition that they were suitable for the transportation of the circus?

A. Yes.

Q. They were, of course, second-hand or used equipment? A. Second-hand.

(Testimony of George Singleton.)

Q. Did you set the equipment up in Inglewood?

A. Yes, sir, I did.

Q. Did you have any difficulty in that connection?

A. Not a bit in the world, with the exception that we were shorthanded on labor. We had a whole day to do it. We had it all up in the afternoon.

Q. Of the first day you arrived?

A. Of the first day we arrived. But I would have had it up earlier than that, but we got in town that morning at about 5:00 o'clock and moved this stuff to the lot, and about 6:00 o'clock I had the lot all surveyed ready to go to work a little after, and I had orders not to move or put anything up until Mr. Marco came to the lot, through Mr. Clawson. The understanding was, the contract was, they was [159] to pay, oh, I think it was—whether it was five or ten weeks in advance, for the rent of the stuff. I lost about two hours waiting there, and later on Mr. Marco, I think it was, or Mr. Nelson, and I can't say who else, Mr. Clawson, was all out in front of the lot, and finally Mr. Clawson come to me and said he had a wire from Mr. Eddy saying to turn over the stuff to the Great American Circus, and he was going ahead and put it up, and I lost two hours that morning waiting on that.

Q. Then you did go ahead and put it up?

A. Yes.

Q. Now, did you have any trouble with the equipment at San Diego?

(Testimony of George Singleton.)

A. At San Diego the only trouble we had there, it was a lot below tidewater, and they had pumped a lot of sea sand in, and every time the tide would raise the water would come up, and every wagon that was pulled in off the highway would go right to the wagon bed. Finally we employed two caterpillar tractors, 60's or 80's, I think they called them, or 80 or 90 horse power, but the very largest tractors that could be found, and it took two of them tractors to pull each and every one of the wagons, one at a time, and just drug them right through, putting them in position to unload. And those wagons stood up under that treatment, pulling in, and coming off we had four tractors coming off. And it took me from along about 2:00 [160] or 3:00 o'clock in the afternoon until 11:00 o'clock that evening to get the wagons on the lot, and we wasn't going to show until the next afternoon, and all the men was all worn out, and I sent them to bed. And they began work at daylight, and the show was all up, with the exception of the stage. We had a big caterpillar pushing dirt around, or trying to level it, and it took them all afternoon to get that stage straightened out. They had a man there from Los Angeles, from the Fanchon & Marco office, looking at it. It took them all afternoon. And they was supposed to give a rehearsal. And they were able to give the show the next day.

(Testimony of George Singleton.)

Q. Did you have any trouble with the equipment at Santa Ana?

A. Well, we got in there late, and the top was all ready to go up along about 1:00 o'clock, I suppose, along about 1:00 o'clock. And the wagon that brought the side poles for the big top, was loaded with plank and side poles, and it was necessary to have them in order to raise the big top, that had a hot box that held it up, and finally it got in along about 3:00 o'clock, and we was about ready to open the doors. They could have opened the doors at 3:00 o'clock, or possibly earlier, but one side of the show was up, and the back end was ready, and they could open the doors at 3:00 o'clock. But for some reason, I couldn't say what it was, from the front they called the show off. They gave a [161] night performance. I sent the men to aid them, and came back and finished putting the short side grandstand at the front end up.

Q. What was the reason for being late in arriving at Santa Ana from San Diego?

A. It was a long haul, about a 5-mile haul, in the first place, from the lot down, and it was along, I should say, about 1:30 when we got to the train, and everything was off the lot then, and they had a bad place to load; it was uphill, and a curve in the track, and we had four horses and two elephants to load that heavy wagon, and finally I think they got a tractor to help load the train, and I went to bed about 2:00 o'clock.

(Testimony of George Singleton.)

Q. Had they left when you went to bed at 2:00 o'clock? A. No.

Q. What would you state was the cause of the late departure from San Diego?

A. I couldn't say whether it was the fault of the railroad company. I think it was loaded between 2:00 and 3:00 o'clock. But lots of times, whenever it is loaded, it is turned over to the railroad company, and will stand for two or three hours at a time.

The Court: He is surmising.

Mr. Combs: That is right.

Q. By Mr. Combs: Now, what was the cause, if you know, for the delay in getting the show up in Santa Ana? [162] A. I just stated.

Q. The causes you have stated?

A. Yes, about the wagon being late and we couldn't get the poles.

Q. Can you state how long that wagon with the hot box delayed you, if you know?

A. I couldn't say, because I didn't——

The Court: Well, that ends it, if you don't know.

Q. By Mr. Combs: You didn't observe it yourself? A. No, sir.

Q. After the night show in Santa Ana what occurred?

A. It was loaded to go off the lot, I guess, around midnight, and I rode this same wagon we had trouble with in the morning.

(Testimony of George Singleton.)

Q. What did you observe in that connection?

A. We got about two blocks from the train, and this same wagon had another hot box. I said to the driver, "I will go and get a blacksmith and take the wheel off," and I brought him down, and it took him about 30 or 40 minutes to take the wheel off.

Q. Did that delay the departure of the train any?

A. No, that didn't. There were others behind that.

Q. There were others behind that that were not loaded until after that was loaded? A. Yes.

Q. Did you get away in seasonable or early time, out of [163] Santa Ana, for Pasadena?

A. Well, I couldn't say, because after that wagon came I went to bed.

Q. When did you arrive in Pasadena?

A. It was along about noon, or between noon and 1:00 o'clock.

Q. At the railroad track?

A. Downtown, yes.

Q. How far was the lot from there?

A. About five miles.

Q. Is that a short or a long haul?

A. An unusually long haul.

Q. What was done when you arrived?

A. I got off and got into a taxi and went to the lot and surveyed the lot, and waited there about, fully two hours, before I got the wagons.

(Testimony of George Singleton.)

Q. You finally got the wagons?

A. I finally got one wagon, and then they commenced to come. Then along, I think when I was raising the big top, a fall became fouled, and when I hooked the elephant to it, the rope which fouled in the block, it cut the rope off. That was the lead line on the ground, the one that goes through the snatch block. And so I had to splice this rope.

Q. Did you do that personally?

A. Yes. And proceeded to finish raising the canvas on the big top. [164]

Q. Then what occurred, if anything?

A. Well, there was nothing particularly occurred after that. It was very late then, and it must have been after 2:00 o'clock. So I was ready for the doors along—we could have opened the doors at 3:30, because I had all the front side lumber grandstand back in there, and we could have admitted the people. I sent all my men to eat, and in the meantime Mr. Eagles came in to me and says, "The show is off. They called it off for the afternoon."

Q. About what time was that?

A. Along about 4:00 o'clock.

Q. Was the tent up at that time?

A. The tent was up, and the inspector had been in and inspected it and put his O. K. on it.

The Court: You say, "I spliced the rope." What was the condition of the rope where it separated?

(Testimony of George Singleton.)

A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.

The Court: Well, you have answered the question.

Q. By Mr. Combs: How long did that splicing of that rope take you? A. About 15 minutes.

Q. How long did the breaking of that rope delay the [165] putting up of the tent?

A. Not more than 25 minutes.

Q. About 25 minutes? A. Yes.

Q. After Pasadena you went to Pomona; is that correct? A. Yes, sir.

Q. Anything out of the ordinary or unusual occur there?

A. No, sir. We got in there early in the morning. And this overloading stuff—we had three of Mr. Eagles' trucks, which took this extra staging and poles and a lot of extra baggage and stuff that we didn't have room for on the wagons—they took that across country in the trucks, and got in there early, about 7:00 o'clock in the morning, and the show would have been ready at noon, but that stage was holding it back.

Q. You observed that stage being erected, I suppose? A. Yes.

Q. How long did it take, approximately, to erect that stage?

(Testimony of George Singleton.)

A. Well, never less than three hours, sometimes longer. It depends on what kind of ground they had.

Q. How long was the longest time you recall?

A. At any time I don't think it was over three and a half or four hours.

Q. Was that an unusually long time for the erection of the stage? [166]

A. 30 minutes—they should put it up in 30 minutes.

Q. Is that about the allotted time allowable for such a purpose in connection with good management of a circus? A. Yes.

Q. In connection with the labor involved in this circus, did you ever get a full crew of men?

A. No, sir.

Q. What was the most men you ever had in your department?

A. At one time I think it was 20 men, and I had them in the morning, and in the afternoon I had about 10 or 12. The labor agent would bring them in in the morning, and they would eat two or three meals, and in the evening they would be gone.

Q. Were they green or experienced help?

A. Well, I will tell you just who they were. He went down on Fifth Street, on Skidrow, and employed drunks and everything else up there that did not know what it was all about, and they wasn't in good condition to work, in the first place, and I told the labor agent——

(Testimony of George Singleton.)

The Court: Never mind. How many does the show require?

A. Ordinarily a show of that size, 60 men would be a full crew.

The Court: And you had how many?

A. At no time over 20 men. [167]

Q. By Mr. Combs: You employed some boys, of course; is that correct? A. For tickets, yes.

Q. And they were inexperienced?

A. They were Italians and Japs and so forth.

Q. I want to ask you a question. Were the wagons involved in this show in good condition and ready for use at the time they were delivered at Inglewood?

A. They was all picked out and loaded?

The Court: Answer the question.

A. Yes, sir; yes, sir, they were.

Q. By Mr. Combs: Is that also true of the tent rigging, blocks, falls and chairs?

A. I inspected them myself.

Q. The answer is yes? A. Yes, sir.

Q. Is that also true of the train flat decks and runs?

A. I couldn't say. That was out of my department.

Q. Did you inspect the wardrobe?

A. That was out of my department.

Q. Did you inspect the calliope?

A. It was out of my department.

(Testimony of George Singleton.)

The Court: You inspected everything in your department? A. Yes, sir.

The Court: And you have told us about it?

A. Yes, sir. [168]

The Court: Well, that ends it.

Mr. Combs: Just a moment. I think that is all.

Q. By Mr. Combs: Before you left Baldwin Park did you have any discussions or activities in connection with the making of a list of stuff necessary for the production of this circus?

A. Yes, I made a list out and gave it to Mr. Clawson, the stuff we were supposed to use.

Q. That was when you first went out there?

A. It was after I got the stuff picked out.

Q. About what day was that?

A. That was on Friday, the 19th.

Q. And you handed Clawson a list of the stuff you wanted at that time?

A. The stuff I was going to use, that belonged to the Hagenback-Wallace Shows.

Q. Do you know where that list is now?

A. Well, all I could say, Mr. Clawson—

Q. You don't know? A. I don't know.

Q. You never saw a copy of it?

A. No, sir.

Mr. Combs: That is all.

The Court: Cross examine. [169]

RALPH J. CLAWSON,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: Mr. Clawson, what is your present occupation?

A. With the Amusement Corporation of America.

Q. Is that a circus?

A. Circus and carnival combined.

Q. How long have you been engaged in the business of—or in what capacity are you with them?

A. Manager.

Q. Have you heretofore been engaged in the capacity of manager of circuses?

A. Yes, sir.

Q. For what length of time?

A. Since 1929.

Q. Relate your experience to the court in connection with your activities for circuses.

A. With circuses, I have been what they call a lot superintendent, four years, 24 hour man for the show. After that I became assistant manager of John Robinson's Circus: later assistant manager of Hagenback-Wallace; and then I became manager and assistant manger of the Ringling Show. Then I was transferred to Baldwin Park, [177] California, as manager of winter quarters of the Hagenback-Wallace Circus. At the present time I am with the Amusement Corporation of America.

(Testimony of Ralph J. Clawson.)

The Court: What is your present title and employment? A. Manager.

The Court: For whom?

A. Amusement Corporation of America.

The Court: Proceed.

Q. By Mr. Combs: Now, did you have some occasion to contact Fanchon & Marco, or their representative, respecting the Great American Circus?

A. I did.

Q. When was that, first?

A. That was along in the first part of May, I would say, in 1939.

Q. Whom did you contact on that occasion?

A. Charles Nelson.

Q. What was the occasion?

A. Trying to rent or lease property from them.

Q. Hagenbeck-Wallace? A. Yes.

Q. Where did you first contact him?

A. In the office on Sunset Boulevard.

Q. Of Fanchon & Marco? A. Yes, sir.

Q. Who was present? [178]

A. The first few visits we was by ourselves.

Q. What was said by you and what was said by Mr. Nelson?

A. I told him we had properties for rent, consisting of elephants and circus equipment, all excepting canvas, and Mr. Nelson said they would probably be in a position to rent some of this stuff the coming year for a circus, and so I told him I would make him a deal any time he was willing to

(Testimony of Ralph J. Clawson.)

go ahead. He called me back one day and said, "Go ahead and make up a list."

Q. How long was that—

A. From two to three weeks, I would say; two weeks, I would say.

Q. What conversation did you have with him at that time?

A. Well, we talked mostly about equipment, how big a show he would want, and what equipment he would need, and so forth.

Q. Just the two of you present? A. Yes.

Q. Where did the conversation take place?

A. That was on Sunset Boulevard also.

Q. And that terminated without any definite arrangement being made? A. Yes.

Q. Did you have any conversation after that?

A. Mr. Daillard was the next.

Q. Where was that? [179]

A. At Fanchon & Marco's office.

Q. About how long before the date of the contract involved in this case?

A. I would say a week, approximately.

Q. That was, then, approximately the 15th of May, 1939? A. Somewhere along in there.

Q. Who was present at that time?

A. Mr. Daillard was all, that day.

Q. Just he and you? A. And Mr. Nelson.

Q. What was the conversation?

A. We was trying to arrange a show, and they wanted a 10-car show, but they wanted seating

(Testimony of Ralph J. Clawson.)

capacity of 5,000 seats. And we explained to them that it would be impossible for them to load and carry that much equipment on 10 cars. So they decided that they would take their people and feed their people at hotels or cafeterias, and they wouldn't need the cook house, so that would eliminate a lot of train space and wagon space. Later on they decided they would have to have a cook house and they would feed them on the lot. So it ended that day. And the next morning Mr. Bren—I met him, he came into the picture, and we started to deal then. The New York office did most of it through long distance telephone.

Q. You had no authority at that time to make a contract with Hagenbeck-Wallace, did you? [180]

A. No, not with the consent of the New York office.

Q. In fact, in this case the contract did come out of the New York office on the 22nd of May?

A. Yes, the 22nd or 23rd.

Q. When it was executed? A. Yes.

Q. You had that conversation about the 15th, and then you had a conversation the next day with some representative of Fanchon & Marco?

A. Yes, we had conferences every day, two or three times a day.

Q. Right up to the time of the delivery of the stuff at Inglewood? A. Yes.

Q. Who were those conferences mostly between, Mr. Clawson?

(Testimony of Ralph J. Clawson.)

A. I had never met Mr. Marco until we started to deal with the New York office, and then he came in.

Q. What was the occasion for your meeting Marco?

A. Mr. Marco said that he thought I didn't want to rent the property and I was holding up the contract.

Q. When did this take place?

A. I think that was on a Wednesday before we started to work on Friday.

Q. That was about—

A. This was a couple of days before the contract. [181] I asked to meet Mr. Marco, and we had a meeting in his office, and I told him that we would wire the New York office saying that I approved of it. Mr. Marco sent the wire out of his office. And then later on in the day they started further calls to New York, and I think the contract was executed and made from there, or with the representatives in New York, and they telephoned me from New York what equipment I should give them.

Q. Did they give you in their telephone conversation a list of the equipment contained in the contract?

A. They gave me a list, and the next morning they came through with a wire confirming what I should give, and the contract came through a couple of days later.

(Testimony of Ralph J. Clawson.)

Q. What were you doing out at Baldwin Park during this time?

A. I had charge of the winter quarters, looking after rental of the property and trying to secure a livelihood for us.

Q. Was anyone out there doing anything with relation to this Great American Circus?

A. At that time?

Q. Yes. A. Mr. Eagles was there.

Q. From about the 19th of May on?

A. I would say the 19th, yes, and Mr. Daillard, both was there. They would come early in the morning and stay [182] late at night.

Q. What did they do?

A. They selected property, and we would look over equipment, and we would decide on one wagon, and of course we would figure the space, and we was all working together. Then we changed the wagon lists around, and spent considerable time figuring what wagons we would have to have to hold the equipment.

Q. And you finally delivered six or seven wagons in excess of the number called for in the contract?

A. Yes. I think, if I remember right, it was nine wagons over. At the last moment Mr. Daillard—previous to that Mr. Daillard had hired wagons from a firm named Potter, in Alhambra, what was known as the Springer Wagon, a wagon for the light plant and two canvas wagons, which was formerly the property of Hagenback-Wallace, and this

(Testimony of Ralph J. Clawson.)

party out there bought the property.

Q. It didn't belong to you at that time?

A. No. So the day before we was supposed to leave Mr. Potter cancelled his agreement with Mr. Daillard and me also. So we had to get extra wagons and rearrange our whole load then. So we gave them additional wagons.

Q. You did that without authorization from New York, on your own motion?

A. Yes, on my own motion.

Q. And on their request? [183]

A. On their request.

Q. And that amounted to approximately nine additional wagons? A. Yes.

Q. The contract did not call for a cook house?

A. No.

Q. And you just gave them that of your own motion?

A. Yes, they wanted to take it, like the ladders, the swinging ladders; I had no contract for that.

Q. At their request?

A. Yes, on the request of Mr. Daillard and Mr. Eagles.

Q. Now then, you did a lot of work around there during that week?

A. Night and day, yes, sir.

Q. To get this stuff in condition?

A. That is right.

Q. Did you do any painting of the wagons?

A. Yes.

(Testimony of Ralph J. Clawson.)

Q. You painted in "Great American Circus", instead of whatever was on there before?

A. We lettered all the wagons "Great American Circus," and we hired a company in Baldwin Park to come up and spray the wagons and letter them "Great American Circus." We also painted the train, the cars, which said Hagenback & Wallace. We went over it for them in color. The color was selected by Mr. Eagles. [184]

Q. You spent a considerable sum of money in that connection?

A. I would say on paint alone we run considerably better than \$500.

Q. Now, you had an opportunity to examine these wagons yourself, did you not? A. Yes.

Q. And you knew of their condition?

A. Yes.

Q. With respect to the same, and as to the 20 wagons that were contained or referred to in the contract, when they were delivered over at Inglewood, California, were they in good condition and ready for use?

A. They was in usable condition and could be used, yes.

Q. And they were used wagons?

A. They were used wagons, yes, had been on the road. Some of the wagons I helped build myself.

Q. Was that also true of the condition of the tent rigging, blocks, falls and chairs?

(Testimony of Ralph J. Clawson.)

A. It was in good condition, but had been used.

Q. Was that also true of the train flat decks and runs?

A. There was one or two places on top of one of the decks was a little bit bad, so Mr. Daillard and I, we looked it over out at Baldwin Park, and he said, "Well, we will get that over in Inglewood," and we fixed that up down at San Diego, and when the report on the train come from the [185] Pacific Electric or the Santa Fe, they come out and give us a clearance on it.

Q. Inspected it and tested it for operation?

A. Yes. And I am pretty sure Mr. Daillard was there, because he called me—I was in Mr. Garrett's office downtown, and Mr. Daillard telephoned in to me that the inspectors would like to have me out there when they made the inspection.

Q. What was the condition of the calliope when it left Baldwin Park?

A. I think it was usable.

Q. What occurred with relation to the calliope when it was attempted to be moved from the wagon onto the bandstand?

A. It dropped. We had property boys that dropped the calliope.

Q. After that had been taken off of the train at Inglewood?

A. Yes. This calliope rode in a large wagon, and the back end had a large endgate, and they

(Testimony of Ralph J. Clawson.)

had these boys there, and they put them on unloading this, and they dropped this piece of equipment.

Q. And it did not play for the rest of the term of the circus? A. No.

Q. Did you know anything about the elephant howdahs?

A. Yes. We had altogether at Baldwin Park 12 howdahs, [186] and there was four or five of them over at M. G. M. Studio, and they was making a picture over there—I think the name was “Lady of the Tropics,” with Hedy Lamarr. So after the howdahs went over there, Mr. Rogers, the art director, decided that they would build their own howdahs, something more elaborate, and so all the howdahs was laying over there, and the elephants that Mr. Eagles and Mr. Daillard selected did not carry howdahs anyway.

Q. Was anything ever said about these elephant howdahs?

A. They asked for them, said just have them around in the back here, but they wanted the larger elephants.

Q. Did they ever ask that they be delivered?

A. Yes.

Q. When was that?

A. I believe in Inglewood, and Mr. Eagles said, “I will go out and pick them up in one of my trucks, at the studio.”

Q. And as far as you were concerned, you were not directed to get those howdahs?

(Testimony of Ralph J. Clawson.)

A. By nobody, no, sir.

Q. How many howdahs were included in that contract?

A. Well, you see—I will explain that to you. We have 23 elephants, and first Mr. Nelson selected, he selected the elephants, and said he wanted those elephants, and we had to give him smaller elephants to go in our supposed number, so he selected those elephants, and you have to break an elephant to carry a howdah, and Mr. Daillard [187] was out there and figured, “We will have to have a lot of power around the show, so we had better take those bigger elephants, and just so we have blankets for them it will be all that is necessary.”

Q. They would not carry howdahs?

A. No.

Q. They were not trained to do that?

A. No.

Q. Did you have an opportunity to examine the wardrobe? A. I did, yes.

Q. What was its condition? A. Usable.

Q. Usable? A. Yes.

Q. What was the condition of the sleeping cars?

A. The sleeping cars had mattresses, and they was clean and in good condition.

Q. But respecting the sheets, pillow cases and curtains, have you anything to relate to the court in that connection?

(Testimony of Ralph J. Clawson.)

A. They wasn't fully equipped on those, not with sheets and blankets, which wasn't customary, according to our contract; they wasn't supposed to be equipped.

Q. Were you supposed to do that? A. No.

Q. In the show business is it customary to rent the cars equipped with blankets, sheets and pillow cases? [188]

A. No, that is not the custom. I am going to illustrate. Last week I rented a car from Del McCoy, and all we had in it was just a mattress, and we never have blankets or sheets or pillow cases. We have the pillows, but not the—we furnish pillows and mattresses only.

Q. And in the circus business that is generally understood? A. Yes, sir.

Q. You arrived with all your equipment at Inglewod; is that correct? A. Yes.

Q. Of course, exclusive of the elephant howdahs referred to?

A. I think that is what was missing.

Q. Nothing was said about that at Inglewood?

A. Not a word.

Q. Now then, what occurred when you arrived there, as far as you were concerned?

A. After the equipment arrived there that morning I wired New York for advice, owing to the terms of the contract—I didn't pay much attention to the erecting of the equipment.

Q. It was all erected, however?

(Testimony of Ralph J. Clawson.)

A. Yes, all put up there. So they told me I was supposed to get another payment down at Inglewood.

Q. How much? [189] A. \$2500.

Q. Did you get it? A. I did not.

Q. Did you have any conversation with Marco about it? A. Mr. Marco and Mr. Daillard.

Q. What was that conversation?

A. I asked them, after the opening performance, about the money, so Mr. Marco says, "Yes, we will go out to the wagon and get it." So we started, and him and Mr. Daillard went in conference, and they said, "We will give it to you in San Diego."

Q. Was there any further conversation about it then? A. Not that night.

Q. Did you have any conversation at the same time about the notes?

A. The notes, they said, "Yes, we will give you the notes. Come in the wagon and we will give them to you when we get to San Diego in the morning."

Q. What else transpired prior to the time you left Inglewood, respecting you and Fanchon & Marco?

A. Mr. Eagles and Mr. Daillard, they came over and asked me to help Mr. Nelson put the performance together.

Q. Do you know what the occasion for that was?

A. They was having some trouble getting the acts in the big show.

(Testimony of Ralph J. Clawson.)

Q. That was in the matter of the production of the show [190] itself?

A. The performance, the production, yes.

Q. Will you relate just what that trouble was?

A. Mr. Marco came to me and said, "I have had everybody else around here this morning trying to get me a rehearsal," and he said, "Can you get me a rehearsal," and I said, "I will be very glad to help you." So we started in and got a skeleton rehearsal, about 35 or 40 minutes. And then Mr. Marco and I personally rehearsed the balance, with his suggestions. So he said, "I would like to have you go with us and help us put this performance on each day, the act."

Q. What did you say to that?

A. I said, "All right, I will try to make it."

Q. Was anything said respecting your salary?

A. Yes. He said they would give me \$50 a week.

Q. In what capacity?

A. Equestrian director.

Q. What did you say then?

A. I told him that I was on the pay roll of the people in New York at that time, and Mr. Eagles said it was all right, "You will have additional expense, anyway," so I said I would accept it.

Q. From that time on you acted as ringmaster?

A. That is right.

Q. Until it closed? A. Yes. [191]

Q. Did you receive your payments?

A. I did.

(Testimony of Ralph J. Clawson.)

Q. \$50?

A. Yes, sir, that is, right from Baldwin Park.

Q. From Roy Wolff? A. The treasurer.

Q. The treasurer? A. Yes.

Q. After the show was closed, in Baldwin Park?

A. Yes.

Q. As soon as you undertook the job as ring-master, the performance went off in Inglewood?

A. Yes, sir.

Q. And you went to San Diego? A. Yes.

Q. And what transpired there?

A. At San Diego one of the conditions—I remember the road was in very bad condition, and Mr. Eagles went ahead with the train, and I drove my car through, and I think I got in town at 6:00 or 7:00 o'clock at night, just after the day they closed in Inglewood, and there was a lot of sand there, and so Paul said, "We are going to work until it gets good and dark and put the show up in the morning."

Q. Was that done? A. That was done.

Q. Did you see Mr. Marco down there? [192]

A. I see Mr. Marco the following day, yes.

Q. Did you have any conversation respecting the \$2500 and the four notes? A. Yes.

Q. What was that?

A. Mr. Marco—we was sitting in the seat together, and he said, "Yes, we are going to give it to you." He said, "Do you know anything about our contract, how far up north we are going?" And I said I had no information of this contract. And

(Testimony of Ralph J. Clawson.)

he said, "We are not very well pleased with some of the contracts we have made up north." I guess he was referring to the northern part of the state. He said, "We practically give the show away up there some places," and he said, "I doubt if this thing will ever pay. We can't take in any money under these conditions." And so I asked for my \$2500 again, and he told me, he says, "We will give it to you," and, well, I didn't get it.

Q. Did he say when?

A. He didn't say, Mr. Marco, until Pasadena. The rest of my conversations was always with Mr. Daillard. He was supposed to be the executive chief.

Q. The next conversation, where was that, with Daillard?

A. That was in Santa Ana.

Q. When?

A. Following after San Diego.

Q. What was said? [193]

A. I said, "I must have that money to send in to New York." And so Mr. Daillard said, "Well, we have spent quite a bit of extra money repairing some of this equipment," and he said, "We will take that out of the first payment." I said I wasn't promising to do that. So at Pasadena, being a holiday, things was more or less confused over there, and Mr. Marco was there in the afternoon, and I think I talked to him a little while.

Q. At Pasadena?

A. At Pasadena.

Q. Then that Daillard conversation that you just related was at Santa Ana, or, first, the Marco one at San Diego?

(Testimony of Ralph J. Clawson.)

A. San Diego, Daillard, yes.

Q. And Pasadena?

A. And at Santa Ana I talked to Mr. Daillard about the money, but I didn't ask Mr. Marco for it at Pasadena, and the next day the show closed.

Q. You had no conversation at Pasadena?

A. No.

Q. Did you say anything at Pomona?

A. I asked Mr. Daillard for it three times during the morning and afternoon performances.

Q. What did he say?

A. He said, "We are going to straighten this up right away in New York." [194]

Q. That was the last conversation?

A. I wired our New York office for information that afternoon, and that night the show closed.

Q. Did you ever make any further demand on—

A. I went back to see Mr. Marco at his office the next day after the show closed, and talked to him about it some.

Q. What was said by you and by him?

A. I asked him, "What are we going to do about the payments, Mr. Marco?" And he says, "I don't know." He says, "The show is not on the road," and we had a lot of trouble, and there was some talk of the show reorganizing, and of course it never materialized.

Q. Did he offer you a job if they reorganized?

A. Yes, he talked—said he would like to have me.

(Testimony of Ralph J. Clawson.)

Q. The show went off on schedule at San Diego.

A. Yes.

Q. And at Santa Ana it was delayed, or did you miss the matinee?

A. At Santa Ana I think the matinee was called off by the management.

Q. Did you have occasion to observe the reason for the calling off of that afternoon performance?

A. I didn't, really. Over there it seemed to be a delay about getting the equipment up on the lot. They was moving around rather slow and seemed short-handed. I would say that was the cause of it.

[195]

Q. What can you state about the experience of the help?

A. Well, the heads of departments was very capable men.

Q. How about the general rank and file of the workers?

A. Well, they was a very poor class of men, much more unusual than you see around a circus. We most generally hire young boys, around about 25 or 30, and they do all right, and we had men more like 50 or 60 years of age, and people were going and coming over there——

Q. What about the condition as to loading of the circus? Did you have sufficient wagons to handle all equipment?

A. I don't think they did until they took on extra equipment in Inglewood.

(Testimony of Ralph J. Clawson.)

Q. How much extra equipment did you take on there?

A. We had to make a whole wagon complete for the Fanchonettes. They have got a big involved act. I think there were 24 girls, and every one carried a lot of stuff, and the stage came on there, and we had all the trunks that come in for those big acts, that never come to Baldwin Park. Most all that was added.

Q. Did that result in overloading?

A. To a certain extent it did, yes.

Q. In Pasadena did you have occasion to observe the working of the main fall there?

A. I noticed they got the line fouled once or twice there. [196]

Q. There were elephants pulling that line?

A. They pulled the cable. The cable goes through the block, and sometimes the cable will foul.

Q. Has an elephant sufficient strength or power to pull a rope like that in two?

A. An elephant don't know his strength when he starts to pull.

Q. You believe they could pull the main fall in two, though?

A. Yes, I believe he could, very easily.

The Court: You say an elephant is the motive power?

A. That pulls the fall up, your Honor?

The Court: And the rope got fouled?

A. It got fouled in a block.

(Testimony of Ralph J. Clawson.)

The Court: Where did it tear, between the elephant and where?

A. It broke once right on the No. 1 bail ring, and going through the block there it got fouled.

The Court: And broke right at the block?

A. I think so. It is pretty hard to tell, but that is the way I think. And they tie that right onto the bail ring.

Q. By Mr. Combs: That was chained on after the fall broke at Pasadena?

A. Yes.

The Court: Are you through? [197]

Mr. Combs: Almost. Just a moment, if your Honor please.

Q. By Mr. Combs: Then you went to Pomona, after Pasadena? A. Yes.

Q. Did the show go on on schedule there?

A. I didn't keep the time on the performances, but I think the performance started along about 3:00 o'clock. I wouldn't want to say.

Q. It went on more or less on schedule?

A. Yes, sir.

Q. You are often 20 minutes to a half hour late, aren't you?

A. On some days. Of course it doesn't occur every day, but it happens. The first part of the season you are more or less late in arriving and getting your equipment in shape.

Q. And equipment, that is to say, circus wagons, quite frequently have hot boxes on the road?

(Testimony of Ralph J. Clawson.)

A. In recent years it has. All this equipment was built back along to be drawn by horses, all old iron-tired wagons and boxings and axles in there, and when you use too much power, in place of going at four miles an hour, probably the trucks will run up to ten or twelve miles.

Q. Or maybe more than that?

A. Yes, maybe. With the Great American Show we [198] didn't have our own drivers. They hired local trucks.

Q. Did they run faster than the four or five miles an hour that such wagons will take?

A. Yes, considerable. They probably run 15 or 20 miles.

Q. In this Great American Circus?

A. Yes. I stopped them several times. I think Mr. Daillard and I were standing out there, and stopped two drivers for going out of the lot too fast.

Q. And that would result in hot boxes?

A. Yes, sir. Of course, that was a long haul. It is quite frequent on a show as big as the Ringling Show, to have one or two hot boxes a day. If any of them get hot, we call a greaser, and they go around and grease those wagons, and sometimes they may skip a wheel or something, and whenever you get the motive power to it you always have this trouble.

Q. At Pomona did there occur anything with relation to the Actors' Federation of Labor union, that you observed there?

(Testimony of Ralph J. Clawson.)

A. Yes. A representative of the Actors' Association pulled out the Fanchonette out of the show, and I think it was Walter Guice, and he blows the organization and his act, and I am pretty sure the band was union and said they would have to go out also.

Q. By "pulling out" you mean go on a strike?

A. No, just pull out from working. We wasn't union. [199] We wasn't an organized show.

Q. That actually occurred within your knowledge at Pomona? A. Yes.

Q. So that you lost Guice, the band and the Fanchonettes?

A. We would have lost them if we had went on at all.

Q. And did you go back to Baldwin Park the next day? A. That is right.

Q. Respecting the runs on the flat cars, were they in good or bad condition?

A. The runs was in good condition.

Q. Do you know that of your own knowledge?

A. I know that of my own knowledge, because they was brand new runs made in 1938, 38 inches wide. It was very good equipment.

Q. Did you observe the fact that the pole wagon jumped the runs in Santa Ana?

A. No. I wasn't there.

Q. When a car or wagon jumps the runs, in circus parlance, what does that mean?

(Testimony of Ralph J. Clawson.)

A. That means sometimes that your deck poler, the wagon itself, in other words, it is fastened to the wagon, and a man walks along like this and guides this pole, and sometimes he might get it to the edge, and when he makes a stop, he steps to one side, and the pole might jerk a little. [200]

Q. And it just runs off the runs?

A. Yes. It is not very often that it happens. And this boy is apt to step aside, and one wheel will go off the run, because it can run off. [201]

Cross Examination

Q. What condition would you say this equipment was in?

A. I would say it was in usable condition, all used equipment, though.

Q. Would you say it was in good condition?

A. Usable.

Q. I am asking you if you think it was in good condition.

A. I think it was good enough to use, yes.

Q. You would say it was in good condition and ready for use?

A. It can be used. It is not new property.

Q. I would like to have you answer me specifically on that question. I am asking you if, in your opinion, it was in good condition and ready for use?

A. I would say the property was all in shape so it [207] could be used.

(Testimony of Ralph J. Clawson.)

Q. Will you answer that yes or no, please?

The Court: Just answer the question that he is asking.

Q. By Mr. Schaefer: Did you consider the equipment in good condition and ready for use?

A. I do, yes. It could be used. That is as far as I can tell. It could be used. As far as good condition, I don't know just how you mean that.

Q. You are familiar with circus equipment, aren't you? A. I am, yes.

Q. And you knew the purpose for which the defendant was going to use the equipment, didn't you?

A. That is right.

Q. And in your opinion it was in good condition for that purpose?

A. It could be used for circus purposes.

Q. It was in good condition for that purpose?

A. It was in usable condition for that purpose.

[208]

Q. Now, when did you begin working on that equipment? A. We started——

Q. The day of the week.

A. I think it would be about a Thursday.

Q. Thursday of the week preceding; is that right? A. That is right.

Q. What else did you do from Thursday until the time that equipment moved into Inglewood?

A. We painted the wagons and fixed up corner chains and ropes, and whatever we could do on it.

Q. Tell me what else you did, if anything.

(Testimony of Ralph J. Clawson.)

A. We got—we brought up a cook house wagon, equipped with boilers and general stuff, painted the equipment, painted the poles.

Q. Anything else you did besides the cook house and the painting of the equipment?

A. Yes. We had the wardrobe cleaned, sent it to the cleaners out at El Monte, I think. We fixed up electrical equipment, and had our men out there working night and day.

Q. What electrical equipment?

A. Cables and lines, etc.

Q. The defendant didn't take the electrical equipment provided for in the contract?

A. No, they didn't take that. [210]

Q. What electrical equipment was there that they took, that you did work on?

A. The cables and falls and stuff like that.

Q. Any other work that you did?

A. Yes. We painted the wagons. I have stated that before. We fixed all the wagons underneath, the gears; we straightened the gears up on the wagons and tightened all the connecting rods which was necessary.

Q. How many men were employed for that purpose or working on it?

A. We had, I would say, out there, roughly, probably a hundred.

Q. Working on the equipment?

A. Yes, working on the equipment.

Q. Getting it in shape? A. Yes, sir.

(Testimony of Ralph J. Clawson.)

Q. Was there any work done on the runs?

A. Yes, the runs, the boards on the sides, was tightened up to pull them together. The runs was in good condition before.

Q. What about the cars? A. Which cars?

Q. Flat cars. What was the condition of the decks?

A. The decking wasn't in bad shape. There was probably one or two places that was weak, but as a whole it was in good condition. [211]

Q. They were completely re-decked, weren't they, some of them, at San Diego?

A. No, they was not.

Q. How many cars?

A. I couldn't tell you what they did on that.

Q. You say the sleeping cars were not equipped with blankets or sheets or pillow cases?

A. Not complete. We had some.

Q. You say the custom in that regard is to furnish them with mattresses only?

A. Yes, and built-in berths.

Q. But you do furnish them with mattresses?

A. Yes.

Q. Did you not have a conversation with Mr. Daillard and Mr. Eagles, at which time they asked you about the berth equipment?

A. At winter quarters I told them—Mr. Daillard said we was supposed to equip the cars complete, and so I told him I didn't think so, because we didn't have the equipment. I gave them a list of what

(Testimony of Ralph J. Clawson.)

equipment we had, so he said, "We ought to go get hold of some stuff anyway, and we will straighten this out later." So I didn't get any.

Q. Didn't you tell him you would try to get some? A. No, sir.

Q. Didn't you attempt to do so? [212]

A. Mr. Eagles called up the United Tent & Awning Company, and they said, "Who do you want this charged to?"

Q. Isn't it a fact that you called the United Tent & Awning Company first and attempted to obtain some blankets? A. No, sir, I did not.

Q. On no occasion? A. No, sir.

Q. Did you tell Mr. Daillard to procure the equipment? A. I did not, no, sir.

Q. Did you have elephant howdahs out there?

A. They had five at M. G. M., four or five, and we had eight in the winter quarters left.

Q. Were those usable?

A. Every one of them, yes. [213]

MARCO WOLFF,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination [219]

DEFENDANT'S EXHIBIT No. 15

Western Union

TWS MW PDI—Mr. John Ringling North
Ritz-Carlton Hotel
New York, N. Y.

Strongly recommend rental to Fanchon & Marco. They are playing under some well known charity auspices out here. I have tried to liquidate our property out here and so far have not been successful. This rental will show us a good revenue as you know we are at a tremendous expense now. We will also have elephants, wagons, and cars for other rentals on the Coast. I worked out the price of sixteen hundred a week with Mr. Nelson, Fanchon and Marco's representative. Their admission prices are small, twenty-five and fifty a day, and they are really not in a position to pay any more. Was informed late this afternoon that they can get equipment from Rochester, Indiana to play the dates. Kindly advise me your opinion at once as I do not think we should lose this business. Regards.

RALPH CLAWSON.

[Endorsed]: For identification Deft. Exhibit No. 15. Marked Nov. 27, 1940.

(Testimony of Marco Wolff.)

A. Daillard told me that the calliope didn't work, and he said the rigging was in bad shape, the seats were in bad shape, the wagons needed a lot of work done to them, the cars on the trains needed a lot of work done. And he took me around and showed me—Daillard took me and showed me a lot of the bleacher seats without any backs on the back of them, and there was one entire section without any cross pieces at all. Later my insurance agent saw these seats and the equipment, and told me that I couldn't possibly get insurance for it.

The Court: Whatever the insurance agent told him a few days later on wouldn't be material. You can't do that. [231]

The Witness: This was at the time I was out there.

The Court: No. Just this conversation between you and Daillard and Clawson. Clawson was present when this conversation was had between you and Daillard?

A. Yes. Clawson told me that he would get the calliope fixed right away, and that the additional cross pieces for the seats would come out, and the elephant howdahs were not there, and he said he would get us the elephant howdahs right away. He said he didn't have any money and he couldn't fix up the railroad cars, that his credit wasn't good for that, and he asked us to advance the money for that.

The Court: Asked you?

A. Yes. And he suggested that we could deduct

(Testimony of Marco Wolff.)

from our first payment any advances that we might have to make. There were quite a few purchases that had to be made for rigging and hardware and rope, and he said he would be ready with the show. But our rehearsal, which was for 9:00 o'clock originally, and then 10:00 o'clock, and then 11:00 o'clock, and 2:00 o'clock, and 5:00 o'clock, and 8:00 o'clock at night, we still had no rehearsal. The equipment wasn't ready the entire first day. The tent was up, and so I told the performers the following day to have rehearsal in the morning, so that we would have a rehearsal before the matinee went on, but again they were busy trying to make repairs on rigging. I know one of the performers, Tiny Kline, refused to go up in the rigging with her ring [232] act, because she said she would break her neck. And there were continual postponements, which I reported continuously to Clawson, and finally, about 30 minutes before we had to open the tent for the customers, we were able to just run through the opening part, and just walk through. We couldn't actually go through the rehearsal properly. The calliope, which is a very important part of the musical part of a circus, was never usable. And we had to let a number of people sit right off the main track without seats to sit on. I complained to Clawson about it, and he said he would get it in shape. And they had a 3-day stand in San Diego, with a day in between, and he thought he could get it in shape for San Diego. And I told him I wouldn't pay him until he would get it in shape. [233]

(Testimony of Marco Wolff.)

A. I told Clawson that I was very dissatisfied with the equipment, that it had taken us a day and a half to get it up, that we had spent over a thousand dollars already in putting things in shape that he was supposed to spend in order to deliver it to us in good shape, that much of the equipment had not been used, that some of the performers had refused to go up on the rigging because it was unsafe, and they didn't wish to risk their necks. I told him that we were tremendously involved with sponsors. I even told him about our deal with the Chief of Police in San Francisco. And I told him if we couldn't do any better, if it took us a day and a half to get the show up, I didn't see how we could make our next move, although I had left a day open between Inglewood and San Diego, but beyond San Diego I didn't see how we could possibly put our circus on safely and meet our performances, if Mr. Daillard or Eagles would come and ask for another purchase order or for some cash. And Roy Wolff—we had to send to our studio several times and get a large check cashed, and he would have to be spending out tens and twenties and thirties and hundreds.

[237]

Cross Examination

Q. Then you sent a telegram to your sponsors?

A. Yes, sir.

Q. And that telegram is contained in this Exhibit 14, reading as follows: "Kramer of American Federation of Actors has called out acts which are

(Testimony of Marco Wolff.)

members of his organization. This and other labor difficulties which have caused us to miss matinee performances in Santa Ana and Pasadena necessitates us advising you with regret we will be unable to fulfill contract for circus performance. One of our men will contact you later. Fanchon & Marco, Inc.”

You sent that to these named sponsors?

A. Yes, sir. [264]

MRS. PATTY HACKETT,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Schaefer: Mrs. Hackett, what is your business or occupation?

A. I have charge of the Fanchonettes and am one of them.

Q. Mrs. Hackett, do you recall the Great American Circus in May of 1939? A. I do.

Q. Were you in that show? A. Yes, I was.

Q. Did you take part in the Fanchonette show of that circus? A. Yes.

Q. Did you travel with the circus? A. I did.

Q. In the sleeping cars? A. I did.

Q. Did you have occasion to go into the sleeping cars of the circus? A. Yes.

Q. When did you first go in, at what time or place? A. In Inglewood, where we opened.

(Testimony of Mrs. Patty Hackett.)

Q. Will you tell us the condition of the sleeping car [275] you occupied?

A. Yes. The berths that we slept in had no curtains, and there were no springs on the berths. There were just wooden boards, with straw mattresses on them, and they had evidently been in storage for quite some time, because there were lumps in them.

Mr. Combs: The statement that they had evidently been in storage for some time was a conclusion of the witness.

The Court: Well, she says there were lumps.

The Witness: I came to that conclusion because of the——

The Court: Answer the question.

Q. By Mr. Schaefer: Just state what you saw. What was the condition of the mattresses?

A. They were in very poor condition.

The Court: That isn't it.

Q. By Mr. Schaefer: Tell us whether they were smooth or lumpy?

A. They were lumpy, and they were all downs and ups, and you couldn't sleep on them. It was practically impossible to.

Q. Were there any toilet facilities.

A. Yes, and they were in very bad condition.

Mr. Schaefer: I will stipulate that that may go out. When you say "in very bad condition" you are testifying to your conclusion. And the court doesn't know what a bad condition may mean. [276]

(Testimony of Mrs. Patty Hackett.)

Q. By Mr. Schaefer: Will you tell us what the condition was? Was there running water or not, and were they clean?

A. There wasn't running water, and the lavatory, the toilet in there could not be flushed, because of that reason, and it had been used, and we could not use it afterwards, because the refuse was still in there.

Q. Did you sleep in the car? A. I tried to.

Q. Is there anything else you can tell with respect to the equipment? A. Yes.

The Court: That is too general.

Q. By Mr. Schaefer: First, tell me what equipment you are speaking about—in the sleeping car?

A. In the sleeping car.

Q. Proceed.

A. Yes. The windows wouldn't stay open. We had to prop them open to get air, prop them open with a Coca Cola bottle.

Q. Anything further with respect to the nature of the equipment? A. I believe not.

Q. The sleeping car or otherwise? How many girls were in the car with you?

A. There were 20. [277]

Q. Did you examine all the berths, or those occupied by the Fanchonettes?

A. I was in several of them, yes.

Q. Were they all in the same general condition?

The Court: What was the condition of the balance of them?

(Testimony of Mrs. Patty Hackett.)

A. They were all practically the same. I didn't examine them minutely, but they seemed to be all the same.

Mr. Schaefer: Any cross examination?

Cross Examination

Q. By Mr. Combs: When did you arrive at Inglewood?

A. I don't remember the exact date.

Q. Was it the day of the first performance?

A. Yes, I believe so, or the date previous to the opening day.

Q. The cars, however, were in Inglewood when you arrived? A. I don't know.

Q. They were in Inglewood when you first saw them, were they not? A. Yes.

Mr. Combs: That is all.

The Court: Call your next witness.

Mr. Schaefer: I have, your Honor, six additional witnesses who were in the Fanchonettes, whose evidence will [278] be cumulative, and I take it your Honor does not care to have that produced?

The Court: Do you concede that these witnesses would testify the same way?

Mr. Combs: Substantially as this young lady did.

Mr. Schaefer: I have here Miss Lorraine Roberts, Miss Virginia Perkins, Miss Mary Carr, Miss Ruth Barr, Mrs. D. G. Douglass and Mrs. Ann Weber, who will testify in the same manner.

Mr. Combs: If called, they would testify substantially as this witness did.

The Court: Yes. Call the next witness. [279]

TINY KLINE,

called as a witness in behalf of defendant, being first duly sworn, testified as follows: [280]

Direct Examination

A. The mattress was lumpy and very thin. And the runners in the aisle at this particular place in front of my berth had a big hole about maybe two feet broken out, and you could stumble in it easy, and it was unsanitary.

Mr. Combs: That is a conclusion of the witness.

The Court: Proceed.

A. And one toilet assigned to the ladies was just a toilet, with no running water, and the wash basin in it was so close that it would only hold one person. While one girl would be washing in there, no one could utilize the toilet, and that, of course, was an inconvenience to everybody.

Q. By Mr. Schaefer: Was there running water?

A. In the wash basin, yes.

The Court: Was there water to flush the toilet?

A. No. And the wash basin, which was really supposed to be for the girls to make their toilet, was utilized by the porters to shine the shoes, and therefore we had only [285] one toilet and wash room, and it was very bad. [286]

WAYNE DAILLARD,

called as a witness on behalf of defendant, being first duly sworn, testified as follows: [288]

Direct Examination

Q. By Mr. Schaefer: What did you see?

A. I saw splintered decking, splintered timber.

The Court: Tell us what you saw.

A. I saw the decks splintered, with holes in them, places that were worn.

Q. By Mr. Schaefer: Were they repaired at San Diego? A. Yes.

Q. Did you discuss this with Mr. Clawson?

A. Yes. I got the report on that from Mr. Beeson, I believe his name was, and also from Mr. Eagles, and I went down and looked at them, and I called it to Mr. Clawson's attention. At that point Mr. Clawson had refused to do any more at San Diego, as he said he had no authority to spend any money until the situation had been worked out. I said, "Well, I am going to have the train decks repaired of necessity, and I am going to hold Hagenback-Wallace for it."

Q. You said that to Mr. Clawson?

A. Mr. Clawson.

Q. At San Diego? A. At San Diego. [298]

Q. Did you see any of the wagons empty out from the train? A. Yes.

Q. To the lot? A. Yes.

Q. Did you observe any of them in difficulties?

A. Yes.

(Testimony of Wayne Daillard.)

Q. Will you state what you saw in that connection?

A. Yes. I was going from the lot downtown to lunch with Mr. Priest.

The Court: Just what you saw.

A. I saw a wagon boxing on fire.

Q. By Mr. Schaefer: How fast was the wagon moving?

A. We followed the wagon for about a mile, Mr. Priest and myself, and I would say four, or maybe five miles an hour.

Q. Did you see that wagon again?

A. Yes.

Q. When did you see it again?

A. An hour later, when we returned from lunch.

Q. Where did you see it the second time?

A. It had proceeded about a mile and a half, possibly.

Q. Was the matinee given in Santa Ana?

A. It was not. [299]

Q. Did you give the afternoon performance in Pasadena? A. No.

Q. Do you recall any lines breaking in Pasadena, or falling of the tents?

A. Yes. I observed some lines break in Pasadena.

Q. Do you recall how many times that happened? Were you there?

A. The report was——

The Court: Not the report. What did you see?

A. I saw the tent, that is, the canvas, drop on

(Testimony of Wayne Daillard.)

three different occasions that I observed it. I couldn't, however, observe the cause of that.

Q. By Mr. Schaefer: You saw the tent fall, did you? A. Yes.

Q. Did you have any conversation with Mr. Clawson with respect to that?

A. I don't recall any.

Q. Did you have any conversation with him with respect to the ropes?

A. Yes. In substance, that conversation was——

[300]

Q. That was in Pasadena?

A. In Pasadena.

Q. Was anyone else present besides you and Mr. Clawson?

A. I believe Mr. Eagles was present at that. As

A. I saw the tent, that is, the canvas, drop on a matter of fact, I think Mr. Eagles brought about the conversation.

Q. What was said by the parties?

A. In substance it was that I wanted, I asked, or maybe demanded—I don't know—that those ropes be renewed. We had very concrete evidence that there was something wrong with them, and Mr. Clawson again advised that he wasn't able to do anything in the way of purchasing ropes.

Q. Did he state why?

A. No, I believe not. [301]

Q. What was the condition of the wardrobe?

A. Very bad.

The Court: What do you mean by that?

(Testimony of Wayne Daillard.)

A. I mean the wardrobe was faded and worn, and I have seen a lot of wardrobe.

The Court: Well, just what you saw as to the condition it was in.

A. And incomplete.

The Court: In what respect?

A. There would be trousers missing to uniforms, or caps missing to uniforms, and turbans missing.

The Court: We could save considerable time if you would [302] just point out how many turbans were missing.

A. I can't do that accurately.

Q. By Mr. Schaefer: Can you tell us about what portion of the wardrobe was usable? We can arrive at it that way.

A. You asked me what condition the wardrobe was in, and I have handled wardrobes for years—

The Court: Don't argue. Just answer the questions.

A. I recall that we replaced, or bought, that were missing, duck trousers for the band; caps for the band; turbans for some of the entry acts.

The Court: The missing parts were supplied by you?

A. Yes, we purchased them.

Q. By Mr. Schaefer: Can you state now what percentage or proportion of the wardrobe that was furnished was usable, and what was not usable? Answer that yes or no.

A. Yes.

(Testimony of Wayne Daillard.)

Q. I will ask you what percentage of the wardrobe that was furnished was usable and what percentage was not usable?

Mr. Combs: That is objected to as calling for a conclusion of the witness.

The Court: I think from his answers to the questions awhile ago he is not qualified to answer.

Mr. Schaefer: I am directing it to the entire wardrobe.

Q. By Mr. Schaefer: Do you know the amount of wardrobe that was obtained from the Hagenback-Wallace Shows? Did [303] you see the wardrobe? A. Yes.

Q. Do you know what proportion of that was used?

A. There was about 75 per cent of what we took that we actually used.

Q. About 75 per cent? A. Yes.

Q. Were there any elephant howdahs supplied by Hagenback-Wallace? A. No.

Q. Was the calliope in operation?

A. No. [304]

GLENN HALL,

called as a witness in behalf of defendant, being first duly sworn, testified as follows: [314]

Direct Examination

A. The chairs were all right. The plank they sit on, there was a number of them that were splin-

(Testimony of Glenn Hall.)

tered; the edges that were on the front of them or the backs, to hold the chairs, there were a number of them off, and it caused the chairs——

Mr. Combs: Just a minute. That is a conclusion.

Q. By Mr. Schaefer: What did you observe after the seats were erected with respect to the chairs? Did they set normally?

A. Yes. There was a few of the planks that had boards nailed over them so that they would set normally.

Q. Did you examine the bolts or nuts, or see them when you were erecting them?

A. There were a few of them that were replaced on the jacks, yes.

Q. Did you sleep on the train?

A. I did one night, yes.

Q. What was the condition of the car?

Mr. Combs: That is objected to as calling for a conclusion of this witness.

Q. By Mr. Schaefer: State what you saw or observed.

A. On the train, on the sleeping car, there were bunks that had small, thin mats, instead of mattresses on them, and they were hard and lumpy, and the windows on the car, you couldn't hardly open them. The one I was in I couldn't get the window open, so I rode on the flat car. [317]

Mr. Schaefer: Cross examine.

(Testimony of Glenn Hall.)

Cross Examination

Q. By Mr. Combs: You wouldn't state that all the windows in the cars couldn't be opened, would you?

A. Well, in about four or five different bunks that I tried, I couldn't. [318]

DEFENDANT'S EXHIBIT No. 16

Great American Circus

INCOME AND EXPENSE STATEMENT

Ticket Sales Including Tax Inglewood.....	5/24/39	\$1,607.69
" " " " San Diego	5/26/39	578.71
" " " " San Diego	5/27/39	1,984.06
" " " " San Diego	5/28/39	1,747.20
" " " " Santa Ana	5/29/39	1,587.70
" " " " Pasadena	5/30/39	864.47
" " " " Pomona	5/31/39	804.80
Total Ticket Income.....		\$9,174.63
Misc. Income:		
Banner Account		\$145.00
Milk Fund		11.59
Pie Car		16.99
Total Misc. Income.....		173.58
Total Income		\$9,348.21
Expense:		
General Misc. Operating Expenses per statement.....		\$29,252.15
Cost of Equipment Repairs per statement.....		1,672.40
Settlement with Sponsors per statement.....		1,747.59
Total Expense		\$32,672.14
Net Loss		\$23,323.93

GENERAL AND MISCELLANEOUS OPERATING EXPENSES

To Whom Paid	Kind of Expense	Amount
Eagles Hay & Grain Co.	Electric Lamps	\$ 34.92
Eagles Hay & Grain Co.	Paint	1.19
F. Saylor	Truck Hire	28.60
United Tent & Awning Co.	Blankets	35.00
Eagles Hay & Grain Co.	Light Plant Rental.....	21.43
Eagles Hay & Grain Co.	Electric Lamps	142.31
Chas. G. Willis	Rental 6 Horses	60.00
Bill Nixon	Gasoline	8.00
Peter L. Ferry & Sons	Transportation tractor	20.00
Eagles Hay & Grain Co.	Light plant rental.....	150.00
L. E. Bramhall	Repair Light Plant.....	27.44
Baker-Lockwood Mfg. Co., Inc.	Rental tent	437.50
Eagles Hay & Grain Co.	Animal feed	82.38
	Cleaning lot etc.....	52.36
	Cook house supplies.....	23.80
	Truck rental	96.50
	Sheeting & duck.....	27.61
B. Sheppard Co.	Stationery	24.98
Neilson Bros.	Leatherette Bow Ties.....	4.64
Industrial Garment Co.	Pants, suits and shirts.....	202.46
Cohn Goldwater Mfg. Co.		

To Whom Paid	Kind of Expense	Amount
Office Contingent Fund	Transportation men & travel.....	145.00
Brokaw Bauer Chevrolet Co.	Payment bill posting truck.....	154.50
Office Contingent Fund	Free Show for sponsors.....	121.10
Blanchard Press	Advertising paper.....	250.00
Anderson Tire Co.	Tire and wheel for truck.....	12.00
Wayne Dailard	Cash for misc. expenses.....	200.00
Joe Bren	Travel expense Neal Abel.....	50.00
Al's Gilmore Service	Gasoline.....	20.42
Ben Austin	Bill Posters' expense.....	100.00
Globe Ticket Co.	Tickets.....	41.10
Hollywood Printers	Release forms.....	4.12
Monte Orr	Drawings for ads.....	35.00
So. Pacific Co.	Travel Expense Ben Black.....	31.30
Alexander Stationery Co.	Rubber stamp and ledger sheets.....	4.38
J. B. Austin	For telegrams.....	3.79
Western Union Telegraph Co.	Neal Abel Travel Expense.....	25.00
P. P. Burch	Cash to W. Dailard for expenses.....	500.00
Pacific Freight Lines	Rent 4 trucks—1 week.....	210.00
Mitchell & Herb, Inc.	Advertising mats.....	26.01
Pittsburgh Paints	Bill posters' brushes.....	22.35
Roy N. Wolff	Change fund.....	600.00
Santa Fe Ry.	Transportation Circus.....	500.00
Fanchon & Marco Disbursement Fd.	Salaries per payroll.....	231.60
Western Union Telegraph Co.	Travel Expense R. Stapleton.....	75.00

To Whom Paid	Kind of Expense	Amount
Office Contingent Fund	Misc. Cash Expense.....	112.02
Western Union Telegraph Co.	Neal Abel Travel Expense.....	25.00
Bruce Merman	Booking Expense.....	75.00
So. Pacific Company	Circus Scrip books.....	290.40
Al's Gilmore Service	Gasoline.....	24.24
A. S. Chernoff	Stationery.....	34.76
Globe Ticket Co.	Tickets.....	85.17
Hollywood Sign Co.	Painting boxes.....	27.00
Pacific Freight Lines	Rental 4 trucks—1 Week.....	210.00
Railway Express Agency	Express on advertising paper.....	19.73
So. Pacific Co.	Lower berth Marie Carr.....	2.45
Office Contingent Fund	Misc. Cash Expense.....	126.10
Russell Stapleton	Travel Expense.....	37.20
Unit Transfer	Drayage.....	29.40
Fanchon & Marco Disburse. Fund	Salaries per payroll.....	437.50
F & M Service Corp.	Photographs.....	31.00
Larry Kaford	Travel Expense.....	119.30
Mimeographing Supply Co.	Mimeograph paper.....	6.80
Western Union Telegraph Co.	Travel Expense Neal Abel.....	25.00
Office Contingent Fund	Entertainment for sponsors.....	222.50
	Travel Expense.....	10.00
Western Union Telegraph Co.	Travel Expense Neal Abel.....	50.00

To Whom Paid	Kind of Expense	Amount
Roy Wolff	Cash for labor payroll.....	500.00
L. L. Cronkite	Bill poster's expense.....	73.33
P. P. Bureh	Cash for labor payroll.....	150.00
Fanchon & Marco Disburse. Fund	Salaries per payroll, acts, line girls, musicians, etc.	3,294.37
Karl Knudson	Travel Expense & water deposit.....	51.51
J. B. Austin	Travel Expense	28.07
Railway Express	Express advertising paper.....	21.94
So. Pacific Company	Railroad ticket J. Newnan.....	16.60
Pacific Freight Lines	Rental 4 trucks—1 week.....	210.00
Roy Wolff	For cash advanced to Red Wagon.....	50.69
Ben Black	Travel expense	71.42
Tom Heney	Travel Expense	16.18
Metropolitan Engravers	Mats & zinc etchings.....	89.76
Postal Telegraph	Telegrams	12.87
Red Arrow Messenger Co.	Messenger Charges	11.35
So. Pacific Company	Railroad fare J. B. Austin.....	23.05
Western Union Telegraph Co.	Telegrams	125.50
M. E. Farnsworth	Expense after Circus closed.....	8.00
Fanchon & Marco Disburse. Fund	Salaries per payroll.....	25.00
Office Contingent Fund	Misc. Cash Expense.....	110.06
Henley Typewriter Co.	Rented typewriter	5.00

To Whom Paid	Kind of Expense	Amount
Unit Transfer	Drayage	12.40
Fanchon & Marco Disburse. Fund	Circus payroll	1,396.34
Office Contingent Fund	Misc. Cash Expense	48.56
Wayne Dailard	Travelling expenses	95.00
Harry F. Callan	Bill Posting	226.56
Continental Baking Co.	Groceries	12.00
Globe Ticket Co.	Tickets	552.92
Pacific Freight Lines	Balance due rental 4 trucks	290.00
So. California Telephone Co.	Long distance calls	274.35
Santa Fe Ry.	Tickets to San Diego	5.40
Fanchon & Marco Disburse. Fund	Salaries per payroll	234.29
Office Contingent Fund	Travel Expense	61.46
Green's Show Print	Advertising cards and paper	106.67
Green's Show Print	Advertising cards and paper	106.67
Green's Show Print	Advertising cards and paper	106.68
Wayne Dailard	Travel Expense	37.50
Fanchon & Marco Disburse. Fund	Circus payroll	55.00
Gay Goodin	Trucking 6 horses	6.00
Huggins-Young Co.	Cookhouse supplies	22.00
So. California Disinfecting Co.	Supplies—cookhouse	14.63
Blanchard Press	Advertising paper	2,000.00
Pacific Electric Railway	Switching cars	184.80

To Whom Paid	Kind of Expense	Amount
Rosen-Sidman Co.	Insurance	296.53
Fanchon & Marco Disburse. Fund	Salaries per payroll	26.67
Office Contingent Fund	Misc. Cash Expense	43.41
Unit Transfer	Drayage	11.70
Collector Internal Revenue	Admission taxes	1,013.13
American Airlines	Travel Expense	13.48
Bay Cities Laundry	Sleeping car expense	34.67
Foster & Kleiser	Bill board—Pasadena	48.00
Radio Station XEAC	Advertising—San Diego	25.00
Rosen-Sidman Co.	Insurance	1.00
Larry Kaford	Travel Expense	23.65
Alexander Stationery Co.	Rubber stamp96
Wayne Dailard	Telephone expense	10.95
Billboard Publishing Co.	Advertising	7.00
Mitchell May Jr. Co.	Insurance	2.50
Rex Wilson Art Service	Signs	9.79
Western Union Telegraph Co.	Telegrams	14.72
Office Contingent Fund	Travelling Expense	16.40
Office Contingent Fund	Travelling Expense	12.80
Office Contingent Fund	Travel Expense	4.55
Gilmore Oil Co.	Travel Expense Larry Kaford	23.65
Sunshine Laundry	Laundrying shirts and coveralls	9.01

To Whom Paid	Kind of Expense	Amount
Eastern Wholesale Grocery Co.	Cookhouse Supplies	185.65
Billboard Publishing Co.	Advertising	14.00
Baker Lockwood Mfg. Co.	Balance due rental of tent.....	31.25
State & Federal Governments	Payroll Taxes	450.25
Various	Cash expenditures for operations made on Circus lot, per receipted bills.....	7,700.53
Laborers	Payroll—paid in cash on lot.....	2,950.64
Laborers	Ducie books refunded.....	6.70
Performers	Advanced in cash.....	255.47
	Total.....	<u>\$30,821.35</u>
	Less cash advanced by main office and accounted for in \$7,700.53 figure above.....	<u>\$ 1,569.20</u>
	Net Total.....	<u>\$29,252.15</u>

Great American Circus

COST OF EQUIPMENT REPAIRS

To Whom Paid	Description	Amount
Los Angeles Hardware Co.	Rope, tools, etc.....\$	183.16
Los Angeles Hardware Co.	Rope, tools, etc.....	167.28
United Tent & Awning Co.	Rental stake driver.....	10.00
Lou Skeels	4 Chairs	8.24
Harper & Reynolds	Garbage cans & hammers.....	5.03
Elite Glass & Paint	Paint	14.16
M. H. Brown Uniform Cap Co.	Band caps & uniform caps.....	38.11
B. Sheppard Co.	Bed sheets & pillow cases.....	211.19
Grether & Grether	Blankets	100.43
United Tent & Awning Co.	Rental stake driver.....	10.00
Santa Fe Ry.	Taking cars to be repaired.....	55.00
Art Springer	Painting wagons	136.50
Ace Lumber Co.	Seat blocks	17.00
Arrow Key Service	Repairing safe	10.00
Century Lumber Co.	Lumber	104.83
Dan Dixon	2 Stools	2.58
Dohrmann Supply Co.	Dining car equipment.....	14.75
Ted Ducey	Truck hire	21.25
Ted Ducey	Truck hire	15.00

To Whom Paid	Description	Amount
Ted Ducey	Truck hire	10.00
Ted Ducey	Truck hire	15.00
Eagles Hay & Grain	Mill blocks	4.64
Hazard-Gould & Co.	Chain and cable.....	21.50
J. Fred Kahle & Son	8 Bridles	18.54
Kress Co.	Dining car equipment.....	1.18
Lawrence Lumber Co.	Lumber	13.61
L. A. Heavy Hardware Co.	Blacksmith equipment	11.04
L. A. Heavy Hardware Co.	Blacksmith equipment	11.62
L. A. Heavy Hardware Co.	Padlocks, candy stands for train.....	21.63
L. A. Heavy Hardware Co.	Rope	15.83
L. A. Heavy Hardware Co.	Bolt cutters	4.43
L. A. Heavy Hardware Co.	Machine bolts, etc. to Santa Fe Shops.....	16.89
Mayer & Boyce	Repairs to air pump.....	8.27
Marston Co.	120 Yards burlap.....	24.72
Sears, Roebuck & Co.	4 Garden Rakes.....	5.73
Hazard-Gould & Co.	Tools	11.04
Santa Fe Ry.	Repairs to cars.....	332.22
	Total.....	\$1,672.40

Great American Circus

SETTLEMENT WITH SPONSORS

To Whom Paid	City	Amount
Don Price	Fresno, Calif.	\$ 100.00
American Legion	Pasadena, Calif.	250.00
American Legion	Glendale, Calif.	150.70
B. W. Osterman	Santa Ana, Calif.	151.01
American Legion	Oakland, Calif.	98.88
American Legion	Santa Monica, Calif.	119.34
American Legion	San Diego, Calif.	80.53
Elks Lodge	Santa Ana, Calif.	62.30
Jack Horner	Long Beach, Calif.	200.00
Jack Horner	Long Beach, Calif.	25.00
Bakersfield Californian	Bakersfield, Calif.	33.38
Fresno Bee	Fresno, Calif.	49.93
Fresno Guide	Fresno, Calif.	11.34
Evening Outlook	Santa Monica, Calif.	46.34
Glendale News Press	Glendale, Calif.	57.12
Press Telegram	Long Beach, Calif.	63.00
Star Free Press	Ventura, Calif.	10.00

To Whom Paid	City	Amount
Glendale Star	Glendale, Calif.	12.45
State Display Co.	Fresno, Calif.	20.00
Air View Magazine	Santa Monica, Calif.	50.00
Long Beach Independent	Long Beach, Calif.	47.52
Foster & Kleiser	Long Beach, Calif.	90.00
Elks Lodge	Bakersfield, Calif.	8.00
Hancock Bros.	San Francisco, Calif.	10.75
	Total	\$1,747.59

R. V. KETTRING,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

Q. What is your position with the Santa Fe Railroad? A. General car foreman.

Q. Did you have occasion to inspect and examine some circus cars of the Great American Circus in May of 1939? A. I did.

Q. Did you make any repairs to those cars?

A. Yes, sir.

Q. Do you have any data there indicating the nature of the repairs and the number of the cars?

A. Yes. We have a complete——

Q. Where did you pick up those cars?

Mr. Combs: Excuse my interrupting you. We will stipulate that the Santa Fe made repairs of three hundred and some odd dollars. [336]

The Court: How much is that?

Mr. Combs: Three hundred and thirty-two and some cents.

Mr. Schaefer: Of course, it isn't, your Honor, the purpose to prove the amount with this witness. The purpose is to prove the nature and extent of the repairs, as one of the elements of the failure of the equipment. I have called this witness to show the condition of the cars. That is my point.

The Court: Oh, I don't care anything about that.

Mr. Schaefer: Well, I think it goes to the defendant's case very largely, your Honor, to show

(Testimony of R. V. Kettring.)

how extensive the repairs were. We have the testimony of Mr. Clawson that there were minor repairs made, to begin with, and I have a witness here to show what the nature of the repairs was, the man who did it.

The Court: The nature does not make any difference.

Mr. Schaefer: It shows the extent of the repairs necessary to the equipment, and their condition when they came from Baldwin Park, your Honor. It goes to that part of our case.

The Court: When was this inspection made?

A. Well, the final inspection on the cars was made on May 23rd, at our Santa Fe yards. The original inspection was made prior to that time. I do not recall the date. It was made at Baldwin Park. The inspection at Baldwin Park, you might say, was the preliminary inspection. [337]

Q. By Mr. Schaefer: What condition did you find the cars in?

A. We found the cars at Baldwin Park in what we would term, in a railroad term, as in fair condition, needing repairs to the safety appliances, air brakes, and the running gear of the cars, to make them safe to move.

Q. Will you state what repairs were made and give the car numbers, if you can, and state why they were made?

The Court: We don't need that. What other defects, if any, did you find in the cars?

(Testimony of R. V. Kettring.)

A. Well, I found several little defects that was in violation of the Interstate Commerce rules, if we would operate the cars over our lines, such as old air lines, wheels with worn flanges. And we had one coach that was—on request of the parties operating the show, they asked us to make repairs—it had a defect in violation of the Interstate Commerce rules, and these repairs were all made to the cars on our repair tracks, prior to their departure for San Diego. The cars were brought back from Inglewood to our repair tracks, and repairs were made.

Q. By Mr. Schaefer: Mr. Kettring, will you look through these bills as quickly as you can and tell me if they are the original bills that came from the Santa Fe to Fanchon & Marco?

A. Yes, sir, they are. They are the original bills.

Q. Do they show the nature of the repairs?

[338]

A. They show the nature of the repairs and why the repairs were made.

Q. And the cars on which they were made?

A. And the individual cars upon which they were made.

Q. That first yellow bill has the name “Kettring” on it. Is that your signature?

A. That is the signature of my clerk.

Q. Put there at your direction?

A. At my direction.

(Testimony of R. V. Kettring.)

Mr. Schaefer: We offer these bills in evidence for the purpose of showing——

The Court: Any objection?

Mr. Combs: I don't believe so. Is that the three hundred and thirty odd dollars?

Mr. Schaefer: \$332.22.

The Court: The same amount as in your bill?

Mr. Schaefer: That is right.

The Court: Let it be filed.

The Clerk: Defendant's Exhibit No. 17.

DEFENDANT'S EXHIBIT No. 17

Santa Fe

MEMORANDUM BILL

Los Angeles, Calif.

Station, May 24, 1939

The Great American Circus.

For repairs to cars 65, 85, 87, 80, 64, 83, 89, 88, 84, 82, 81, 52, 50, 45, and 46, Los Angeles, repair track
May 23rd, 1939.

Items of Repairs	Amount	Items of Repairs	Amount
As per A. A. R. billing attached.			
Miscel. charges (Labor & mtl.....)	\$260.09		
Labor 26.4 hours @ \$1.25.....	33.00		
Labor 17.8 hours @ 1.40.....	24.92		
Labor 6. hours @ .42 1/2.....	2.55		
Wrot iron 168 lbs. @ 5 1/2¢.....	9.24		
Lumber 6 BM ft. @ 05¢.....	.30		
Spring steel 24 lbs. @ 5 1/2¢.....	1.32		
Mailable iron 10 lbs. @ 08¢.....	.80		
	\$332.22		

(Bill to be collected by Agent, Los Angeles.)

(Bill made on AAR basis)

Mr. Mendelsohn-cc-CRM, RT.

CREDIT

LABOR		MATERIAL	
Account	Amount	Account	Amount
314	129.45	314	99.38
317	70.18	317	30.66
402P	2.55		

Note: To be forwarded to the Audit office.

R. V. KETRING
General Car Foreman.
AJP/RJ

M. M.

To Be Attached to Bill
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
Car No. 65 Initial or Name Great American Circus Kind Stock

End	Repairs Made	Miscel.	Labor Hrs.	Wrot. Lbs.	Lumber Ft.	Squads			Why Made
						Steel Lbs.	Mall. Lbs.	Cast Lbs.	
	Air brakes cleaned.....	4.53							
	8 Journal boxes repacked.....	3.50							
AL	One truck spring.....		.5		24				Broken
	Car jacked		1.						Repairs
B	Three brake beam safety bar bolts & L nuts 3/4x3.....	.60		2					Worn out
	One brake bell crank.....						10		Broken
	One bracket			7					"
	Two att. bolts and lock nuts 5/8x2 1/2".....	.40		1					Worn out
	One brake chain bolt 5/8x2 1/2.....	19							"
	One bell crank pin.....		.2	1					"
	Two cotter keys.....	.02							"

To Be Attached to Bill
 American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
 Car No. 85 Initial or Name Great American Circus Kind Flat

End	Repairs Made	Miscel.	Labor Hrs.	Wrot. Lbs.	Lumber Ft.	Spring Steel		Why Made
						Lbs.	Mail. Lbs.	
B	One piece of train line pipe 1 1/4 x 16"	.19						Rusted
	One coupling 1 1/4	.11						Treads broken
	Two ends of pipe treaded	.38						Repairs
	Four connections	.52						"
	Two 'U' pipe clamps 1/2 x 3	.38	1					Worn out
R&3	One pair SH wrot steel wheels	8.32						Worn flange
	Two journal bearings 9"	2.04						Worn out
	Two dust guards 9"	.16	.4					" "
	Four journal box bolts and lock nuts							" "
	1-1/8 x 16	.16	23					" "
	One brake conn. cotter	.01						" "
	Labor		5.					Wheels etc.
	8 Journal boxes repacked	3.50						
L-2-4&R4	3 Journal bearings	3.06						Worn out
	Air brakes cleaned	4.53						

ASSOCIATION OF AMERICAN RAILROADS—BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED

MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	Full Flange Con- tour—Yes or No	CAUSE OF REMOVAL	After Turning
2-28 C 30	70	381	1/2"	1/2"	Spun to 74 T	
	None	49069	1/2"	1/2"		
✓	70	97	1/2"	1/2"		
	None	43553	1/2"	1/2"		

AXLE A. A. R. Non-A. A. R. } Length _____ Condition of _____

WHEELS AND AXLES APPLIED

MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Con- tour—Yes or No	SERVICE METAL	New or Second Hand	Net Charge
3-3-17 24 T	8	255 T		1/2"	SA	
✓		1558		1/2"	✓	
		415 T		1/2"		
		1568		1/2"	SA	

AXLE A. A. R. Non-A. A. R. } Length _____

LOCATION	Size and Kind of Wheels	JOURNAL Length	JOURNAL Diameter	Wheel Seat Diameter	CENTER Diameter	LABOR
11-23	Removed 38 1/2 W Wheel	9	5 5/8	6 1/2	5 9/16	
	Applied 38 1/2 W Wheel	9	5 5/8	6 1/2	5 1/2	TOTAL

Actual Dimensions	APPLIED	Inspector	Wheel Shop Inspector
REMOVED			

Date 5-2-23 19 24 Repaired at Santa Fe
 Car No. 83 Initial W.A. Kind Wheel

To Be Attached to Bill
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
Car No. 80 Initial or Name Great American Circus Kind Flat

End	Repairs Made	Miscel.	Labor Wrot. Hrs. Lbs.	Lumber Ft.	Spring Steel Lbs.	Mail. Cast Lbs.	Why Made
R&L4	One pair SH wrot steel wheels.....	8.32					Worn flange
	Two journal bearings 9".....	2.04					“ Out
	Two dust guards 9".....	.16	.4				“ “
	Four journal box bolts and lock nuts						
	1-1/8"x16.....	.16					“ “
A	One top rod repaired 22#.....	.46					Cut by axle
	Two conn. pins R&R.....		.4				Repairs
R2	One journal bearing 9".....	1.02					Worn out
	8 Journal boxes repacked.....	3.50					
	Air brakes cleaned.....	4.53					
	Labor		4.0				Wheels etc.

Hall 1 39 300 Bks. 9754

TO BE ATTACHED TO BILL

Santa Fe Form 1179-A

ASSOCIATION OF AMERICAN RAILROADS —BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED				WHEELS AND AXLES APPLIED						
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning Full Flange Contour Yes or No	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	SERVICE METAL	New or Second Hand	Net Charge
3-25	none	FC 97	3/8	Cracked	1-28-27	D	807 A	1/4	SA	
		3/582	3/8		Ard		8/504B			
✓	none	FC 260	3/8		✓	✓	811 A	1/4	SA	
	none	49069					8/504B		SA	
AXLE A. A. R. Non-A. A. R. } Length		Condition of		AXLE A. A. R. Non-A. A. R. } Length						
LOCATION	Size and Kind of Wheels		JOURNAL		Wheel Seat		CENTER		LABOR	
	Removed	Applied	Actual Dimensions	Length	Diameter	Diameter	Diameter	Diameter	TOTAL	
PR 4	33" W	33" W	REMOVED	9	5	6 1/2	5-5/8			
	33" W	33" W	APPLIED	9	5	6 1/2	5-7/16			

Date 5-23-1939 Repaired at Los Angeles Initial Hagenbach, Wallace Kind FL Inspector L. W. Brooks Wheel Shop Inspector



ASSOCIATION OF AMERICAN RAILROADS --BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED				WHEELS AND AXLES APPLIED							
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning Full Flange Con- tour—Yes or No	CAUSE OF REMOVAL	After Turning	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	SERVICE METAL Full Flange Con- tour—Yes or No	New or Second Hand	Net Charge
	7C	121	57	Thin Rim		4-337	B	875		SA	
	7006	31582	78	74T				4317C			
	500	68	✓				✓	967		SA	
		81582						31626			
LOCATION: <u>RA 11</u> Size and Kind of Wheels: <u>Removed 33" NWA</u> JOURNAL Length: <u>9</u> Diameter: <u>5</u> CENTER Diameter: <u>5 7/16</u> Applied <u>33" R.A.</u> Actual Dimensions: <u>REMOVED</u> Diameter: <u>6 1/2</u> LABOR: <u>TOTAL</u> Condition of: <u>APPLIED</u> Diameter: <u>5</u> Diameter: <u>5 7/16</u>											
Date	3-23-39		1939	Repaired at	200 Angeles		Inspector	J. R. C.			
Car No.	88		Initial	The Street Wheel		Kind	Wheel Shop	Inspector			

Hall 1 39 300 Bks. 9754

TO BE ATTACHED TO BILL

Santa Fe

Form 1179-A

ASSOCIATION OF AMERICAN RAILROADS - BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED				WHEELS AND AXLES APPLIED							
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Contour Yes or No	SERVICE METAL	New or Second Hand	Net Charge
None	None	58611A	5/16	Thrust Flange 747	8-25-29	None	911 7A		3/16 SH		
		None	9/16		None		A2346B				
		586393	9/16		5-23-53		889A				
		None	9/16		None		28333				
AXLE A.A.R. Non-A.A.R. }		Length		Condition of		AXLE A.A.R. Non-A.A.R. }		Length			
LOCATION		Size and Kind of Wheels		Actual Dimensions		JOURNAL		WHEEL SEAT		LABOR	
RR 73		Removed 35" x 12"		REMOVED		Length 9		Diameter 5"		Diameter 5 7/16	
		Applied 1 "		APPLIED		Length 9		Diameter 5"		Diameter 5 7/16	

Date 5/23 19 21 Repaired at RR Shop Inspector J. Walker

Car No. 88 Initial H or Name Harold Wallace Kind W Wheel Shop Inspector



To Be Attached to Bill
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
Car No. 84 Initial or Name Great American Circus Kind Flat

End	Repairs Made			Spring			Why Made
	Miscel.	Labor Wrot. Hrs.	Lumber Ft.	Steel Lbs.	Mail. Steel Lbs.	Cast Lbs.	
	Air brakes cleaned.....	4.53					
B	One train line nipple 1 1/4x6".....	.14					Worn out
"	One SL angle cock.....	1.70					SL leaky core
"	One connection.....	.13					Repairs
"	One 'U' clamp R&R 4".....	.19					"
"	8 Journal boxes repacked.....	3.50					Worn out
R&L1-3	R-4 5 Journal bearings.....	5.10					Worn flange
R&L2	One pair SH wrot steel wheels.....	8.32					Worn out
	Two journal bearings.....	2.04					" "
	Two dust guards.....	.16	.4				" "
	Four box bolts and lock nuts 1-1/8x16.....	.16	23				Wheels etc.
	Labor.....	5.					Worn out
BR	One side bearing bolt and lock nut 3/4x2	.20	1				

ASSOCIATION OF AMERICAN RAILROADS - BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED				WHEELS AND AXLES APPLIED			
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST
3-28 AOC	MC	316- 49069	1/2"	Thin flange 744	3-17-36 A-2	S	802 A E 407
3-28 AOC	MC	85- 31682	1/2"		✓	✓	804 A E 407
AXLE A. A. R. } Length _____ Condition of _____ Non-A. A. R. }			AXLE A. A. R. } Length _____ Condition of _____ Non-A. A. R. }				
LOCATION		Size and Kind of Wheels		JOURNAL		WHEEL SEAT	
Rk. 2		Removed 33" RD		Diameter 5		Diameter 5-9 1/16	
		Applied 33" RD		Diameter 5		Diameter 5-7 1/16	
				Actual Dimensions		LABOR	
				REMOVED		TOTAL	
				APPLIED			
Date 5-23		19 39		Repaired at		Inspector	
Car No. 84		Initial		or Name		Wheel Shop	
		Applied		Kind		Inspector	



To Be Attached to Bill
 American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
 Car No. 52 Initial or Name Great American Circus Kind Pass. car

End	Repairs Made			Spring			Why Made
	Miscel.	Labor Hrs.	Wrot. Lbs.	Lumber Ft.	Steel Lbs.	Mall. Lbs.	
A							
B							
AB							
Bx3&12							
Air brakes cleaned..... 8.63							

To Be Attached to Bill
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketrings,
Car No. 50 Initial or Name Great American Circus Kind Pass. car

End	Repairs Made	Guards			Why Made
		Miscel.	Lumber Ft.	Steel Lbs.	
Bx1&2	One pair SH wheels 36"RS.....				Worn flange
	material charge 2/16".....				
	service metal @ \$1.80.....	3.60			Worn out
	2 Journal bearings 9".....	2.04			" "
	2 Dust guards 9".....	.16			To restore
	Restore full flange.....		1.4		wheels to svc.
	Labor R&R wheels.....			10.40	
AB	12 Journal boxes repacked.....			5.25	
Bx3&9	2 Journal bearings 9".....			2.04	Worn out
Bx7	1 " Wedge (Drop forged) 15 Lbs. @ 5 1/2¢.....			.83	Cracked
	Air brakes cleaned.....			8.87	

ASSOCIATION OF AMERICAN RAILROADS - BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED				WHEELS AND AXLES APPLIED					
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST		
33	None	41 -	9/16	Just changed	6-13-30	\$	858		
42	None	52237	9/16	# 74	6-13-30	\$	29888		
42	None	6882	9/16	turned to top	6-13-30	\$	894		
42	None	53094	9/16	Ring	6-13-30	\$	29888		
AXLE No.-A. R. }	Length	Condition of	AXLE No.-A. R. }						
LOCATION		Size and Kind of Wheels		JOURNAL		WHEEL SEAT		CENTER	
Ry 1-2		Removed 36120		Length		Diameter		Diameter	
		Applied 36120		9 7/16		4 7/16		5 7/16	
				APPLIED		6 7/16		5 7/16	
				REMOVED		6 7/16		TOTAL	
				APPLIED		6 7/16			
Date		5 23 1900		Repaired at		San		Inspector	
Car No.		Augusto 50		Initial		Kynbroke Wallace		Wheel Shop	
				or Name		Kind		Inspector	
				50		80		Maxey	

To Be Attached to Bill
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
Car No. 45 Initial or Name Great American Circus Kind Pass. car

End	Repairs Made	Labor Wrot.		Lumber Ft.	Spring Steel		Cast Lbs.	Why Made
		Hrs.	Lbs.		Lbs.	Lbs.		
A	One wood end sill patch 4-1/2x5x27 1/2"			5				Decayed
"	Three att. bolts 1/2x7 1/2"			2				Worn
A	Actual	4.						Repairs
"	One vestibule diaphragm straightened on car cold.							Bent
"	20 Do stove bolts 1/4x1 1/2"08					
"	Actual	3.2						Dia. repairs
"	Three carrier iron bolts and lock nuts 3/4x3 1/2"9		3				Worn & loose
AB	12 Journal boxes repacked as per rule 66	5.25						
Bx4	One journal bearing 9"	1.02						Worn out
	Air brakes cleaned	8.00						

To Be Attached to Bill
 Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketrings,
 Car No. 83 Initial or Name Great American Circus Kind Flat

Ead	Repairs Made	Surads			Why Made
		Miscel.	Lumber Ft.	Steel Lbs.	
	8 Journals repacked.....			3.50	
	Air brakes cleaned.....			4.53	
	L-1-R3-R&L2				
	4 Journal bearings.....			4.08	Worn out

To Be Attached to Bill
Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles, Inspector R. V. Ketring,
Car No. 89 Initial or Name Great American Circus Kind Flat

End	Repairs Made	Miscel.	Lumber Hrs., Lbs.	Lumber Ft.	Spring Steel		Cast Lbs.	Why Made
					Lbs.	Lbs.		
	8 Journal boxes repacked.....	3.50						
	L-1-2-R-3&4							
	Four journal bearings 9".....	4.08						Worn out
	One top rod repaired 22#.....	.46						Cut on axle
	Two conn. pins R&R.....	.4						Repairs
	Two " " cotters02						
	Air brakes cleaned.....	4.53						

To Be Attached to Bill
 Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939 Repaired at 612 Los Angeles Inspector R. V. Ketring,
 Car No. 64 Initial or Name Great American Circus Kind Stock

End	Repairs Made	Labor Wrot.		Lumber		Spring		Miscel.		Cast		Why Made
		Hrs.	Lbs.	Ft.	Lbs.	Lbs.	Lbs.	Lbs.	Lbs.	Lbs.		
	Air brakes cleaned.....											
	8 Journal boxes repacked.....											
	One lon. running board 1"x7"x9'.....											Decayed

[Endorsed]: Filed Nov. 28, 1940.

(Testimony of R. V. Kettring.)

Mr. Schaefer: May it be stipulated that we paid \$55 for one round trip from Inglewood to Los Angeles, in transporting the cars?

Mr. Combs: So stipulated.

Mr. Schaefer: Cross examine.

The Court: Any cross?

Mr. Combs: Yes. [339]

Cross Examination

Q. By Mr. Combs: The cars were moved from Baldwin Park to Inglewood in the condition in which they were at Baldwin Park, were they not?

A. Yes, sir. After several minor repairs were made to the cars, and on agreement with the parties in charge of the circus at that point that they would see that the air brakes were operative, we agreed to move them to Inglewood, so they could unload them, and move them from Inglewood back to our repair tracks for repairs.

Q. And that was done?

A. That was done. I was the one that agreed to that. [340]

TED DUCEY,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

Q. Did you do any work for the Great American Circus in May of 1939? A. I did.

Q. What work did you do?

A. I furnished trucks to move their wagons to the Rose Bowl.

Q. And where, with relation to your business, was the [341] railroad siding upon which the circus unloaded?

A. Right in front of my yard.

Q. Tell us about the hauling of the trucks, how you hauled them.

A. We hauled the wagons behind the trucks, tied them on and hauled them down to the Rose Bowl. Going out Lincoln Avenue, there is quite a hill going down into the Rose Bowl, and the main reason for the trucks, there was no brakes on the wagons or anything, and we had to tie the wagons, one in back of one truck, to start it, and one truck behind there, to hold it back, so they wouldn't run away. We lost two or three of them, as it was.

Q. Did you examine the circus wagons?

A. I saw them, yes.

Q. What did you find with respect to the brakes?

A. There wasn't any of them that were any good at all. There wasn't one wagon that had one that was worth even trying to use.

(Testimony of Ted Ducey.)

Q. And you put one truck on in front and one on behind?

A. Yes. We would take two wagons and tie it behind one truck, and then tie an extra truck on behind, to hold them back.

Q. Are you familiar with circus equipment?

A. Well, I have watched——

The Court: Answer yes or no.

A. Yes. [342]

Q. By Mr. Schaefer: Over what period of time?

A. 20 years or more.

Q. Have you seen circuses come there during that time? A. Yes.

Q. Have you seen the equipment?

A. Yes, sir.

Q. Did you see the runs that were used in the Great American Circus? A. Yes.

Q. Did you see the condition they were in?

A. I did.

Q. What condition were they in?

Mr. Combs: That is objected to on the ground that no foundation has been laid for his expert testimony.

Mr. Schaefer: I will go further, your Honor. I am just trying to conserve time.

Q. By Mr. Schaefer: Have you examined circus equipment? A. I have.

Q. Have you had occasion to work for circuses?

A. I have.

Q. On numerous occasions? A. I have.

(Testimony of Ted Ducey.)

Q. Over how many years?

A. Oh, 20 years.

Q. You have seen how many circuses unload there? [343]

A. One a year, I guess, I would say.

Q. Can you tell us what you observed as to the appearance of these runs?

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial and still no qualification as an expert.

Mr. Schaefer: Your Honor, he can tell what he saw, of his own knowledge. He doesn't have to be an expert to testify to what it looks like or what it appears to be. Anyone can testify to that.

Q. By Mr. Schaefer: Are you familiar with runs used in unloading flat cars? A. I am.

Q. Have you observed runs used on circus flat cars over a period of years? A. I have.

Q. How many have you examined?

A. I have seen every one that unloaded for 20 years, one each year at least.

Q. Have you seen the wagons go up and down the runs? A. I have.

Q. The operation of the runs? A. Yes.

Q. Did you observe these runs? A. Yes.

Q. What condition did they appear to be in?

A. They were wood. They were not steel, like they [344] generally use on all the other circuses, and they had a crib up under them to brace the wood, and had quite a little trouble unloading.

(Testimony of Ted Ducey.)

Mr. Combs: May we have that last stricken out, "quite a little trouble unloading"?

The Court: That is a conclusion of the witness. Proceed.

Q. By Mr. Schaefer: What condition did the runs appear to be in?

The Court: What condition were they in?

A. They were not in very good condition.

The Court: Tell us about it.

A. They were made out of wood, and they had wooden cribbing underneath them, to let the cars off, and as they would let these wagons down over the wood runway, the vibration would drop the cribbing out from under it, and then they would have to stop and crib it all up again. [345]

Q. Did you examine the bolster block that broke?

A. Yes.

Q. Will you describe what a bolster block is?

A. A bolster block is on a wagon that is commonly [346] called, sometimes a fifth wheel, where the kingpin goes in. When they get worn they get a sharp edge, and if they get caught in a railroad track or twist or turn, you can't hardly get them back in line again.

Q. Did you examine these?

A. We had occasion to examine all of them, because we had trouble with them.

Q. Have you examined bolster blocks and wagons for a long time?

(Testimony of Ted Ducey.)

A. Ever since I was a kid.

Q. On how many wagons?

A. My father had at least 50 wagons, in the same business all his life.

Q. And you worked for him? A. Yes.

Q. What condition were these bolster blocks in? A. They were practically worn out.

Mr. Combs: That is a conclusion.

The Court: Yes. It will be stricken.

Q. By Mr. Schaefer: Were they worn or not worn? A. They were worn.

Q. Did you notice anything else about them that you now recall? A. About what?

Q. The bolster blocks, any other condition?

A. That was all it could be, was worn. [347]

J. V. AUSTIN,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. J. V. Austin.

Direct Examination

Q. By Mr. Combs: What is your occupation, Mr. Austin? A. Showman.

Q. How long have you been engaged in that business? A. About 40 years.

Q. And in that connection what shows have you been involved with, as such showman?

(Testimony of J. V. Austin.)

A. John Robinson's; Hagenback-Wallace; Al G. Barnes; Sells-Floto; Ringling Brothers; Barnum & Bailey; and the Great American Circus.

Q. What capacities did you work for those organizations in?

A. From advertising agent to manager.

Q. Practically every capacity of an executive nature? A. Most every one.

Q. And in that connection did you become very familiar with the operation and complete activities and functions of circuses? A. Necessarily.

Q. And your present residence is at San Antonio, Texas? [351] A. Yes, sir.

Q. Mr. Austin, did you have occasion to meet Marco Wolff, of Fanchon & Marco, involved in this law suit, at some time during 1939? A. I did.

Q. What was the nature and what were the circumstances of that meeting?

A. I was employed by them as traffic manager and advertising agent of the Great American Circus.

Q. When was that employment undertaken?

A. About the 8th or 9th of May.

Q. 1939? A. 1939.

Q. Who employed you?

A. Mr. Nelson sent me the wire that gave me the employment.

Q. What did you do then?

A. I came from San Antonio here.

Q. When did you arrive here?

A. I think it was about the 7th or 8th.

(Testimony of J. V. Austin.)

Q. What did you do upon your arrival?

A. I conferred with Mr. Nelson regarding the advertising matter that had been gotten up, and made some suggestions regarding additional advertising matter, and assisted in making the route in such a way that the moves could be made by train.

[352]

Q. How long did that activity engage your attention? A. I would say about a week.

Q. Then about the 17th of May, or the 15th of May, did you continue your work for the Great American Circus? A. I did.

Q. In what capacity?

A. As traffic manager and advertising agent.

Q. What did you do in that connection from then to the 23rd of May?

A. I consummated the railroad contract for the movement of the special train and directed the activities of the advertising agent, and divers and sundry other things connected with the advertising.

Q. You are familiar with the custom of renting railroad coaches to circuses, or in circuses, are you not? A. Again, please.

Q. You are familiar with the custom or the manner in which railroad coaches, Pullman coaches, or those coaches in which the performers sleep, are rented to circus companies, are you?

A. You mean rented by circus companies from other owners?

Q. Yes. A. Yes.

(Testimony of J. V. Austin.)

Q. Are they rented with or without pillows, sheets and blankets? [353]

A. When rented from the Pullman Company, which it sometimes becomes necessary to do, they naturally come equipped, with their man in charge, and, I would say, when being rented for other purposes, without.

Q. That is to say, in all other cases, where such cars are rented, other than when they are rented from the Pullman Company, they come without that equipment? A. I would say so, yes.

Q. Did you have occasion to examine the railroad cars in this Great American Circus?

A. I did not.

Q. You did not? A. I did not.

Q. Did you go out to Baldwin Park before the opening day of the circus? A. I did.

Q. Did you examine any of the equipment out there at that time?

Mr. Schaefer: Just a minute. I object to that unless it is the equipment used by the Great American Circus.

The Court: It should be limited.

Mr. Combs: It should be. I so qualify my question.

A. Only to the extent that the various wagons that were to be used were identified by Mr. Clawson as "this" and "that" and "this," and so forth.

Q. By Mr. Combs: Can you state what your observation [354] of their condition was at that time?

(Testimony of J. V. Austin.)

A. My observations of their conditions were that they were usable.

Q. Were they in good condition, suitable for use for the production of a circus?

Mr. Shaefer: I object to that as calling for the conclusion of the witness, without proper foundation being laid.

The Court: Let us find out what he knows about it. Do you know anything more about them?

A. I can only say that they looked to me to be usable.

Q. By Mr. Combs: You made only the one visit in Baldwin Park before the 23rd? A. Yes.

Q. And on the 23rd what did you do in connection with the Great American Circus?

A. I devoted most of my time to the advance activities, in getting the advertising out and directing the men in charge of it.

Q. Were you present at Inglewood when the show was put on?

A. I was there at the night performance.

Q. Did that go off in order and in a normal manner?

A. I thought for the initial day it went off unusually good.

Q. Were you at San Diego when the show went off there? [355] A. I was not.

Q. Were you at Santa Ana when it went off there? A. I was not.

Q. At Pomona? A. No, sir.

(Testimony of J. V. Austin.)

Q. Were you at Pasadena? A. No, sir.

Q. Then the only show or performance that you saw was that at Inglewood? A. Yes, sir.

Q. Did you have occasion at any time during the course of the operation of the Great American Circus to examine the equipment?

A. I did not.

Q. In connection with the production of circuses, has it been your observation that circuses have one or more hot boxes in a run of even a week?

Mr. Schaefer: I object to that as leading and suggestive.

The Court: It is leading. Sustained.

Q. By Mr. Combs: Has it ever been your experience to observe a hot box on one of the wagons in a circus? A. Yes.

Q. Frequently or infrequently?

A. Frequently, especially since they move them by automobile. [356]

Q. In your experience with circuses, how long does it ordinarily take to get smooth running operation after the circus has first started running?

A. I would say about a week.

Q. Was there any difference in the manner in which this Great American Circus, so far as you observed it, observed the task of getting under way as a smoothly operating circus, from any other circus?

Mr. Schaefer: I object on the ground that no foundation has been laid, and the witness was not

(Testimony of J. V. Austin.)

present, and didn't have the opportunity to see the functioning of this circus.

The Court: He doesn't seem to have shown, at any rate, that he knows anything about it in these other places.

Q. By Mr. Coombs: Respecting the billing of a circus, how long is it ordinarily the case that billing is done, how long in advance of the presence of the circus in a given town?

A. Usually two weeks.

Q. Was that done in the case of the Great American Circus? A. It was not.

Q. How long was the advance notice of billing in that circus? A. Seven days.

Q. Was that an inadequate length of time for the best results in billing? [357]

A. According to the regular way of doing it, yes.

Q. During your experience in a circus have you ever seen train flat decks or runs repaired in the ordinary run of a circus?

A. You refer to the decking on the flat cars?

Q. Yes. A. It frequently wears out.

Q. And has to be replaced?

A. And has to be replaced from time to time—from the spikes in the chock.

Q. Is such also the case with tent rigging, blocks, falls and chairs? A. Yes.

Q. And also with wagons, in fact; isn't that correct?

(Testimony of J. V. Austin.)

A. They continually may get out of order. They have very strenuous work, riding on the flat cars at night and being hauled over all kinds of roads in the daytime.

Q. Would you say, from your experience with a circus, that repairs becoming necessary to such equipment during the course of a circus are an ordinary or an extraordinary thing?

A. Any circus requires daily repairs.

Q. A blacksmith goes right along with it?

A. A corps of blacksmiths.

Q. And is constantly in attendance, fixing up miscellaneous circus equipment? [358]

A. Yes.

Q. Including blocks, falls, wagon runs and flat decks, and everything? A. Yes.

Q. Is that right? A. Yes.

Mr. Combs: That is all.

The Court: Cross examine.

Cross Examination

Q. By Mr. Schaefer: Mr. Austin, you say repairs are frequently necessary? A. Daily.

Q. Is that caused by the use of the equipment?

A. Yes, by the very strenuous treatment it receives.

Q. After equipment has been brought into winter quarters after a season, is it customary to make any repairs then?

A. Not until before they start out in the spring.

Q. About how long would it take to get their equipment in shape?

(Testimony of J. V. Austin.)

A. That would depend upon the force.

Q. Tell me about the force. Give me the number. Give me some idea as to how long it would take.

A. That would depend upon the nature and the amount of the repairs, and the kind and number of mechanics that [359] you have to make them with, and the materials, and the accessibility of the special material which is necessary.

Q. Suppose, Mr. Austin, that you have circus equipment out for a season—I suppose that would be from spring until about September?

A. Until about November.

Q. Suppose you had circus equipment out for a season, in ordinary use, such as it gets, and which you are familiar with, how long would you say it would take to put that equipment into repair before it could go out the next season, and tell me upon what you base it, number of men, etc.

A. I wouldn't hazard a guess until I had seen the equipment and know what repairs are necessary.

Q. Will you tell me how long it would have taken to put the Hagenbeck-Wallace equipment that you saw out there into shape, supposing it to have come in in September, and to have had no work done to it?

A. I wouldn't know what kind of shape it was brought in in.

Q. In good condition, so that it would be thoroughly repaired, and so that it would be usable and——

Mr. Combs: We object to that. It is a little bit involved there.

(Testimony of J. V. Austin.)

Mr. Schaefer: Wait until I finish my question.

Q. (Continuing) So that it was in good condition and [360] ready for use.

Mr. Combs: I don't understand what the question is. May we have the question again?

Mr. Schaefer: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

Q. By Mr. Schaefer: And in good condition and ready for use.

A. I couldn't hazard a guess, unless I was more familiar with the minute condition of the property than I was.

Q. You weren't familiar with the minute condition of this property, then? A. No, sir.

Q. Are you familiar with any instance in which Hagenback-Wallace rented out their sleeping cars?

A. Not Hagenback-Wallace.

Q. Are you familiar with any other circus company renting out its cars? A. Yes.

Q. What company? [361]

A. I would have to make a little explanation in connection with that.

Q. Can you tell me what company, first?

A. With the American Circus Corporation. We operated several shows, and we rented, I think, some cars from each one of the shows to a carnival put out during the summer.

Q. How many such contracts are you familiar with, how many times?

(Testimony of J. V. Austin.)

A. I think we only did it twice.

Q. And that is what you base your knowledge of the custom on? A. Yes, sir.

Q. When you say the equipment looked usable, you made just this one-minute inspection you spoke about? A. Non-minute. [362]

JACK W. KRAMER,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Court: Your name?

A. Jack W. Kramer.

Direct Examination

Q. By Mr. Schaefer: What is your business or occupation at the present time?

A. At the present time I am working as a labor conciliator of the American Federation of Labor.

Q. In the latter part of May of 1939 what was your business or occupation?

A. I was the representative of the American Federation of Actors in the circus division, from Canada to Mexico, for the American Federation of Actors.

Q. Are you familiar with the Great American Circus that was produced in May of 1939?

A. Very much so.

Q. Did you see that circus out at Inglewood?

A. Yes, sir.

(Testimony of Jack W. Kramer.)

Q. Did you have a conversation with Mr. Marco Wolff in connection with that circus?

A. Out there, you mean?

Q. At any time. A. Yes, sir. [364]

Q. Where?

A. In his office, when I contacted him to take out a closed contract for the circus.

Q. And did you see him on any other occasion?

A. Yes, sir; I saw him on the grounds.

Q. Where? A. Out at Inglewood.

Q. Did you have a conversation with him there?

A. Yes, sir.

Q. Who was present on that occasion?

A. Well, I can't recall the names, it has been so long ago, but I believe there was a man, the manager of the circus.

Q. Mr. Clawson? A. Clawson is the name.

Q. Will you relate that conversation?

A. I told him about wanting a closed contract for the men, that most of our men were already in it. He said at the present time that he had been so involved in fixing the circus over, so that it would be possible to present a show under the canvas, that he wanted to know if I would give him a little extension of time, until such time as they could know whether or not they could afford to pay the price that we wanted for the men, and whether or not they could see their way clear that they could organize and unionize the circus. So I told him that in the event [365] that he did not organize immediately in

(Testimony of Jack W. Kramer.)

that town, or not later than the next town, it would be an utter impossibility for him to go into San Francisco with the show, because he wouldn't have a chance to even open there, much less show in the town, that they would not be as lenient with him as I was.

Q. Have you had any experience with circuses?

A. I have had about 27 years of it, yes, sir.

Q. Have you been a performer? A. Yes, sir.

Q. Did you see this circus equipment?

A. I did.

Q. Will you state what you saw?

Mr. Combs: That is objected to.

Mr. Schaefer: Well, he has had 27 years of experience with circuses.

Mr. Combs: That is not a proper foundation for an opinion yet. He can say what he saw.

The Court: He can state what he saw.

Mr. Schaefer: Go ahead.

A. I saw the big top in the process of going up, and I saw the men putting up the side walls and guying the ropes, and I saw the juice wagon and the ticket wagon; I saw the animal wagons; I saw the dressing room tents, where the horses and performers were, and I had occasion to go down on the tracks and see these so-called sleepers they [366] had there, that I forbade my people on the show to sleep in them.

Mr. Combs: Oh——

The Court: That will be stricken. Just answer the questions.

(Testimony of Jack W. Kramer.)

Q. By Mr. Schaefer: Will you describe the sleeping cars there that you saw?

A. Well, there was nothing in there other than being very, very dirty, and they had a box down on one end of the platform, where I had to step on it to get onto the first step. Then when we went in it seemed like there was straw in the ticking; instead of being a mattress, it was a straw ticking for them to lay on, and I didn't see anything else, or there was no covers or anything else. I suppose there was—— [367]

Q. By Mr. Schaefer: At Inglewood, did you say?

A. No. It was over at Pomona.

Mr. Schaefer: He said the opening day.

Mr. Combs: He is talking about Pomona now.

The Witness: You asked me if I had been any other place other than the opening day, and I believe Pomona was the town the circus closed in.

Mr. Schaefer: It has been stipulated that that is the place.

The Witness: Yes.

Q. By Mr. Schaefer: Did you have a conversation with anyone there?

A. Yes.

Q. Was Mr. Clawson present?

A. No, sir. Mr. Clawson was on the inside with this other gentleman you mentioned before, Marco.

Q. At the time you closed the circus did you have a conversation with Mr. Clawson, or was he present?

(Testimony of Jack W. Kramer.)

A. Mr. Clawson was present, and then he kept on leaving and coming back, and coming back and leaving, to oversee some of the other things going on on the inside. They were kind of late for the show, and he kept on going back and forth.

Q. Did you state at that time why the circus was being [369] closed? A. Yes, sir.

Q. To Mr. Clawson?

A. To Mr. Clawson and to Mr. Marco as well. Mr. Marco kept referring me to Mr. Clawson, because he said he was not familiar with circuses.

Q. What did you say to Mr. Clawson in that regard?

A. I told him we would have to close the circus or be sure the men were all organized.

Q. Did you give him any other reason than that?

A. Yes, we would have to close it. I told him there would have to be several repairs made before I would allow my performers to perform in the show.

Q. I take it this was a conversation with Mr. Clawson?

Mr. Combs: It is self-serving.

The Court: Proceed.

Q. By Mr. Schaefer: Go on with the conversation where you left off, Mr. Kramer, and what you said in regard to closing to Mr. Clawson. You stated that several repairs had to be made. Did you mention them?

A. Yes.

Q. What did you say?

(Testimony of Jack W. Kramer.)

A. I told him I wouldn't allow anything to be attached to one pole that was on the end of the big top down around the entrance, that seemed to be so cracked—in fact it was cracked—and they had two bands of iron, one at the [370] top of the place where it had been split, and it split all the way through, and a band of iron on the bottom of it.

Q. Was this the main pole?

A. One of the quarter poles. [371]

CHARLES E. CUNNINGHAM,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination [376]

Q. Did you work in this capacity for the Great American Circus? A. Yes, sir.

Q. Did you have an opportunity to notice the condition of the seats? A. I did.

Q. Where did you join the circus—in Inglewood? A. Yes, sir.

Q. Did you follow through to Pomona?

A. Yes, sir.

Q. Did you help erect seats in each one of the places? A. Yes, sir.

Q. Will you tell us the condition of the seats as you saw them?

A. Well, the condition of the seats was such that it would retard the erection of the seats in the

(Testimony of Charles E. Cunningham.)

proper length of time that was necessary to erect them.

Mr. Combs: I ask that all of that be stricken.

The Court: Yes, I will strike it.

Q. By Mr. Schaefer: Tell us the condition of the seats. What was the matter with them, etc.?

A. Well, the jacks were misfits, that is, the opening [377] in the jacks was of various widths.

Q. What is a jack?

A. A jack is what holds up the stringers that you put the bible backs on, and then you set your chairs on top of the bible backs.

Q. What was the matter with them?

A. They were misfits. There were various widths in the openings, and in order to erect the stringers on the jacks you would have to choose various and sundry jacks to make them fit on one stringer, and some of the jacks were in such shape that you had to use them in such a manner that they would be strong enough to be used.

Q. Did this cause any delay?

A. Yes, it delayed the erection of the seats.

Q. Did you examine the cross members?

A. The cross members—you mean the bible backs?

Q. Yes.

A. Yes. They were frayed on the ends, frayed by continuous use over a duration of time, and they become worn and frayed. And may I say what is the natural action in starting and shipping out in the spring?

(Testimony of Charles E. Cunningham.)

Q. If you know the custom.

A. To see that all those frayed ends are taken care of and all worn planks are replaced, so that they are in good shape, good condition.

Q. Was that done in the case of the equipment used by [378] the Great American Circus?

A. No, sir, it showed no signs of being put in usable condition.

Q. Did you see the decks of the flat cars?

A. I did.

Q. What condition were they in?

A. They were in aged condition. I didn't examine them closely enough to see if they had any holes in the decks, but they were in aged condition, and just like any aged material, it is apt to give way.

Mr. Combs: That part is a conclusion.

Q. By Mr. Schaefer: You didn't examine them for holes?

A. No. I observed the wagons coming off the flats, and their action gave me the conclusion that there were holes in the flats, or weak spots.

Mr. Schaefer: Cross examine.

Cross Examination

Q. By Mr. Combs: These seats were inspected by the seat inspector at Pasadena, weren't they?

A. Yes, sir, he was there.

Q. And passed, too?

A. After we had tried our best to put them in the proper condition, yes.

(Testimony of Charles E. Cunningham.)

Q. But they passed inspection?

A. Yes, but after a certain length of time. [379]

CHARLES H. PRIEST, JR.,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination [398]

Q. Did you observe the equipment out there in May of 1939? A. Yes, sir.

Q. What did you observe, first, with respect to the wagons? A. In what respect?

Q. Well, the wheels.

A. They were all in very poor condition.

The Court: Just tell us what you found, not your conclusion.

Q. By Mr. Schaefer: In other words, why did you come to any conclusion? We don't want the conclusion, but we want to know the things that you saw, that you observed.

A. Well, the wheels on the wagons were in very bad shape.

The Court: That doesn't mean anything. I can't give [399] consideration to that.

Q. By Mr. Schaefer: In what way, Mr. Priest?

A. The whole point, of course, is that it would be very hard for me to answer that question, because primarily I was interested in selling the merchandise.

(Testimony of Charles H. Priest, Jr.)

The Court: I am not concerned about that.

Q. By Mr. Schaefer: Did you make any observation of the axles? Could you determine from looking at the wagons anything about the axles? Did you observe the way the wheels slanted?

The Court: Let him state just what he saw.

A. Well, I could see that the wheels did slant out at the bottom, where they should have slanted in. The set was out on a number of the wheels. And the wheels themselves were in poor condition.

Mr. Combs: That is objected to again.

Mr. Schaefer: I submit, your Honor, he is telling what he saw.

The Court: But I don't know what "poor" means, or what it means to him.

A. The wheel itself should be in perfect condition, the spokes should be tight, and the fellies should be tight.

The Court: Tell us what you saw. Were the spokes loose?

A. I couldn't say, but the tires were loose on the fellies. [400]

The Court: You say they were?

A. Yes, sir. [401]

Q. By Mr. Schaefer: Were you present when the equipment was loaded on the cars?

A. No, sir.

Q. You were not? A. No, sir.

Q. Did you send out any articles to Baldwin Park? A. Yes, sir.

(Testimony of Charles H. Priest, Jr.)

Q. For repairs? A. Yes, sir.

Q. Do you have a copy of any invoices or anything which would indicate what you sent out?

A. Yes, sir.

Q. Can you refresh your recollection from them?

[402]

A. I would have to get them out of my brief case. I brought them up for that purpose.

The Court: Get your brief case. I thought those items were admitted.

Mr. Combs: We will admit any items that——

Mr. Schaefer: They haven't been.

Mr. Combs: I think we actually paid for most of them. It was over a thousand dollars.

Mr. Schaefer: I don't think so.

The Witness: Do you want me to enumerate——

The Court: Just pick out the bills and show them to counsel, and they can be marked as an exhibit.

A. These are the original sales sheets of our records, which, as a record, must be returned to our files, for our files there, after the case is over. That wants to be stipulated, your Honor.

The Court: Well, that is up to you.

The Witness: We have to have these records back for our files.

Mr. Combs: The court might have to have them.

The Court: If the court gets its mark on them, we won't give them back.

The Witness: I can give you copies of them, but I can't give you the originals. We have to have them in our files.

(Testimony of Charles H. Priest, Jr.)

Mr. Combs: Did Fanchon & Marco pay all of these bills, [403] or is this some of the bills we paid?

Mr. Schaefer: I don't know until he reads them. I have some that we paid.

The Court: They are all included in this statement?

Mr. Combs: I will take counsel's word for those they paid.

Mr. Schaefer: All right. They are all included in the statement, and they have all been paid for.

The Court: He says that he will concede that you furnished and paid for them, so you can take your bills back.

The Witness: O. K., sir.

Q. By Mr. Schaefer: Did you see the circus at San Diego?

A. No, sir.

Q. Did you see it at Santa Ana? A. Yes, sir.

Q. Did you see the equipment leave the train?

A. Yes, sir.

Q. Did you see any of the wagons on the road?

A. Yes, sir.

Q. Did you notice anything particular about any of the wagons, or wagon? Did you notice any wheels—

Mr. Combs: That is leading and suggestive, I think.

The Court: Answer.

A. Not while they were being unloaded off the train. [404]

Q. By Mr. Schaefer: On the street?

(Testimony of Charles H. Priest, Jr.)

A. On the street, yes, sir.

Q. What did you see?

A. One wagon that they were pulling down Main Street in Santa Ana, the wheel was in such condition that——

The Court: Just what condition was it in?

A. The bushing was smoking, apparently worn out.

The Court: Not apparently.

Q. By Mr. Schaefer: Did it appear to be worn? Or couldn't you tell by looking? Did you examine the wheel?

A. They took the wheel off after they got down to the lot, and the bushing was all broken.

Q. Did you see it then? A. Yes, I did.

Q. Were you alone when you saw this wheel smoking, or was someone with you?

A. No. Mr. Daillard was with me.

Q. Did you observe the wagon later?

A. Yes, sir.

Q. When?

A. At the shop on the show lot in Santa Ana.

[405]

Q. Did you supply any rope—did Mr. Daillard order any rope from you on that occasion, at Pasadena?

A. He ordered some. Ordinary rope, you mean, for the top?

Q. Yes.

A. There were a number of coils, I think, furnished in Pasadena, if I recollect right.

(Testimony of Charles H. Priest, Jr.)

Q. Was this equipment furnished at one time or at one place, or during different times?

A. Oh, no; different times.

Q. At each stop? A. That is right.

Q. Did you send equipment to San Diego?

A. No, sir.

Q. But to Santa Ana? A. Yes, sir. [406]

Q. Pasadena? A. Yes, sir.

Q. Some to Pomona? A. Yes, sir.

Q. Did you send some out to Inglewood?

A. Yes, sir.

Q. By Mr. Schaefer: Do you handle rope?

A. Yes, sir.

Q. How long have you handled rope?

A. Possibly 20 years.

Q. Have you had occasion to examine rope during that time? A. Yes, sir.

Q. Did you examine the rope in this circus?

A. I had occasion to examine, check pieces of rope on the circus.

The Court: When? [407]

A. At Pasadena.

Q. By Mr. Schaefer: What was the condition of the rope?

A. It was dry-rotted.

Q. Dry-rotted? A. Yes.

Q. Did you state that to anyone?

A. Yes, sir.

Q. To whom?

A. Mr. Daillard and Mr. Eagles.

(Testimony of Charles H. Priest, Jr.)

Q. Did you tell it to Mr. Clawson?

A. Yes, sir.

Mr. Schaefer: You may cross examine. [408]

WALTER S. GUICE,

a witness of lawful age, being produced, sworn and examined on the part of the defendant, on his oath deposes and saith:

Direct Examination

By Mr. Arthur: [417]

Q. Can you tell us what the main falls are?

A. The main falls holds the big top and the riggings.

Q. What is a fall? A. Pulley block and rope.

Q. That holds the main circus tent?

A. That is right, and the canvas and the rigging; there is four of them. They had a four-pulley top, one at each pole.

Q. Is that the rope upon which all the riggings of the various acts and equipment are supported?

A. Yes, sir, where all the big riggings is hung, and then they have a ring that they hang on the quarter pole.

Q. And your rigging was supposed to be hung onto what? A. From the pole ring of the big top.

Q. Why did you refuse to go up that night?

A. The main fall on the center pole on which our rigging was hung was bad and I wouldn't take no chances on it.

(Deposition of Walter S. Guice.)

Q. What was wrong with it? [422]

A. The ropes showed dry rot.

Q. That is, the rope? A. Yes, sir.

Q. What was the condition of the rope?

A. It was frayed out and didn't look safe.

Q. And you and the members of your act refused to go up because of the condition of the rope?

A. That is right. We called for the manager of the show and asked him about a chain to lash the bale ring of the big top to the center pole so if the rope would break it wouldn't come down, which he did.

Q. The rope of which you speak, if that rope were, as you say in bad condition, that was the main supporting rope of the tent itself, wasn't it?

A. Of that one piece, yes, sir.

Q. On the center pole? A. Yes, sir. [423]

Cross Examination

Q. Had you noticed the condition of the main falls before that time?

A. No, sir, until I seen them break putting up, and then I went up and examined them when they had my rigging up. I seen them break when I put the rigging up and I examined them.

Q. What condition did you find them in when you examined them?

A. Dry rot, indicating they had been laying around and not used.

Q. Can you explain a little more fully what you mean by dry rot?

(Deposition of Walter S. Guice.)

A. This rot exists after it is in a real dry place. It is manila rope, and they generally put a little tar in it and it dries out, just like you put grease in the cable, and it lays there and dries out, and dust gets in there and cuts the fiber and it eventually gets dry, and when it gets [432] dry it is just like powder; it falls apart. Manila rope is oiled; it has some kind of oil in it, and if you aren't using it it dries out and causes dry rot. Dust gets in it and cuts it, and they break up from being pulled over iron sticks or iron edges, and that cuts the fibers, and it finally weakens. [433]

Recross Examination

A. Since you asked me I will tell you: The ridge ropes were bad. Of course, that doesn't have anything to do with the canvas; that is only to raise the poles with, and after you get it raised the ridge rope would be slacked off; that is on a pulley, see? That is the condition I saw in Pasadena; that is the condition it was in.

Mr. Combs: I move that the last part of that answer "That is what the condition was in Pasadena" be stricken from the record. That is not responsive to any question, and is a statement of a conclusion on the part of the witness. [434]

DEFENDANT'S EXHIBIT No. 1

AGREEMENT

This Agreement, made and entered into this 11th day of May, 1939, between Fanchon & Marco, Inc., hereinafter referred to as First Party, and Glendale Post #127, Ltd., hereinafter referred to as Second Party,

Witnesseth:

Whereas, the parties hereto desire to enter into an agreement whereby First Party shall arrange, stage, produce, furnish and deliver a three-ring circus, under canvas, for presentation in the City of Glendale, Calif., on the dates of June 1st, 1939, with afternoon and evening performances, on a location designated as San Fernando Road and Allen Ave., and hereinafter referred to as "the location"; and

Whereas, Second Party agrees to sponsor said circus under its auspices.

Now, Therefore, in consideration of the promises herein contained, the money to be paid First Party by Second Party, and the services to be rendered by the First Party, it is mutually understood and agreed as follows, to wit:

First Party Agrees At Its Own Expense As Follows:

1. To transport, deliver and erect at "the location" all and complete equipment necessary to present a three-ring circus under canvas, and a complete sideshow, and to take away said equipment on

completion and leave "the location" in a clean condition;

2. To stage and produce a three-ring circus lasting a minimum of two hours and consisting of approximately twenty-six (26) displays of circus entertainment, and including a brass band to play for the entire performance, afternoon and evening.

3. To supply an adequate amount of circus posters and to post the same in suitable locations; to supply copies and mats for newspaper ads and press material;

4. To direct the publicity;

5. To supply all necessary administrative services including an auditor, advance agent, press agent, business manager and ticket sellers.

6. To supply the general admission tickets;

7. To furnish two toilets (one for men and one for women).

8. To pay all salaries for the artists and acts, labor, transportation, cartage and administrative expenses, including all taxes, levies or assessments, levied under so-called Social Security Acts or Unemployment Insurance Laws, and First Party agrees to hold Second Party harmless from any claims and demands by any competent authority for all or any part of such levies or assessments.

9. To pay all federal taxes upon admissions;

10. To carry all necessary Workmen's Compensation Insurance.

Second Party Agrees At Its Own Expense As Follows:

1. To supply a suitable location and to procure the license to conduct said Circus;

2. To produce the advance tickets and to conduct and carry on an advance ticket sale at least two weeks prior to the date of the first performance.

3. To furnish any additional toilets required by law over and above the two furnished by First Party.

4. To furnish adequate police and fire protection;

5. To furnish active working committees requested by First Party.

Both Parties Hereto Agree to the Following:

1. The Gross receipts from the sale of all advance exchange tickets, all gate admissions, including the side show, after deduction of federal taxes shall be divided seventy percent to the First Party (70%) and thirty percent (30%) to the Second Party.

2. Second Party agrees to pay to First Party all monies received from said advance ticket sale up to the sum of \$1,500.00 and said \$1,500.00 is then to become such a sum portion of the First Party's seventy percent (70%) share of the gross receipts referred to in the preceding paragraph.

If, by the sale of advance tickets, this sum to be given by Second Party to First Party does not reach the sum of \$1,500.00, then first Party is to take out of the general admissions a sum equal to the difference between the total sum received for the sale of advance tickets and \$1,500.00 and in such

event, said \$1,500.00 shall be such a sum portion of the First Party's Seventy Percent (70%) share of the gross receipts referred to in the preceding paragraph in this agreement.

3. First Party will furnish without cost to Second Party an advance ticket man who will assist Second Party in its ticket campaign and will aid and act as advisor to Second Party.

4. No concessions shall be maintained on the location except those operating under the license or consent of the Second Party, and all revenue from the sale and operations of such concessions shall be exclusively retained by the Second Party. Unless otherwise agreed to, the only concessions to operate on the location shall be as follows:

Hot Dogs	Balloons
Hamburgers	Canes
Lemonade	Whips
Soft Drinks	Hats & Novelties
Coca Cola	Souvenirs
Popcorn	Frozen Custard
Candy	Tintypes
Crackerjack	Guess Your Weight
Ice Cream Bars &	Scale
Cones	Candy Floss
Peanuts	Parking

5. While it has been agreed that First Party shall direct the publicity, it is understood that in most instances the best publicity can be obtained on the application of the Second Party owing to its

local position with the press, etc., and the Second Party agrees to fully cooperate with the First Party in obtaining the best publicity and First Party agrees to defray seventy percent (70%) of the cost of local newspaper advertising and Second Party agrees to pay thirty percent (30%) of the cost of such local newspaper advertising.

6. First Party agrees to carry policy of Public Liability Insurance, insuring parties hereto against any claims for injuries to persons or property. Second Party also agrees to carry policy of Public Liability Insurance, insuring parties hereto against any claims for injuries to persons or property.

7. It is understood and agreed that circumstances beyond the control of the First Party, such as fire, flood, transportation delay, strikes, war or what is defined in law as "Act of God", shall be an excuse for non-performance hereunder by either of the parties hereto, and in such event neither of the parties hereto shall be liable to the other for such non-performance.

8. This agreement shall be binding upon the heirs, administrators, assigns and successors of the parties hereto.

FANCHON & MARCO, INC.

By.....

GLENDALÉ POST #127 AMN.
LEGION

By ARNOLD R. SEIFERTS,

Commander.

[Endorsed]: Filed Nov. 22, 1940.

DEFENDANT'S EXHIBIT No. 2

Agreement dated May 4, 1939, between Fanchon & Marco, Inc. and Long Beach Pyramid No. 43, A. E. O. S. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 3

Agreement dated May 27, 1939, between Fanchon and Marco, Inc. and Napa Post 113, American Legion. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 4

Agreement dated May 29, 1939, between Fanchon & Marco, Inc. and American Legion Post #13. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 5

Agreement dated May 19, 1939, between Fanchon & Marco, Inc. and Charles Roe Post #30 of the American Legion. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 6

Agreement dated May 29, 1939, between Fanchon and Marco, Inc. and Oakland American Legion Committee. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 7

Agreement dated May....., 1939, between Fanchon & Marco, Inc. and Santa Ana Lodge #794 B. P. O. E. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 8

Agreement dated May 29, 1939, between Fanchon & Marco, Inc. and William J. Quinn. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 9

Agreement dated May 16, 1939, between Fanchon and Marco, Inc. and Santa Monica Cities Post 123, American Legion. Filed in the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 10

Agreement dated May 18, 1939, between Fanchon & Marco, Inc. and Ventura Lodge #1430

B. P. O. E. Elks. Filed in the District Court
November 22, 1940.

DEFENDANT'S EXHIBIT No. 11

Agreement dated May 6, 1939, between Fan-
chon & Marco, Inc. and D. M. Price. Filed in
the District Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 12

Agreement dated May 6, 1939, between Fan-
chon & Marco, Inc. and Inglewood Council of
Parents and Teachers. Filed in the District
Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 13

Agreement dated May 2, 1939, between Fan-
chon & Marco, Inc. and Bakersfield, California
Lodge No. 266 B. P. O. Elks. Filed in the Dis-
trict Court November 22, 1940.

DEFENDANT'S EXHIBIT No. 14

The following telegram was sent to:

- Mr. Everett M. Glenn, 709 Capital Bank Bldg.,
Sacramento, Calif.
- Mr. Bert Ronzee, Commander, American Legion,
1762 Elm St., Napa, California.
- Mr. Ray L. Johnson, Sacramento Memorial
Mausoleum, Stockton Blvd., at El Paraiso,
Sacramento, Calif.
- Mr. Fred S. Dean, 400 American Avenue, Long
Beach, Calif.
- Mr. Freed Hair, Pyramid #43, Sciots, Long
Beach, California.
- Mr. Arnold R. Seifert, Commander Post 127,
American Legion, Glendale, Calif.
- Mr. W. F. May, Post #123, American Legion,
Santa Monica, Calif.
- Mr. W. F. May, 12216 Dorothy St., Brentwood
Heights.
- Mr. Don Price, Ryans Auditorium, Fresno,
California.
- Mr. John R. Huff, B. P. O. Elks, Bakersfield,
Calif.
- Mr. Russell T. Petis, B. P. O. Elks, Bakers-
field, Calif.
- Mr. W. E. McNeil, Ventura Lodge 430, B. P. O.
Elks, Ventura, Calif.
- Mr. A. F. Spring, Ventura Lodge 430, B. P. O.
Elks, Ventura, Calif.

Mr. Elmer P. Zollner, c/o American Legion
Convention Headquarters, American Le-
gion Memorial Bldg., Oakland, Calif.

Kramer of American Federation of Actors has called out acts which are members of his organization. This and other labor difficulties which have caused us to miss matinee performances in Santa Ana and Pasadena necessitates us advising you with regret we will be unable to fulfill contract for Circus performance. One of our men will contact you later.

FANCHON & MARCO, INC.

Sent the night of Pomona Performance, May 31,
1939.

[Endorsed]: Filed Nov. 22, 1940.

MURRAY PENNOCK,

called as a witness in behalf of plaintiff in rebuttal,
being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: You have been sworn?

A. I have.

Q. What is your occupation, Mr. Pennock?

A. The show and theatrical business.

Q. How long have you been engaged in that
business? A. Oh, nearly 30 years.

(Testimony of Murray Pennock.)

Q. In what capacities?

A. In a managerial capacity, I should say, generally.

Q. With what circuses?

A. Well, going back to 1908 and stating them in chronological order, Norris & Rowe, Sells-Floto, Bud Atkinson in Australia, and Al G. Barnes for 12 consecutive years, and maybe one or two others I missed—Irwin Brothers Wild West, and one or two experiences intervening.

Q. Were you present at Baldwin Park in the week preceding the 23rd of May, 1939?

A. Yes, I was.

Q. Who were you with at that time? [438]

A. I was out at the winter quarters on the Sunday preceding the opening of the Great American Circus.

Q. Did you have occasion at that time to observe any circus equipment? A. Yes, I did.

Q. What was the occasion for your making that observation?

A. Well, I walked around the lot. Naturally, having been in the circus business all those years, I was interested, and I walked about the lot a good deal with Mr. Clawson. I also talked casually to Mr. Eagles and to Mr. Daillard.

Q. Did you take a look at the equipment at that time?

A. I looked at the equipment closer previously.

Q. How long previously?

(Testimony of Murray Pennock.)

A. Oh, perhaps a month or six weeks previously.

Q. Were you familiar with its condition at that time? A. Yes.

Q. Will you state what the condition of the wagons was?

A. May I explain? I came out there—I had been engaged by M. G. M. as technical adviser of their circus picture they were preparing, and they had asked me to set up a typical show of a certain size, and after that was done they talked about the rental of equipment which was available in various places, and I suggested that we go out to Baldwin Park and look over the equipment there, which Mr. [439] Clawson had told me was for rent. I took two draftsmen, whose names I have forgotten now, and Stan Rogers, who was one of the art directors at M. G. M., out there on two or three occasions.

Q. At that time you examined this equipment minutely, did you not?

A. More or less minutely, yes.

Q. What was its condition? Was it in good condition, suitable for use at that time?

Mr. Schaefer: I will object to that, on the ground that there is no showing that the equipment was that of the Great American Circus, or that it was an examination of all of the equipment.

The Court: If he examined all of it, it would be proper. Did you examine all of the equipment?

(Testimony of Murray Pennock.)

A. All of the equipment with respect to the rolling stock, the wagons about which we are now talking.

The Court: About how many wagons?

A. At that time I believe there were 40 or 50 wagons on the lot.

The Court: Overruled.

A. Many of these wagons were old Al G. Barnes wagons which had been relegated to the back of the lot and were obsolete, some of which, as a matter of fact, I built. But the Hagenback-Wallace equipment I think we went over pretty thoroughly. The draftsmen were interested from the stand- [440] point of making drawings, presumably to fill in the archives out at the studio, should the occasion arise for building wagons in the future.

Mr. Schaefer: I submit that that isn't an answer to the question.

The Court: That is argument. What condition was it in?

A. The wagons, all of the Hagenback-Wallace wagons were in comparatively good condition.

Q. By Mr. Combs: Suitable for use?

A. Suitable for use.

Q. Did you examine the flat cars at that time?

A. I saw the flat cars, yes.

Q. What was their condition?

A. The flat cars were in equally good condition.

Q. Did you examine the rigging, tents, drops and falls?

(Testimony of Murray Pennock.)

A. Not minutely, no. I saw the ropes and rigging coiled in one of the barns. I saw the canvas rolled up, but I did not examine it closely, no.

Q. Did you have an opportunity to observe this equipment again after that date at Baldwin Park?

A. I went out to the opening of the show at Inglewood, both afternoon and evening. I left the studio and spent possibly 45 minutes to an hour on the lot in the afternoon, while the show was being prepared, and I went back again about the dinner hour in the evening, and remained until it had been partially torn down at night. I left there [441] about 12:30 or 1:00 o'clock the following morning after the performance.

Q. Did you see the equipment there?

A. Yes.

Q. What was its condition then, generally?

A. I thought it was in perfectly usable condition, such of it as I saw.

Q. What did you see?

A. I saw the big top in the air. I saw many of the wagons, in fact all of the wagons, I think. I saw the seats. I saw the poles and the other paraphernalia incident to the erection of the tent, and the stage, and ring curbs, and all those properties, in use. I looked the show over generally, as an ex-showman would.

Q. All of that show and equipment was in use at that time, too, was it not?

(Testimony of Murray Pennock.)

A. As far as I know, yes. All of it I saw was in use.

Q. Did you see the show again after that date?

A. I saw the show in Pasadena on the afternoon of Memorial Day.

Q. Did you observe the main fall rope break there? A. No, sir.

Q. Did you observe the show erected?

A. It wasn't erected. The side show was up, and they were putting up the big top at the time I went over there. At the time I normally expected the doors to be open the [442] big top was in process of erection at that time, and I was there for an hour and a half, and very little or no progress was made in that hour and a half, so I departed for home.

Q. In the circus business is it the custom to rent sleeping cars with or without berth curtains, pillow cases, sheets and blankets?

A. I have on occasion rented circus sleepers, and am more or less familiar with the practice in that connection, and I know of no instance within my knowledge where sleepers, circus sleepers, as such, are rented completely equipped.

Cross Examination

Q. By Mr. Schaefer: Mr. Pennock, how long did your examination take you a month previous to the Sunday you were out?

A. I was out there on three occasions, I be-

(Testimony of Murray Pennock.)

lieve, as I stated. I think each time we spent from two to three hours.

Q. How long a time did you spend examining wagons?

A. Well, fully half of the time was spent on the examination of the wagons.

Q. How many wagons did you want?

A. Did we want? [443]

Q. Yes.

A. Well, that was problematical, because at that time no definite decision regarding the size of the show to be portrayed on the screen had been arrived at.

Q. Did you ever rent any of this equipment?

A. Not that I know of, no.

Q. Your studio didn't rent it?

A. I don't know, because before the actual filming of the picture I had closed my engagement with M. G. M.

Q. You don't know of your own knowledge whether it went out? A. I do not.

Q. The purpose for which you wanted this equipment was for filming, is that right?

A. Yes.

Q. It wasn't to be rolled from town to town?

A. That is right.

Q. And you could take as much time as you wanted to put it up? A. That is right.

Q. And the wagons were going to be stationary all the time? A. That is right.

(Testimony of Murray Pennock.)

Q. So you didn't pull any of the wheels off and examine the axles? A. No. [444]

Q. You made no examination at all, whatever?
A. No.

Q. You weren't interested in whether the wagons had brakes or not?

A. I wasn't particularly interested, no.

Q. What was your interest in the flat cars?

A. The interest in the flat cars at that time was the fact that they had discussed—there was a sequence in the picture showing the circus train in motion, passing from town to town at night, and it was supposed to be a night shot, and they were going to build a miniature train, and they wanted scale drawings of flat cars and coaches and stock cars, so that they could portray this train in motion and have it a reasonable facsimile.

Q. They weren't going to use any flat cars at all, then, for drawing purposes? A. No.

Q. So you didn't have any occasion particularly to examine these cars as to their condition?

A. I had examined them previously.

Q. How long previously?

A. I should say 60 days prior to the show going out.

Q. Did you examine the cars—

A. Thoroughly.

Q. Did you examine those that went out with the Great American Circus? [445]

(Testimony of Murray Pennock.)

A. I must have examined those, because I examined all of them.

Q. Do you recall now car No. 65, which was a stock car?

A. I can't identify the cars by number in my mind, no.

Q. Did you have in mind at the time you examined those cars and now, when you state that they were in good and usable condition, that car 65 had to have the air brakes cleaned, eight journal boxes re-packed, that one truck spring was broken, that they had to have repairs made and the car jacked, that three brake beam safety bar bolts and lock nuts $\frac{3}{4}$ by 3 were worn out, that one brake bell crank was broken, that one bracket was broken, that two bolts and lock nuts $\frac{5}{8}$ by $2\frac{1}{2}$ were worn out, that one brake chain bolt $\frac{5}{8}$ by $2\frac{1}{2}$ was worn out, that one bell crank pin was worn out, and that two cotter keys were worn out, all on car 65? Did you know that when you made that examination?

A. Not in detail, no, sir.

Q. When you examined car 85, a flat car, did you know that one piece of train line pipe $1\frac{1}{4}$ by 16 was rusted and needed replacing, that one coupling $1\frac{1}{4}$ had the threads broken, that two ends of pipe had to be threaded, that there were four connections that had to be repaired, that two "U" pipe clamps $\frac{1}{2}$ by 3 were worn out, that one pair SH wrought steel wheels had worn flanges on them, that two journal bearings, 9 inches, were worn [446]

(Testimony of Murray Pennock.)

out, that two dust guards 9 inches were worn out, that four journal box bolts and lock nuts $1\frac{1}{8}$ by 16 were worn out, that one brake connecting cotter was worn out, that the wheels were badly worn, that eight journal boxes had to be repacked, that three journal bearings were worn and that the air brakes had to be cleaned? Did you know that when you inspected car No. 85?

A. I knew many of them, yes. None of those were major defects.

Q. Did you hear Mr. Kettring, of the Santa Fe, testify? Did you hear him testify that some things violated the Interstate Commerce laws?

A. Yes, sir.

Q. Did you hear him state that they had to be repaired before they would carry them on their lines? A. I did.

Q. When you examined car No. 87, did you know at that time that the air brakes had to be cleaned, that eight journals had to be repacked, that six journal bearings were worn out, that four safety bar bolts and lock nuts $\frac{3}{4}$ by 2, were worn out? Did you know that when you examined car No. 87?

A. Not in detail.

Q. Did you know when you examined car No. 80, a flat car, that one pair of SH wrought steel wheels had a worn flange, that two journal bearings 9 inch were worn out, [447] that two dust guards 9 inch were worn out, that four journal box bolts and lock nuts $1\frac{1}{8}$ by 16 were worn out, that one

(Testimony of Murray Pennock.)

top rod was repaired because it was cut by the axle, that there were two connecting pins that had to be repaired, that one journal bearing 9 inch was worn out, that eight journal boxes had to be repacked, that the air brakes had to be cleaned, and that there had to be labor performed on those cars? Did you know that when you examined car 80?

A. Again not in detail, no, sir.

Q. When you were examining car 88, which was a flat car, did you know that two pair of SH wrought steel wheels had worn flanges, that four journal bearings 9 inch were worn out, that four dust guards were worn out, that eight journal box bolts and lock nuts were worn out, that there had to be labor performed on the wheels, that eight journal boxes had to be repacked, that two journal bearings were worn out, that two connecting cotter keys had to be replaced because they were worn out, and that the air brakes had to be cleaned? Did you know that when you examined car 88?

A. Again not in detail, no, sir.

Q. Did you know when you examined car 84, another flat car, that the air brakes had to be cleaned, that one train line nipple 1¼ by 6 had to be replaced because it was worn out, that one SL angle cock had a leaky core, that one connection had to be repaired, that one U-clamp needed [448] repairing, that eight journal boxes had to be repacked, that five journal bearings were worn out,

(Testimony of Murray Pennock.)

that one pair SH wrought steel wheels had worn flanges, that two journal bearings were worn out, that two dust guards were worn out, that four box bolts and lock nuts $1\frac{1}{8}$ by 16 were worn out, that labor was required on the wheels, that one side bearing bolt and lock nut $\frac{3}{4}$ by 2 was worn out? Did you know that when you examined car 84?

A. I knew there were some flanges that needed attention and some journals that needed attention, yes.

Q. And you considered those minor details?

A. Yes, sir.

Q. Did you know when you examined car 82, a flat car, that there were eight journal boxes repacked, that the air brakes had to be cleaned, and that one journal bearing 9 inch was worn out? Did you know that?

A. Not all of it, no, sir.

Q. Did you know on car No. 81, a flat car, that eight journal boxes had to be repacked, that the air brakes had to be cleaned, and that seven journal bearings 9 inch were worn out? Did you know that when you examined car 81?

A. I knew some of it, but not all of it.

Q. Did you know when you examined car 52, which was a passenger car, that there were three carrier iron bolts and lock nuts that were worn out, and three additional ones $\frac{3}{4}$ by 5 were worn out, and three additional ones $\frac{3}{4}$ by 4 were [449] worn out, and that twelve journal boxes had to be repacked,

(Testimony of Murray Pennock.)

and two journal bearings had to be replaced because worn out, and that the air brakes needed cleaning? Did you know that when you examined passenger car No. 52?

A. You can't know, can't tell whether an air brake needs cleaning until the car is connected onto a train.

Q. Isn't that an element that you must take into consideration?

A. No, because air brakes are automatically cleaned and must be cleaned every so often when the train is in operation. The date of the cleaning is stenciled on the brakes, and when the time comes for subsequent cleaning it has to be taken care of.

Q. Did you examine the stenciling on the brakes?

A. I saw stenciling on the brakes of some of the cars which stated that the air had been tested only a week or two prior to the Hagenback-Wallace Show coming in. It bore the date of the preceding September, 1938.

Q. Were these some of the cars that were with the Great American Circus?

A. I don't know.

Q. And with car 50, another passenger car, did you know that there was one pair of SH wheels that had worn flanges, that two journal bearings 9 inch were worn out, that two dust guards were worn out, and that a full flange had to be restored to restore the wheels to service, that [450] there were wheels that required labor, and that twelve

(Testimony of Murray Pennock.)

journal boxes had to be repacked, and two journal bearings 9 inch were worn out, and that one journal wedge had to be drop-forged, and that the air brakes had to be cleaned? Did you know that when you examined car 50, a passenger car?

A. I think I knew everything that was faulty in connection with car 50, because I had talked to Clawson about leasing that car myself.

Q. And you thought it was in good, usable condition? A. Definitely, yes.

Q. But you thought it was in usable shape for taking over to the studio?

A. No. I was contemplating a tour of Canada with a negro choir, the Hall-Johnson Choir, and Mr. Clawson was making desperate efforts to lease me two Hagenback-Wallace cars.

Q. And car No. 45, a passenger car, do you remember that?

A. I know the No. 45 car, yes, sir.

Q. Did you see anything wrong with that car?

A. I don't recall specifically, no. The No. 50 car was the car I was chiefly interested in.

Q. Can you tell me whether you examined car No. 45 in making your inspection?

A. I knew, as any circus man knows, of course, that there were things wrong with all of those cars.

[451]

Q. I am talking about car 45 now.

A. I can't state specifically.

(Testimony of Murray Pennock.)

Q. You didn't know, then, that there was one wood end sill patch that was decayed on that, that had to be replaced? A. No.

Q. Did you know that one vestibule diaphragm had to be straightened on the car because it was bent? A. I saw that, yes.

Q. And that there were three carrier iron bolts and lock nuts that were worn and loose? Did you see that? A. I think so.

Q. Did you know that twelve journal boxes had to be repacked as per Rule 66?

A. The journal boxes on every railroad car have to be packed frequently.

Q. And that one journal bearing 9 inch had to be replaced?

A. Journal bearings have to be replaced frequently for any car in service.

Q. Did you examine passenger car No. 46?

A. Among the others, yes.

Q. Do you remember anything about that?

A. No, not particularly.

Q. That was in good condition too, was it?

A. I didn't say any of the lot were in good condition. [452] I said they were in usable condition.

Q. Would you say the cars were not in good condition?

A. They were in comparatively good condition, usable condition. To begin with, of course, they are wooden cars, and are quite serviceable for use in

(Testimony of Murray Pennock.)

circus movements, where they would not be considered good sleeping cars by the master mechanics of the Santa Fe or any other railroad, for use in passenger traffic, where train speeds are rated on a faster basis than the movements of a circus. The circus probably depended upon the equipment moving under specific running orders. I was traffic manager of the Barnes Circus for seven years, and under running orders of 20 or 25 or 30 miles an hour those cars were usable for service of that description, where they would not be considered usable by the Interstate Commerce Commission or a railroad man for passenger service work, like the Santa Fe Chief.

Q. You say 20 or 25 miles an hour would be the maximum?

A. I didn't say the maximum. I said that would be the average speed at which the train was transported.

Mr. Schaefer: No further questions. [453]

PATRICK GRAHAM,

called as a witness in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: You have been sworn?

A. Yes, sir.

(Testimony of Patrick Graham.)

Q. Where is your place of residence?

A. Pasadena, California.

Q. Where?

A. 985 North Marengo Avenue.

Q. What is your occupation?

A. Circus employee.

Q. How long have you been engaged in that capacity? A. 19 years.

Q. What character of work did you undertake during that 19 years?

A. All the way from cook house punk up to head porter.

Q. For what circuses?

A. I started on the John Robinson Show; Sells-Floto; Hagenback-Wallace; Sells Brothers; Al G. Barnes; McCullough Brothers.

Q. Did you work for the Great American Circus? A. Yes, I did.

Q. And that was in May of 1939?

A. That is right. [454]

Q. Who employed you?

A. Mr. Eagles employed me.

Q. And when? A. Friday morning.

Q. Before it went over to Inglewood?

A. Before it went over to Inglewood.

Q. Did you do anything when he employed you, or did you just wait around?

A. No. I always worked 24 hours a day when I worked any.

Q. And you went to Baldwin Park?

(Testimony of Patrick Graham.)

A. Yes, sir.

Q. What did you do when you got there?

A. He told me to take one of his trucks and come over to Los Angeles and pick up men.

Q. For what purpose? A. For laborers.

Q. Did you do so? A. I did so.

Q. What were you to get? A. Men.

Q. By Mr. Combs: How many did you get?

A. I picked up 25 on the first load. I lost two on the way over, and stopped and picked up two more at Baldwin Park, and I had 21 when I wound up.

Q. Did you go for more men after that? [455]

A. I made quite a few trips, yes, sir.

Q. Were they experienced circus hands or green?

Mr. Schaefer: I object to that as calling for a conclusion of the witness.

Mr. Combs: I will withdraw it.

Q. Is that all you did there at Baldwin Park?

A. No. I had charge of the sleeping cars.

Q. What was your official capacity?

A. Head porter.

Q. In that connection did you have occasion to observe the sleepers?

A. I had four or five occasions to observe them.

Q. Did you have charge of them?

A. I had charge of them.

Q. What did you do with relation to the sleepers before you left Baldwin Park?

(Testimony of Patrick Graham.)

A. You see, I have been a head porter before in other shows. That is my business.

Mr. Schaefer: If the court please,—

A. And I carry my own crew of experienced porters.

Mr. Schaefer: I want to enter an objection that it is not responsive.

The Court: Just answer the question.

Q. By Mr. Combs: You carry your own crew of porters? A. That is right.

Q. Did you have that crew there? [456]

A. I did.

Q. Did you put them to work on these cars?

A. I did.

Q. What did you direct them to do?

A. I told them to clean the cars.

The Court: What did they do?

A. They cleaned the cars up.

Q. By Mr. Combs: From end to end; is that right? A. From end to end.

Q. With disinfectants?

A. With disinfectants.

Q. Relate exactly what you had them do in connection with cleaning the cars?

A. As was customary, we took all the mattresses out and set them out in the sun and aired them, and if there was any spots on them that we could wash off, we washed them off. They was fairly new, bought brand new in 1938, in Indiana, out of Chicago, for Howard Yberry in Chicago.

(Testimony of Patrick Graham.)

Q. Proceed.

A. And there was not much work on cleaning the mattresses, so the men went back inside after they got the mattresses out, and proceeded to clean the cars, taking the wooden slats off of the beds. As you know, our beds do not have springs. Springs are bad for the kidneys, so we have wooden slats across the bunks. They took all the slats out and washed them with disinfectants and washed the cars down [457] with disinfectants, and made whatever minor repairs was supposed to be made on the berths.

Q. Was that all you did there?

A. I sent the sheets out that we had.

Q. How many sheets did you have?

A. We had 67 that was originally Hagenback-Wallace sheets, that was left there by the people that didn't want to take them.

Q. What usually happens when a circus comes in to winter quarters with relation to sheets, pillow cases and blankets?

Mr. Schaefer: I object to that.

The Court: Sustained as to what usually happens.

Q. By Mr. Combs: What is the custom?

Mr. Schaefer: I object to the custom.

The Court: Sustained.

Q. By Mr. Combs: Then you needed more than 67 sheets for this equipment?

A. Yes, it is customary to have a few more than that.

(Testimony of Patrick Graham.)

Q. With how many cars?

A. They told me they was going to sleep 267 people.

Q. Did you contact or discuss the matter with Eagles or anyone else?

A. I think they got a little mad at me. I discussed it too many times with them.

Q. You told them you needed sheets, pillow cases and [458] blankets? A. Yes, sir.

Q. And you finally got them?

A. Yes, after I worried Mr. Daillard until he was about sick.

Q. And you got them before you left Baldwin Park, didn't you?

A. Yes. They brought them over about 7:00 o'clock Monday evening.

Q. And that was at Inglewood?

A. At Inglewood the beds was made up.

Q. Were they dirty or clean?

A. Fairly clean. I slept in them myself, and Mr. Eagles slept in them, and everybody else slept in them. There was no complaint at the time of the beds being dirty.

Q. Later on you got some berth curtains?

A. That is right.

Q. When was that? A. At San Diego.

Q. Did anything transpire with relation to berth curtains?

A. I had a little difficulty in getting berth curtains.

(Testimony of Patrick Graham.)

Q. Did you ask Eagles for them?

A. I asked Mr. Eagles for them, and he referred me to Mr. Daillard, because they made a ruling on the show that we couldn't purchase nothing without the purchasing agent's [459] order.

Q. Who was the purchasing agent?

A. Well, they had a couple of them up there. If you wanted one you couldn't find him, so we used the other one.

Q. Which one did you——

A. I finally got Mr. Daillard to go down with me.

Q. Did you have occasion to observe the condition of the flat cars in this circus?

A. Very much so.

Q. What was their condition?

A. I would say they was good. I have worked on worse.

Q. By Mr. Combs: What was the condition of the runs? A. Very good.

Q. What was the condition of the wagons?

A. Good.

Mr. Schaefer: I will object to that and move to strike the answer on the ground that there is no foundation laid for the answer to that question.

The Court: The court will consider it, if it has any value.

Q. By Mr. Combs: There was a toilet in one of these cars. What was the style of the toilets in these cars? [460]

(Testimony of Patrick Graham.)

A. We had two lavatories in each car, naturally, one at each end, for both sexes, the women on one end and the men on the other. The lavatories was inspected in the Santa Fe shops over here in Los Angeles.

Q. Did they pass them at that inspection?

Mr. Schaefer: Just a minute. I object to that on the ground that no foundation has been laid for it.

The Court: Sustained.

Q. By Mr. Combs: Did the Santa Fe direct you to do anything in the lavatories?

A. No.

Mr. Schaefer: I object to that on the ground——

The Court: Well, he has answered no, and the answer is against him.

Mr. Schaefer: Well, I can't hear his answers, your Honor.

The Court: Speak so that he can hear you.

Q. By Mr. Combs: All right. What was the style of the lavatories there? Were they flush or non-flush lavatories?

A. They would flush.

Q. The toilets in particular, how were they flushed?

A. They had a ratchet on the side, and all you had to do was just push down and the toilets flushed.

Q. Was that the case with all of these toilets?

A. That is right. [461]

(Testimony of Patrick Graham.)

Cross Examination

Q. By Mr. Schaefer: Mr. Graham, how long have you served as porter with circuses?

A. 12 years.

Q. In the capacity of porter?

A. In the capacity of porter.

Q. And you were the one that was in charge of these sleepers; is that right? A. That is right.

Q. What was the condition of the floors of the sleepers, the carpets?

A. Mr. Carter, who was boss porter, had new carpet put in.

Q. I am asking you the condition of these cars as they were in May, 1939? A. They was good.

Q. Were there any holes in the carpets?

A. No, sir.

Q. Were you present this morning when Tiny Kline testified? A. Yes, sir, I was.

Q. Did you hear her testimony?

A. Yes, I was here and I heard it.

Q. You say there were no springs in these sleepers? [462] A. No, sir.

Q. The mattresses were new?

A. They was new in the spring of 1938.

Q. That was the year before?

A. That is right.

Q. Did you purchase them?

A. Mr. Nick Carter purchased them.

Q. Were you porter, when they were purchased, on these cars?

(Testimony of Patrick Graham.)

A. I was through Indiana when they was purchased.

Q. And you saw these mattresses purchased in Indiana in 1938? A. Yes.

Q. What kind of mattresses were they?

A. They was cypress mattresses with a cotton filling.

Q. Did they have any springs in them?

A. No, sir.

Q. Then there were no springs in the beds at all? A. No.

Q. These 67 sheets, were they furnished?

A. They was just there.

Q. And they were taken?

A. We used them, yes.

Q. And you had 267 people to sleep?

A. That is right.

Q. You don't supply berth curtains every time a car [463] goes out, buy new ones?

A. It is according to who takes the show out.

Q. Were there any berth curtains for these sleeping cars out at winter quarters? A. No.

Q. What happened to them?

A. I would have to explain that.

Q. Don't you ever have berth curtains for these cars?

A. In certain circumstances, yes. There was a little difficulty on the Hagenback-Wallace Show when it closed, and the people took what they could carry, and the berth curtains was pretty good ma-

(Testimony of Patrick Graham.)

terial, so they took them, and the blankets and sheets.

Q. They didn't take the mattresses, did they?

A. They are a little too bulky to carry.

Q. You say the car was fairly clean. Just what character of cleanliness is fairly clean? Does that mean partly dirty?

A. No, sir. You see, we always fumigate cars.

Q. That is the law, isn't it?

Mr. Combs: He doesn't know the law.

Q. By Mr. Schaefer: Is that the law?

The Court: Well, he is asking what he did. He is not asked about the law.

Q. By Mr. Schaefer: Are you required to fumigate them?

A. To a certain extent, yes. [464]

Q. They were fumigated?

A. No. We used another method.

Q. You didn't fumigate?

A. We didn't have time to fumigate.

Q. When did you begin getting the cars ready?

A. Friday morning at 7:30.

Q. And you left the winter quarters what time?

A. Monday evening.

Q. So you worked on them from Friday until Monday? A. Yes, sir.

Q. You say you had no complaints about cleanliness. You were here this morning when the seven ladies from the Fanchonettes were here?

A. My time was taken up entirely in——

(Testimony of Patrick Graham.)

Q. You did say the toilets were all in good, clean, working condition?

A. The toilets were in good condition.

Q. Did you say the water was flushing in all the toilets? A. It was. [465]

CHARLES W. NELSON,

recalled as a witness on behalf of plaintiff in rebuttal, testified further as follows:

Direct Examination

A. Yes. Mr. Clawson and myself and some other individual was standing in what was afterwards to become the backyard of the show, as we call it, and there was a truck being unloaded just in front of us by a couple of young fellows. They were unloading the calliope off of the tail-boards, and instead of letting it slide down straight, they had it at an angle, so it was at an angle, and it slipped and struck the ground and toppled over. [467]

[Endorsed]: Filed March 12, 1941.

[Endorsed]: No. 9779. United States Circuit Court of Appeals for the Ninth Circuit. Fanchon & Marco, Inc., a Corporation, Appellant, vs. Hagenbeck-Wallace Shows Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from

the District Court of the United States for the Southern District of California, Central Division.

Filed March 29, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9779

FANCHON & MARCO, INC., a corporation,
Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY,
a corporation,

Appellee.

STATEMENT OF POINTS RELIED UPON
AND DESIGNATION OF RECORD.

Point I.

The following paragraphs of the Findings of Fact are not supported by the evidence:

II, III, IV, IX, X, XI, XIII and XVI.

Point II.

The District Court erred in drawing inferences from the non-production of evidence, in paragraphs IX and X of the Findings of Fact.

Point III.

That the judgment is not supported by the Findings of Fact and Conclusions of Law.

Point IV.

The District Court erred in the admission of testimony objected to by appellant.

DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION OF THIS CASE.

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Amended Designation of Contents of
Record on appeal 48

This specification of points relied upon,
and the designation of the record.

That portion of the reporter's transcript of the
testimony as follows:

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Dated: March 28th, 1941.

MacFARLANE, SCHAEFER,
HAUN & MULFORD,
JAMES H. ARTHUR and
WILLIAM GAMBLE

By HENRY SCHAEFER, JR.,
Attorneys for Appellant.

Received copy of the within Statement this 28th day of March, 1941.

COMBS & MURPHINE,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 29, 1941. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF DOCUMENTS, RECORDS AND PROCEEDINGS TO BE INCLUDED IN RECORD ON APPEAL, AND TO BE INCLUDED IN THE PRINTED TRANSCRIPT THEREOF.

Comes now the Appellee, Hagenbeck-Wallace Shows Company, a corporation, within ten days of the date of the service upon it of Appellant Fanchon & Marco, Inc's State of Points Relied Upon and Designation of Record, and designates the following documents, records and proceedings, and portions of the record which it believes necessary to a proper determination of the above entitled case

on appeal, including portions of the reporter's transcript of testimony received during the trial.

I.

Appellee's Exhibits A-1 and A-2.

II.

Appellant's Exhibits 1 to 17 inclusive.

III.

The following portions of the reporter's transcript of the testimony and proceedings before the trial court, as set forth by line and page, as follows:

1. Page 2, line 19, to page 9, line 15 inclusive, being certain preliminary statements and stipulations.

2. Page 10, line 8 to page 18, line 4; page 31, line 13 to page 36, line 20; page 37, line 3 to page 42, line 7; page 42, line 14 to page 50, line 8, being all of the remainder of the direct examination of Paul Eagles, beyond that requested by Appellant herein.

3. Page 56, line 13 to page 56, line 15; page 64, line 23 to page 67, line 3; page 70, line 6 to page 72, line 7; page 85, line 8 to page 89, line 14; page 91, line 12 to page 92, line 19, being portions of the cross and redirect examination of Paul Eagles.

4. Page 93, line 1 to page 95, line 15; page 95, line 22 to page 96, line 6; page 96, line 13 to page 98, line 26, being all of the remaining examination of Charles W. Nelson not requested by Appellant.

5. Page 101, line 1 to page 107, line 4; page 107, line 13 to page 110, line 26; page 111, lines 5 to 11;

page 111, line 21 to page 113, line 16; page 113, line 23 to page 116, line 5; page 116, line 25 to page 117, line 24, being all of the remaining examination of George Singleton not requested by Appellant.

6. Page 125, line 1 to page 133, line 4; page 134, line 25 to page 136, line 8; page 137, line 9 to page 145, line 12; page 145, line 23 to page 148, line 8; page 148, line 16 to page 149, line 4; page 158, line 3 to page 159, line 16; page 160, line 1 to page 161, line 14, being portions of the testimony of Ralph J. Clawson not requested by Appellant herein.

7. Page 299, line 1 to page 301, line 15; page 302, line 9 to page 302, line 16; page 303, line 15 to page 309, line 10, being portions of the testimony of J. V. Austin not requested by Appellant herein.

8. Page 312, line 1 to page 314, line 7; page 317, line 3 to page 318, line 22, being portions of the testimony of Jack W. Kramer not requested by Appellant herein.

9. Page 327, line 19 to page 327, line 26, being portions of the testimony of Charles E. Cunningham not requested by Appellant herein.

10. Page 350, line 14 to page 353, line 3; page 354, line 11 to page 355, line 6, being portions of the testimony of Charles H. Priest, Jr. not requested by Appellant herein.

11. Pages 384, line 4 to page 388, line 7; page 388, line 18 to page 389, line 11, being portions of the testimony of Murray Pennock not requested by Appellant herein.

12. Page 400, line 1 to page 402, line 6; page 404, line 9 to page 405, line 15; page 405, line 20 to page 406, line 11; page 408, line 4 to page 408, line 11; page 409, line 21 to page 411, line 11, being portions of the testimony of Pat Graham not requested by Appellant herein.

13. Page 413, line 6 to page 413, line 10, being portions of the testimony of Charles W. Nelson not requested by Appellant herein.

14. Page 212, line 14 to page 212, line 25, being portions of testimony of Marco Wolff.

Dated this 1st day of April, 1941.

COMBS & MURPHINE

By LEE COMBS,

Attorneys for Appellee.

Received copy of the within Designation this 1st day of April, 1941.

MacFARLANE, SCHAEFER,

HAUN & MULFORD,

By W. F.

Attorneys for Appellant.

[Endorsed]: Filed Apr. 2, 1941. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

Whereas, the Appellee has designated for inclusion in the printed record certain exhibits being Appellant's exhibits 1 to 13, and

Whereas, it is agreed upon by the Appellant and by the Appellee, through their respective counsel undersigned, that for the consideration of this case it is unnecessary that all of said exhibits be printed in the record.

Now, Therefore, It Is Hereby Stipulated, that Appellant's Exhibit 1 is to be reproduced in its entirety in the printed record and that Exhibits 2 to 13 inclusive may be omitted except a notation as to the parties thereto and the date of execution.

Dated: April 9, 1941.

COMBS & MURPHINE

By LEE COMBS

Attorneys for Appellee

MacFARLANE, SCHAEFER,

HAUN & MULFORD,

JAMES H. ARTHUR and

WILLIAM GAMBLE

By HENRY SCHAEFER, JR.,

Attorneys for Appellant.

Good cause appearing therefor,

It Is Hereby Ordered, that the printed record may be made to conform to the above stipulation.

Dated: April 14, 1941.

CURTIS D. WILBUR,

Judge of the Circuit Court of Appeals.

[Endorsed]: Filed April 14, 1941. Paul P. O'Brien, Clerk.

No. 9779.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

MACFARLANE, SCHAEFER, HAUN & MULFORD,

JAMES H. ARTHUR and

WILLIAM GAMBLE,

1150 Subway Terminal Building, Los Angeles,

Attorneys for Appellant.

FILED

JUN 24 1941

PAUL P. O'BRIEN

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No. 9779.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

**Statement of Pleadings and Facts Disclosing Basis of
Jurisdiction.**

The appellant, Fanchon & Marco, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California.

The appellee, Hagenbeck-Wallace Shows Company, is a corporation organized and existing under and by virtue of the laws of the State of Indiana.

The appeal is from a judgment in favor of the appellee in the sum of fifteen thousand six and 07/100 dollars (\$15,006.07), general damages and costs rendered upon a judgment by the Court.

The complaint alleges the making and execution of a written contract dated May 22, 1939, wherein the appellee leased to appellant specified circus equipment for five weeks under certain terms and conditions, and wherein the appellant agreed to pay as rent therefor the sum of two thousand five hundred dollars (\$2,500.00) per week. It is further alleged in the complaint, that the appellee delivered said equipment in compliance with the terms of the contract, in good condition, ready for use, and that appellee has performed all the other covenants in said contract to be performed by appellee, and that the appellant has failed and refused to pay the rental of two thousand five hundred dollars (\$2,500.00) a week for the period, and that the whole amount together with interest thereon is due and owing from appellant to appellee. [Pr. Tr. pp. 2-14.]

It is further alleged, that on or about May 31, 1939, the appellant returned all of said circus equipment to the appellee, and that during the unexpired term of said rental period, namely, a period of four weeks, the appellee endeavored to, and made every effort to, rent said circus equipment, but was unable to do so. That as a consequence of appellant's alleged breach and return of said equipment, the appellee was compelled to feed the animals to its damage in the amount of one thousand six hundred dollars (\$1,600.00).

The Answer of appellant admits the execution of the contract, but denies that the appellee has performed all the conditions and covenants on its part to be performed.

That as an affirmative defense, the appellant sets up the fact that on or about the 31st day of May, 1939, the appellant returned all of said equipment to the possession of the appellee, and served the appellee with a Notice of Rescission. [Pr. Tr. pp. 14-26.] There is also included in the answer, a counterclaim for appellant's damages in the amount of \$50,000.00.

That the action was commenced in the United States District Court of the Southern District of California, Central Division, pursuant to 28 U. S. C. A., Section 41 (1). The statutory provision relied upon to sustain the jurisdiction of the District Court is 28 U. S. C. A., Section 41 (1). The statutory provision relied upon to give this Honorable Court jurisdiction on appeal to review a judgment of the District Court is 28 U. S. C. A., Section 225, paragraph (a).

The pleadings necessary to sustain the existence of jurisdiction in the District Court are the Complaint [Pr. Tr. p. 2], the Answer [Pr. Tr. p. 14], Reply to Counterclaim [Pr. Tr. p. 26], Amended Counterclaim [Pr. Tr. p. 28], Reply to Amended Counterclaim. [Pr. Tr. p. 32.]

Judgment was entered in the District Court on December 3rd, 1940. [Pr. Tr. p. 46.] Notice of Appeal was filed by appellant on the 16th day of January, 1941. [Pr. Tr. p. 48.] Bond on appeal in the sum of \$20,000.00 covering both judgment and costs was filed by appellant on January 16th, 1941. [Pr. Tr. p. 49.]

The typewritten transcript of record in the above entitled cause was filed and docketed in this Honorable Court

on the 29th day of March, 1941 [Pr. Tr. p. 285], which was within the time allowed for the docketing of said transcript, the time therefor having been extended by the District Court in compliance with provisions of Rule 73 of Rules of Civil Procedure for the District Courts of the United States. [Pr. Tr. p. 55.] The typewritten transcript of record was prepared pursuant to a Designation of Record on Appeal and Amended Designation of Record on Appeal in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, the Designation having been filed on the 12th day of March, 1941 [Pr. Tr. p. 52], Amended Designation having been filed on the 13th day of March 1941. [Pr. Tr. p. 54.]

Pursuant to Rule 19, subdivision 6, of the Rules of this Honorable Court, a statement of the parts of the record necessary for the consideration of the case, and a statement of points relied upon was filed on the 2nd day of April, 1941. [Pr. Tr. p. 286.]

The transcript of record was filed in this Honorable Court on the 29th day of March, 1941, and all proceedings having been taken within the time as provided by the rules of Court, and the provisions of the Federal Code, 28 U. S. C. A., Section 230, this case is now before this Honorable Court.

Statement of Case.

The appellee in this case is a corporation engaged in the business of conducting and maintaining circuses and leasing circus equipment. For some time prior to May 23, 1939, this circus equipment was stored at appellee's winter quarters in Baldwin Park, California. [Pr. Tr. p. 66.]

Approximately three or four weeks before the execution of the contract between the appellee and appellant, the agent of the appellee, Ralph J. Clawson, solicited the appellant with the idea of renting to appellant the circus equipment owned by the appellee; that extended negotiations were had regarding the rental of said equipment which culminated in the execution of a contract, attached as "Exhibit A" to appellee's complaint [Pr. Tr. p. 8] and which was stipulated to be the contract executed by the parties. [Pr. Tr. p. 36.]

That at the pretrial hearing, the issues in said cause were limited to the question of whether the equipment was delivered in accordance with the provisions of the contract, namely, whether the equipment was in good condition and ready for use when delivered by the appellee to the appellant at Inglewood, California. The appellant contends that the appellee failed to deliver all of the specified equipment, and that the equipment delivered was not in good condition and ready for use as specified in the contract; that after having used said equipment for a period of one week, appellant found it so completely unsatisfactory that it was impossible for appellant to pursue the

business of putting on and staging a circus. [Pr. Tr. p. 36.]

That on the 31st day of May, 1939, the appellant returned all of said equipment to the appellee at its winter quarters at Baldwin Park and thereupon served the appellee with a Notice of Rescission of said contract. [Pr. Tr. p. 25.]

The appellee introduced evidence attempting to prove that the equipment as delivered was in compliance with the terms of the contract, namely, in good condition and ready for use, but the evidence introduced is so inadequate that it fails to establish any fact upon which a finding by the Court can be sustained.

Appellee's complaint alleged on the contract and set forth two additional causes of action. It was agreed at the pretrial hearing that the second and third causes of action were predicated upon the first, and it was ordered by the Court that the second and third causes of action be dismissed. The trial, therefore, proceeded on the first cause of action only.

Appellee in paragraph IV of its complaint [Pr. Tr. p. 3] made as a part of its case the allegation that after the return of the equipment to the appellee, the appellee made every endeavor during the remaining portion of the rental term to let the property but was unable so to do. No evidence whatever was offered to sustain this allegation.

Specifications of Error.

I.

The Court erred in finding that there had been a waiver by the appellant of the terms of the contract which provided that the equipment when delivered in Inglewood would be in good condition and ready for use.

II.

The Court erred in concluding that a presumption arose because the appellant failed to produce certain physical evidence, to-wit, some rope which was not in appellant's possession but was in the possession of appellee, and in making a finding upon such erroneous presumption.

III.

The finding of fact that the property delivered by appellee to appellant at Inglewood was at the time of delivery in good condition and ready for use, is not supported by the evidence.

IV.

The Court erred in finding that the appellant company engaged in the show business was familiar with the circus business and knew about ropes, and that it must have known how long the rope would likely continue in use. [Findings, Pr. Tr. p. 40.]

V.

The Court erred in finding that there was no dry rot in the rope and that dry rot could not be detected by a person looking at it, and that the witnesses had no special knowledge. [Findings, Pr. Tr. p. 43.]

VI.

The Court erred in finding that there was no evidence that the wagons had been greased or oiled and drawing a conclusion therefrom that they had not been greased or oiled, and at the same time finding that the appellant employed a staff of efficient showmen as heads of the several departments. [Findings, Pr. Tr. p. 44.]

VII.

The Court erred in concluding that the appellant accepted the property “without discovering any fault of any sort or fashion,” and then immediately concludes further that the appellant “assumed to make reconditioning for such needed repairs as were apparent.”

VIII.

The Court erred in concluding that appellant closed the circus because threatened with a closed shop by labor unions.

IX.

The Court erred in admitting the testimony, over objection of appellant, as follows:

“Q. What did you do when you arrived at Baldwin Park with relation to examining and making such repairs as were necessary to the wagons? A. Well, I believe that first day I hired a mechanic who was on the Barnes Show, Forbes—I am sure it was the first day—and another man who handled the tractors, and I told them to look over the wagons that we were selecting, one of them to look them

over for the rings, to let them up and down off the train to see if they were all sound, and, if they were not, to get them repaired.

Q. Under your direction and supervision? A. That is so.

Q. Did he report back to you in that connection? A. Yes.

Q. What did he report to you? A. He reported to me that the wagons were usable.

Q. And were there any repairs that were made on those wagons? A. Yes. I told him to make any necessary repairs on the wagons.

Q. Were they in such condition as used circus wagons would normally be in, at such a time? A. Yes.

Mr. Schaefer: I object to that as calling for the conclusion of the witness.

The Court: I think, after what he has stated, his conclusion is proper.

Q. By Mr. Combs: And were they, in your opinion, in good condition and ready for use in the business of the production of a circus at that time? I will withdraw that. At the time of May 23rd, when delivery was made at Inglewood? A. Well, I had used them and we hauled the show out with them.

Mr. Schaefer: I move to strike that answer as not responsive, Your Honor.

Q. By Mr. Combs: In your opinion. Just answer the question.

The Court: Answer the question as propounded.

Q. By Mr. Combs: In your opinion. A. They were in usable condition, yes." [Pr. Tr. pp. 71-72.]

X.

The Court erred in admitting the testimony, over objection of appellant, as follows:

"Q. Did anything occur at Santa Ana with relation to the equipment that was out of the ordinary? A. Yes. We had a long hill there, and I think the pole wagon went over the side of the run.

Q. What was the occasion for that? A. I wasn't there. All I know is the report that it was so.

Q. Who reported it to you? A. The trainmaster—or Pat Graham came down and told me it was reported to him by the trainmaster.

Q. Are you able to say whether or not it went over the side of the run because of some faulty construction of either the wagon or the run? A. I don't know.

Q. Have you ever had opportunity to observe a wagon slip off a run before, in the conduct of a circus? A. Yes.

Q. In fact, that is usually an accident that occurs as a result of wrong turning? A. It could be, if he didn't handle the pole of the wagon properly coming across the platform.

Mr. Schaefer: I move to strike that out, Your Honor. He wasn't there, and he has given what might be a reason.

The Court: He is giving his ideas as a man familiar with this sort of business, and I think it is proper. The court will only give it such weight as it ought to have, anyway." [Pr. Tr. p. 88.]

XI.

The Court erred in admitting the testimony, over objection of appellant, as follows:

"Q. Did you go out to Baldwin Park before the opening day of the circus? A. I did.

Q. Did you examine any of the equipment out there at that time?" [Pr. Tr. pp. 88-89.]

"Mr. Schaefer: Just a minute. I object to that unless it is the equipment used by the Great American Circus.

The Court: It should be limited.

Mr. Combs: It should be. I so qualify my question.

A. Only to the extent that the various wagons that were to be used were identified by Mr. Clawson as 'this' and 'that' and 'this,' and so forth.

Q. By Mr. Combs: Can you state what your observation of their condition was at that time? A. My observations of their conditions were that they were usable.

Q. Were they in good condition, suitable for use for the production of a circus?

Mr. Schaefer: I object to that as calling for the conclusion of the witness, without proper foundation being laid.

The Court: Let us find out what he knows about it. Do you know anything more about them? A. I can only say that they looked to me to be usable." [Pr. Tr. p. 226, line 16, to p. 227, line 10.]

XII.

The Court erred in admitting the testimony, over objection of appellant, as follows:

"Q. Did you have occasion to observe the condition of the flat cars in this circus? A. Very much so.

Q. What was their condition? A. I would say they was good. I have worked on worse.

Q. By Mr. Combs: What was the condition of the runs? A. Very good.

Q. What was the condition of the wagons? A. Good.

Mr. Schaefer: I will object to that and move to strike the answer on the ground that there is no foundation laid for the answer to that question.

The Court: The court will consider it, if it has any value." [Pr. Tr. p. 280, lines 13-27.]

XIII.

The judgment is not supported by the findings in that there is no finding to sustain the allegation of the complaint that the appellee made an effort to mitigate damages as alleged in its complaint.

ARGUMENT.

POINT I.

The Court Erred in Finding That There Had Been a Waiver by the Appellant of the Terms of the Contract Which Provided That the Equipment When Delivered in Inglewood Would Be in Good Condition and Ready for Use.

The Court found that

“When the defendant accepted the property, after examination and after exposition of the property to him, without discovering any fault of any sort or fashion, and assumed to make reconditioning for such needed repairs as were apparent, and charged it to the plaintiff’s account with the plaintiff’s consent, he waived such reconditioning as is shown to have been necessary and to have been made,”.

The evidence not only does not sustain this finding but on the contrary it is appellant’s contention that there is no substantial evidence to support this conclusion.

Under the terms of the contract, the appellee was required at its own expense to deliver all of the leased circus equipment “in good condition and ready for use, to the lessee (appellant) at Inglewood, California, by May 23, 1939”. [Pr. Tr. p. 9.] This sets forth the obligation of the appellee, and a determination must be made whether or not this obligation was fulfilled by the appellee. An examination of the evidence indicates that the only substantial proof offered by appellee is that the equipment was ready for use, but there is no proof of that part of the covenant which requires that the equipment be in good condition.

The appellee could not fulfill its obligation in this connection by merely delivering the equipment ready for use at Inglewood without having it in good condition for the period of the contract. This covenant of the contract must be read in connection with the preceding covenant which provides that the lease was for five weeks with an option for renewal for a period which, if exercised, would have made a total rental period of twelve weeks. Good condition could only, therefore, mean in such condition that the appellant could reasonably anticipate the use of the equipment for the term provided.

As a further preliminary, and aid in construing the lease contract between the parties, it must be called to the Court's attention that as the lease was originally prepared the appellee had in mind that the appellant was to acknowledge that it had examined the property, and that the appellee was to make no representation as to its condition or fitness for the use thereof intended by the lessee.

“8. The Lessee has examined the said property and the Lessor makes no representation as to its condition or fitness for the use thereof intended by the Lessee. (WPD JP.)” [Pr. Tr. p. 11.]

But the appellant did not agree to such a condition and accordingly struck the same from the contract. While paragraph 8 was deleted and became of no effect, yet it is of tremendous aid in construing the intention of the parties. Under the circumstances we submit that the contract must be considered in the light that the appellant had not examined the leased property, and that such representations as to fitness as would ordinarily be implied for the use to which the equipment was intended to be used, must be implied.

Section 1955 of the California Civil Code, provides as follows:

“One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.”

Therefore, we reiterate that the appellee was required to prove that all of the equipment provided for in paragraph (1) of the contract [Pr. Tr. p. 8] was delivered at Inglewood in good condition and ready for use. The appellant had not examined the property and did not release the appellee from any representation that might have been made as to condition or fitness, and the appellee knew that the equipment was to be used for five weeks and perhaps twelve.

The lower Court's approach to this problem apparently was that the appellant, because it was in the show business, had circus knowledge and an intimate knowledge of ropes [Pr. Tr. p. 40], and that appellant had sent out agents to examine the property at Baldwin Park and to pass on it there.

The Court found as a fact that there had been a waiver by the appellant of the terms requiring the equipment to be in good condition and ready for use. [Pr. Tr. p. 45.]

It is evident that the parties considered the matter of waiver and expressly eliminated such a provision. In order to interpret the contract and ascertain the effect of the language it is necessary to consider it as a whole. Furthermore, in determining whether there has been a waiver of any term of the contract, it is of utmost im-

portance to have a complete understanding of the facts which operated upon the minds of the parties in executing that particular instrument.

It is said in *Lemm v. Stillwater Land & Cattle Co.*, 217 Cal. 474, at 480,

“A court must look at the contract as a whole and give to each particular clause thereof the modification or limitation or qualification which it is evident from the other parts of the contract the parties intended. (See 1641, Civ. Code; *Ogburn v. Travelers Ins. Co.*, 207 Cal. 50, 53 (276 Pac. 1004); *Stockton Sav. & L. Soc. v. Purvis*, 112 Cal. 236, 238 (44 Pac. 561, 53 Am. St. Rep. 210); 6 R. C. L. p. 834 *et seq.*) In the interpretation of contracts the duty of the court is to ascertain the intent of the parties. Although the language of the contract must govern its interpretation (Civ. Code secs. 1638, 1639), nevertheless the meaning is to be obtained from the entire contract and not from any one or more isolated portions thereof. (*Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 115 (291 Pac. 184); *Kennedy v. Lee*, 147 Cal. 596, 601 (82 Pac. 257); *Eastman v. Piper*, 68 Cal. App. 554 (229 Pac. 1002; 13 C. J. p. 525).) To assist it in the performance of this duty the court may look to the circumstances surrounding the parties at the time they contracted (Civ. Code, sec. 1647; *Ogburn v. Travelers Ins. Co.*, *supra*, at p. 52; *Smith v. Carlston*, 205 Cal. 541, 550 (271 Pac. 1091); *Henika v. Lange*, 55 Cal. App. 336, 339 (203 Pac. 798)), including the object, nature and subject matter of the agreement (6 R. C. L., pp. 836, 837, *Eastman v. Piper*, *supra*, at p. 565; *Canal Co. v. Hill*, 82 U. S. 94, 100, 101 (21 L. Ed. 64)), and the preliminary negotiations between the parties (6 R. C. L., p. 839), and thus place itself in the same situa-

tion in which the parties found themselves at the time of contracting. (Code Civ. Proc., sec. 1860; 6 R. C. L., p. 849; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 273 (86 Pac. 509, 691); Blaeholder v. Guthrie, 17 Cal. App. 297, 300 (119 Pac. 524).)”

The intention of the parties can be clearly ascertained from the fact that the provision providing that the appellant waive his right to demand that the equipment be delivered in good condition was stricken from the terms of the contract. This immediately impels us to the contrary conclusion in regard to waiver of the expressed terms of the contract. If there has arisen such a waiver it must be demonstrated by other facts and circumstances which give rise to a presumption of more force than the intention expressed by these actions in revising the terms of the contract.

In *Ogburn v. Travelers Insurance Co.*, 207 Cal. 52, the Court in the following language states that it is of primary importance to ascertain the intentions of the parties and to carry them out by enforcing the terms of a contract.

“In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. (*Burnett v. Piercy*, 149 Cal. 178, 189 (86 Pac. 603); *First Nat. Bank v. Bowers*, 141 Cal. 253, 262 (74 Pac. 856).) This fundamental rule finds recognition in section 1636 of our Civil Code, wherein it is provided that ‘A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.’ As to the hardships, advantages or

disadvantages which may result from such a construction, the courts have nothing to do. (Gazos Creek etc. Co. v. Coburn, 8 Cal. App. 150, 156 (96 Pac. 359).) The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject matter of the agreement. (Los Angeles Gas & E. Co. v. Amalgamated Oil Co., 156 Cal. 776, 779 (106 Pac. 55).) A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument, taking it by its four corners. Every part thereof should be given some effect. (Sec. 1641, Civ. Code.) In other words, 'the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus*; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done.' (Balfour v. Fresno C. & I. Co., 109 Cal. 221, 227 (41 Pac. 876, 878).) Section 1648 of the Civil Code declares that 'However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.' "

All the evidence given at the trial of the cause, indicates quite the contrary to any presumption of waiver on behalf of the appellant of the terms of the contract. The fact that the agents of the appellant were at Baldwin Park laying out the show, does not indicate that appellant was not entitled to rely upon the express language of the contract.

In the case of *Craig v. White*, 187 Cal. 489, the problem presented parallels the present case in many respects. It was held therein that although the presence of an opportunity on behalf of the plaintiff to investigate the title to land existed, nevertheless he was not precluded from demanding that a good title be conveyed to him. The Court makes the following observations in respect to the requirements to constitute a waiver:

“We have been referred to no authority which holds that mere opportunity to investigate title before entering into a contract of purchase, and the implied approval of the title offered by subsequently entering into the contract, constitutes a waiver of the obligation of the vendor to furnish title on tender of the final payment. The fact of inspection and approval by the plaintiff here of the deed offered for escrow has no significance, because the deed itself was regular on its face and purported to convey the title to the land contracted for.

“An examination and acceptance of an imperfect title precedent to entering upon a contract to purchase, by express agreement or under circumstances giving substantial advantage to the purchaser, or operating to the detriment of the vendor, might operate as an estoppel.

“But even an express agreement to buy and pay for land to which it was known the vendor had no title whatever would be void for want of consideration.

“Here there is no claim of an express waiver, and there are no circumstances to sustain an equitable estoppel of the purchaser.

“It is entirely clear that both parties contracted on the belief that the defendant had and could convey title to the land. The plaintiff, although it does not so appear of record, presumably made some search or inquiry. The record title appeared to be in defendant. The plaintiff, by entering upon the contract to purchase, impliedly, at least, expressed himself as satisfied that the title was good. We are of the opinion that this did not preclude him from rescinding while the contract was still executory, and not merged in an executed and delivered deed of conveyance, when he discovered that the defendant had no title whatever and could not make such conveyance.

“As is said in Ruling Case Law (27 R. C. L., p. 908), ‘To constitute a waiver within the definitions given, it is essential that there be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them.’ And again: ‘In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.’”

There is no indication throughout the entire testimony contained in the record, that the appellee was misled in any way to his prejudice by any belief created that there was a waiver on behalf of the appellant.

In *Kadow v. City of Los Angeles*, 31 Cal. App. (2d) 324 at 329, the Court states that there must be such a showing.

“Appellant Smith’s contention, which appears for the first time on appeal, in substance to the effect that the failure to file a written claim with him, the officer, within ninety days after the accident constituted a waiver, is without merit. It is the general rule that a party to an action who relies upon a waiver must specially plead such waiver. (25 Cal. Jur., p. 931.) Moreover, ‘In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to;’ also, ‘A waiver is the intentional relinquishment of a known right with knowledge of the facts.’ (Cal. Jur. *supra*, pp. 926, 928.) There is no justification for the application of the doctrine in the case at bar.”

The record is replete with evidence that the appellant and its agents were protesting the deficiencies in the equipment to the agents of the appellee and reporting deficiencies and demanding that they be repaired. [Pr. Tr. pp. 164, 165, 166, 172, 174 and 175.]

In the case of *Linnard v. Sonnenschein*, 94 Cal. App. 729, it is stated by the Court:

“The ‘waiver’ defense urged is based upon the acceptance by plaintiff of various sums on account of the rent of the premises after the notice changing the terms of the tenancy and the notice to quit. Acceptance of rent after a notice changing a tenancy or after notice to quit does not necessarily operate to waive the notice. While the unconditional acceptance by a landlord of moneys as rent, which rent has accrued after the time the tenant should have surrendered possession will constitute strong evidence of the landlord’s waiver of the notice to quit, waiver always rests on intent and is ever a question of fact.”

Such language clearly indicates that an unconditional acceptance might constitute a waiver and is strong evidence thereof, but in face of the constant protestations of the agents and officers of the appellant it cannot be said that there was an unconditional acceptance of the equipment. Such evidence is not disputed and stands uncontradicted in the record. A finding contrary to such evidence in view of the law cannot be sustained. Furthermore, from a reading of the record it may appear that all of the deficiencies in the equipment were present and apparent at the time of the delivery in Inglewood. This is not the case. Deficiencies set forth in the notice of rescission became evident day by day during the week’s possession by the appellant. The appellant’s decision at Inglewood to go on was based only on a knowledge of the existing deficiencies.

POINT II.

The Court Erred in Concluding That a Presumption Arose Because the Appellant Failed to Produce Certain Physical Evidence, Towit, Some Rope Which Was Not in Appellant's Possession But Was in the Possession of Appellee, and in Making a Finding Upon Such Erroneous Presumption.

The finding:

“No part of the broken rope is produced in court as evidence, nor is its absence explained. There is testimony [37] that the weakness in the rope was dry rot, but little weight can be attached to those statements, because a rope so afflicted could not be detected by a person merely looking at it, as the testimony shows these witnesses did. They had no special knowledge with relation to it. And the witness who spliced the rope testified in this case, but he did not say anything about any dry rot or any appearance at the broken place of the rope of any unusual condition. The non-production of that, of course, would indicate the contrary idea to the dry rot.” [Pr. Tr. p. 43.]

is not supported by the facts or the law.

The Court in drawing the presumption evidently had in mind California Code of Civil Procedure, Section 1963 (5)

“That evidence wilfully suppressed would be adverse if produced.”

It is evident from the reading of this section, that before such a presumption can arise, there must be a showing of wilfull suppression of the evidence. All the equipment used by the appellant was returned to the appellee,

and it remained in its possession. It is, therefore, impossible to presume that there was any suppression, wilful or otherwise, on the part of the appellant, and that the means of production of the rope in Court were not within the powers of the appellant.

In the case of *Estate of Moore*, 180 Cal. 570, at 585, it is said:

“The court gave the familiar instruction with respect to the presumption of law that evidence wilfully suppressed would be adverse if produced. This was error because the record fails to disclose any instance of suppression of evidence or anything that could be properly construed as such withholding of facts in defendant’s possession. That, under the circumstances, the error was prejudicial there can be no doubt, and this is emphasized when we note that one of the counsel for respondents, in his argument, sought to apply the rule subsequently announced in the instruction to the circumstance that no person named in the will had been called as a witness.”

In *Hiner v. Olson*, 23 Cal. App. (2d) 227 at 234, the Court quotes 10 *Cal. Jur.* 779, Section 86, as follows:

“When the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which, from its very nature, must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, a presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.”

It is quite evident from the testimony, that the condition of the rope played a considerable part in the evidence offered on behalf of appellant to show that the equipment was in good condition and ready for use. It became a material issue in the case, sufficient for the Court to make a specific finding in that regard. The indication of the Court that its finding was based on a presumption, which if given to a jury in an instruction would have been clearly erroneous, is prejudicial to the appellant and is error sufficient to warrant a reversal of the case.

In *Tieman v. Red Top Cab Co.*, 117 Cal. App. 40, at 46, the Court states as follows:

“Appellants’ failure to offer any evidence on these issues, although obviously the best advised, requires that the above evidence ‘be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict’. (Code Civ. Proc., sec. 2061, subd. 6.) ‘It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.’ (Bone v. Hayes, 154 Cal. 759, 765 (99 Pac. 172, 175); Alloggi v. Southern Pac. Co., 37 Cal. App. 72 (173 Pac. 1117); Perry v. Paladini, Inc., 89 Cal. App. 275 (264 Pac. 580).)”

POINT III.

The Finding of Fact That the Property Delivered by Appellee to Appellant at Inglewood Was at the Time of Delivery in Good Condition and Ready for Use, Is Not Supported by the Evidence.

In order to determine whether this finding is supported by any competent evidence, we deem it advisable to review and summarize for the Court the testimony of the witnesses touching on the condition of the equipment and its fitness for use.

1 Paul Eagles testified that he was a merchant. [Pr. Tr. p. 63.] In a written statement which was made to counsel for appellant, and returned to Mr. Marco of the appellant corporation in Mr. Eagle's letter of June 28th [Appellee's Exhibit No. A-2, Pr. Tr. p. 112] the letterhead of the witness is not reproduced, which would disclose the business of the witness, but it will be noted from this exhibit that the statement, which appears in the typewritten reporter's transcript of testimony page 341, shows that the witness is engaged in the feed and fuel business. This statement is in no wise repudiated, but the witness states it does not meet with his approval because it is just a recitation of events that happened on the road, and that it should be more complete.

To qualify this witness as to his knowledge of the equipment, it is shown by his testimony that he was the sublessee of said equipment from November, 1938, until around March, 1939. [Pr. Tr. p. 70.] However, when the equipment was to be taken out by the appellant he hired a mechanic to look over the equipment, and it was reported to him that the wagons were useable. [Pr. Tr. p. 72.] Over objection [Pr. Tr. p. 72] the witness was allowed

on such foundation to give his opinion regarding the condition of the wagons.

The witness states that he did not make a personal examination of the tent rigging, blocks, and falls. [Pr. Tr. p. 73.]

The witness testified as to the condition of the seats and chairs, and stated that he had used them on previous occasions, but he did not state that they were in useable condition as of the time they were delivered to Inglewood. [Pr. Tr. p. 73.]

The knowledge of this witness with respect to the wardrobe was acquired from a report of a subordinate that there were certain items missing and that it needed cleaning. [Pr. Tr. p. 73.]

The sleeping cars were without blankets, sheets or pillow cases, and there were no berth curtains. [Pr. Tr. p. 74.] The witness did not know whether any of these materials were furnished except that berth curtains were obtained in San Diego. [Pr. Tr. p. 75.]

In regard to the supplying of elephant howdahs, this witness testified that he had no discussion regarding them; that he does not remember any request having been made for their delivery. [Pr. Tr. p. 75.]

When this witness was questioned regarding his knowledge of the condition of the equipment prior to leaving Baldwin Park, he stated that it is true that he selected the equipment and knew either from his own knowledge or from the knowledge of subordinates as near as possible as it was for anyone to know from that extent of the equipment loaded in three days. [Pr. Tr. p. 78.] The rest of the testimony of this witness concerns the operation of the

circus subsequent to the time of the delivery of the equipment, and if bearing upon other points will be discussed under those topics.

On cross-examination, the witness was questioned regarding his knowledge of the equipment and in respect to the wagons he stated that he examined them only in a general way. [Pr. Tr. p. 101.] He did not examine the axles or boxings; that he selected them merely for size and their ability to carry load. [Pr. Tr. p. 101.]

In respect to the train decks, this witness states that generally speaking they were in good condition, but repairs were made both at Inglewood and San Diego. [Pr. Tr. p. 102.]

In regard to the condition of the rope, this witness said that it was neither good nor bad, that it would be medium, and when asked if he remembers making the statement that the ropes were all in very poor condition [Rep. Tr. p. 343, line 3, to p. 344, line 2], he could not recall. [Pr. Tr. p. 107.]

This witness further stated on cross-examination that it is possible that he made the statement; that he knew the elephant howdahs never arrived; that the wardrobe was in bad condition, some entirely unuseable. [Pr. Tr. p. 107.]

In considering Mr. Eagles' testimony these facts must be kept in mind:

Although working for appellant, he was called by appellee as an adverse witness [Rep. Tr. p. 9, line 10, to p. 50, line 6] and examined under the broad latitude of cross-examination. He was not an adverse witness and there was no showing to justify such examination. It is apparent that the witness was in conference with appellee's

counsel, and that at the same time he refused to discuss the matter with appellant's counsel. [Rep. Tr. pp. 50-55.] Calling the witness as an adverse witness was done to give his testimony the effect of having been wrested from the appellant, and reluctantly given, while appellee would make it appear that the witness was adverse to appellee. The fact is, Mr. Eagles was a very willing witness for appellee, no doubt because this was appellant's only circus venture, while appellee would require feed for the animals for a long time to come.

Furthermore, the witness had difficulty in stating anything particular that had been discussed with appellee's counsel and could only generalize. Is it not more reasonable to assume that his statement made to counsel for appellant on June 13, 1939 [Rep. Tr. p. 341, line 16] within two weeks after the circus closed and the equipment was returned, is more apt to be in line with the facts, than his testimony offered at the trial, which was November 27, 1940, a few days lacking a year and a half after the close of the circus. And the witness never did deny the statement! In returning it to Mr. Marco, he said that it didn't meet with his approval because "it is just a recitation of events that happened while the Great American Circus was on the road and I believe it should be more complete if it is to be submitted to use in the settlement of a claim". [Rep. Tr. p. 345, line 11.]

Not an untrue recitation of events, but incomplete. Counsel that took the statement testified concerning it [Rep. Tr. p. 340] and while it may be said this testimony is not entitled to any greater credence than any other testimony, yet the Court should take into consideration that counsel was an officer of the Court in which he was testifying and had been so for many years. Furthermore,

counsel's testimony is fully corroborated by his secretary. [Rep. Tr. p. 336, line 26.]

The cross-examination of Mr. Eagles with respect to the statement he made on June 13, 1939, is interesting. [Rep. Tr. pp. 73-83.] Some of this testimony is reproduced:

“Q. These are the same questions I have heretofore asked you, and very briefly I will refer to this, because it is the only time you and I ever had a conference, and it was in my office on June 13th, 1939, in my presence and in the presence of my stenographer. Did you say, ‘It took us about an hour and a half to get the wagon up, and this delayed us in our show, causing us to miss the afternoon’s performance entirely’? A. I didn’t, because I wouldn’t have made that statement, because I called the show in the afternoon at Santa Ana.

Q. Did you state, ‘Another reason for our delay was occasioned by a wagon carrying the big top side poles to run hot’? A. That was the wagon that had the side poles on it.

Q. Did you state to me that, ‘Another reason for our delay was occasioned by a wagon carrying the big top side poles to run hot’? A. That doesn’t make much sense. That isn’t good language there, that I can understand, on that statement you just read.

Q. Do you wish me to read it to you again? A. If you will, please.

Q. ‘Another reason for our delay was occasioned by a wagon carrying the big top side poles to run hot’. A. Anyway, the wagon—

Q. Did you make that statement to me at the time stated? A. I don’t believe so.

Q. Did you say, 'The axles were not in proper alignment and the wheels, instead of slanting in at the bottom, were slanting out, causing friction in the wheel box'? Did you so state to me? A. I wasn't making statements to you.

Q. Did you make that statement to me in my office at the time stated? Will you please tell me, if you can? A. I can't recall.

Q. You don't recall? A. No.

Q. I will ask you if, at the time heretofore stated, you didn't make the following statement to me: 'In leaving Santa Ana the rope on the No. 4 broke. This was due to the poor condition of the rope, causing one of the main center poles to fall. No one was injured, fortunately'? A. No. 4 what? That is not a very complete sentence.

Q. I don't know. A. Neither do I.

Q. I am saying only what you told me. I can't change it. 'In leaving Santa Ana the rope on the No. 4 broke. This was due to the poor condition of the rope, causing one of the main center poles to fall. No one was injured, fortunately.' A. There is something out of that sentence. It might have referred to No. 4 pole.

Q. All right. Did a No. 4 pole fall or break or cause any trouble? A. I don't remember.

Q. You don't remember? A. No.

Q. My question is, did you so state to me? A. I know I didn't make that statement, just 'No. 4'. I know I didn't make that.

Q. Did you make the substance of that statement in a little different form to me?

Mr. Combs: That is objected to as not proper cross-examination.

The Court: Yes. I will have to sustain that objection.

Q. By Mr. Schaefer: Your answer is then, that you did not make that statement, do I understand?

The Court: I so understood him to say.

Mr. Combs: That is what he said.

Q. By Mr. Schaefer: All right. Did you say to me at the same time: 'another wagon ran hot on the way to the train at Santa Ana, causing a further delay'? A. It was the same wagon.

Q. Did you make that statement? A. I don't believe I did. It was the same wagon, going and coming, that we had trouble with.

Q. I will ask you if you remember stating to me, on the same occasion, 'As a result, we didn't get out of Santa Ana until 6:30 a. m., whereas we should have been out not later than 3:00 a. m. Accordingly, we arrived in Pasadena on Memorial Day around 10:00.' Did you so state to me? A. Those are about the figures, but I can't recall the conversation.

Q. By Mr. Schaefer: Then did you tell me as follows: 'We greased all the wagons causing us trouble on the flat cars, but nevertheless on the trip from the train to the lot in Pasadena, which is a long haul, we had wagon trouble—wheels smoking and causing delay.' Did you so state to me? A. I don't remember, and I don't remember the trouble with the wagons.

Q. Did you have any difficulty in the erection of the equipment in Pasadena? A. Yes.

Q. What difficulty did you have? A. The rope broke three times.

Q. The rope broke three times? A. Yes.

Q. Did the main falls break? A. That is the main falls.

Q. Will you explain for the benefit of the court what are meant by the main falls? A. That is the rope that pulls the tent up to the top of the center pole.

The Court: The center pole? A. Yes, the center pole.

Q. By Mr. Schaefer: Block and falls is similar to what is known as block and tackle, isn't it? A. That is right.

Q. Did any of the performers refuse to perform that evening? A. Why, they didn't, after an explanation. They started to refuse.

Q. Did any of them come to you and tell you they wouldn't go out? A. Yes, Walter Guice.

Q. What Walter Guice is that? A. He had the aerial bar.

Q. The aerial bar? A. Yes.

Q. Did anybody else refuse to go up? A. I don't think anybody else actually refused. Ernie White was standing there with him.

Q. Did he refuse to go up? A. I don't believe he did. He was standing there.

Q. What is his act, Ernie's? A. An upside down balancing act.

Q. Stood on his head in a trapeze? A. That is right.

Q. Did these performers finally go up? A. Yes.

Q. Did you have to make some rearrangement of the equipment? A. No. It had already been made by George Singleton.

Q. What was it that was done? A. He just made fast their bars, so that they couldn't fall down on top of them.

Q. How did he do that? A. I believe with a chain or rope, or something like that.

Q. It wasn't the ordinary way that the equipment was ordinarily fastened? A. It has been done before.

Q. It isn't the ordinary way, though, is it, Mr. Eagles? A. Not the ordinary way, no.

Q. What was the condition of the rope in Pasadena? Was it good or bad? A. Just like any second-hand rope.

Q. Would that be good or bad? A. It would be medium.

Q. Do you remember telling me on the occasion mentioned, 'The ropes were all in very poor condition'? Did you so state to me? A. I can't recall it.

Q. Do you remember stating to me, 'While we had some green labor, yet the equipment itself delayed us tremendously'? Did you so state? A. I don't recall that part of the conversation.

Q. The elephant howdahs never came out, did they? A. No, not to my knowledge.

Q. What condition was the wardrobe in? A. I didn't examine it personally. George King did, the wardrobe man.

Q. Did you see the wardrobe at all? A. I saw it in the fall.

Q. How did it look? A. Well, all right. There were some additions made to it at different times.

Q. Who made the additions? A. I believe Fanchon & Marco.

Q. Was some of the wardrobe unusable? A. We didn't take all the wardrobe. I don't know whether it was unusable or not.

Q. Did you state to me at the time mentioned, 'I know that the elephant howdahs never arrived; that the wardrobe was in bad condition, some entirely unusable'? Did you so state? A. I might have. I probably told you that."

We submit that the interest of the witness and this impeachment, renders his testimony of little value, and at any event, it was highly improper and error to permit Eagles to be examined as an adverse witness.

The witness, Charles W. Nelson, testified that prior to the 23rd of May, he had been to Baldwin Park and observed that some of the wheels appeared as though they had dried out in the sun. [Pr. Tr. p. 116.] He further states in response to an inquiry as to whether the equipment was useable or unuseable that he thought it was useable from observation and his slight knowledge of what technical details are necessary for the production of a performance. [Pr. Tr. p. 117.]

It must be observed that the evidence as given by these witnesses was gained from hearsay, that neither had made a thorough examination of any part of the equipment, nor in fact was either hired for this purpose; that any inspection of the equipment, especially pertaining to the seats and chairs, had been made at previous times and not within the time before the equipment was delivered on the 23rd day of May, 1939. The evidence of Eagles also shows that there was in fact some equipment missing and that the same was not supplied until subsequent to the date of delivery; that there were in fact repairs made to the equipment shortly after its delivery.

The most important and persuasive argument showing that the evidence given by Charles W. Nelson is entirely incompetent, and that a finding of fact based thereon is entirely unsupported, is that from his own admission he states that he has a slight knowledge of the technical details necessary for the production of a show; and that

with this slight knowledge he concluded the equipment was useable. This is clearly an expression of opinion evidence, some of which was admitted over the objection of the appellant, and it is shown that from the basis of the witness' opinion, the evidence is highly incompetent and not worthy of consideration by the trier of facts.

That such equipment was useable is far short of a compliance with the terms of the contract. It is self-evident that a piece of equipment may be useable, but not be in good condition such as was in the contemplation of the parties when this contract was made.

The contract was made with the purpose in mind that appellant would operate a circus as a going business for from five to twelve weeks. Much more was in the minds of the parties than that the equipment should be useable—it was expressly provided that it must be in good condition and ready for use in the production of an operating circus.

The next witness whose evidence we must consider is that of George Singleton, called on behalf of the appellee. The witness was questioned regarding the condition of the wagons and testified that they were in fairly good shape, suitable for the transportation of a circus; that they were second-hand equipment. [Pr. Tr. p. 125.]

It was stated by the witness that in Santa Ana there was trouble with one of the wagons going on to the lot and that the same wagon gave them trouble the next day. [Pr. Tr. p. 129.]

It will be noted that the testimony of this witness is in itself contradictory, for the witness states that the wagons are in fairly good shape and then in response to a question covering the same facts, states that they are in good condition and ready for use. [Pr. Tr. pp. 132 and 134.]

In regard to the rest of the equipment, this witness makes no affirmative statement, except that he does state [Pr. Tr. p. 134] that he did inspect the tent rigging, blocks, falls and chairs.

This witness had also been in the employ of appellant. He had a suit pending against appellant and counsel for appellee was also his counsel. [Rep. Tr. p. 118.] He made a statement on June 6, 1939, within one week after the equipment was returned. [Rep. Tr. p. 332, line 5.] Mr. William Gamble, of counsel for appellant, testified concerning the taking of this statement. [Rep. Tr. p. 329.] This was substantiated by the stenographer. [Rep. Tr. p. 336, lines 8-25.]

The testimony of Ralph J. Clawson states that he did inspect the 20 wagons that were delivered at Inglewood, and in response to a question whether they were in good condition and ready for use, the witness responded that they were in useable condition and could be used. [Pr. Tr. p. 143.]

In regard to the train flat decks and runs, the witness states that there were some places that were bad, but that they decided they could fix it up at San Diego. [Pr. Tr. p. 144.]

The witness thinks that the Calliope was useable, but states that it was dropped at its delivery in Inglewood and that it did not play the rest of the time. [Pr. Tr. p. 144.] This witness also testified that the wardrobe was in useable condition and that the sleeping cars were clean and in good condition, but that the sleeping cars were not fully equipped. [Pr. Tr. pp. 146-147.]

The witness testifies in regard to the runs and flat cars that they were in good condition; that the runs were new

in 1938, and that it was very good equipment. [Pr. Tr. p. 157.]

On cross-examination this witness was far from positive in his statements and contradicted himself by qualifying his answer to the effect that the equipment was useable—that it was good enough to use, that it could be used, but the witness did not commit himself to the effect that the equipment was in good condition and ready for use at the time of delivery. [Pr. Tr. p. 158.]

It is submitted that the evidence as presented by this witness considered as a whole, cannot be the basis for finding that the equipment was in good condition and ready for use as contemplated by the terms of the contract. The testimony of this witness fully covers the conditions under which the circus was operated and such testimony fully contradicts any evidence that the equipment was in good condition for if it had been such the method of operation would have not been so fraught with trouble and disappointment as related throughout the testimony of all the witnesses.

② The witness, J. V. Austin, testified in regard to the custom of renting railroad coaches to circuses in order to show that it was not necessary for the appellees to furnish the sheets, pillow cases and blankets. [Pr. Tr. p. 225.]

However, as a basis for this testimony on cross-examination, it was revealed that this witness had rented circus sleeping equipment on two previous occasions and it was upon this experience that he based the custom. [Pr. Tr. p. 232.]

The witness was asked his opinion regarding the condition of the equipment and was allowed to testify over

the objection of appellant, that it *looked* usable. [Pr. Tr. p. 227.] He based his opinion on an observation made on one visit to the winter quarters at Baldwin Park prior to the 23rd day of May. When asked on cross-examination, the witness stated his knowledge insufficient to give an opinion. [Pr. Tr. p. 232.]

It is submitted that such evidence was highly incompetent and could not be made the basis of any finding of fact.

In reviewing the evidence of the witnesses, we consider that while the testimony of Murray Pennock and Patrick Graham was given on rebuttal, yet it should be considered here in analyzing the plaintiff's evidence to sustain the findings.

Murray Pennock testified that he had examined the equipment six weeks previous [Pr. Tr. p. 260], for the purpose of using it in filming a motion picture. [Rep. Tr. p. 390.] The witness stated that after making the examination for the purpose explained, that the wagons were in comparatively good condition, suitable for use. [Pr. Tr. p. 262.] That the flat cars were in equally good condition. [Pr. Tr. p. 262.] The riggings, tent, drop and falls he did not examine.

The witness testified that at the opening of the show in Inglewood, that he thought the equipment was in perfectly usable condition, so much as he saw of it, but he stated that he looked the show over generally. [Pr. Tr. p. 263.]

On cross-examination this witness testified that he did not take any of the wheels off of the wagons [Pr. Tr. p. 266]; that he was not interested whether the wagons had brakes or not; that his interest in the flat cars was for

the purpose of making miniatures for motion picture reproduction. [Pr. Tr. p. 266.]

This witness after testifying to the condition of the cars, on cross-examination acknowledged that he knew of many defects which existed. [Pr. Tr. p. 267.]

Furthermore, the witness' use of the equipment was confined to filming in the making of a motion picture. Of course, the equipment was all right to look at, and answered the purpose perfectly in giving circus atmosphere to a motion picture. But such use is not comparable to a use in transit.

The witness, Pat Graham, who was porter of the sleeping cars, stated that he cleaned them. [Pr. Tr. p. 277.] They intended to sleep 267 people and the only equipment was 67 sheets. [Pr. Tr. p. 279.] As to the cleanliness of the equipment, the witness stated that they were fairly clean; that berth curtains were not obtained until they reached San Diego. [Pr. Tr. p. 279.] Without any foundation as to the knowledge of the witness concerning the condition of the wagons and the runs, he was allowed to give his opinion as to their condition. [Pr. Tr. p. 280.] Over objection of appellant, the Court refused to strike out the answers.

This is a summary of all the pertinent evidence in the transcript regarding the condition of the equipment, and its arrival in Inglewood, and upon its delivery to the appellant.

One of the conditions in the contract [Pr. Tr. p. 8] to be performed on behalf of the appellee was that such equipment should be in good condition and ready for use. The appellee so alleged in his complaint, and by this testimony as above summarized, attempted to prove that as an element necessary for recovery in this cause of action.

Throughout the testimony, as recorded in this record, it is shown that the appellant relied upon this representation of the appellee; that the equipment would be in good condition and ready for use because of the fact that they had made commitments with sponsors and had become obligated to produce a circus or become liable in damages on contracts with the sponsors. [Pr. Tr. p. 250.]

It is quite evident from this testimony that the appellee has not performed the obligation under its contract. As shown by the testimony of the witnesses for the appellant [Pr. Tr. pp. 163, 172], promises were repeatedly made on behalf of the agents for the appellee that the equipment would be put in condition and repair so that the appellant could continue the operation of the circus. It is shown that upon these representations the appellant continued to operate the circus for a period of one week and by the testimony of appellee's own witness, there was delay after delay occasioned by faulty equipment. The appellant was forced to miss performances which caused a substantial reduction in all its receipts and which made the operation of the circus absolutely impossible.

Appellant relied upon these representations that the circus equipment would be in good condition and ready for use, and it was impossible for the appellant to discover some of the latent conditions until after it had had the equipment in its possession for a period of time. It was for that reason, that the appellant continued to operate the circus for a period of a week before exercising its right to rescind. A substantial effort to comply with its provisions of the contract, and an attempt to put the equipment in good condition so that it would be possible for it to operate, was made before the appellant returned the equipment and rescinded the contract.

POINT IV.

The Court Erred in Finding That the Appellant Company Engaged in the Show Business Was Familiar With the Circus Business and Knew About Ropes, and That It Must Have Known How Long the Rope Would Likely Continue in Use. [Findings, Pr. Tr. p. 40.]

It is evident that in this finding the Court misunderstood the testimony with respect to the knowledge of the appellant company and its officers regarding their knowledge as to the operation of the circus business, and also with the knowledge as to the condition of the circus equipment. There is no testimony on behalf of the witness Marco Wolff, that he knew anything with respect to the operations of a circus.

In respect to the testimony of Wayne Dailard, who was the coordinator or general manager of the circus, his knowledge is found in the following testimony [Rep. Tr. pp. 236-237]:

“Q. By Mr. Schaefer: Mr. Daillard, what is your business or occupation? A. I am in the amusement business.

Q. How long have you been in that business? A. 20 years.

Q. Were you ever employed by Fanchon & Marco? A. Yes, sir.

Q. When? A. Early in 1939.

The Court: You say the amusement business. There are many kinds of amusements. What particular line? A. Theaters, principally.

The Court: Theaters? A. Theater business, that is right.

The Court: Show business? A. Yes.

The Court: Circus? A. No.

Q. By Mr. Schaefer: Were you employed by Fanchon & Marco in connection with the Great American Circus? A. Yes, sir.

Q. What position did you have with the Great American Circus? A. I acted as the coordinator or general manager.

Q. What is a coordinator? A. I was the contact between the actual circus operation and the office.”

Even considering the testimony of Paul Eagles and George Singleton, who very obviously were prejudiced against the appellant, there is no showing that either one of these men was particularly familiar with the condition of ropes. They were, it is conceded, experienced in the operation of a circus. It is undoubtedly true that the defendant was engaged in the show business, and had had a great deal of experience in the production of stage and theatrical performances; however, this would not endow them with the knowledge of circus operation. Is it not logical that for this reason paragraph 8 was deleted from the contract?

POINT V.

The Court Erred in Finding That There Was No Dry Rot in the Rope and That Dry Rot Could Not Be Detected by a Person Looking at It, and That the Witnesses Had No Special Knowledge. [Findings, Pr. Tr. p. 43.]

The Court finds [Pr. Tr. p. 43]:

“There is testimony that the weakness in the rope was dry rot, but little weight can be attached to those statements, because a rope so afflicted could not be detected by a person merely looking at it, as the testimony shows these witnesses did. They had no special knowledge with relation to it. And the witness who spliced the rope testified in this case, but he did not say anything about any dry rot or any appearance at the broken place of the rope of any unusual condition. . . . At the time of the breaking of the rope the man who was in charge of that department was an old showman. He was working in his line of business in making this exhibition. If that had broken because of dry rot, he would have discovered it, and he would have reported it to the defendant, and a part of the rope, or the broken part, would have been saved as a matter of protection to the defendant. But this was not done.”

The Court has utterly failed to understand the testimony. Every portion of this finding is entirely without support.

We shall consider the finding in its several parts, and the testimony with respect thereto:

First, the Court says, little weight can be attached to the statements that there was dry rot because this could

not be detected by looking at it, and that the witness had no special knowledge with relation to it. There are three witnesses that testified to the dry rot:—Walter Guice, Charles H. Priest, Jr., and George Singleton, the man referred to as the old showman.

Guice's deposition was taken, and he was subjected to cross-examination. He says that he has been in the show business for many years, and that he and his family have an aerial act. It is his business to know about rope because his and his family's lives depend upon what he knows about rope. He established himself as an expert.

“Q. What type of act was that that you had? A. Horizontal bars, aerial act, with four people.

Q. Can you explain the type of equipment that that act called for? A. Called for pulley blocks and ropes and steel cable, steel pipe and hickory bars.

Q. Are you familiar with the various kinds of ropes used in the circus? A. I am.

Q. How long have you been familiar with the type of ropes used in the circus? A. I acquired that knowledge through a period of about thirty years.” [Rep. Tr. p. 366.]

“Q. Did you attend to the putting up of your equipment at Pasadena at night? A. I did.

Q. Did you notice anything about the equipment that was different? A. No; the only thing is I refused to go up in the main falls of the big top, and I informed the manager I refused to let anyone of my people go up in them.

Q. Can you tell us what the main falls are? A. The main falls holds the big top and the riggings.

Q. What is a fall? A. Pulley block and rope.

Q. That holds the main circus tent? A. That is right, and the canvas and the rigging; there is four of them. They had a four-pulley top, one at each pole.

Q. Is that the rope upon which all the riggings of the various acts and equipment are supported? A. Yes, sir, where all the big riggings is hung. and then they have a ring that they hang on the quarter pole.

Q. And your rigging was supposed to be hung onto what? A. From the pole ring of the big top.

Q. Why did you refuse to go up that night? A. The main fall on the center pole on which our rigging was hung was bad and I wouldn't take no chances on it.

Q. What was wrong with it? A. The ropes showed dry rot.

Q. That is, the rope? A. Yes, sir.

Q. What was the condition of the rope? A. It was frayed out and didn't look safe.

Q. And you and the members of your act refused to go up because of the condition of the rope? A. That is right." [Rep. Tr. pp. 368A-369.]

He, and his family were performers in this circus, and that he examined the rope, and that it did have dry rot, and that he refused to go up until his appliances were first hooked up by chains.

"Q. Did you think that because of the condition of the rope you wouldn't risk doing your act? A. Yes, sir.

Q. Because why; were you afraid? A. Afraid the main fall would break and let us down and it would cripple somebody.

Q. What did the manager do, you say? A. Sent out and got some chain and lashed the bale ring of the big top to the center pole so in the event the rope would break it wouldn't come down; it would stay there.

Q. Do you know from your many years of experience in the circus business and in the use of these riggings, whether the bale ring is ordinarily lashed to the pole?

Mr. Combs: We object to that as irrelevant, incompetent and immaterial; no proper foundation laid, and calls for a conclusion of the witness.

A. No, they are never lashed." [Rep. Tr. pp. 369-370.]

* * * * *

"Q. Had you noticed the condition of the main falls before that time? A. No, sir, until I seen them break putting up, and then I went up and examined them when they had my rigging up. I seen them break when I put the rigging up and I examined them.

Q. What condition did you find them in when you examined them? A. Dry rot, indicating they had been laying around and not used.

Q. Can you explain a little more fully what you mean by dry rot? A. This rot exists after it is in a real dry place. It is manila rope, and they generally put a little tar in it and it dries out, just like you put grease in the cable, and it lays there and dries out, and dust gets in there and cuts the fiber and it eventually gets dry, and when it gets dry it is just like powder; it falls apart. Manila rope is oiled; it has some kind of oil in it, and if you aren't using

it it dries out and causes dry rot. Dust gets in it and cuts it, and they break up from being pulled over iron sticks or iron edges, and that cuts the fibers, and it finally weakens.” [Rep. Tr. pp. 378-379.]

Mr. Priest, produced by the appellant, testified that he had had twenty years’ experience with ropes, and that he examined the rope after it broke in Pasadena and found it to have dry rot. [Pr. Tr. p. 246.]

Considering the testimony of George Singleton, the old showman, who the Court said would have discovered the dry rot had it existed. It is apparent that from the following testimony [Pr. Tr. pp. 131-132]:

“A. I finally got one wagon, and then they commenced to come. Then along, I think when I was raising the big top, a fall became fouled, and when I hooked the elephant to it, the rope which fouled in the block, it cut the rope off. That was the lead line on the ground, the one that goes through the snatch block. And so I had to splice this rope.

Q. Did you do that personally? A. Yes. And proceeded to finish raising the canvas on the big top.” [164]

* * * * *

“The Court: You say, ‘I spliced the rope.’ What was the condition of the rope where it separated? A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.”

that this witness did not give any answer regarding the condition of the rope in respect to dry rot. The answer is evasive in that it is a general statement of opinion and not a direct answer to the Court's inquiry.

This is the man, the Court will remember, that had worked for the appellant but who testified on behalf of the appellee; the man that had a suit pending against the appellant in which the attorney for the appellee was also his counsel [Rep. Tr. p. 118]; this is the man that made a statement a short time after the circus closed and then repudiated it, and came into the camp of the appellee. [See Rep. Tr. p. 332 and pp. 120-123.] Therefore, we must not consider him as appellant's witness, and assume that he would have testified to a disclosure as to the condition of the rope. The ropes were all in the possession of the appellee, and none were produced by them.

In this finding, the Court has stated that it is impossible to detect the existence of dry rot by merely looking at the rope. This finding is entirely unsupported by any evidence. It is evidently an assumption or presumption that the Court has indulged in without due consideration of the evidence. All the testimony with respect to the condition of dry rot given by witnesses who have had considerable experience in handling ropes is that upon an examination they discovered the existence of dry rot.

POINT VI.

The Court Erred in Finding That There Was No Evidence That the Wagons Had Been Greased or Oiled and Drawing a Conclusion Therefrom That They Had Not Been Greased or Oiled, and at the Same Time Finding That the Appellant Employed a Staff of Efficient Showmen as Heads of the Several Departments. [Findings, Pr. Tr. p. 44.]

If the Court is to assume that there were efficient heads of the department, it is only fair to conclude that they had sense enough to grease a wagon the same as they must have had to feed a horse.

Why should the Court consider as a presumption that the wagons were not greased, rather than conclude that the presumption is that they were greased. The testimony of Mr. Priest that the spindles and axles were bent [Pr. Tr. p. 242] would indicate that the heating was caused by something far greater than lack of grease. There is direct testimony, however, that shows that they were greased; but despite this fact, they continued to give trouble [Pr. Tr. p. 94]:

“A. The same wagon gave us trouble going back, although we had greased it.

Q. But you greased it and it did operate all right?

A. No. It gave us trouble. It had another hot box.”

POINT VII.

The Court Erred in Concluding That the Appellant Accepted the Property "Without Discovering Any Fault of Any Sort or Fashion", and Then Immediately Concludes Further That the Appellant "Assumed to Make Reconditioning for Such Needed Repairs as Were Apparent." [Pr. Tr. p. 45.]

The evidence shows conclusively that the appellee never complied with the contract in delivering one circus train consisting of seven flat cars, two stock cars, two coaches and two sleepers, at lessor's expense, in good condition and ready for use to the lessee at Inglewood, California. The evidence does show that the cars were not in good condition or ready for use, and that they could not be used because of Inter-State Commerce Commission Regulations.

There is in evidence, various agreements entered into between the appellant and certain sponsors. [Deft's Exs. 1-13; Pr. Tr. pp. 250-257.] It should, therefore, be quite apparent that the appellant was legally bound to provide circus shows for these sponsors at the time and place named in these several contracts. The circus train was delivered in an improper and dangerous condition. The appellant was not thinking about legal rights and technicalities, but was trying to perform its contracts with its sponsors and at the same time carry out its contract with the appellee. In this endeavor, the appellant seeing that the appellee had wholly failed in this regard, ordered the

cars fixed. In the printed transcript, pages 194 to 217, appears Defendant's Exhibit No. 17, consisting of the reproduction of bills and repairs made to these cars.

Considering the position of the appellant at the time the circus equipment was delivered and also taking into consideration the promises made by the agents of the appellee, that the equipment would be in good condition and ready for use, it cannot be contended that there was any assumption on the part of the appellant to recondition the equipment. It has been pointed out wherein the equipment was deficient in the argument under POINT III. These were substantial elements but appellant was faced with a situation wherein it had to attempt to fulfill its obligations to its sponsors without sanctioning any of the deficiencies and relying upon the promise of the appellee that they would be corrected. The appellant attempted to go forward and produce the circus. The finding that there was an assumption on the part of the appellant to recondition at its own expense the equipment, and thus constituting a waiver is rebutted completely, we believe, by the argument in POINT II.

POINT VIII.

The Court Erred in Concluding That Appellant Closed the Circus Because Threatened With a Closed Shop by Labor Unions.

If the Court will consider the appellant's exhibits (1 to 13) [Pr. Tr. pp. 250-257], it will be apparent that these sponsors' contracts provided for the production of a circus for the sponsor. Naturally, it was up to the appellant to provide the equipment. Failure of equipment, as between the sponsor and the appellant, must rest on the shoulders of the appellant, but not necessarily so as between the appellant and appellee. Why should it be thought incredible, that the appellant on discovering that it could not carry on, because of the poor equipment, attempt to put itself in the best possible position, in making settlements with its sponsors? There was no effort on the part of appellant to put something over on the appellee. The telegrams which were sent to the sponsors were stipulated in evidence at the time of the pretrial hearing. It is true that Mr. Kramer of the American Federation of Music wanted a closed shop. Had appellant desired to avail itself of this type of relief and had it thought that the equipment could not be made to work, it could easily have handled Kramer in such a way that he would have called out the union men at Inglewood, and thus given the appellant the right to avail itself of the defense to the sponsors' contracts. But the fairness and honesty of the appellant is shown in no better way than its actions at a time when it least thought of legal difficulties, and

when it could not be deemed to be putting itself in a good legal position. While the appellant was trying to make the equipment function, it was also keeping the union quiet in its demands. For one week, appellant continued attempting to make things go. The record is replete with failure of equipment; wheels burning, rope breaking, poles falling, missed and delayed performances, and to this the appellee says—green labor. But green labor didn't break dry rotted ropes; green labor didn't make wagon wheels burn; green labor didn't delay performances, because appellee's expert, Mr. Singleton, testified that he had the tent up in Inglewood in three hours without difficulty, and could have put it up in less time. [Rep. Tr. p. 124.]

Appellee is simply taking advantage of a situation in which the appellant sent out telegrams and availed itself of a legal defense as against the sponsors after Kramer had called out his union labor due to a greater degree on account of the poor conditions. [Pr. Tr. pp. 235-238.]

POINT IX.

Opinion Evidence.

The Admission of Opinion Testimony Must Be Preceded by a Proper Foundation Showing That the Witness Is Qualified as an Expert by Reason of His Superior Knowledge and It Must Be Shown That He Has Had an Opportunity for Observation in Order to Draw His Conclusion Therefrom.

In considering the issue that the evidence set out in specification of error, Point IX, was erroneously admitted, the foundation of the evidence must be kept in mind in order that the substantial character of these errors be apparent.

Conceding for argument that the evidence was of such a peculiar nature that opinion testimony was proper, nevertheless, such opinion evidence gained by the expert must be based on some knowledge of the facts by observation. The distinction being that the expert is allowed to draw conclusions from his observation. However, we shall attempt to point out that these experts did not have sufficient foundation in observation to permit them to testify.

The excerpt of the testimony above set forth is forceful argument in itself that there was not a sufficient knowledge upon the part of this witness to express an opinion as to the condition of the wagons at the time in question.

In the first place the witness states he did not himself examine, but had a mechanic by the name of Forbes report to him. It is upon this hearsay evidence that the opinion is based. This objection goes to the force of the witness' whole testimony, for the Court upon the showing of his knowledge of the circus business allowed further opinion testimony as to items of equipment. [Pr. Tr. pp. 71-74.]

It cannot reasonably be said that this witness had the foundation to come within the language as set forth in the leading case of *Vallejo & Northern Ry. Co. v. Reed Orchard Company*, 169 Cal. 545, 570:

“Witnesses who are skilled in any science, art, trade or occupation; may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge of the subject of inquiry which jurors generally have not. . . . To warrant its introduction, the subject of inquiry must be one relating to some trade, profession, science or art in which the persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have (*Ferguson v. Hubbel*, 97 N. Y. 513 (49 Am. Rep. 544); *Young v. Johnson*, 123 N. Y. 233, (25 N. E. 363); *Excelsior etc. Co. v. Sweet*, 57 N. J. L. 231, (30 Atl. 553).) ‘When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. . . . It is not because a man has a reputation for superior sagacity and judgment, and power of reasoning, that his opinion is admissible. . . . It is because a man’s professional pursuit, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt.’”

POINT X.

Opinion Evidence.

The admission of the evidence under specification of error, POINT X, was allowed by the statement of the Court on the theory that the witness was an expert and familiar with the business engaged in by the appellant. Such an allowance is undoubtedly made for the admission of such testimony under the proper circumstances.

Code of Civil Procedure, Sec. 1870, subd. 9.

“The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;”

Such exception, however, has no application to the present situation, and made no observation upon which he could base an opinion. The witness by his testimony was not present at the happening of the event referred to, and the question propounded to him is not confined to the reason for the accident as described in his testimony but is merely a conjecture as to what is usually the cause of such an accident and is not confined to this particular event. It is purely speculative evidence, whether given by an expert or whether given by a layman, it is clearly inadmissible.

POINTS XI and XII.

Opinion Evidence.

The testimony under Points XI and XII may be considered together. In both instances the witness testified that he made a very minute examination of the equipment. Even though the Court refuses to rule on the objection, he was allowed to state "that it looked to him to be useable". Such testimony does not even come within the category of an opinion, although it certainly has that force and effect. The witness testified that it looked to be useable. It is inconceivable upon what theory such evidence was admitted. It is true that the trial court is to determine the qualification of an expert witness and has a wide discretion in the determination thereof, but it is submitted that the Court clearly abused its discretion in permitting such evidence as hereinabove set out in the record.

Howland v. Oakland Cons. St. Ry. Co., 110 Cal. 513, at 521;

Kinsey v. Pac. Mut., 178 Cal. 153;

Dobbie v. Pac. Gas & Elec. Co., 95 Cal. App. 781.

POINT XIII.

The Judgment Is Not Supported by the Findings in That There Is No Finding to Sustain the Allegation of the Complaint That the Appellee Made an Effort to Mitigate Damages as Alleged in Its Complaint.

The appellee has not maintained the burden of proof as to damages. The appellee has alleged in its complaint [Pr. Tr. p. 2] “that plaintiff made every endeavor during the remainder of the term of said contract, to let said property to others but was unable so to do.” There is no testimony by any witness produced on behalf of the appellee that any effort was made whatsoever to mitigate the damages by renting the equipment or attempting to rent the equipment to others. While it may be the rule that proof of mitigation of damages rests upon the defendant, in the instant case the appellee has assumed by this allegation the burden of proving damages sustained.

It is said in *Wilson v. Crown Transfer, Etc. Co.*, 201 Cal. 701, 706:

“Where the plaintiff alleges that the goods stored were lost by fire due to negligence of the defendant, then the burden of proving these allegations is upon the plaintiff, but when the plaintiff’s pleadings contain no such allegation, but the defendant, seeking to justify its refusal to return the goods, sets up their destruction by fire and alleges that the fire was not due to its fault or negligence, then the burden is upon the defendant to prove the allegation of its affirmative defense and show that it was free from negligence as to the cause of the fire.”

It is submitted that these cases are closely analogous to the instant case and that the reasoning therein is applicable here.

Dieterle v. Bekin, 143 Cal. 683;

Cussen v. Southern Calif. Savings Bank, 133 Cal. 534;

U-Drive, Etc., v. System Auto Parks, 28 Cal. App. (2d) 782.

There is no showing that any attempt to rent the equipment was made during the remaining term of the contract. Dismissing all other points of error urged, the most that appellee could recover would be for one week, less the repairs and improvements made by the appellant.

Conclusion.

In conclusion, we submit:

1. The appellant had a right to look to the contract in determining the legal rights of the parties. This provided that the appellee would deliver to appellant at Inglewood the equipment named, in good condition and ready for use for at least five weeks; that the same was taken without examination and the appellee was not relieved of the law of California, as set forth in Section 1955 of the Civil Code.

2. The equipment was not received in good condition and ready for use and some of it was missing entirely.

3. The defects as set forth in the notice of rescission were not fully known until the day the equipment was returned. The defects appeared on each day. The testimony shows that at Inglewood the cars were repaired at

a cost of over \$300.00; the Calliope didn't play, the elephant howdahs were not delivered. At San Diego, additional repairs had to be made to the flat cars by putting on new decks. At Santa Ana, the runs caused a wagon to tip over in leaving the car; wheels burned; and wagons were delayed. In leaving Santa Ana, a pole was dropped, fortunately no one was hurt. In Pasadena, the matinee on Memorial Day was missed, although there was a huge crowd present. The rope broke three times, and the testimony shows there was dry rot. At Pomona there was a further delay, and the afternoon performance was so late that its value was lost. These delays were not labor as is indicated where there were only sixteen men to erect a tent in Inglewood. This could have been done in Pasadena if the ropes had held.

4. The appellant had no alternative with such equipment and with the danger of injury to the public, and it may well be understood that the last thing it would want to do would be to face the sponsors in their unfulfilled promise to perform.

5. The rescission did not take place because of labor trouble. There was no reason to unionize a circus that could not perform, and the union representative himself testified that the condition of the equipment and the safety of his members was a consideration.

6. The rescission on the part of the appellant being justified, there should have been no judgment against it, but it should have recovered the damages which it sustained, and which the Court found to be \$23,323.93 for one week. [Pr. Tr. p. 45.]

7. The appellee has failed to offer any evidence on the allegation contained in paragraph IV, "That plaintiff

made every endeavor during the remainder of the term of said contract, to rent said property to others but was unable so to do", and having adopted this as part of its case was bound to offer some proof. If the Court believed that the other issues had been met by the appellee by a preponderance of the evidence, yet with proof lacking on this issue, the appellee's recovery should be mitigated to one week, less the expenses incurred by the appellant in repairs to the equipment.

In conclusion, we submit that the judgment should be reversed and findings be made accordingly.

Respectfully submitted,

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No. 9779.

IN THE

7
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLEE'S ANSWERING BRIEF.

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No. 9779.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLEE'S ANSWERING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

This appeal was taken by Fanchon & Marco, Inc., a California corporation, from a judgment in favor of Hagenbeck-Wallace Shows Company, an Indiana corporation, in the amount of \$15,006.07, awarded after a trial by Court, jury trial having been waived. The complaint in this matter alleges that plaintiff and defendant are respectively corporations organized under the laws of the States of Indiana and California and that the amount involved in this action exceeds the sum of \$3000.00. It alleges the execution on May 22, 1939, of a contract between the parties hereto, attached to the complaint as Exhibit "A". It alleges performance by the plaintiff in conformity with the terms thereof of the delivery at Inglewood, Cali-

fornia, of certain circus property, equipment and animals covered by the said contract, the acceptance thereof by defendant under the terms of the contract and the repudiation, after more than one week's use of said equipment, of the contract and the return of the equipment to the winter quarters of plaintiff. It alleges that plaintiff suffered damages in the amount of \$1600.00, cost of feeding and caring for animals and equipment for four weeks remaining under said contract after repudiation thereof by defendant, and the failure to pay five items of \$2500.00 each, being the five weekly rental payments due under the contract. In addition thereto, the plaintiff seeks recovery of interest on the unpaid sums, as provided by law, and for other items particularly appearing in the complaint, demand for the same and default on the part of defendant having been alleged. There were two common counts in the complaint which were dismissed at the pre-trial hearing. The defendant's answer denies the obligations as due, alleges that the equipment was not in good condition and ready for use for circus purposes when delivered, as required under the contract, and sets up several affirmative defenses, including fraud and misrepresentation in connection with the condition of the equipment at the time the contract was entered into, failure of consideration in connection therewith and impossibility of adaptation of the equipment delivered by plaintiff to the use for which defendant contracted for the same. In addition, a counterclaim on behalf of the defendant was filed, alleging in substance that the condition of the equipment was not as required by the contract, and that the defendant suffered damages in the sum of \$2500.00 for repairs in connection with the same, and for \$50,000 for loss of profits as a result of its inability to use the same.

A reply to the counter-claim was filed. Later the counter-claim was amended and a reply to the amended counter-claim in substance denying the allegations therein contained was filed.

The action was commenced in the United States District Court, in and for the Southern District of California, Central Division, and the pleadings were at issue in that Court. The statutory provision believed to sustain the jurisdiction of the District Court is 28 U. S. C. A., Sec. 41 (1). The statutory provision giving this Honorable Court jurisdiction on appeal to review a judgment of the District Court is 28 U. S. C. A., Sec. 225, Par. a.

The pleadings necessary to show the existence of jurisdiction are the complaint [Pr. Tr. pp. 2 to 14], the answer and counter-claim of defendant Hagenbeck-Wallace Shows Company [Pr. Tr. pp. 14 to 26], plaintiff's reply to the counter-claim [Pr. Tr. pp. 26 to 28], defendant's amended counter-claim [Pr. Tr. pp. 28 to 32], and the reply to amended counter-claim [Pr. Tr. pp. 32 to 35].

A pre-trial was had and the issues defined in the Order on pre-trial [Pr. Tr. pp. 35, 36] and the Certificate of pre-trial hearing under Rule 16 [Pr. Tr. pp. 36 to 39] and confined the issues to the condition of the equipment when delivered to the defendant and to losses, if any, recoverable that were occasioned by the deficiency of the equipment, if any. The judgment was entered in the District Court on December 3, 1940 [Pr. Tr. p. 46]. Notice of Appeal was filed by appellant on the 16th day of January, 1941 [Pr. Tr. p. 48]. Bond on appeal in the sum of \$20,000.00, covering both judgment and costs, was filed by appellant on January 16, 1941 [Pr. Tr. p. 49].

The typewritten transcript of record was filed and docketed in this Honorable Court on the 29th day of March, 1941 [Pr. Tr. p. 285], within the time allowed for the docketing of said transcript. Thereafter, the printed transcript of record was prepared pursuant to a designation of record on appeal and amended designation of record on appeal, in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, the designation having been filed on the 12th day of March, 1941 [Pr. Tr. p. 52] and the amended designation having been filed on the 13th day of March, 1941 [Pr. Tr. p. 54]. A designation of parts of records necessary for consideration of this case pursuant to Rule 19, Subdivision 6, of this Honorable Court, was filed in conformity with said rule [Pr. Tr. pp. 287 to 291]. An appellee's designation of documents, records and proceedings to be included in record on appeal and to be included in the printed transcript thereof was filed in the manner provided by the Rules of Court in connection with the same by appellee on April 2, 1941 [Pr. Tr. pp. 291 to 294].

The statement of points relied upon by the appellant was filed at the same time and as a part of the Appellant's designation of parts of record, on the 2nd day of April, 1941 [Pr. Tr. p. 286].

The transcript of record was filed in this Honorable Court on the 29th day of March, 1941, and all proceedings have been taken within the time provided by the Rules of Court and the provisions of 28 U. S. C. A., Sec. 230.

Statement of the Case.

There are a number of statements in Appellant's Statement of the Case which under Rule 20, Sub. 3 of the Rules of this court, Appellee controverts. Therefore we are setting out herewith Appellee's Statement of the Case.

The Appellee in this case is an Indiana corporation, and is engaged in the circus business, and in April and May of 1939 had on hand in its winter quarters at Baldwin Park, California, a large amount of circus equipment, including performing animals, elephants, etc., which it was willing to lease.

The Appellant is also a corporation incorporated in the State of California, and is engaged in the general show or public amusement business, and during the months of April and May, 1939, decided to put on a circus in California to be known as the Great American Circus, for an indefinite number of weeks but not less than five weeks, and from May 2, 1939, to May 19, 1939, Appellant contracted with a number of sponsors in various California cities to put on a three-ring circus. Nine such contracts were made prior to May 22, 1939 and four made after May 22, 1939, up to and including May 29, 1939.

Negotiations were carried on between Ralph Clawson, the local manager representing Appellee, and Charles W. Nelson, booking agent for Appellants, Daillard, the appointed general manager for the Great American Circus and Marco Wolff, the vice-president of Fanchon & Marco, the Appellants, in relation to leasing a part of the circus

equipment held by Appellee in its winter quarters at Baldwin Park, California, sufficient in kind and variety, including 10 elephants and other animals, to enable the Appellants to put on a three-ring circus in conformity with their contracts with the sponsors.

During these negotiations, the Appellants' agents Dailard and Nelson, visited the location of the equipment accompanied by Mr. Clawson, and on May 18, 1939, the Appellants employed George Singleton, of 40 years experience in the circus business and a former employee of Appellee, as a "boss canvasman" in charge of the "big top" and all the equipment, including poles, ropes, chairs, chains, wires, blocks, falls and tackles, and instructed him to go to Baldwin Park and start laying out the equipment needed and to employ the necessary men to assist him in the matter.

The next day, or on May 19, 1939, Appellants hired as manager Paul Eagles, a circus man of 25 years' experience, to take charge of selecting the equipment and to obtain skilled men to take charge of the various departments of the circus and to manage the same.

The local manager and agents of both parties could not come to an agreement, and the Eastern representatives of both parties were consulted at New York, who finally on May 22, 1939, two days before the circus was to open in Inglewood, entered into the written lease agreement which is set out in full in the printed transcript. While the contract was made in New York it was to be performed solely in California.

In the meantime the entire equipment had been inspected and selected and the "big top" had been erected by Singleton and his crew at Baldwin Park, and upon the signing of the agreement was immediately torn down and the circus transported to Inglewood for the opening show on May 24, 1939.

The equipment was transferred by the leased circus train, but the Appellants were informed by the Santa Fe officials that certain repairs were needed to the train to conform to certain Interstate Commerce rules. Marco Wolff, the vice-president of the Appellants, after consultation and agreement with Clawson, the agent of Appellees, hired the repairs made by the Santa Fe Railroad and charged the expense to Appellee. In a like manner certain other minor repairs were made and minor articles purchased, and the expense charged to Appellee.

The Great American Circus showed in Inglewood May 24, 1939, two performances; San Diego, May 26-27-28, 1939, five performances; Santa Ana, May 29, 1939, one performance; Pasadena, May 30, 1939, one performance, and Pomona, May 31, 1939, two performances.

In Pomona the business agent for the American Federation of Actors called out certain acts on strike and the circus immediately closed and the equipment was returned to Baldwin Park, California, and on the 1st day of June, 1939, the Appellants gave notice of rescission, claiming the equipment leased by them was not in "good condition and ready for use" and that this fault compelled the Ap-

pellants to close the show. Appellees have claimed the failure of the show was due to poor management in making poor contracts with sponsors from a financial standpoint, green, inexperienced labor for the circus and not enough time to break them in, and finally the calling out on strike of the band and certain special acts and features, compelling the closing of the show.

The initial payment of \$2500.00 due Appellee on delivery of the circus equipment at Inglewood was never paid by Appellant, nor were the four notes of \$2500.00 each called for by the agreement ever delivered to Appellee and on November 10, 1939, Appellee filed this action in the United States District Court, Southern District of California, Central Division, for \$15,475.14, together with interest thereon.

After a pre-trial hearing on November 25, 1940, in which it was stipulated that the issue would be confined to the condition of the equipment on its delivery, and after a trial of three days before the Court sitting without a jury, the Court found for Appellees and gave judgment to them in the amount of \$15,006.07. The defendant (Appellants) have appealed to this Court and the matter is now before them, and this is Appellee's Answering Brief to Appellant's Opening Brief. The matters included in this statement are hereafter referred to in the brief and the page and line of the printed transcript is set out for each fact herein stated.

Summary of Argument.

POINT 1.

IN ANSWER TO APPELLANTS' POINT III:

Where a case is tried before the Court, the trial judge has the sole right to believe or reject the testimony of a witness, and the sufficiency of evidence to establish a given fact is also a question for the trial court.

POINT 2.

IN ANSWER TO APPELLANT'S POINTS I AND VII:

A deleted clause in an instrument or other extrinsic evidence, is inadmissible to show intention, waiver or non-waiver or other interpretation, where the contract is plain, unambiguous and certain, and waiver is a question of fact to be determined by the trier of the facts.

POINT 3.

IN ANSWER TO APPELLANT'S POINT VI:

The condition and usability of the wagons as a part of the equipment was a question for the trial court.

POINT 4.

IN ANSWER TO APPELLANT'S POINTS II, IV AND V:

The submission of weaker evidence when stronger evidence could have been produced, should be viewed with distrust and in any event the trial court is the sole and final judge of the credibility of witnesses and testimony produced, and the knowledge of the agent is knowledge of the principal.

POINT 5.

IN ANSWER TO APPELLANT'S POINT VIII:

The Court had a right to conclude from the admission of Appellant that one of the reasons for closing the show was the calling out of a number of performers by the business agent of the American Federation of Actors.

POINT 6.

IN ANSWER TO APPELLANT'S POINTS IX, X, XI AND XII:

The qualifications of expert witnesses and the admission of opinion evidence is a matter within the discretion of the trial court, and there can be no abuse of that discretion where the trial is before the Court without a jury and the Court only gives the testimony such weight as it ought to have.

POINT 7.

IN ANSWER TO APPELLANT'S POINT XIII:

There is no need of a finding on an immaterial allegation of the complaint in relation to mitigation of damages, where Appellant submitted no evidence in relation thereto and the stipulation and agreement of the parties confirmed by the Court at the pre-trial hearing limited the issues and did not include "mitigation of damages" as an issue.

POINT I.

In Answer to Appellant's Point III.

Where a Case Is Tried Before the Court the Trial Judge Has the Sole Right to Believe or Reject the Testimony of a Witness and the Sufficiency of Evidence to Establish a Given Fact Is Also a Question for the Trial Court.

In the interest of continuity of thought and as a logical sequence in argument we are answering Appellant's Point III first, because we believe this to be the gist of Appellant's entire argument. Obviously if the "circus equipment" listed by Appellant was as the trial court found,

"all of the property that was delivered and accepted at Inglewood was in good usable condition" [Pr. Tr. p. 40, lines 28-29],

there is nothing left of Appellant's argument, for all of Appellant's other points are corollaries to his Point III.

In justification for Appellant's contention that this finding by the trial court is not justified by the evidence, Appellant reviews the testimony of witnesses Eagles, Singleton, Clawson, Austin, Pennock and Graham, and attempts to discredit the testimony of Eagles and Singleton, respectively, the manager and boss canvasman of the Great American Circus and employees of Appellant, and the agents who, with others, inspected, selected and assembled the equipment at Appellant's winter quarters at Baldwin Park prior to the date of the lease agreement. Appellant was not only given an opportunity to inspect, but did in fact, by his authorized agents, inspect and select every piece of the equipment out of the great mass of like equipment belonging to Appellee.

Appellant's criticism of witnesses Eagles and Singleton, and reference to their testimony, is in great part taken from the reporter's transcript and not a part of the printed transcript. (App. Op. Br. pp. 28 to 37.)

We understand that the rules of practice of the Circuit Court of Appeals, Ninth Circuit, to be

That the Circuit Court will not consider parts of the record not printed.

Rule 19, Subdiv. 6,

and that the Court will not consider the parts of the reporter's transcript cited by Appellant. (We therefore object to consideration of any part of the reporter's transcript.) We shall therefore omit further reference to said portions of Appellant's Opening Brief. Neither shall we consider Appellant's undignified attempt to discredit the witness Eagles by his argument (Op. Br. p. 29) based on matters not in any record, to-wit, that because said witness was a merchant and in the feed business he should not be believed because he wanted to sell feed for the Appellee's circus animals.

Appellant further charges error (Op. Br. p. 35, lines 1 to 4) because the witness Eagles was examined as an adverse witness. We submit that Appellee had every right, the witness being Appellant's manager, to be examined as an adverse witness under the provisions of Section 2055, C. C. P., or Rules of Civil Procedure 43b. No objection to Appellee's request to so examine the witness Eagles was ever made by Appellant, nor did the Court rule on said request. [Pr. Tr. p. 63, line 12.] Nor was the witness asked any question that could not have been asked on direct examination. [Pr. Tr. pp. 63 to 101.] Nor did Appellant ever object to any question asked Mr.

Eagles, except a question calling for an opinion, when the trial court, in answer to the objections, said:

“The Court: He is giving his ideas as a man familiar with this sort of business and I think it is proper. The Court will only give it such weight as it ought to have anyway.” [Pr. Tr. p. 89, lines 6 to 9.]

The appellant made a weak attempt to impeach the testimony of Eagles and Singleton (not contained in the printed record, but cited from reporter’s transcript on pages 30, 31, 32, 33, 34 and 37 of Appellant’s Opening Brief). Our only answer to this line of argument is that the trial court heard these witnesses, observed their demeanor on the stand on both direct and cross-examination, and evidently believed them.

In addition, if the testimony of Eagles and Singleton were eliminated, there are still a great number of corroborative witnesses whose testimony is sufficient to support the judgment of the trial court.

The propositions of law contained in our heading to this Point I we believe are so fundamental that it is unnecessary to cite more than a few of a long line of California decisions to sustain them.

“Under the Code of Civil Procedure the jury, or trial judge sitting in place of a jury, is the exclusive judge of the credibility of a witness.”

10 *Cal. Jur.* 1160, Point 5.

“Witness presumed to speak the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by

evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.”

C. C. P., Sec. 1847.

“It is the duty of a reviewing court upon appeal to construe the evidence so as to support the judgment; to accept as true that evidence which tends to sustain the findings and judgment (unless it is inherently incredible) and to reject as untrue the evidence which conflicts therewith. Substantially all of the material facts testified to in behalf of defendants in support of their claim for equitable relief were either directly contradicted by the testimony of the plaintiff himself or were inferentially contradicted by the testimony of other witnesses produced by him. The trial court was the exclusive judge of the credibility of these witnesses.”

Neher v. Kauffman, 197 Cal. 674, 242 Pac. 713.

“The amount of credit to be given to the positive testimony of a witness is solely a question for the trial tribunal, except perhaps where the testimony in the light of the undisputed facts is inherently so improbable and impossible of belief as to in effect constitute no evidence at all.”

2 *Cal. Jur.* 916, Points 1-2.

“The question of the weight of impeaching evidence was one that was within the province of the trial court.”

Weissbaum v. Eibeshutz, 211 Cal. 170 at 174, 294 Pac. 396.

“The question of the credibility of the witness whose testimony given during the trial of this action was sought to be impeached in the manner described was one that was confided exclusively to the determination of the trier of facts.”

Goodwin v. Robinson, 20 Cal. App. (2d) 283 at 289, 66 Pac. (2d) 1257.

“Upon appeal, appellants challenge the sufficiency of the evidence to support the finding of the trial court to the effect that the statements made by defendants to plaintiff were false, and known by the defendants to be false, and insist that the evidence shows that such statements were true. We cannot agree with this contention. Having in mind the general rule that all intendments are in favor of the judgment and that this court must accept as true all evidence tending to establish the correctness of the findings as made.”

Feckenscher v. Gamble, 12 Cal. (2d) 482 at 492, 85 Pac. (2d) 885.

“It is only in cases where there is no evidence to sustain a finding, or where it can be said, as a matter of law, that the evidence is insufficient to sustain it, that this court has jurisdiction to consider the evidence. It is the exclusive province of the trial court to determine the credibility of the witnesses, and from the conflicting evidence determine the disputed fact. Those principles have been so often reiterated that they have become trite.”

Stransky v. Callan, 81 Cal. App. 476 at 487, 253 Pac. 960.

POINT II.

In Answer to Appellant's Points I and VII.

A Deleted Clause in an Instrument or Other Extrinsic Evidence Is Inadmissible to Show Intention, Waiver or Non-Waiver, or Other Interpretation Where the Contract Is Plain, Unambiguous and Certain and Waiver Is a Question of Fact To Be Determined by the Trier of the Facts.

Appellant's Points I and VII are so closely related that, in order to avoid repetition, we shall consider them together under this one heading.

It makes little difference whether Appellant under the pleadings had the burden of proof on the question of whether the leased equipment when delivered at Inglewood was in poor condition and not ready for use, or whether the Appellee should have the burden of proving said property was in good condition and ready for use, for, under the stipulation and order of the Court, the issue was limited to the condition of the equipment when delivered to the defendant [Pr. Tr. p. 39, line 78], and the trial court found, after all evidence had been submitted by both Appellant and Appellee, that

“all of the property that was delivered and accepted at Inglewood was in good useable condition.” [Pr. Tr. p. 40, lines 28-29.]

The agreement of lease between the parties made May 22, 1939, is set out in full [Pr. Tr. pp. 8 to 12], and calls for delivery of the itemized equipment stored and quartered at Baldwin Park, California, to Inglewood on May 23, 1939, in good condition and ready for use.

We submit this contract is plain, unambiguous and certain, and we can see no reason for the introduction of any extrinsic evidence to explain its terms or to show lack of knowledge of its subject-matter on the part of Appellant.

C. C., Sec. 1625;

C. C. P., Sec. 1856.

Appellant is laboring hard to make capital out of a deleted clause in this instrument, to the effect that Appellant had no knowledge of the condition of the equipment, when the facts are shown, without contradiction, the Appellant's agents had already at the time of the agreement, inspected, selected and set up the equipment at Baldwin Park. Eagles, the manager, and Daillard, the coordinator, had started on this work as early as May 19, 1939. [Pr. Tr. pp. 66-67.] Singleton, the "boss canvasman," was already there at that time getting out the paraphernalia, having started such work on the 18th of May, 1939. [Pr. Tr. p. 121, lines 7 to 13.] Nelson, an associate of Fanchon & Marco and manager of the Fair Booking Department and in charge of all arrangements prior to the agreement, together with Daillard, had examined the equipment six or eight weeks before the show opened. [Pr. Tr. p. 116, lines 20-31.] Singleton, the "boss canvasman" in charge of selecting the equipment, had assembled same and put the "big top" up at Baldwin Park prior to the signing of the agreement [Pr. Tr. p. 125, lines 1 to 20], in the presence of Daillard and Marco Wolff himself, and it was well known to all that the equipment selected was used, or "second-hand," equipment. [Pr. Tr. p. 125, lines 18 to 30.]

All this argument by Appellant about extrinsic evidence being used in the interpretation of the contract or to show non-waiver and all his cases cited to show that Appellant did not know the condition of the equipment is just a waste of time, for the fact is Appellant did know of the condition of the equipment and the trial court so found. [Pr. Tr. p. 41, lines 16-18.]

The only waiver spoken of by the Court was in relation to certain needed minor repairs, especially to the circus train, and where the cost of such repairs in the amount of \$332.22 were charged to Appellee and the charges accepted at the request of Appellant. This particular waiver is fully covered later under this point.

It will be remembered that the equipment in question was well known to all parties prior to the signing of the agreement to be "second-hand," or used equipment, and the express warranty of "good condition" and "ready for use" should be interpreted with the fact in mind that the equipment was second-hand and was to be used in the circus business. Then "good condition" and "ready for use" would be a warranty that the equipment was reasonably adapted to the purposes for which it was leased.

22 Cal. Jur. 999 to 1001, Secs. 72-73.

In this connection we again call the Court's attention that out of the many hundred of articles of equipment leased by Appellant but an infinitesimal number were claimed by Appellant to be unfit for its purpose, and all these were repaired and made fit at Appellee's expense.

The conclusion of the Court [Pr. Tr. p. 45, lines 13 to 21] that Appellant waived any flaws in the equipment

that was reconditioned by them and the cost of which was charged to plaintiff (Appellee) is fully justified under the facts and the law of California.

Appellant confines his objection to the equipment leased under his Point VII to the circus train, consisting of seven flat cars, two stock cars, two coaches and two sleepers, and states they could not be used under Interstate Commerce regulations.

R. V. Kettring, general car foreman for the Santa Fe Railroad, called as a witness for the defendants (Appellants), testified as follows:

“Q. By Mr. Schaefer: What condition did you find the cars in? A. We found the cars at Baldwin Park in what we would term, in a railroad term, as in fair condition, needing repairs to the safety appliances, air brakes, and the running gear of the cars, to make them safe to move.

Q. Will you state what repairs were made and give the car numbers, if you can, and state why they were made?

The Court: We don't need that. What other defects, if any, did you find in the cars? A. Well, I found several little defects that was in violation of the Interstate Commerce rules, if we would operate the cars over our lines, such as old air lines, wheels with worn flanges. And we had one coach that was—on request of the parties operating the show, they asked us to make repairs—it had a defect in violation of the Interstate Commerce rules, and these repairs were all made to the cars on our repair tracks, prior to their departure for San Diego. The cars were brought back from Inglewood to our repair tracks, and repairs were made.

Q. By Mr. Schaefer: Mr. Kettring, will you look through these bills as quickly as you can and

tell me if they are the original bills that came from the Santa Fe to Fanchon & Marco? A. Yes, sir, they are. They are the original bills.” [Pr. Tr. p. 191, line 19, to p. 192, line 18.]

Marco Wolff, the Marco of Fanchon & Marco, the Appellant herein, testified concerning the repairs to the train and to the conversation with Clawson, the agent of Appellant, as follows:

“A. Yes. Clawson told me that he would get the calliope fixed right away, and that the additional cross-pieces for the seats would come out, and the elephant howdahs were not there, and he said he would get us the elephant howdahs right away. He said he didn’t have any money and he couldn’t fix up the railroad cars, that his credit wasn’t good for that, and he asked us to advance the money for that.

The Court: Asked you? A. Yes. And he suggested that we could deduct from our first payment any advances that he might have to make.” [Pr. Tr. p. 164, line 21, to p. 165, line 2.]

The bill for these repairs amounted to \$332.22. [Pr. Tr. p. 193, lines 1 to 10.] It was then paid by Appellant and charged to Appellee.

The trial court found that:

“This property had been used in the show business, some of it for a number of years. The ropes had been used for one or two years, perhaps two years. The defendant is familiar with the show business and had been in such business for some time. He knew about the ropes, and must have known how long those ropes would likely continue in use. The defendant had in its employ a practical staff of efficient

showmen, who had been engaged in the show business, some for many years.” [Pr. Tr. p. 40, lines 11 to 21.]

And, continuing, the Court further found:

“All of the property that was delivered and accepted at Inglewood was in good, usable condition. Some of it was in need of some repairs, which the defendant had made and charged to the plaintiff’s account, to be deducted from the first payment due the plaintiff. The railroad cars needed repairs to bring them within the Interstate Commerce requirements. These repairs were made to the cars and, after reconditioning, the cars were delivered at Inglewood.” [Pr. Tr. p. 40, line 29, to p. 41, line 6.]

Appellant meticulously followed the statutes of California in relation to hiring personal property, which read as follows:

“A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.”

Civil Code, Sec. 1956.

“If a letter fails to fulfill his obligations, as prescribed by section nineteen hundred and fifty-five, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter’s default, and may recover such amount from him.”

Civil Code, Sec. 1957.

Having made these repairs, and Appellee having agreed to pay for same, or having, in the language of the Court:

“assumed to make reconditioning for such needed repairs as were apparent, and charged it to the plaintiff’s account with the plaintiff’s consent, he waived such reconditioning as is shown to have been necessary and to have been made.” [Pr. Tr. p. 45, lines 17 to 21.]

Moreover, waiver is a question of fact and is to be determined by the Court or jury, except when but one inference can be drawn from the facts.

25 *Cal. Jur.*, Sec. 8, pp. 932-933;

27 *R. C. L.* 912;

Boyd v. Chivers, 134 *Cal. App.* 566, 25 *Pac.* (2d) 878.

“Appellant also contends that the alleged waiver by defendant should have been submitted to the jury as a question of fact, and that the directed verdict was, therefore, improper. While waiver is a mixed question of law and fact, when, however, but one inference can be drawn from the facts it is not error for the court to charge the jury that these facts constitute waiver.”

Lompoc Produce v. Browne, 41 *Cal. App.* 607 at 613, 183 *Pac.* 166.

“Furthermore, the finding of the court that there was no waiver is a finding on a question of fact, proof of which rested upon appellant. (Citing cases.) In view of the record in this case we must accept that fact to be true.”

Schick v. Equitable Life Assur. Soc., 15 *Cal. App.* (2d) 28 at 35, 59 *Pac.* (2d) 163.

POINT III.

In Answer to Appellant's Point VI.

The Condition and Usability of the Wagons as a Part of the Equipment Was a Question for the Trial Court.

The Appellant, under his Point VI, complains of the Court's findings of the condition of the wagons. The evidence showed, concerning the wagons, that after they had been delivered at Inglewood they had been driven several miles in San Diego [Pr. Tr. p. 128, lines 22-23], that they had been hauled out of loose sand, where they had sunk to the wagonbed, by 60 and 80 H.P. caterpillars [Pr. Tr. p. 127, line 115], and then, the next day, on the long haul at Santa Ana, when the wagons were loaded beyond their normal capacity and were hauled by gas motor-powered trucks at great speed [Pr. Tr. p. 156, lines 1-26], the spindle on one of the hubs became heated (one hub out of 104 or one wagon out of 26) and there was no evidence that the wagons during this time were greased until after the show at Santa Ana. We submit that any reasonable mind, after hearing this evidence, would conclude that the wagons, for second-hand equipment, were, when delivered at Inglewood, in a good usable condition.

POINT IV.

In Answer to Appellant's Points II, IV and V.

The Submission of Weaker Evidence When Stronger Could Have Been Produced Should Be Viewed With Distrust and, in Any Event, the Trial Court Is the Sole and Final Judge of the Credibility of Witnesses and Testimony Produced, and the Knowledge of the Agent Is Knowledge of the Principal.

Appellant's Points II, IV and V are in relation to the condition and usability of one item of the equipment, to-wit, the "rope" used to lift the "big top" or main tent to its place. The finding of the Court that

"all of the property that was delivered and accepted at Inglewood was in good usable condition" [Pr. Tr. p. 40, lines 28-29],

was discussed under Appellant's Point III of his Opening Brief and Appellee's Point I of this Answering Brief, and the arguments made by Appellee therein apply equally to these points relating to the condition of the "rope," as said "rope" is but a minutely small fractional part of "all of the equipment."

Appellant assumes, under his Point II, that the trial court had in mind a wilful suppression of evidence by Appellant. No intimation was ever made by the Court, counsel for Appellee, or anyone else that Appellant wilfully suppressed any evidence. Conjecture of what the Court had in mind is neither useful nor of any force or effect. The language of the Court is sufficient to express the Court's intention, and we submit the finding that

"all of the property was in good condition"

includes the rope and such finding is amply justified by the testimony of the witness Singleton alone. He had been a "boss canvasman" for 40 years; he bought this particular piece of rope in the first instance; he inspected and selected it as agent of the Appellant; he saw it become fouled in the "blocks" and break when pulled on by an elephant, and he spliced the rope after the break and testified, in answer to a question by the Court, that the rope was in usable condition. We set out the pertinent part of Singleton's testimony, taken from the printed transcript, as follows:

"Q. When you went out to Baldwin Park when Mr. Nelson first employed you, what did you do out there? A. I proceeded to get the wagons out and get material out, etc., chairs, poles, rigging, canvas; I proceeded to get the show together, to load it in wagons to go to Inglewood. Then I had an order to put the show up in winter quarters.

Q. Let me ask you about putting it up in winter quarters. Do you mean that you set it all up and tested it and tried it out? A. Do you know exactly how much wagon space it would take to load—

Q. Did you lay out the falls? A. I put the big top up. It was all up in the air, and they came out and stopped me and had me tear it down and load it to go to Inglewood.

Q. When did you put it up? A. I think it was Friday, finished it Friday night, some time after dark.

Q. That was the same equipment you loaded to go to Inglewood? A. Yes.

Q. And the same equipment the Great American Circus used? A. Yes.

Q. And it was all up there, and you looked at it in the air, set up, before you left Baldwin Park?

A. Yes, sir.

Q. Did anyone else look at it with you? A. Why, Mr. Clawson went over some of this stuff, and Mr. Daillard was around there, and Mr. Marco was all around, looking at the wagons, but I personally supervised the sorting and loading of all the stuff myself." [Pr. Tr. pp. 124-125.]

"The Court: You say, 'I spliced the rope.' What was the condition of the rope where it separated?

A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.

The Court: Well, you have answered the question." [Pr. Tr. pp. 131-132.]

and the testimony of the witness Clawson as follows:

"Q. In Pasadena did you have occasion to observe the working of the main fall there? A. I noticed they got the line fouled once or twice there.

Q. There were elephants pulling that line? A. They pulled the cable. The cable goes through the block, and sometimes the cable will foul.

Q. Has an elephant sufficient strength or power to pull a rope like that in two? A. An elephant don't know his strength when he starts to pull.

Q. You believe they could pull the main fall in two, though? A. Yes, I believe he could, very easily.

The Court: You say an elephant is the motive power? A. That pulls the fall up, Your Honor?

The Court: And the rope got fouled? A. It got fouled in a block.

The Court: Where did it tear, between the elephant and where? A. It broke once right on the No. 1 bail ring, and going through the block there it got fouled.

The Court: And broke right at the block? A. I think so. It is pretty hard to tell, but that is the way I think. And they tie that right onto the bail ring." [Pr. Tr. pp. 154-155.]

That the Court was amply justified in his finding by the testimony of the witness Singleton alone is shown by section 1844, C. C. P., which reads as follows:

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason."

C. C. P., Sec. 1844.

The Court said in his finding as follows:

"No part of the broken rope is produced in court as evidence, nor is its absence explained." [Pr. Tr. p. 43, lines 14-15.]

The Appellant concludes from this language that the Court had in mind Sec. 1963, Subdiv. 5, C. C. P. As before pointed out, this conclusion is in no way sustained by any remark of the Court or anyone else. However, the Court could have very properly considered in relation thereto, Sec. 2061, Subdivs. 6-7, C. C. P., which read as follows:

"6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

“7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.”

Sec. 2061, Subdivs. 6-7, C. C. P.

Or Section 1963, Subdivision 6, C. C. P., in relation to disputable presumption, which reads as follows:

“6. That higher evidence would be adverse from inferior being produced.”

Sec. 1963, Subdiv. 6, C. C. P.

Appellant failed to set out in full the trial court’s finding in relation to this rope, and we continue where Appellant left off as follows:

“At the time of the breaking of the rope the man who was in charge of that department was an old showman. He was working in his line of business in making this exhibition. If that had broken because of dry rot, he would have discovered it, and he would have reported it to the defendant, and a part of the rope, or the broken part, would have been saved as a matter of protection to the defendant. But this was not done.” [Pr. Tr. pp. 43-44.]

We submit that if the rope was successfully spliced without the removal of any part of it, this in itself was evidence that there was no dry rot in the part that was spliced, and if at the time of the trial it was in possession of Appellee as claimed by Appellant, it could have been obtained by Appellant by the use of slight diligence in discovery under Rule 34 of the Federal Rules of Civil Procedure, or by subpoena *duces tecum* under Sec. 1985 C. C. P. At least it was in Appellant’s power to obtain possession of the rope.

The rule is well stated in a note to 70 A. L. R., p. 1326, as follows:

“It has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it and without satisfactory explanation he fails to do so, the jury may draw the inference that it would be unfavorable to him.”

Citing:

10 R. C. L., p. 884.

And this rule is restated in 20 Am. Jur., p. 188, Sec. 183.

And in a very recent case it was held the production of weak evidence when strong is available, can lead only to the conclusion that the strong would have been adverse, and silence then becomes evidence of the most convincing character.

Int. Circuit v. United States, 306 U. S. 208, 83 L. Ed. 610, 59 S. Ct. 467.

The case of *Estate of Moore*, 180 Cal. 570 at 585, also reported in 182 Pac. 285 (cited by App. Op. Br. p. 24, line 6), is a case on wilful suppression of evidence, and not in point.

We have no quarrel with the rule enunciated in the other cases cited by Appellant, to-wit, *Hiner v. Olson*, 23 Cal. App. (2d) 227, at 234, also reported in 72 Pac. (2d) 890, on rehearing 73 Pac. (2d) 945, and the case of *Tieman v. Red Top Cab Co.*, 117 Cal. App. 40 at 46, also reported in 3 Pac. (2d) 381, and recite them as sustaining our position, and it is with a feeling of charity that we call attention to the first sentences on pages 24-25 of Appellant's Opening Brief as evidently a mistake, although we agree with the conclusions therein stated.

Appellant's objections set forth under his Point IV apparently are made to that part of the Court's finding reading as follows:

"This property had been used in the show business, some of it for a number of years. The ropes had been used for one or two years, perhaps two years. The defendant is familiar with the show business, and had been in such business for some time. He knew about the ropes, and must have known how long those ropes would likely continue in use. The defendant had in its employ a practical staff of efficient showmen, who had been engaged in the show business, some for many years." [Pr. Tr. p. 40, lines 11-20.]

And Appellant again uses the reporter's transcript (we renew our objection to this practice on the part of Appellant), to show by the testimony of Mr. Daillard, the "coordinator" of the Great American Circus, that he was an experienced theatre man but not a circus man. It may be conceded that neither Daillard nor Wolff were qualified as expert circus men, but the fact is undisputed that they employed a number of circus men of many years experience to act as their agents and managers of the various departments of the circus, men who were familiar with this particular equipment.

Singleton, the "boss canvasman" for the Great American Circus, testified in answer to a question by the Court as follows:

"The Court: You say, 'I spliced the rope.' What was the condition of the rope where it separated?

A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.

The Court: Well, you have answered the question.”
[Pr. Tr. pp. 131-132.]

And the further fact that Singleton was able himself to splice the broken rope so that it not only held for the show in Pasadena but also at Pomona the next and last performance, would indicate familiarity with the condition of ropes.

We submit that it is a fundamental and well-settled rule of law, that the knowledge of the agent in the course of his agency is the knowledge of the principal.

1 Cal. Jur. 846, Sec. 125, Point 8;

Faires v. Title Ins. & Trust Co., 15 Cal. App. (2d) 350, at p. 354, 59 Pac. (2d) 428.

“As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.”

Sec. 2332 C. C.

Appellant's argument under his Point V is but a repetition of the argument under Points II and IV and we feel that it has been answered heretofore. Most of the testimony cited by Appellant in his Point V is taken from the reporter's transcript. (Op. Br. pp. 45, 46, 47.) (We again object to the consideration of testimony not in the printed transcript.) Suffice it to say, that of the three witnesses whose testimony is referred to in the Opening Brief, page 45, lines 3 and 4, Guice, the trapeze artist, Priest, the hardware man, and Singleton, the “boss canvasman” who spliced the rope in question, the Court evidently believed that Singleton knew more about the condition of this particular rope than the others.

POINT V.

In Answer to Appellant's Point VIII.

The Court Had a Right to Conclude From the Admission of Appellant That One of the Reasons for Closing the Show Was the Calling Out of a Number of the Performers by the Business Agent of the American Federation of Actors.

The admission of Appellant that the reason for closing the show was as contained in their telegram sent the last night of performances at Pomona, May 31st, 1939, to fourteen sponsors under contract with Appellant, which telegram reads as follows:

“Kramer of American Federation of Actors has called out acts which are members of his organization. This and other labor difficulties which have caused us to miss matinee performances in Santa Ana and Pasadena necessitates us advising you with regret we will be unable to fulfill contract for Circus performance. One of our men will contact you later.” [Pr. Tr. p. 259, lines 4-11.]

However, this was not the sole reason for closing the show. The trial court in its conclusions, gives another very cogent reason, to-wit:

“Operating the show for a week at a net loss of \$23,323.93.” [Pr. Tr. p. 45, lines 10, 11, 20.]

Nowhere in the telegram is “faulty equipment” stated as a reason for closing the show or missing performances.

The strike and other labor difficulties are given as the sole reasons for closing the show.

We submit that Appellant's real objection to the conclusion of the trial court is that the Court failed to find that a reason for closing the show was "faulty equipment", and Appellant's self-serving argument (Op. Br. pp. 53-54) as to its fairness and honesty in not availing themselves sooner of the "strike" clause in their contracts with sponsors [Pr. Tr. p. 254, Par. 7], is more ludicrous than logical. Also, their reiteration or exaggerated claims of faulty equipment, when their evidence at its best showed one wagon wheel out of 104 ran dry after the wagon had been pulled out of the sand, hub-deep, by caterpillars in San Diego, and one rope broke when it became fouled and pulled on by an elephant. All of these contentions were disposed of by the Court in its finding contrary to the Appellant's claims. The Court made up its mind from all the evidence and facts. The items complained of were infinitesimal matters in any event, when one considers the vast amount and mass of equipment carried by a big three ring circus, the quantity and nature of which has become an American idiom for intricacy and variety.

POINT VI.

In Answer to Appellant's Points IX, X, XI and XII. The Qualifications of Expert Witnesses and the Admission of Opinion Evidence Is a Matter Within the Discretion of the Trial Court, and There Can Be No Abuse of That Discretion Where the Trial Is Before the Court Without a Jury and the Court Only Gives the Testimony Such Weight as It Ought to Have.

Appellant's objections under Points IX, X, XI and XII as set out in his Opening Brief, being pages 55 to 58 inclusive, we believe can be properly considered and answered under one heading. These objections relate to the testimony of Paul Eagles, J. V. Austin and Pat Graham, on the condition and suitability of the circus equipment leased by Appellant.

Paul Eagles testified as to his qualifications as an expert on circus equipment as follows:

“Q. During the past years of your life have you had any connection with circuses or a circus? A. Yes.

Q. Will you relate to the court what that connection was? A. I have been purchasing agent and had various jobs, and also business manager, and manager.

Q. For what period of time? A. Well, over a period of approximately 25 years.

Q. And for what circuses did you engage in those activities during that period of time? A. Well, Al G. Barnes.

Q. Relate to the court approximately what years, and what you did for Al G. Barnes. A. Well, I was purchasing agent and I was business manager.

Mr. Schaefer: I am sorry. I can't hear, Your Honor.

The Court: Speak so that all of us can hear you.

A. I was purchasing agent and I was business manager.

Q. By Mr. Combs: And for what years, Mr. Eagles? A. The last year was 1938.

Q. What was the first year? A. Oh, about 1915 or 1914, in there.

Q. Subsequent to 1938 what circus did you work for, if any? Did you say 1928 or 1938? A. 1938.

Q. Subsequent to that year— A. Mostly with Al G. Barnes.

Q. Did you ever work for the Great American Circus? A. Yes.

Q. What year? A. In 1939.

Q. In what connection? A. Manager." [Pr. Tr. p. 63, line 25, to p. 64, line 31.]

"Q. Was there anything else you did on that first day, that you recall? A. Got all the stuff together and started putting it all together.

Q. Did you lay out the tent rigging, blocks and falls? A. Singleton did.

Q. Did you direct him to do it on that day? A. Yes.

Q. Did you examine the poles for the circus? A. Yes.

Q. All of this equipment was second-hand or used circus equipment, was it not? A. It was.

Q. You knew that fact at least as early as the 19th of May, did you not? A. Yes.

Q. In fact you knew it prior to that time, did you not? A. I had it under sub-lease from No-

vember 1938 until around the middle of March, or later, possibly.

Q. Of 1939. A. Yes, sir.

Q. You were very familiar with all of this equipment? A. Yes, sir.

Q. Including both what was taken by Fanchon & Marco for the Great American Circus and that which was not taken; is that correct? A. That is right.” [Pr. Tr. p. 70, line 13, to p. 71, line 9.]

J. V. Austin testified as to his qualifications as follows:

“Q. By Mr. Combs: What is your occupation, Mr. Austin? A. Showman.

Q. How long have you been engaged in that business? A. About 40 years.

Q. And in that connection what shows have you been involved with, as such showman? A. John Robinson’s; Hagenbeck- Wallace; Al G. Barnes; Sells-Floto; Ringling Brothers; Barnum & Bailey; and the Great American Circus.

Q. What capacities did you work for those organizations in? A. From advertising agent to manager.

Q. Practically every capacity of an executive nature? A. Most every one.

Q. And in that connection did you become very familiar with the operation and complete activities and functions of circuses? A. Necessarily.” [Pr. Tr. p. 223, line 23, to p. 224, line 12.]

Pat Graham testified as to his qualifications as follows:

“What is your occupation? A. Circus employee.

Q. How long have you been engaged in that capacity? A. 19 years.

Q. What character of work did you undertake during that 19 years? A. All the way from cook house punk up to head porter.

Q. For what circuses? A. I started on the John Robinson Show; Sells-Floto; Hagenbeck-Wallace; Sells Brothers; Al G. Barnes; McCullough Brothers.

Q. Did you work for the Great American Circus? A. Yes, I did.” [Pr. Tr. p. 275, lines 6 to 19.]

It will be remembered that all these witnesses were employees of the Appellant and worked with the Great American Circus during its operation, and the witnesses Paul Eagles and Pat Graham worked on and helped select the equipment used under the lease by the Great American Circus.

It is hard to conceive how a witness could be better qualified to give an expert opinion of the useability and condition of the circus equipment in the instant case than Paul Eagles. He had worked as purchasing agent, business manager, and manager, and in various other capacities in the circus business, for 25 years and had been manager of the famous Al G. Barnes Circus for more than 20 years, and was the manager of the Appellant's circus, and had not only carefully and minutely examined the equipment but had selected the portions to be used by his employer, the Great American Circus, the appellant herein. These qualifications apply equally to J. V. Austin,

of 40 years experience, and Pat Graham, of 19 years experience.

Appellant correctly states in his Opening Brief, page 57, lines 7 to 12, that the basis for opinion of expert testimony in California is *Section 1870, Subdivision 9, C. C. P.*, and the interpretation of said section by the Supreme Court in the case of *Vallejo v. Reed Orchard Company*, 169 Cal. 545, also reported in 170 Pac. 426. In that case, neither the qualifications of the expert witnesses who were allowed to testify, nor the qualifications of the witness whose testimony was refused by the trial court, are set out in the exhaustive opinion but the rule announced therein has been followed by the Appellate Courts of California in a long line of decisions ever since. This rule is set out at page 575 as follows:

“The question whether or not a witness is qualified to give his opinion, as evidence upon a matter in issue, is submitted to the trial judge in the first instance, and is to be determined by him before such opinion may be given. (*Fairbank v. Hughson*, 58 Cal. 314.) It is, in itself, in the nature of a trial of a question of fact, by evidence addressed to the judge alone, and, as in other decisions on questions of fact by a trial court, his ruling thereon is a matter of discretion and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. (*Howland v. Oakland etc. Co.*, 110 Cal. 521, (42 Pac. 983); *Mabry v. Randolph*, 7 Cal. App. 427, (94 Pac. 403).) If there is any substantial evidence to sustain the ruling, the exception thereto will be disallowed.”

Vallejo etc. v. Reed Orchard Co., 169 Cal. 545, at 575, 170 Pac. 426.

The opinions of the witnesses in the instant case as to the condition and useability of said equipment, were in no way binding upon the Court, for

“It is not mandatory that the trial court accept the conclusions of an expert, even though it is uncontradicted.”

First National Bank v. Caldwell, 84 Cal. App. 438, at 447, Point 9, 258 Pac. 411.

The cases cited by Appellant under Points XI and XII (App. Op. Br. p. 58), fully sustain the position of Appellee and the trial court's ruling. *Howland v. Oakland etc.*, 110 Cal. 513, also reported in 42 Pac. 983, holds as follows:

“We cannot say the court abused its discretion in holding that the witness McCarthy had shown himself sufficiently qualified to answer the hypothetical question, tending to elicit his opinion as to whether the car of appellant could, with proper care and attention, have been stopped in time to avoid the collision. This is a question largely for the determination of the trial judge, and his ruling will not be disturbed except error clearly appears.”

Howland v. Oakland etc., 110 Cal. 513, at 521, 42 Pac. 983.

In *Kinsey v. Pacific Mutual Life Ins. Co.*, 178 Cal. 153, also reported in 172 Pac. 1098 (App. Op. Br. p. 58), the question of qualifications of life guards to express their opinion as to whether the appearance of the deceased was indicative of death by drowning was ruled upon by the trial court and the trial court refused to accept their

qualifications, the Supreme Court on appeal sustained the trial court in the following language:

“As to whether or not they were thus qualified was question for the determination of the trial judge, and in the absence of an abuse of discretion disclosed by the record, his ruling should not be disturbed.”

Kinsey v. Pacific Mutual etc., 178 Cal. 153, at 156,
172 Pac. 1098.

In *Dobbie v. Pacific Gas & Elec.*, 95 Cal. App. 781, also reported in 273 Pac. 630 (App. Op. Br. p. 58), there was no question of the qualification of the witness. The Appellate Court in sustaining the trial court, merely held that the question asked did not call for “opinion evidence”, and further said:

“The admission or exclusion of such evidence rests largely within the discretion of the trial court, which in the present instance was not abused.”

Dobbie v. Pacific Gas & Elec., 95 Cal. App. 781,
at 792, 273 Pac. 630.

The language of the rulings of the trial court in the instant case clearly shows that the Appellant suffered no harm from the admission of the testimony of Paul Eagles.

“The Court: He is giving his ideas as a man familiar with this sort of business, and I think it is proper. The Court will only give it such weight as it ought to have anyway.” [Pr. Tr. p. 89, lines 6-9.]

And in answer to the objection made against testimony of Pat Graham:

“The Court: The Court will consider it if it has any value.” [Pr. Tr. p. 280, lines 25-26.]

POINT VII.

In Answer to Appellant's Point XIII.

There Is No Need of a Finding on an Immaterial Allegation of the Complaint in Relation to Mitigation of Damages, Where Appellant Submitted No Evidence in Relation Thereto and the Stipulation and Agreement of the Parties Confirmed by the Court at the Pretrial Hearing, Limited the Issues and Did Not Include "Mitigation of Damages" as an Issue.

In answer to Appellant's Point XIII of his Opening Brief, we submit that the allegation of Appellee's complaint referred to, to-wit, "that plaintiff made every endeavor during the remainder of the term of said contract to let said property to others but was unable so to do", is an immaterial allegation or surplusage, and its insertion is merely an anticipation of a defense. It was not even necessary for Appellant to deny the same, and his denial raised no issue nor shifted the burden of proof from Appellant to Appellee on a matter which Appellant admits that proof of "mitigation of damages" rests upon the defendant (Op. Br. p. 59, lines 10-12).

Appellant's admission, however, is but a re-statement of the well-settled law of California that "the burden of showing facts in mitigation of damages rests upon the defendant".

Andersen v. La Rinconada Country Club, 4 Cal. App. (2d) 197, at 201, Point 4, 40 Pac. (2d) 571;

Vitagraph, Inc. v. Liberty Theatre Co., 197 Cal. 694, at 699, Point 2, 242 Pac. 709.

Where in a suit upon a contract, plaintiff alleged that he had performed all the conditions of the contract on his part to be performed and defendant denied this allegation and urged upon appeal that it was incumbent upon plaintiff to prove the allegation, the Appellate Court said in affirming the decision for plaintiff:

“In the first place, the complaint stated a complete cause of action without Paragraph IV, and the contract being pleaded in terms and not being set forth in full, Paragraph IV may be considered as surplusage, or at least an immaterial allegation which it is not necessary to deny. (21 Cal. Jur. 143.)”

Easom v. General Mortgage Co., 101 Cal. App. 186, at 190, Point 3, 281 Pac. 514.

Appellant presented no evidence concerning mitigation of damages and he should not now be heard to complain, when the duty rested upon Appellant to have presented evidence of this character.

Where an objection on appeal that the trial court failed to take into account matters of mitigation of damages when the Appellant had offered no evidence on such “mitigation”, the Appellate Court said:

“It does not appear from the record that any independent evidence was presented to the trial court heard relative to the value of these elements. Appellant will not now be heard to complain that the court failed to take into account elements in mitigation of damages, when the duty rested upon it to have presented evidence of this character.”

Kramer v. Associated Almond Growers, 111 Cal. App. 595, at p. 600, Point 5, 295 Pac. 873.

The cases cited by Appellant to sustain his argument that the burden of proof shifted from Appellant to Appellee are warehouse or bailment cases, and in each case the burden was held to be with the defendant. The first case, *Wilson v. Crown Transportation*, 201 Cal. 701, also reported in 258 Pac. 596, was decided on the application and construction of Sec. 8 of the Warehouse Receipt Act, Statutes 1909, page 437, and that part of Sec. 8 which reads as follows:

“In case the warehouseman refuses or fails to deliver the goods in compliance with the demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal,”

the Court saying at page 707:

“It would be difficult to give a reasonable construction to the statute without attributing to it the force of placing the burden of proof for failure to deliver on the warehouseman.”

The other cases cited are either warehouseman or bailment cases, the rule of law being the same in either case.

This question of “pleading”, however, in the instant case is a moot one, for upon stipulation of the parties at the pretrial hearing the issue was limited as follows:

“The issue will be limited to the condition of the equipment when delivered to the defendant and to losses, if any, recoverable that were occasioned by the deficiency of the equipment, if any.” [Pr. Tr. p. 39, lines 7 to 10.]

There was never any modification of the stipulation at the trial.

A pretrial stipulation is binding, unless modified at the trial.

Federal Rules Civil Procedure, Rule XVI.

“At the pretrial conference, it was stipulated that Florida was the place of the making of the contract and the stipulation was made a part of the pretrial order. This pretrial stipulation is binding unless modified at the trial. (Federal Rules Civil Procedure, Rule XVI.) At the trial there was evidence from which it could be inferred that the contract was executed in Texas but the order was not modified and we hold the stipulation is binding.”

Ringling Bros.-Barnum & Bailey Combined Shows v. Olvera, 119 Fed. (2d) 584, decided May 2, 1941.

Conclusion.

In conclusion Appellee submits:

The Appellants herein not only had an opportunity to inspect and examine the property leased by them, but by their authorized agents did inspect, examine and select the equipment leased to them prior to the signing of this agreement. That Appellees fulfilled every requirement of this contract and Sec. 1955 of the California Civil Code. The equipment as found by the Court was in good condition and ready for use at the time of delivery and Appellants paid the expense of repairs to such minor articles as were requested by Appellants. There was no concealment of any kind on the part of Appellee. That the issues in the case were confined to the question of condition of the equipment at the time of delivery by stipulation and pretrial order of the Court. The trial court is the sole judge of the credibility of witnesses and the suf-

iciency of the evidence to sustain its findings. The qualification of expert witnesses and the admission of opinion evidence is also a matter within the discretion of the trial court. None of the rulings of the trial court in regard to the admission of evidence which was objected to by appellant were harmful and if error it was harmless. The finding by the Court that Appellant had waived any objection to that part of this equipment which was repaired at the expense of Appellee was fully justified by the evidence and the law and the finding that Appellant knew of and was familiar with the circus business through its agents of long experience in this business is fundamentally sound. And finally, the trial court heard all the witnesses, observed their demeanor on the stand and examined the written documents introduced in evidence, and the trial court's finding and conclusion thereon should be sustained under Section 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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No. 9779.

IN THE

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 9779.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Summary of Argument.

POINT I.

There is a complete lack of credible testimony to support the finding attacked by the appellant.

POINT II.

The deleted portion of the contract is available to the court in determining the intention of the parties respecting waiver.

POINT III.

There can be no adverse presumption from the non-production of evidence when the burden is not upon the party to produce evidence.

POINT IV.

Opinion evidence is not admissible without a sufficient showing that the expert is qualified as to knowledge or skill.

Point I.—In Answer to Appellee's Point I.

THERE IS A COMPLETE LACK OF CREDIBLE TESTIMONY TO SUPPORT THE FINDING ATTACKED BY THE APPELLANT.

It may be conceded that the general rule is that the appellate court will not consider conflicts in testimony and will resolve any doubt in favor of the finding by the trial court. There are, however, exceptions to this general rule, and it is appellant's earnest contention that the facts in the present case fall within one of the exceptions.

The case of *Neilson v. Houle*, 200 Cal. 726, states an exception on page 727:

“Where testimony, in the light of the undisputed facts, is so inherently improbable and impossible of belief as to, in effect, constitute no evidence at all, the rule that the amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, does not apply. Undoubtedly an appellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. . . . Even if there is a certain degree of improbability about much of the evidence that leaves it unsatisfactory to the mind of the appellate court, if it is not contradicted nor impeached except by its own weakness the decision of the lower court will not be disturbed.”

In *Hales v. Snowden*, 19 Cal. App. (2d) 366, it is stated by the court, on page 372:

“Of course, testimony which is inherently improbable may be disregarded (*Neilson v. Houle*, 200 Cal. 726 (254 Pac. 891)), but to warrant such action there must exist either a physical impossibility of the

evidence being true, or its falsity must be apparent, without any resort to inferences or deductions. (Powell v. Powell, 40 Cal. App. 155 (180 Pac. 346); Stahmer v. Stahmer, 125 Cal. App. 132 (13 Pac. (2d) 833).)”

A review of appellee’s evidence as presented at the trial which is fully discussed under appellant’s opening brief, Point III, clearly shows that the witnesses and evidence elicited from them is so incredible and impossible of belief as to constitute no evidence at all and any finding based upon such evidence would be clearly erroneous.

No extended discussion will be here indulged in, as the evidence has been fully covered in the opening brief.

Point II.—In Answer to Appellee’s Point II.

THE DELETED PORTION OF THE CONTRACT IS AVAILABLE TO THE COURT IN DETERMINING THE INTENTION OF THE PARTIES RESPECTING WAIVER.

Appellee has completely failed to comprehend the import of appellant’s argument with respect to the deleted clause of the contract.

The deleted clause would have no modifying effect on the other terms and conditions contained in the contract, but the clause is nevertheless a part of the “four corners” of the instrument and can be considered in determining the interpretation of the contract and the intention of the parties at the time the contract was entered into.

It is for the purpose of determining the existence of a waiver that the clause is of prime significance. In view of its deletion, there can be drawn the inference that there was a reliance upon the terms of the contract that the equipment would be delivered “in good condition and ready

for use” at the time the contract was executed. There must be a showing subsequent to the execution of the contract to justify such a finding.

The appellee cannot point to any evidence in the record which indicated that appellant waived the terms of the contract. True the appellant was forced to make repairs in order to fulfill its obligation to produce a circus in accordance with the sponsors’ contracts. There is, however, no conflict nor contradiction of the fact that appellant continually protested the deficiencies in the equipment.

The contention of appellee that waiver is a question of fact is not supported by the cases which it cites. Waiver is a mixed question of law and fact. But there can be no dispute about the law, for there is no evidence of waiver to be found in the record and any finding thereon is completely unsupported both in law and fact.

Point III.—In Answer to Appellee’s Point IV.

THERE CAN BE NO ADVERSE PRESUMPTION FROM THE NON-PRODUCTION OF EVIDENCE WHEN THE BURDEN IS NOT UPON THE PARTY TO PRODUCE EVIDENCE.

Whatever the basis for the trial court’s presumption may be, it is impossible to follow appellee’s logic in its argument that it was upon the appellant to produce the higher evidence or suppressed evidence with respect to the rope when the appellee assumed the burden of proving the condition of the rope.

The appellee alleged in its complaint that the equipment was delivered in accordance with the terms of the contract. [Pr. Tr. p. 2.] The appellee attempted to prove this allegation by the testimony of its witnesses. The onus was, therefore, upon appellee and any intendment to be drawn from the non-production of the rope should have

been against appellee. Appellant neither had the burden to prove the condition, nor did it have the evidence in its possession. Appellee had assumed the burden of proof, and had the evidence in its possession, yet it asks the court to raise an adverse presumption against the appellant because it did not produce evidence which was part of appellee's case.

Point IV.—In Answer to Appellee's Point VI.

OPINION EVIDENCE IS NOT ADMISSIBLE WITHOUT A SUFFICIENT SHOWING THAT THE EXPERT IS QUALIFIED AS TO KNOWLEDGE OR SKILL.

Appellee attempts to justify the admission of the evidence objected to on behalf of appellant by showing the qualification of the witnesses.

The whole force of appellee's argument is lost when it is realized that appellant is not questioning the witnesses' qualifications as persons skilled in the circus trade. True as that may be, it is not shown that these experts made any sufficient examination of the equipment to qualify them to express an opinion with respect to this specific property. The testimony set forth under Points IX, X, XI and XII of appellant's opening brief shows that the experts had not made an examination sufficient to enable them to make any deductions with respect to the condition of the equipment. In order to form an opinion the expert must be presented with a hypothetical set of facts, or have an opportunity to make an observation of the physical facts.

In 10 *Cal. Jur.* 959 it is said, with respect to opinion evidence, that there are two classes of cases where opinions are admissible. The first is where the conclusion is to

be drawn from facts which are not common knowledge. The jury is then given the facts and draws its own conclusion. The present case does not fall within this class, but, rather, in the second class, of which it is said at page 960:

“In the other class are found those cases in which the conclusions to be drawn from the facts stated, *as well as knowledge of the facts themselves*, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence.”
(Italics ours.)

It cannot be stated that the witnesses show they had sufficient knowledge of the facts to warrant an expression of an opinion. None had made a complete and thorough examination of the equipment; and in the evidence given under Point X of appellant's opening brief the witness was not even present nor was a state of facts given to him upon which he could base an opinion. His testimony was idle speculation.

Conclusion.

The arguments presented under the other points in appellee's brief have been amply answered by appellant in its opening brief, therefore it is unnecessary to discuss them here. We submit that errors committed by the trial court entitle appellant to a reversal of the judgment.

Respectfully submitted,

MACFARLANE, SCHAEFER, HAUN & MULFORD,
JAMES H. ARTHUR and
WILLIAM GAMBLE,

By HENRY SCHAEFER, JR.

Attorneys for Appellant.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

SIGNAL OIL AND GAS COMPANY, a Cor-
poration, Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United
States for the Southern District of California,
Central Division

FILED

JUN - 3 1941

PAUL P. O'BRIEN,
CLERK



United States
Circuit Court of Appeals

For the Ninth Circuit.

SIGNAL OIL AND GAS COMPANY, a Cor-
poration, Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Upon Appeals from the District Court of the United
States for the Southern District of California,
Central Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Assistant United States Attorney,
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Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the Southern District of California, Central Division.

In Equity No. 1460-Y

UNITED STATES OF AMERICA,

Complainant,

vs.

SIGNAL OIL AND GAS COMPANY,

Defendant.

BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States for the Southern District of California:

The United States of America, complaining of the above-named defendant, respectfully shows to the Court:

I.

That at all times hereinafter mentioned complainant was and now is a corporation sovereign and body politic.

II.

That the defendant, Signal Oil and Gas Company, is a corporation organized under the laws of the State of Delaware on June 25, 1928, with offices, and doing business, in the city of Los Angeles and within the jurisdiction of this Court.

III.

That this is a suit in equity by the United States of America of a civil nature, arising under the laws

of the United States providing for internal revenue and the collection thereof brought at the direction of the Attorney General, and begun and prosecuted with the sanction, and at the request of, the Commissioner of Internal Revenue, to obtain relief of the defendant, the complainant having no clear, adequate or complete remedy at law, as will more properly appear in succeeding allegations. [2]

IV.

That the Signal Gasoline Company, a corporation now dissolved, was organized under the laws of the State of California on December 15, 1922, and thereafter engaged in the manufacture and sale of gasoline, with offices, and doing business, in the City of Los Angeles, and within the jurisdiction of this Court.

V.

That the Signal Gasoline Corporation, a corporation now dissolved, was organized under the laws of the State of California on February 11, 1924, and thereafter engaged in the manufacture and sale of gasoline, with offices, and doing business, in the City of Los Angeles, and within the jurisdiction of this Court.

VI.

That pursuant to an agreement between the Signal Gasoline Company and the Signal Gasoline Corporation dated May 1, 1924, all the assets and liabilities of the Signal Gasoline Company were

turned over to the Signal Gasoline Corporation, for 400,000 shares of stock of the Signal Gasoline Corporation, and on September 11, 1924, the Signal Gasoline Company was dissolved. The 400,000 shares received by the Signal Gasoline Company in exchange for its assets and liabilities were distributed to its stockholders.

VII.

That the Signal Gasoline Company, Incorporated, a corporation now dissolved, was organized under the laws of the State of California on December 30, 1924, and was as hereinafter indicated a holding company for the stock of the Signal Gasoline Corporation.

VIII.

That on July 31, 1928, the Signal Gasoline Company, Incorporated, owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the stock outstanding of Signal Gasoline Corporation (4.23%) was owned by individual stockholders of the Signal Gasoline Company, Incorporated. [3]

IX.

That on August 1, 1928, the defendant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of

the Signal Gasoline Corporation, in exchange for stock of the Signal Oil and Gas Company.

X.

That on or about November 30, 1928, the defendant, Signal Oil and Gas Company, acquired the remaining 4.23% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders by exchange for stock of the Signal Oil and Gas Company.

XI.

That the Signal Gasoline Corporation was liquidated as of December 1, 1928, all its assets and liabilities being assigned to its sole stockholder, the defendant Signal Oil and Gas Company, and the Signal Gasoline Corporation was dissolved by court order on December 12, 1928.

XII.

That the income tax return of the now dissolved Signal Gasoline Company for the calendar year 1923 was filed with the Collector of Internal Revenue for the Sixth District of California on March 15, 1924, and its income tax return for the period ended September 11, 1924, was similarly filed on May 13, 1925.

XIII.

That on October 2, 1928, the Commissioner of Internal Revenue addressed a letter to the Signal Gasoline Corporation, as transferee of the Sig-

nal Gasoline Company, notifying it that a deficiency of \$468.33 for income taxes for the year 1923 had been determined.

XIV.

That on December 28, 1929, the Commissioner of Internal Revenue addressed a letter to the Signal Gasoline Corporation, as transferee of the Signal Gasoline Company, notifying it that a [4] deficiency of \$2,672.53 for income taxes for the period ended September 11, 1924, had been determined.

XV.

That thereafter petitions were filed with the Board of Tax Appeals for a redetermination of the proposed deficiency referred to in Paragraphs XIII and XIV above, and by an order entered on February 16, 1932, the Board of Tax Appeals held that the Signal Gasoline Corporation was liable for the sums indicated as transferee of the Signal Gasoline Company. (Signal Gasoline Corporation vs. Commissioner, 25 B. T. A. 532.)

XVI.

That no further appeal was taken and on September 10, 1932, the Commissioner of Internal Revenue assessed against the Signal Gasoline Corporation for the year 1923 a tax of \$468.33, plus interest of \$227.96, and for the period ended September 11, 1924, a tax of \$2,672.53, plus interest of \$1,200.70.

XVII.

That no part of the above taxes with interest so assessed for the year 1923 and for the period ended September 11, 1924, has been paid.

XVIII.

That by reason of the dissolution of the Signal Gasoline Corporation and the distribution of all its assets to the defendant, its sole stockholder, the Signal Gasoline Corporation was and is left without money, assets or property of any kind with which to pay said taxes due the United States.

XIX.

That the net assets which were acquired by the defendant Signal Oil and Gas Company, as sole stockholder of the Signal Gasoline Corporation, as heretofore shown, were in excess of the amount of the above-mentioned taxes with interest for the year 1923 and for the period ended September 11, 1924, and in excess of the amount for which recovery is sought herein. [5]

XX.

That due demand for the payment of said taxes with interest has been made upon the Signal Oil and Gas Company, but said demand has not been complied with and the taxes remain unpaid.

Wherefore, in consideration of the premises and the facts heretofore stated, the complainant comes before the Court and prays:

1. That the Honorable Court order, adjudge and decree that the defendant, Signal Oil and Gas Company, be accountable to complainant and liable for the aforesaid taxes in the sum of \$4,569.52, with interest from September 10, 1932, and that said defendant, Signal Oil and Gas Company be ordered to pay to complainant said unpaid taxes with interest.

2. That this Honorable Court order, adjudge and decree that the assets of the Signal Gasoline Corporation which were transferred to the defendant, Signal Oil and Gas Company, constitute a trust fund for the payment of the aforesaid taxes assessed against the Signal Gasoline Corporation, and that the defendant, Signal Oil and Gas Company, shall account to this Court for the aforesaid trust property, and the fund aforesaid be applied to the payment of the said taxes.

3. That the complainant have such other and further relief, general and special, as may appear to the Court to be just and equitable, as well as a decree for costs.

And may it please the Court to grant unto said complainant a writ of subpoena of the United States of America issued out of and under the seal of this Honorable Court, directed to the above-named defendant, and commanding it on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to and perform and abide by such orders, directions and decrees

as may be made against it in the premises, and complainant will ever pray.

BEN HARRISON,

United States Attorney.

E. H. MITCHELL,

Assistant United States Attorney.

ARMOND MONROE JEWELL,

Assistant United States Attorney.

By ARMOND MONROE JEWELL,
Assistant United States Attorney.

[Endorsed]: Filed Sep. 9, 1938. [6]

In the District Court of the United States in and
for the Southern District of California, Cen-
tral Division.

Equity No. 1461-RJ

UNITED STATES OF AMERICA,

Complainant.

vs.

SIGNAL OIL AND GAS COMPANY,

Defendant.

BILL OF COMPLAINT

To the Honorable Judges of the District Court of
the United States for the Southern District of
California:

The United States of America, complaining of
the defendant, respectfully shows to the Court:

I.

That at all times hereinafter mentioned complainant was and now is a corporation sovereign and body politic.

II.

That the defendant, Signal Oil and Gas Company is a corporation organized under the laws of the State of Delaware on June 25, 1928, with offices, and doing business, in the city of Los Angeles, and within the jurisdiction of this Court.

III.

That this is a suit in equity by the United States of America of a civil nature, arising under the laws of the United States providing for internal revenue and the collection thereof, brought at the direction of the Attorney General, and begun and prosecuted with the sanction and at the request of the Commissioner of Internal Revenue, to obtain relief of the defendant, the complainant having no clear, adequate or complete remedy at law, as will more properly appear in succeeding allegations.

[7]

IV.

That the Signal Gasoline Corporation, a corporation now dissolved, was organized under the laws of the State of California on February 11, 1924, and thereafter engaged in the manufacture and sale of gasoline, with offices and doing business in the City of Los Angeles and within the jurisdiction of this court.

V.

That the Signal Gasoline Company, Incorporated, a corporation, now dissolved, was organized under the laws of the State of California on December 30, 1924, and was as hereinafter indicated a holding company for the stock of the Signal Gasoline Corporation.

VI.

That on July 31, 1928, the Signal Gasoline Company, Incorporated, owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the Signal Gasoline Corporation (4.23%) was owned by individual stockholders.

VII.

That on August 1, 1928, the defendant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation, in exchange for stock of the Signal Oil and Gas Company.

VIII.

That on or about November 30, 1928, the defendant, Signal Oil and Gas Company acquired the remaining 4.23% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders of the Signal Gasoline Com-

pany, Incorporated, by exchange for stock of the Signal Oil and Gas Company.

IX.

That the Signal Gasoline Corporation was liquidated as of December 1, 1928, all its assets and liabilities being assigned to [8] its sole stockholder, the defendant Signal Oil and Gas Company, and the Signal Gasoline Corporation was dissolved by court order on December 12, 1928.

X.

That the income tax return of the now dissolved Signal Gasoline Corporation for the period from February 11, 1924 (the date of its incorporation) to December 31, 1924 was filed with the Collector of Internal Revenue for the Sixth District of California on May 13, 1925. This period of time is hereinafter referred to as the year 1924.

XI.

That on December 3, 1928, the Signal Gasoline Corporation filed Form 872 extending the period for assessment for any deficiency in tax which might be assessed for the year 1924 until December 31, 1929.

XII.

That on December 28, 1929, the Commissioner of Internal Revenue addressed a letter to the Signal Gasoline Corporation notifying it, in accordance with Section 274 of the Revenue Act of 1926,

that a deficiency of \$14,137.05 for income taxes for the year 1924 had been determined. Said notice of deficiency also included a determination with respect to deficiencies in income taxes for the year 1925 and 1926 which are not here involved.

XIII.

That thereafter a petition was filed with the Board of Tax Appeals for a redetermination of the proposed deficiencies referred to in Paragraph XII above, and by an order entered on March 15, 1932, the Board of Tax Appeals determined that the asserted deficiencies were correct. (Signal Gasoline Corporation vs. Commissioner, 25 B. T. A. 861.)

XIV.

That no further appeal was taken with respect to the defi- [9] ciency asserted for the year 1924, and on October 1, 1932, the Commissioner of Internal Revenue assessed against the Signal Gasoline Corporation for the year 1924 a tax of \$14,137.05, plus interest of \$6,080.77.

XV.

That no part of the above tax with interest so assessed for the year 1924 has been paid.

XVI.

That by reason of the dissolution of the Signal Gasoline Corporation and the distribution of all its assets to the defendant, its sole stockholder, the Signal Gasoline Corporation was and is left with-

out money, assets or property of any kind with which to pay said tax due the United States.

XVII.

That the net assets which were acquired by the defendant, Signal Oil and Gas Company, as sole stockholder of the Signal Gasoline Corporation, as heretofore shown, were in excess of the above-mentioned tax with interest for the year 1924, and in excess of the amount for which recovery is sought herein.

XVIII.

That due demand for the payment of said tax with interest has been made upon the Signal Oil and Gas Company, but said demand has not been complied with and the tax remains unpaid.

Wherefore, in consideration of the premises and the facts heretofore stated, the complainant comes before the Court and prays:

1. That the Honorable Court order, adjudge and decree that the defendant Signal Oil and Gas Company be accountable to complainant and liable for the aforesaid tax in the sum of \$20,217.82 with interest from October 1, 1932, and that said defendant Signal Oil and Gas Company be ordered to pay to complainant said unpaid tax with interest. [10]

2. That this Honorable Court order, adjudge and decree that the assets of the Signal Gasoline Corporation, which were transferred to the defendant, Signal Oil and Gas Company, constitute a

trust fund for the payment of the aforesaid tax assessed against the Signal Gasoline Corporation, and that the defendant, Signal Oil and Gas Company shall account to this Court for the aforesaid trust property, and the fund aforesaid be applied to the payment of the said tax.

3. That the complainant have such other and further relief, general and special, as may appear to the Court to be just and equitable, as well as a decree for cost.

And may it please the Court to grant unto said complainant a writ of subpoena to the United States of America issued out of and under the seal of this Honorable Court, directed to the above-named defendant, and commanding it on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to and perform and abide by such orders, directions and decrees as may be made against it in the premises and complainant will ever pray.

BEN HARRISON,
United States Attorney.

E. H. MITCHELL,
Asst. United States Attorney.
ARMOND MONROE JEWELL,
Asst. United States Attorney.

By ARMOND MONROE JEWELL,
Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 9, 1938. [11]

[Title of District Court and Cause—No. 1460-Y.]

ANSWER

To the Honorable Judges of the District Court of
the United States, for the Southern District
of California:

The defendant, Signal Oil and Gas Company, answering the bill of complaint on file herein, denies, admits and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I of the complaint.

II.

Defendant admits the allegations contained in Paragraph II of the complaint.

III.

Defendant has no information or belief as to the matters alleged in Paragraph III of the complaint, and upon such lack of information or belief, denies the allegations contained in Paragraph III of the complaint. [12]

IV.

Defendant admits the allegations contained in Paragraph IV of the complaint.

V.

Defendant admits the allegations contained in Paragraph V of the complaint.

VI.

Defendant denies the allegations contained in Paragraph VI of the complaint.

VII.

Defendant admits that Signal Gasoline Company, Incorporated, a corporation now dissolved, was organized under the laws of the State of California on December 30, 1924. Defendant denies the other allegations contained in Paragraph VII of the complaint.

VIII.

Defendant denies the allegations contained in Paragraph VIII of the complaint.

IX.

Defendant denies the allegations contained in Paragraph IX of the complaint.

X.

Defendant denies the allegations contained in Paragraph X of the complaint.

XI.

Defendant admits that Signal Gasoline Corporation was dissolved by court order on December 12, 1928, and denies the other allegations contained in Paragraph XI of the complaint. [13]

XII.

Defendant admits the allegations contained in Paragraph XII of the complaint.

XIII.

Defendant admits the allegations contained in Paragraph XIII of the complaint.

XIV.

Defendant denies the allegations contained in Paragraph XIV of the complaint, on the ground that Signal Gasoline Corporation was dissolved on December 12, 1928.

XV.

Defendant denies the allegations contained in Paragraph XV of the complaint, on the ground that Signal Gasoline Corporation was dissolved on December 12, 1928.

XVI.

Defendant admits that no further appeal was taken and denies the other allegations contained in Paragraph XVI of the complaint, on the ground that Signal Gasoline Corporation was dissolved on December 12, 1928.

XVII.

Defendant admits the allegations contained in Paragraph XVII of the complaint.

XVIII.

Defendant denies the allegations contained in Paragraph XVIII of the complaint. [14]

XIX.

Defendant denies the allegations contained in Paragraph XIX of the complaint.

XX.

Defendant denies that demand for the payment of said taxes, with interest, has been made on defendant, but admits that the taxes remain unpaid.

For a Second, Separate and Affirmative Defense,
Defendant Alleges as Follows:

I.

Defendant alleges that the complaint is barred by the statute of limitations.

II.

The time within which the complainant could sue in equity under the trust fund theory was six (6) years from and after the date the tax had been assessed against the taxpayer, Signal Gasoline Company.

III.

The additional tax demanded in the complaint was never assessed against the taxpayer, Signal Gasoline Company.

IV.

The time for bringing suit against alleged transferees of the assets of Signal Gasoline Company expired on March 15, 1930, and May 13, 1931, with respect to the taxes of Signal Gasoline Company for 1923 and 1924, respectively. [15]

V.

The complaint was filed on September 9, 1938, and is barred by the statute of limitations.

For a Third, Separate and Affirmative Defense,
Defendant Alleges as Follows:

I.

That the complaint is barred by the statute of limitations.

II.

That the period within which the complainant could bring suit against an alleged transferee of the assets of Signal Gasoline Company was six (6) years from and after the dates of the assessment of the additional tax against Signal Gasoline Company, or from the dates of the filing of the returns. No assessment of the additional tax was made against Signal Gasoline Company and the returns were filed on March 15, 1924, and May 13, 1925, respectively, for the years 1923 and 1924, and the time for suing alleged transferees expired on March 15, 1930, and May 13, 1931, respectively.

III.

That the purported assessment against Signal Gasoline Corporation for the taxes of Signal Gasoline Company for 1923 and 1924 allegedly made on September 10, 1932, does not start a new six-year period in which to sue an alleged transferee, as the purported assessment made on Signal Gasoline Corporation was absolutely null and void, as that corporation had been dissolved on December 12, 1928, and was not in existence at the date of the alleged assessment. [16]

IV.

The complaint herein was filed on September 9, 1938, and the period for filing the same having expired on March 15, 1930, and May 13, 1931, respectively, for the taxes for the years 1923 and 1924, the complaint herein is barred by the statute of limitations.

Wherefore, defendant prays that complainant take nothing by its complaint, and that defendant be allowed its costs of suit herein.

JOSEPH D. PEELER,
MELVIN D. WILSON,
Attorneys for Defendant, Signal Oil
and Gas Company.

[Verified]

[Endorsed]: Filed Sep. 30-1938. [17]

[Title of District Court and Cause—No. 1461-RJ.]

ANSWER

To the Honorable Judges of the District Court of the United States, for the Southern District of California:

That defendant, Signal Oil and Gas Company, answering the bill of complaint on file herein, denies, admits and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I of the complaint.

II.

Defendant admits the allegations contained in Paragraph II of the complaint.

III.

Defendant has no information or belief as to the matters alleged in Paragraph III of the complaint, and, upon such lack of information or belief, denies the allegations contained in Paragraph III of the complaint. [18]

IV.

Defendant admits the allegations contained in Paragraph IV of the complaint.

V.

Defendant admits that Signal Gasoline Company, Incorporated, a corporation now dissolved, was organized under the laws of the State of California on December 30, 1924, and defendant denies the other allegations contained in Paragraph V of the complaint.

VI.

Defendant denies the allegations contained in Paragraph VI of the complaint.

VII.

Defendant denies the allegations contained in Paragraph VII of the complaint.

VIII.

Defendant denies the allegations contained in paragraph XIII of the complaint.

IX.

Defendant admits that Signal Gasoline Corporation was dissolved by court order on December 12, 1928, and denies all of the other allegations contained in Paragraph IX of the complaint.

X.

Defendant admits the allegations contained in Paragraph X of the complaint. [19]

XI.

Defendant denies the allegation contained in Paragraph XI of the complaint.

XII.

Defendant denies the allegations contained in the first sentence of Paragraph XII of the complaint, on the ground that Signal Gasoline Corporation was dissolved on December 12, 1928.

XIII.

Defendant denies the allegations contained in Paragraph XIII of the complaint on the ground that Signal Gasoline Corporation was dissolved on December 12, 1928.

XIV.

Defendant admits that no further appeal was taken with respect to the deficiency asserted for the year 1924, and denies the other allegations contained in Paragraph XIV of the complaint on the ground that Signal Gasoline Corporation was dissolved on December 12, 1928.

XV.

Defendant admits the allegations contained in Paragraph XV of the complaint.

XVI.

Defendant denies the allegations contained in Paragraph XVI of the complaint.

XVII.

Defendant denies the allegations contained in Paragraph XVII of the complaint. [20]

XVIII.

Defendant denies that demand for the payment of said tax, with interest, has been made upon Signal Oil and Gas Company. Defendant admits that the taxes remain unpaid.

For a Second, Separate and Affirmative Defense,
Defendant Alleges as Follows:

I.

Defendant alleges that the complaint is barred by the statute of limitations.

II.

The time within which the complainant could sue in equity under the trust fund theory was six (6) years from and after the date the tax had been assessed against the taxpayer, Signal Gasoline Corporation.

III.

The additional tax demanded in the complaint was never assessed against the taxpayer, Signal Gasoline Corporation, as said corporation was dissolved on December 12, 1928, and the alleged assessment was not purported to have been made until October 1, 1932, and since there was no Signal Gasoline Corporation then in existence, the alleged assessment was void.

IV.

The time for bringing suit against the alleged transferees of the assets of Signal Gasoline Corporation with respect to the taxes of Signal Gasoline Corporation for the year 1924, expired on May 13, 1931, which was six (6) years after the return was filed. [21]

V.

The complaint herein was filed on September 9, 1938, and is barred by the statute of limitations.

Wherefore, defendant prays that the complainant take nothing by its complaint on file herein, and that defendant be allowed its costs of suit herein.

JOSEPH D. PEELER,
MELVIN D. WILSON,
Attorneys for Defendant Signal Oil
and Gas Company.

[Verified]

[Endorsed]: Filed Sep. 30-1938. [22]

[Title of District Court and Cause—No. 1461-RJ.]
 ORDER TRANSFERRING CASE PURSUANT
 TO RULE 19

Good cause appearing therefor, It Is Hereby Ordered: That the above-entitled cause be transferred to the Calendar of Judge Yankwich for further proceedings herein.

Los Angeles, California, February 8, 1939.

RALPH E. JENNEY

Judge

LEON R. YANKWICH

Judge

[Endorsed]: Filed Feb. 17, 1939. [23]

[Title of District Court and Cause—No. Eq.
 1460-Y.]

STIPULATION.

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel that this cause may be tried upon the allegations contained in the complaint, and admitted in the answer, and upon the facts stated in this stipulation, and upon such further evidence as either party may introduce at the trial not contradictory thereto.

I.

That this is a suit in equity by the United States of America of a civil nature, arising under the laws

of the United States providing for internal revenue and the collection thereof, brought at the direction of the Attorney General and begun and prosecuted with the sanction and at the request of the Commissioner of Internal Revenue to obtain relief of the defendant; and that the plaintiff has no clear, adequate or complete remedy at law.

II.

That pursuant to an agreement between the Signal Gasoline Company and the Signal Gasoline Corporation dated May 1, 1924, all the assets and liabilities of the Signal Gasoline Company were turned over to the Signal Gasoline Corporation for 400,000 shares of stock of the Signal Gasoline Corporation, and on September 11, 1924, [24] the Signal Gasoline Company was dissolved; the 400,000 shares received by the Signal Gasoline Company in exchange for its assets and liabilities were distributed to its stockholders; that accompanying this stipulation is a true copy of said Agreement which will be offered into evidence and, with leave of Court, marked "Plaintiff's Exhibit A", and filed herewith.

III.

That at all times herein mentioned the Signal Gasoline Company, Inc., a corporation now dissolved, was prior to its dissolution a holding company for the stock of the Signal Gasoline Corporation.

IV.

That on July 31, 1928, the Signal Gasoline Company, Incorporated, owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the stock outstanding of the Signal Gasoline Corporation (4.23%) was owned by individual stockholders of the Signal Gasoline Company, Incorporated.

V.

That on August 1, 1928, the defendant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation, in exchange for stock of the Signal Oil and Gas Company.

VI.

That on or about November 30, 1928, the defendant, Signal Oil and Gas Company, acquired the remaining 4.23% of the outstanding stock of the Signal Gasoline Corporation [25] from the individual stockholders by exchange for stock of the Signal Oil and Gas Company.

VII.

That the Signal Gasoline Corporation was liquidated as of December 1, 1928, and all its assets and liabilities distributed, as set forth in the stipulation in *United States v. Signal Oil & Gas Co.*, No. Equity 1461-Y.

VIII.

That accompanying this stipulation are true copies of the corporation income tax returns of the Signal Gasoline Company for the calendar year 1923, the amended return of the said company for the same year, the tentative return for the year 1924, and the final return for the year 1924, which will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibits B, C, D, and E, respectively, and filed herein.

IX.

That on October 2, 1928, and on December 28, 1929, the Commissioner of Internal Revenue addressed and mailed a letter to the Signal Gasoline Corporation setting forth certain transferee deficiencies; that true and certified photostatic copies of said letters accompany this stipulation which will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibits F and G", respectively, and filed herein.

X.

That thereafter petitions in the name of the Signal Gasoline Corporation were filed with the Board of Tax Appeals for a redetermination of the deficiencies so proposed; that said proceedings were docketed under Numbers 41532 and 47620, and on February 16, 1932, the Board of Tax Appeals purported to affirm the ruling of the [26] Commissioner in an opinion reported in 25 B. T. A. 532; that ac-

companying this stipulation are true and certified copies of the petitions and decisions in Board Docket No. 41532, and Board Docket No. 47620 which will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibits H and I", respectively, and filed herein.

XI.

That on September 10, 1932, the Commissioner of Internal Revenue purported to assess the Signal Gasoline Corporation as a transferee for the year 1923 a tax of \$468.33, plus interest of \$227.96; and for the period ended September 11, 1924, a tax of \$2,672.53, plus interest of \$1200.70; that a true certified photostatic copy of the assessment list accompanies this stipulation and will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibit J", and filed herein.

XII.

That by reason of the dissolution of the Signal Gasoline Corporation, and the distribution of its assets as hereinabove stated, the Signal Gasoline Corporation was and is left without money, assets or property of any kind with which to pay the taxes due the United States.

XIII.

That the net assets which were acquired by the defendant Signal Oil and Gas Company, as sole stockholder of the Signal Gasoline Corporation, as heretofore shown, were far in excess of the amount

of the above mentioned taxes with interest for the year 1923, and for the period ended September 11, 1924, and in excess of the amount for which recovery is sought herein. [27]

XIV.

That due demand for the payment of said taxes, with interest, has been made upon the Signal Oil and Gas Company.

XV.

That in the proceedings before the Board of Tax Appeals in Docket Numbers 41532 and 47620, no substitution of parties was ever made, and no motion for such substitution was ever made by either of the parties.

XVI.

That no assessment was ever made against the Signal Oil and Gas Company for the said 1923 and 1924 tax liabilities of the Signal Gasoline Company; that no assessment was ever made against the Signal Gasoline Company for the said 1924 tax liability of the Signal Gasoline Company; but that an assessment against the Signal Gasoline Company was made on July 3, 1931, in the amount of \$468.33, plus interest for its said tax liability for the calendar year 1923.

XVII.

That accompanying this stipulation is a true and certified photostat copy of a letter to the Commissioner of Internal Revenue dated January 20, 1932, which will be offered into evidence by the plaintiff

and with leave of Court marked "Plaintiff's Exhibit K", and filed herein.

XVIII.

That at all times herein considered substantially the same persons were Officers and Directors or statutory trustees of the Signal Gasoline Corporation as were the Officers and Directors of Signal Oil and Gas Company and Officers and Directors of the Signal Gasoline Company, Incorporated.

XIX.

That it is the intent of the parties hereto that [28] all of the documents and exhibits herein referred to shall be considered as true copies thereof, that all the signatures thereon are true, that each of the documents shall speak for itself in its legal effect, and that all of the acts of the agents whose names appear on said documents were authorized; save and except, however, that nothing herein shall prevent the defendant from attacking the validity or authority of any of the acts or documents herein referred to, by way of objections to the admissibility of evidence offered at the trial or otherwise, on the grounds that the respective corporate entities were not in existence at the time of the performance of said acts or the execution of said documents, or otherwise.

XX.

That all of the facts, admitted in the pleadings or set forth in the stipulation or found in the ex-

hibits offered, in the case of United States vs. Signal Oil and Gas Company, No. Equity 1461-Y, shall apply herein with the same force and effect and subject to the same objections and reservations, as if pleaded, admitted or proven herein.

Dated: January 16, 1940.

BEN HARRISON,
U. S. Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney
ARMOND MONROE JEWELL,
Asst. U. S. Attorney,
By ARMOND MONROE JEWELL,
Attorneys for Plaintiff.

JOSEPH D. PEELER,
MELVIN D. WILSON,
BY MELVIN D. WILSON,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 16, 1940. [29]

[Title of District Court and Cause — No. Eq.
1461-Y.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel, that this cause may be tried upon the allegations contained in the complaint and admitted in the answer, upon the facts stated in this stipulation,

and upon such further evidence as either party may introduce at the trial not contradictory thereto.

I.

That this is a suit in equity by the United States of America of a civil nature arising under the laws of the United States providing for internal revenue and the collection thereof, brought at the direction of the Attorney General and begun and prosecuted with the sanction and at the request of the Commissioner of Internal Revenue to obtain relief of the defendant; and that the plaintiff has no clear, adequate, or complete remedy at law.

II.

That at all times herein mentioned the Signal Gasoline Company, Incorporated, a corporation now dissolved, was prior to its dissolution a holding company for the stock of the Signal Gasoline Corporation.

III.

That on July 31, 1928, the Signal Gasoline Company, [30] Incorporated, owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the Signal Gasoline Corporation (4.23%) was owned by individual stockholders of the Signal Gasoline Company, Incorporated.

IV.

That on August 1, 1928, the defendant, Signal Oil and Gas Company, acquired all the assets of

the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation, in exchange for stock of the Signal Oil and Gas Company.

V.

That on or about November 30, 1928, the defendant, Signal Oil and Gas Company, acquired the remaining 4.23% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders of the Signal Gasoline Company, Incorporated, by exchange for stock of the Signal Oil and Gas Company.

VI.

That the Signal Gasoline Corporation was liquidated as of December 1, 1928, and all of its assets and liabilities were assigned in accordance with a certain instrument of conveyance and the Decree of Dissolution of the Superior Court, true copies of which accompany this stipulation and will be offered into evidence by plaintiff and with leave of the Court marked "Plaintiff's Exhibits 1 and 2", and filed herein.

VII.

That accompanying this stipulation is a true copy of the income tax return of the Signal Gasoline Corporation [31] for the calendar year 1924, which will be offered into evidence and with leave of Court marked "Plaintiff's Exhibit 3", and filed herein.

VIII.

That on December 3, 1928, the Signal Gasoline Corporation signed and filed Form 872, which is entitled "Consent Fixing Period of Limitation upon Assessment of Income and Profits Tax"; that a true and certified photostatic copy of said form accompanies this stipulation, which will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibit 4", and filed herein.

IX.

That on December 28, 1929, the Commissioner of Internal Revenue addressed and mailed a letter to the Signal Gasoline Corporation, a true and certified photostatic copy of which accompanies this stipulation, and which will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibit 5", and filed herein.

X.

That accompanying this stipulation are true and certified photostatic copies of powers of attorney dated November 21, 1928 and November 21, 1929 in the name of Signal Gasoline Corporation; that these will be offered into evidence by plaintiff and with leave of Court marked respectively "Plaintiff's Exhibits 6 and 7", and filed herein.

XI.

That on or about February 24, 1930, a petition was filed with the Board of Tax Appeals for a re-determination of the deficiencies proposed in Plain-

tiff's Exhibit 5 above referred to; that said proceeding was given [32] Docket No. 47621; that a true copy of said petition accompanies this stipulation and will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibit 8", and filed herein; that by an order entered on March 15, 1932, the Board of Tax Appeals purported to determine that the asserted deficiencies were correct; and that said opinion of the Board of Tax Appeals is reported in 25 B. T. A. 861.

XII.

That on October 1, 1932, the Commissioner of Internal Revenue purported to assess the Signal Gasoline Corporation for the year 1924, a tax of \$14,137.05, plus interest of \$6,080.77; that a true and certified photostatic copy of the assessment accompanies this stipulation, which will be offered into evidence by plaintiff and with leave of Court marked "Plaintiff's Exhibit 9", and filed herein.

XIII.

That by reason of the dissolution of the Signal Gasoline Corporation and the distribution of all of its assets as above set forth, the Signal Gasoline Corporation was and is left without money, assets, or property of any kind with which to pay the said tax and interest due to the United States.

XIV.

That the net assets which were acquired by the defendant Signal Oil and Gas Company, as sole

stockholder of the Signal Gasoline Corporation, as heretofore shown, were far in excess of the above mentioned tax with interest for the year 1924, and in excess of the amount for which recovery is sought herein. [33]

XV.

That due demand for the payment of said tax with interest has been made upon the Signal Oil and Gas Company.

XVI.

That accompanying this stipulation are true copies of the following, which will be offered into evidence by plaintiff and, with leave of Court, marked as Plaintiff's Exhibits and filed as follows:

(a) Letter from F. O. Graves to the Commissioner of Internal Revenue, dated December 3, 1928—"Plaintiff's Exhibit 10";

(b) Protest purportedly from the Signal Gasoline Corporation to the Internal Revenue Agent in Charge, dated November 20, 1929—"Plaintiff's Exhibit 11";

(c) Letter to the Commissioner of Internal Revenue in the name of the Signal Gasoline Corporation, Los Angeles, California, dated January 20, 1932—"Plaintiff's Exhibit 12";

(d) Letter to the Commissioner of Internal Revenue in the name of the Signal Gasoline Company, Incorporated, dated January 20, 1932—"Plaintiff's Exhibit 13";

(e) Sixty day letter, dated March 30, 1931, to the Signal Gasoline Corporation from the Commis-

sioner of Internal Revenue with certain applicable portions of the statement therein attached—"Plaintiff's Exhibit 14";

(f) Applicable portions of revenue agent's report, dated as of August 26, 1930—"Plaintiff's Exhibit 15";

(g) Letter to Collector of Internal Revenue at Los Angeles, dated July 27, 1931, signed by J. H. Rounsavell—"Plaintiff's Exhibit 16";

(h) Offers in compromise in the name of Signal Gasoline Corporation under the respective dates of October [34] 21, 1932, and January 23, 1933—"Plaintiff's Exhibits 17 and 18";

(i) Income tax return of the Signal Gasoline Company, Incorporated, and Subsidiaries for the period of January 1 to July 31, 1928—"Plaintiff's Exhibit 19";

(j) Corporation income tax return of the Signal Oil and Gas Company, and Subsidiaries for the period ended December 31, 1928—"Plaintiff's Exhibit 20"; and

(k) Petition accompanying application of the Signal Oil and Gas Company to issue stock, filed July 23, 1928, and application filed October 6, 1928—"Plaintiff's Exhibit 21".

XVII.

That in the proceedings before the Board of Tax Appeals in Docket Number 47621, no substitution of parties was ever made, and no motion for such substitution was ever made by either of the parties.

XVIII.

That at all times herein considered substantially the same persons were Officers and Directors or statutory trustees of the Signal Gasoline Corporation as were the Officers and Directors of Signal Oil and Gas Company and Officers and Directors of Signal Gasoline Company, Incorporated.

XIX.

That it is the intent of the parties hereto that all of the documents and exhibits herein referred to shall be considered as true copies thereof, that all the signatures thereon are true, that each of the documents shall speak for itself in its legal effect, and that all of the acts of the agents whose names appear on said documents were authorized; save and except, however, that nothing herein shall prevent the defendant from attacking [35] the validity or authority of any of the acts or documents herein referred to, by way of objections to the admissibility of evidence offered at the trial or otherwise, on the grounds that the respective corporate entities were not in existence at the time of the performance of said acts or the execution of said documents, or otherwise.

XX.

That all of the facts, admitted in the pleadings or set forth in the stipulation, or found in the exhibits offered, in the case of United States vs. Signal Oil and Gas Company, No. Equity 1460-Y, shall apply herein with the same force and effect and

subject to the same objections and reservations, as if pleaded, admitted or proven herein.

Dated: January 16, 1940.

BEN HARRISON,
U. S. Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney,
ARMOND MONROE JEWELL,
Asst. U. S. Attorney,
By ARMOND MONROE JEWELL
Attorneys for Plaintiff.

JOSEPH D. PEELER
MELVIN D. WILSON
By MELVIN D. WILSON
Attorneys for Defendant.

[Endorsed]: Filed Jan. 16, 1940. [36]

At a stated term, to wit: The September Term, A. D. 1939 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 16th day of January in the year of our Lord one thousand nine hundred and forty.

Present:

The Honorable: Leon R. Yankwich, District Judge.

[Title of Cause—No. 1460-Y Equity.]

[Title of Cause—No. 1461-Y Equity.]

These causes coming on for trial; A. M. Jewell, Assistant U. S. Attorney, appearing as counsel for the Government; Melvin D. Wilson, Esq., appearing as counsel for the defendant; and Arthur Edwards, court reporter, being present:

It is ordered that these causes be consolidated.

Attorney Wilson makes opening statement in behalf of the defendant.

Pursuant to stipulation, amended and supplemental answer in Case No. 1461 is ordered filed, and stipulation of facts is ordered filed in each case.

* * * * *

Stipulation is entered into by counsel re assessments. Both sides rest.

It is ordered that these consolidated causes be submitted on briefs to be filed 30 x 60 x 15. [37]

[Title of District Court and Cause.—No. 1461-RJ.]

AMENDED AND SUPPLEMENTAL ANSWER

To the Honorable Judges of the District Court of the United States, for the Southern District of California:

The defendant, Signal Oil and Gas Company, having obtained permission of the Court therefor,

makes this amended and supplemental answer to the bill of complaint on file herein and, in so doing, denies, admits and alleges as follows:

I.

Defendant adopts, repeats and incorporates herein by reference Paragraphs I to XVIII of its original answer on file herein, as its first defense.

II.

Defendant adopts, repeats and incorporates herein by reference Paragraphs I to V of its second, separate and affirmative defense set out in its original answer on file herein, as its second defense in this amended and supplemental answer.

[38]

For a Third, Separate and Affirmative Defense,
Defendant Alleges as Follows:

I.

Defendant alleges that the bill of complaint is barred by the statute of limitations.

II.

That the time for bringing suit against the alleged transferees of the assets of Signal Gasoline Corporation with respect to taxes of Signal Gasoline Corporation for the year 1924, was six years from the time the return was filed, namely six years from May 13, 1925, or six years from the time the tax was validly assessed against the taxpayer, Signal Gasoline Corporation.

III.

Signal Gasoline Corporation, having been dissolved in December of 1928, and the purported assessment not having been made until October 1, 1932, it was invalid and null and void as to Signal Gasoline Corporation.

IV.

If the assessment made on October 1, 1932, was valid, it must of necessity have been made against the trustee of the dissolved Signal Gasoline Corporation, who, upon dissolution, received its assets for the purpose of paying its debts and collecting its accounts. Such trustees constitute the first transferees of the assets of Signal Gasoline Corporation, but a valid assessment against them would not give the plaintiff six years within which to sue subsequent transferees of the assets of Signal Gasoline Corporation. [39]

V.

The suit herein, not having been brought by May 13, 1931, was barred by the statute of limitations.

Wherefore, defendant prays that plaintiff take nothing by its complaint on file herein, and that the defendant be allowed its costs of suit herein.

JOSEPH D. PEELER,

MELVIN D. WILSON,

Attorneys for Defendant Signal Oil and Gas Company.

(Verified)

[Endorsed]: Filed Jan. 16, 1940. [40]

[Title of District Court and Cause.—No. 1460-Y.]

MINUTE ORDER

This cause having been heard upon the issues raised by the Complaint and the Answer, and a stipulation of facts and evidence, oral and documentary, having been introduced, and the cause having been submitted to the Court for decision, and the Court having considered the evidence and the law and the arguments and briefs of counsel, now finds in favor of the plaintiffs and orders that the plaintiff do have and recover of the defendant in the sum of \$4,569.52, with interest thereon from September 10, 1932.

As a guide to counsel in the preparation of findings, the Court states the following conclusions upon the issues raised in this and the companion case this day decided also. (1461-Y)

The Court is of the view that under the authority of *McPherson vs. Commissioner of Internal Revenue*, 9 Cir., 1932, 54 F(2) 751, the deficiency assessment was in all respects valid. The deficiency assessment against the Signal Gasoline Corporation was not an assessment against its directors as transferees of the assets. It was an assessment against it for tax liability incurred during its corporate existence. This being the case, the defendants are not in a position to invoke the doctrine of *United States vs. Continental National Bank and Trust [41] Company*, 1939, 305 U. S. 398. In other words, the Court is of the view that we are not dealing

here with the transferee of a transferee and that the actions in this and the companion case were timely and are not barred by the Statute of Limitations.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 8.

Dated this 27th day of July, 1940.

Counsel notified. [42]

[Title of District Court and Cause.—No. 1461-Y.]

MINUTE ORDER

This cause having been heard upon the issues raised by the Complaint and the Answer, and a stipulation of facts and evidence, oral and documentary, having been introduced, and the cause having been submitted to the Court for decision, and the Court having considered the evidence and the law and the arguments and briefs of counsel, now finds in favor of the plaintiffs and orders that the plaintiff do have and recover of the defendant in the sum of \$20,217.82, with interest thereon from September 10, 1932.

As a guide to counsel in the preparation of findings, the Court states the following conclusions upon the issues raised in this and the companion case this day decided also. (1460-Y)

The Court is of the view that under the authority of *McPherson vs. Commissioner of Internal Revenue*, 9 Cir., 1932, 54 F(2) 751, the deficiency

assessment was in all respects valid. The deficiency assessment against the Signal Gasoline Corporation was not an assessment against its directors as transferees of the assets. It was an assessment against it for tax liability incurred during its corporate existence. This being the case, the defendants are not in a position to invoke the doctrine of *United States vs. Continental National Bank and Trust Company*, 1939, 305 U. S. 398. In other [43] words, the Court is of the view that we are not dealing here with the transferee of a transferee and that the actions in this and the companion case were timely and are not barred by the Statute of Limitations.

Findings and judgment to be prepared by counsel for the plaintiff under Local Rule 8.

Dated this 27th day of July, 1940.

Counsel notified. [44]

In the District Court of the United States in and
for the Southern District of California, Cen-
tral Division.

No. Eq. 1460-Y

UNITED STATES OF AMERICA,

Plaintiff.

vs.

SIGNAL OIL AND GAS COMPANY,

Defendant.

No. Eq. 1461-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGNAL OIL AND GAS COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cases having come on for trial on the 16th day of January, 1940, before the Honorable Leon R. Yankwich, United States District Judge, sitting without a jury, plaintiff being represented by the United States Attorney, and Edward H. Mitchell, Assistant United States Attorney, by Armond Monroe Jewell, Assistant United States Attorney, and defendant being represented by Joseph D. Peeler, Esq., and Melvin D. Wilson, Esq., by Melvin D. Wilson, Esq., and a stipulation

of facts having been filed and the court having ordered the consolidation of the above entitled cases for the purpose of trial, and documentary evidence having been offered on behalf of the plaintiff, the court now makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That these are suits in equity by the United States of America of a civil nature arising under the laws of the United States providing for internal revenue and the collection thereof, brought on [45] September 9, 1938, at the direction of the Attorney General and begun and prosecuted with the sanction and at the request of the Commissioner of Internal Revenue to obtain relief of the defendant; and that the plaintiff has no clear, adequate, or complete remedy at law.

II.

That pursuant to and in accordance with an agreement between the Signal Gasoline Company, a California corporation, and the Signal Gasoline Corporation, a California corporation, dated May 1, 1924, all the assets of the Signal Gasoline Company were turned over to the Signal Gasoline Corporation for 400,000 shares of stock of the Signal Gasoline Corporation, and on September 11, 1924, the Signal Gasoline Company was dissolved; the 400,000 shares received by the Signal Gasoline

Company in exchange for its assets and liabilities were distributed to its stockholders; that "Plaintiff's Exhibit A" is a true copy of the said agreement.

III.

That at all times herein mentioned the Signal Gasoline Company, Incorporated, a corporation now dissolved, was prior to its dissolution a holding company for the stock of the Signal Gasoline Corporation.

IV.

That on July 31, 1928, the Signal Gasoline Company, Incorporated, owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the stock outstanding of the Signal Gasoline Corporation (4.23%) was owned by individual stockholders of the Signal Gasoline Company, Incorporated.

V.

That on August 1, 1928, the defendant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation, in exchange for stock of the Signal [46] Oil and Gas Company.

VI.

That on or about November 30, 1928, the defendant, Signal Oil and Gas Company, acquired

the remaining 4.23% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders of the Signal Gasoline Company, Incorporated, by exchange for stock of the Signal Oil and Gas Company.

VII.

That the Signal Gasoline Corporation was liquidated as of December 1, 1928, and all of its assets and liabilities were assigned in accordance with a certain instrument of conveyance and the Decree of Dissolution of the Superior Court; that plaintiff's Exhibits 1 and 2, respectively, are true copies of the said instrument of conveyance and the Decree of Dissolution.

VIII.

That plaintiff's Exhibit B is a true copy of the corporation income tax return of the Signal Gasoline Company for the calendar year 1923; that plaintiff's Exhibit C is a true copy of the amended corporation income tax return of the Signal Gasoline Company for the calendar year 1923; that plaintiff's Exhibit D is a true copy of the tentative corporation income tax return of the Signal Gasoline Company for the year 1924; that plaintiff's Exhibit E is a true copy of the final corporation income tax return of the Signal Gasoline Company for the calendar year 1924, all of which returns were duly filed by or on behalf of the Signal Gasoline Company, on March 15, 1924, May 13, 1925, March 16, 1925 and May 13, 1925, respectively.

IX.

That on October 2, 1928, and again on December 28, 1929, the Commissioner of Internal Revenue duly addressed and mailed a letter to the Signal Gasoline Corporation setting forth certain transferee deficiencies; that said letters, and each of them were duly received by or on behalf of the Signal Gasoline Corporation; that plaintiff's [47] Exhibit F is a true copy of the letter dated October 2, 1928; that plaintiff's Exhibit G is a true copy of the letter dated December 28, 1929.

X.

That thereafter petitions in the name of the Signal Gasoline Corporation were filed by the Signal Gasoline Corporation with the Board of Tax Appeals for a redetermination of the deficiencies proposed in the said letters dated October 2, 1928, and December 28, 1929; that the appeal from the deficiencies proposed in the letter of October 2, 1928, was, on November 19, 1928, docketed with the Board of Tax Appeals under Number 41532; that the appeal from the deficiencies proposed in the letter of December 28, 1929, was on February 24, 1930 docketed with the Board of Tax Appeals under Number 47620; that the petition was signed by six persons and stated that they were the statutory trustees of Signal Gasoline Corporation, a dissolved corporation, acting through its statutory trustees; that on February 16, 1932, the Board of Tax Appeals duly affirmed the ruling of the Commissioner of Internal Revenue in asserting the

deficiencies therein appealed from; that said decision of the Board of Tax Appeals is contained in an opinion reported in 25 Board of Tax Appeals 532; that plaintiff's Exhibit H is a true and certified copy of the petition and decision in the said Board of Tax Appeals docket No. 41532; that plaintiff's Exhibit I is a true and certified copy of the petition and decision in Board of Tax Appeals docket No. 47620.

XI.

That on September 10, 1932, the Commissioner of Internal Revenue duly assessed the Signal Gasoline Corporation, as a transferee of the Signal Gasoline Company, for the above described tax liabilities of the Signal Gasoline Company in the amounts and for the taxable periods as follows:

[48]

For the taxable year 1923—\$468.33, plus interest of \$227.96.

For the taxable period ended, September 11, 1924—\$2,672.53, plus interest of \$1,200.70.

That plaintiff's Exhibit J is a true and certified photostatic copy of the assessment lists of the Commissioner of Internal Revenue setting forth the assessments herein described.

XII.

That plaintiff's Exhibit 3 is a true copy of the income tax return filed on May 13, 1925 by the Signal Gasoline Corporation for the calendar year 1924.

XIII.

That on December 3, 1928, the Signal Gasoline Corporation signed and filed Form 872, which is entitled "Consent Fixing Period of Limitation upon Assessment of Income and Profits Tax", thereby extending the statute of limitations for the assessment of deficiencies on account of the Signal Gasoline Corporation's tax liability for the calendar year 1924; that plaintiffs' Exhibit 4 is a true copy of the said form.

XIV.

That on December 28, 1929 the Commissioner of Internal Revenue duly addressed and mailed a letter to the Signal Gasoline Corporation; that this letter proposed an assessment of additional tax liabilities against the Signal Gasoline Corporation on account of a deficiency for the calendar year 1924; that the said letter also proposed an assessment of other additional tax liabilities for the calendar years 1925 and 1926; that plaintiff's Exhibit 5 is a true copy of the said letter.

XV.

That under date of November 21, 1928 the Signal Gasoline Corporation executed a power of attorney to certain attorneys authorizing the said attorneys to represent the Signal Gasoline Corporation before [49] the Treasury Department of the United States and the United States Board of Tax Appeals with reference to the tax liabilities of the

Signal Gasoline Corporation for the calendar years 1924 and 1925; that said power of attorney was signed by S. B. Mosher and O. W. March, President and Secretary respectively of the Signal Gasoline Corporation; that plaintiff's Exhibit 6 is a true copy of the said power of attorney.

XVI.

That under date of November 20, 1929 a power of attorney was executed whereby certain attorneys were authorized to represent the Signal Gasoline Corporation before the Treasury Department and the Board of Tax Appeals in connection with the tax liabilities of the said corporation for the calendar years 1926 and 1927. The said power of attorney was executed in the name of the Signal Gasoline Corporation, but stated that it was a dissolved corporation acting through its statutory trustees, and was signed on the margin thereof by each of the statutory trustees of the dissolved Signal Gasoline Corporation; that plaintiff's Exhibit 7 is a true copy of the said power of attorney.

XVII.

That on or about February 24, 1930 a petition was filed with the Board of Tax Appeals for a re-determination of the deficiencies proposed in plaintiff's Exhibit 5 above referred to; that said proceeding was therein given docket No. 47621; that said petition was filed under the name of the Signal Gasoline Corporation. However, in the body of the petition there was an allegation stating that

“the petitioner is a dissolved California corporation acting through its statutory trustees * * *”. The petition was verified by all of the statutory trustees; that plaintiff’s Exhibit 8 is a true copy of the said petition to the Board of Tax Appeals; that by an order entered on March 15, 1932 the Board of Tax Appeals determined that the deficiencies asserted therein by the Commissioner of Internal Revenue were correct; that the opinion of the Board of Tax Appeals regarding this matter is reported in 25 Board of Tax Appeals 861. [50]

XVIII.

That on October 1, 1932, pursuant to the said adjudication by the Board of Tax Appeals, referred to in the preceding paragraph, the Commissioner of Internal Revenue duly assessed the Signal Gasoline Corporation for its tax deficiency for the calendar year 1924 in the principal amount of \$14,137.05, plus interest of \$6,080.77; that plaintiff’s Exhibit 9 is a true copy of the assessment list of the Commissioner, upon which there appears the said assessment against the Signal Gasoline Corporation.

XIX.

That by reason of the dissolution of the Signal Gasoline Corporation and the disbursement of all of its assets to its statutory trustees, as above set forth, the Signal Gasoline Corporation was and is left without any money, assets or property of any kind with which to pay the said taxes and interest due to the United States.

XX.

That the assets which were acquired by the defendant Signal Oil and Gas Company, as sole stockholder of the Signal Gasoline Corporation, as heretofore shown, were far in excess of the taxes and interest prayed for in the Complaints herein.

XXI.

That due demand for the payment of the taxes and interest prayed for in the Complaints herein has been made upon the Signal Oil and Gas Company, but no portion thereof has been paid.

XXII.

That at all times herein mentioned and considered substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation as were the officers and directors of the Signal Oil and Gas Company and officers and directors of the Signal Gasoline Company, Incorporated. [51]

XXIII.

That in the proceedings before the Board of Tax Appeals under docket numbers 41532, 47620 and 47621, no substitution of parties was ever made and no motion for such substitution was ever made by either of the parties.

XXIV.

That all of the Exhibits filed by plaintiff herein are true copies of the originals thereof.

XXV.

That in addition to the acts heretofore described, the statutory trustees of the Signal Gasoline Corporation after its dissolution, who were those persons who were the officers and directors of the defendant, persisted in transacting business affairs of the dissolved corporation in the name of the Signal Gasoline Corporation and in particular in the negotiations with the United States of America regarding the tax liabilities of the Signal Gasoline Corporation.

XXVI.

That no assessment was ever made against the Signal Oil and Gas Company for the 1923 and 1924 tax liabilities of the Signal Gasoline Company; that no assessment was ever made against the Signal Oil and Gas Company for the tax liabilities due from the Signal Gasoline Corporation for the year 1924; that no assessment was ever made against the Signal Gasoline Company for the said 1924 tax liability of the Signal Gasoline Company; that an assessment against the Signal Gasoline Company was made on July 3, 1931, in the amount of \$468.33 plus interest for its said tax liability for the calendar year 1923.

XXVII.

On May 13, 1929, a corporation income tax return was filed with the Collector of Internal Revenue at Los Angeles, California on behalf of the Signal Gasoline Corporation and was signed by

S. B. Mosher, as President, and O. W. Marsh, as Treasurer of the said corporation. In said return it was stated in Affiliation Schedule No. 3 thereof that [52] the Signal Gasoline Corporation had been dissolved in December of 1928; that plaintiff's Exhibit 20 is a true copy of the said return.

XXVIII.

In the Revenue Agent's report, dated August 26, 1930, it was stated that the Signal Gasoline Corporation had distributed all of its assets to its stockholders upon its dissolution in December 1928; that plaintiff's Exhibit 15 is a true copy of those portions of the said Revenue Agent's report, which contain those statements. In the letter, dated March 30, 1931 from the Commissioner of Internal Revenue and addressed to the Signal Gasoline Corporation, which letter was the 60 day letter proposing additional taxes for the year 1928, it was stated that the Signal Gasoline Corporation had been dissolved in December 1928; that plaintiff's Exhibit 14 is a true copy of said letter.

CONCLUSIONS OF LAW

I.

That the assessments by the Commissioner of Internal Revenue against the Signal Gasoline Corporation, described in Paragraphs XI and XVIII of the Findings of Fact herein, are correct, timely and valid.

II.

That the said proceedings before the Board of Tax Appeals, the said decisions of the Board of Tax Appeals and the said assessments by the Commissioner of Internal Revenue are valid.

III.

That the actions herein are not barred by the statute of limitations and, therefore, have been timely commenced.

IV.

That the defendant is estopped from setting up the bar of the statute of limitations to the causes of action set forth in Complaints No. 1460-Y and No. 1461-Y. [53]

V.

That the transfer of the assets of the Signal Gasoline Corporation to the defendant as its sole stockholder impressed those assets with a trust for the benefit of the creditors of the Signal Gasoline Corporation and for the benefit of the United States of America in the assertion of its claim for unpaid taxes due from the Signal Gasoline Corporation.

VI.

That plaintiff is entitled to judgment against the defendant in the sum of \$20,217.82, together with interest as provided by law from October 1, 1932 and in the sum of \$4,569.52, together with interest as provided by law from September 10, 1932.

Dated: This 26th day of December, 1940.

LEON R. YANKWICH,

United States District Judge.

Approved as to form as provided by Rule 8:

JOSEPH D. PEELER and

MELVIN D. WILSON.

By MELVIN D. WILSON,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 26, 1940. [54]

In the District Court of the United States in and
for the Southern District of California, Cen-
tral Division.

No. Eq. 1460-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGNAL OIL AND GAS COMPANY,

Defendant.

No. Eq. 1461-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGNAL OIL AND GAS COMPANY,

Defendant.

JUDGMENT

The above entitled cases having come on for
trial on the 16th day of January, 1940, before the

Honorable Leon R. Yankwich, United States District Judge, sitting without a jury, plaintiff being represented by the United States Attorney, and Edward H. Mitchell, Assistant United States Attorney, by Armond Monroe Jewell, Assistant United States Attorney, and defendant being represented by Joseph D. Peeler, Esq.; and Melvin D. Wilson, Esq., by Melvin D. Wilson, Esq., and a stipulation of facts having been filed and the court having ordered the consolidation of the above entitled causes for the purpose of trial, and documentary evidence having been offered on behalf of the plaintiff; and the Court having made its Findings of Fact and Conclusions of Law;

Now, therefore, it is ordered, adjudged and decreed that plaintiff have judgment against the defendant in the sum of twenty thousand two hundred [55] and seventeen dollars eighty-two cents (\$20,217.82) together with interest at the rate of 12% per annum from October 1, 1932 to October 24, 1933, and interest at the rate of 6% per annum from October 24, 1933 to the date of payment; and in the sum of four-thousand five hundred and sixty-nine dollars fifty-two cents (\$4,569.52) together with interest at the rate of 12% per annum from September 10, 1932 to October 24, 1933, and interest at the rate of 6% per annum from October 24, 1933 to date of payment, to-

gether with costs in the sum of (\$27.14) (\$27.06) dollars.

Dated: This 26th day of December, 1940.

LEON R. YANKWICH,

United States District Judge.

Approved as to form as provided by Rule 8:

JOSEPH D. PEELER and

MELVIN D. WILSON.

By MELVIN D. WILSON,

Attorneys for Defendant.

Judgment entered Dec. 26, 1940.

Docketed Dec. 26, 1940.

C. O. Book 4, Page (170) (172).

R. S. ZIMMERMAN,

Clerk.

By LOUIS J. SOMERS,

Deputy.

[Endorsed]: Filed Dec. 26, 1940. [56]

[Title of District Court and Cause—No. Eq.
1460-Y]

NOTICE OF APPEAL

Notice is hereby given that Signal Oil and Gas Company, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment entered in the above entitled action

on the 26th day of December, 1940, in which action United States of America is plaintiff.

The judgment in the above case and in United States of America vs. Signal Oil and Gas Company, No. Eq. 1461-Y, was entered as a consolidated judgment.

Dated: March 17, 1941.

MELVIN D. WILSON,
JOSEPH D. PEELER,
Attorneys for Defendant.

Copies mailed to U. S. Atty. 3-20-41.

R. S. ZIMMERMAN,
Clerk.

By E. L. S.

[Endorsed]: Filed Mar. 20, 1941. [57]

[Title of District Court and Cause—No. Eq.
1461-Y.]

NOTICE OF APPEAL

Notice is hereby given that Signal Oil and Gas Company, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment entered in the above entitled action on the 26th day of December, 1940, in which United States of America is plaintiff.

The judgment in the above case and in United States of America vs. Signal Oil and Gas Com-

pany, No. Eq. 1460-Y, was entered as a consolidated judgment.

Dated: March 17, 1941.

MELVIN D. WILSON,
JOSEPH D. PEELER,
Attorneys for Defendant.

Copies mailed to U. S. Atty. 3-20-41.

R. S. ZIMMERMAN,
Clerk.

By E. L. S.

[Endorsed]: Filed Mar. 20, 1941. [58]

[Title of District Court and Cause—Nos. 1460-Y
and 1461-Y.]

STIPULATION FOR CONSOLIDATED
RECORD ON APPEAL

It is hereby stipulated by and between the respective parties hereto, through their respective counsel, that the above entitled causes of action, having been consolidated for the purpose of trial, may be consolidated for the purpose of appeal and that one record on appeal will be sufficient and satisfactory for the purpose of appealing both cases.

Dated: March 19, 1941.

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

ARMOND MONROE JEWELL

Asst. United States Attorney

By ARMOND MONROE JEWELL

Attorneys for Plaintiff.

MELVIN D. WILSON

JOSEPH D. PEELER

Attorneys for Defendant. [59]

It is so ordered this 20th day of March, 1941, at
4:40 P. M.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Mar. 20, 1941. [60]

[Title of District Court and Cause—Nos. 1460-Y
and 1461-Y.]

STIPULATION FOR ORDER EXTENDING
TIME FOR FILING RECORD ON APPEAL
AND DOCKETING THE ACTION AND
ORDER.

It is hereby stipulated by and between the respective parties hereto, through their respective counsel, that the Court may extend the time for filing the record on appeal and docketing the action

in the above entitled causes, from April 26, 1941 to May 11, 1941.

Dated: April 24, 1941.

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

ARMOND MONROE JEWELL

Asst. United States Attorney

By ARMOND MONROE JEWELL

Attorneys for Plaintiff.

MELVIN D. WILSON

JOSEPH D. PEELER [61]

ORDER

Upon filing the foregoing Stipulation of the parties,

It Is Ordered that the appellant may have from April 26, 1941 to May 11, 1941 within which to file the record on appeal and docket the action in the above entitled cases.

Apr. 24, '41, at 3:45 P. M.

PAUL J. McCORMICK

Judge.

[Endorsed]: Filed Apr. 24, 1941. [62]

[Title of District Court and Cause—Nos 1460-Y
and 1461-Y.]

STIPULATION DESIGNATING RECORD ON
APPEAL

Pursuant to Rule 75 (f) of The Federal Rules of Civil Procedure, it is hereby stipulated by and between the parties hereto, through their respective counsel, that the following shall constitute the Record on Appeal in the above entitled cases:

1. Order Transferring Case, Pursuant to Rule 19, dated February 8, 1939 (Case No. 1461 R. J.)
2. Complaint (Case No. 1460-Y)
3. Complaint (Case No. 1461-Y)
4. Answer (Case No. 1460-Y)
5. Answer (Case No. 1461-Y)
6. Stipulation (Case No. 1460-Y)
7. Stipulation (Case No. 1461-Y)
8. Minute Order of Court before Hon. Leon R. Yankwich, Tuesday, January 16, 1940 (Cases 1460-Y and 1461-Y)
9. Amended and Supplemental Answer (Case No. 1461-Y)
10. Minute Order (Case No. 1460-Y) [63]
11. Minute Order (Case No. 1461-Y)
12. Findings of Fact and Conclusions of Law (Case No. 1460-Y)
13. Findings of Fact and Conclusions of Law (Case No. 1461-Y)
14. Judgment (Cases Nos. 1460-Y and 1461-Y)

15. Notice of Appeal (Case No. 1460-Y)
16. Notice of Appeal (Case No. 1461-Y)
17. Stipulation for Consolidated Record on Appeal and Order attached (Cases Nos. 1460-Y and 1461-Y)
18. Stipulation for Order Extending Time for Filing Record on Appeal and Docketing the Action, and Order (Cases Nos. 1460-Y and 1461-Y)
19. This Designation of Record on Appeal
20. Reporter's Transcript.
21. Plaintiff's Exhibits "A" to "K" inclusive (Case No. 1460-Y)
22. Plaintiff's Exhibits 1 to 21 inclusive (Case No. 1461-Y)
23. Order Permitting Original Exhibits to be Sent to Circuit Court in lieu of Copies, on Appeal (Cases Nos. 1460-Y and 1461-Y)

Dated this 30th day of April, 1941.

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

ARMOND MONROE JEWELL

Asst. United States Attorney

By ARMOND MONROE JEWELL

(Attorneys for Plaintiff)

MELVIN D. WILSON

JOSEPH D. PEELER

Attorneys for Defendant

[Endorsed]: Filed May 1, 1941. [64]

[Title of District Court and Cause—Nos. 1460-Y
and 1461-Y.]

STIPULATION AND ORDER AS TO
ORIGINAL PAPERS OR EXHIBITS

It is hereby stipulated by and between the respective parties, through their respective counsel that the Court may order the original stipulation, the exhibits, and reporter's transcript to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of the copies thereof, such papers to be returned to the District Court upon the termination of the appellate proceedings.

Dated: April 30, 1941.

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

ARMOND MONROE JEWELL

Asst. United States Attorney

By ARMOND MONROE JEWELL

Attorneys for Plaintiff

MELVIN D. WILSON

JOSEPH D. PEELER

Attorneys for Defendant. [65]

It Is So Ordered.

Dated: April 30, 1941.

LEON R. YANKWICH

Judge of the District Court

[Endorsed]: Filed May 1, 1941. [66]

[Title of District Court and Causes.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 66 inclusive, contain full, true and correct copies of the Bill of Complaint in each case; Answer in each case; Order Transferring case; Stipulation of Facts in each case; Order Consolidating Cases and Allowing Filing Amended and Supplemental Answer in Case No. 1461; Amended and Supplemental Answer in Case No. 1461; Decision of Court in each case; Findings of Fact and Conclusions of Law; Judgments; Notice of Appeal in each case; Stipulation and Order for Consolidated Record on Appeal; Stipulation and Order Extending Time to Docket Appeal; Stipulation Designating Record on Appeal and Stipulation and Order for Transmittal of Original Exhibits, Reporter's Transcript, etc., to the Circuit Court of Appeals, which together with the Original Exhibits and Reporter's Transcript of Proceedings transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the clerk's fees for comparing, correcting and certifying the foregoing record amount to \$10.10 which amount has been paid to me by Appellant.

Witness my hand and the seal of the District

Court of the United States for the Southern District of California, this 3rd day of May, A. D. 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH

Deputy. [67]

[STATEMENT OF FACTS

Stipulated to in lieu of Reporter's Transcript]

(a) That these are suits in equity by the United States of America of a civil nature arising under the laws of the United States providing for internal revenue and the collection thereof, brought on September 9, 1938, at the direction of the Attorney General and begun and prosecuted with the sanction and at the request of the Commissioner of Internal Revenue to obtain relief for the appellee; and that the appellee has no clear, adequate, or complete remedy at law.

(b) That pursuant to and in accordance with an agreement between the Signal Gasoline Company, a California corporation, and the Signal Gasoline Corporation, a California corporation, dated May 1, 1924, all the assets of the Signal Gasoline Company were turned over to the Signal Gasoline Corporation for 400,000 shares of stock of the Signal Gasoline Corporation plus the assumption of "outstanding liabilities" not exceeding \$51,076.80 (including all income taxes that may be due the United States Government to the date of the assign-

ment), and on September 11, 1924, the Signal Gasoline Company was dissolved; the 400,000 shares, received by the Signal Gasoline Company in exchange for its net assets, were distributed to its stockholders.

(c) That at all times herein mentioned the Signal Gasoline Company, Inc., a corporation now dissolved, was, prior to its dissolution, a holding company for the stock of the Signal Gasoline Corporation.

(d) That on July 31, 1928, the Signal Gasoline Company, Inc., owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the stock outstanding of the Signal Gasoline Corporation (4.23%) was owned by individual stockholders of the Signal Gasoline Company, Inc.

(e) That on August 1, 1928, the appellant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Inc., which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation, in exchange for stock of the Signal Oil and Gas Company.

(f) That on or about November 30, 1928, the appellant, Signal Oil and Gas Company, acquired the remaining 4.23% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders of the Signal Gasoline Company, Inc., by exchange for stock of the Signal Oil and Gas Company.

(g) That the Signal Gasoline Corporation was liquidated as of December 1, 1928, and all of its assets and liabilities were assigned in accordance with a certain instrument of conveyance and the Decree of Dissolution of the Superior Court. That Plaintiff's Exhibits 1 and 2 respectively, are true copies of the said instrument of conveyance and the Decree of Dissolution, and are attached hereto and made a part hereof.

(h) That the original 1923 income tax return of Signal Gasoline Company was filed by or on behalf of the Company on March 15, 1924, and an amended return for that year was filed on May 13, 1925. A tentative income tax return for Signal Gasoline Company for 1924 was filed March 16, 1925, and the final return for the year 1924 was filed on May 13, 1925.

(i) That on October 2, 1928, and again on December 28, 1929, the Commissioner of Internal Revenue duly addressed and mailed a letter to the Signal Gasoline Corporation setting forth certain transferee deficiencies; the letter of October 2, 1928, claiming a deficiency of \$468.33 for 1923 to be due from Signal Gasoline Corporation as transferee of the assets of Signal Gasoline Company; the letter of December 28, 1929, claiming a deficiency of \$2,672.53 for the period ended September 11, 1924, to be due from Signal Gasoline Corporation as transferee of the assets of Signal Gasoline Company.

(j) That thereafter petitions in the name of the Signal Gasoline Corporation were filed with the Board of Tax Appeals for a redetermination of the deficiencies proposed in the said letters dated October 2, 1928, and December 28, 1929; that the appeal from the deficiency proposed in the letter of October 2, 1928, was on November 19, 1928, docketed with the Board of Tax Appeals under No. 41532; that the appeal from the deficiency proposed in the letter of December 28, 1929, was on February 24, 1930, docketed with the Board of Tax Appeals under No. 47620. The petition numbered 47620 stated in its first paragraph that "The Petitioner is a dissolved Corporation acting through its statutory trustees * * *"; the verification on the petition numbered 47620 was signed by six persons, and this verification stated that these six persons were "* * * the statutory trustees of Signal Gasoline Corporation, a dissolved corporation * * *"; that the petition numbered 41532 and the petition numbered 47620 were each signed by Robert N. Miller and Melvin D. Wilson, as attorneys for the petitioners; that on February 16, 1932, the Board of Tax Appeals purported to affirm the rulings of the Commissioner of Internal Revenue in asserting the deficiencies appealed from in petitions numbered 41532 and 47620; that said decision of the Board of Tax appeals is contained in an opinion reported in 25 Board of Tax Appeals 532.

(k) That on September 10, 1932, the Commis-

sioner of Internal Revenue purported to assess the Signal Gasoline Corporation as a transferee of the Signal Gasoline Company, for the above described tax liabilities of the Signal Gasoline Company in the amounts and for the taxable periods as follows:

For the taxable year 1923, \$468.33 plus interest of \$227.96. For the taxable period ended September 11, 1924, \$2,672.53 plus interest of \$1,200.70.

That attached hereto and made a part hereof is a true copy of Plaintiff's Exhibit J which is a true copy of the Assessment List of the Commissioner of Internal Revenue.

(l) Signal Gasoline Corporation filed its income tax return for the calendar year 1924 on or about May 13, 1925.

(m) On December 3, 1928, the Signal Gasoline Corporation signed and filed Form 872, which is entitled "Consent Fixing Period of Limitation upon Assessment of Income and Profits Tax"; that Plaintiff's Exhibit 4 is a true copy of the said form, and is attached hereto and made a part hereof.

(n) On December 28, 1929 the Commissioner of Internal Revenue addressed and mailed a letter to the Signal Gasoline Corporation; this letter proposed an assessment of additional tax liabilities against the Signal Gasoline Corporation on account of an alleged deficiency in its income tax for the period May 1, to December 31, 1924, in the amount of \$14,137.05; that the said letter also proposed an

assessment of other additional tax liabilities for the calendar years 1925 and 1926.

(o) Under date of November 21, 1928, the Signal Gasoline Corporation executed a power of attorney to certain attorneys authorizing the said attorneys to represent the Signal Gasoline Corporation before the Treasury Department of the United States and the United States Board of Tax Appeals with reference to the tax liabilities of the Signal Gasoline Corporation for the calendar years 1924 and 1925; that attached hereto and made a part hereof is a true copy of Plaintiff's Exhibit 6 which is a true copy of said Power of Attorney.

(p) That under date of November 20, 1929, a power of attorney was executed whereby certain attorneys were authorized to represent Signal Gasoline Corporation, a dissolved corporation, before the Treasury Department and the Board of Tax Appeals in connection with the tax liabilities of the said corporation for the calendar years 1926 and 1927; that attached hereto is a true copy of Plaintiff's Exhibit 7 which is a true copy of said Power of Attorney.

(q) That on or about February 24, 1930, a petition was filed with the Board of Tax Appeals for a redetermination of the 1924, 1925 and 1926 deficiencies proposed in the Commissioner's letter dated December 28, 1929, above referred to; that said proceeding was therein given docket No. 47621; that said petition was filed under the name of the Sig-

nal Gasoline Corporation; the petition numbered 47621 stated in its first paragraph that: "The petitioner is a dissolved California corporation acting through its statutory trustees * * *"; the verification on the petition numbered 47621 was signed by six persons, and this verification stated that these six persons were "* * * the statutory trustees of Signal Gasoline Corporation, a dissolved corporation * * *"; that the petition numbered 47621 was signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners; that on March 15, 1932, the Board of Tax Appeals purported to affirm the rulings of the Commissioner of Internal Revenue in asserting the deficiencies appealed from in petition numbered 47621; that said decision of the Board of Tax Appeals is contained in an opinion reported in 25 Board of Tax Appeals 861.

(r) On October 1, 1932, the Commissioner of Internal Revenue purported to assess the Signal Gasoline Corporation for its tax deficiency for the calendar year 1924 in the principal amount of \$14,137.05, plus interest of \$6,080.77; that attached hereto and made a part hereof is a true copy of Plaintiff's Exhibit 9 which is a true copy of the Assessment list of the Commissioner of Internal Revenue.

(s) That by reason of the dissolution of the Signal Gasoline Corporation and the disbursement of all of its assets to its statutory trustees, as above set forth, the Signal Gasoline Corporation was and

is left without any money, assets or property of any kind with which to pay the said taxes and interest claimed herein by the United States.

(t) That the assets which were acquired by the appellant, Signal Oil and Gas Company, as sole stockholder of the Signal Gasoline Corporation, as heretofore shown, were far in excess of the taxes and interest prayed for in the complaints herein.

(u) That due demand for the payment of the taxes and interest prayed for in the complaints herein has been made upon the Signal Oil and Gas Company but no portion thereof has been paid.

(v) That at all times herein mentioned and considered substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation as were the officers and directors of the Signal Oil and Gas Company and officers and directors of the Signal Gasoline Company.

(w) That in the proceedings before the Board of Tax Appeals under docket numbers 41532, 47620 and 47621, no substitution of parties was ever made and no motion for such substitution was ever made by either of the parties.

(x) A protest against a proposed deficiency for 1927 income taxes of Signal Gasoline Corporation was signed about November 20, 1929. This protest was signed "Signal Gasoline Corporation, By S. B. Mosher". At the left of the said signature, five other trustees of the dissolved corporation signed

their names. The protest was verified by Melvin D. Wilson, one of the attorneys in fact and in law, who stated that he had verified it for the reason that when "the statutory trustees" signed the protest, they neglected to acknowledge it before a notary public.

An offer to compromise the taxes here involved, acknowledged October 21, 1932, was filed shortly thereafter. It was signed "Signal Gasoline Corporation, By S. B. Mosher, H. M. Mosher, O. W. March, R. H. Green, C. LaV. Larzelere". The acknowledgment stated that the above named persons were the statutory trustees of Signal Gasoline Corporation, a dissolved corporation. In the body of the offer, it was stated that Signal Gasoline Corporation was dissolved December 12, 1928.

A similar offer, acknowledged January 23, 1933, and filed shortly thereafter, stated that Signal Gasoline Corporation was dissolved December 12, 1928. It was signed "Signal Gasoline Corporation, By Melvin D. Wilson, Attorney in Fact". In the acknowledgment, it was stated that Signal Gasoline Corporation was a dissolved corporation.

(y) Except for the matters covered in this record, no other correspondence with the Commissioner or Collector of Internal Revenue was filed by or on behalf of the Signal Gasoline Company or the Signal Gasoline Corporation after their dissolution, excepting:

1. That on January 20, 1932, a letter to the Commissioner was written and signed "Signal Gas-

oline Corporation, By J. H. Rounsavell, Comptroller”, advising the Commissioner to change his records so that all correspondence relative to the income tax matters of Signal Gasoline Corporation for 1924 to 1928 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

2. On January 20, 1932, a letter to the Commissioner signed “Signal Gasoline Company, By J. H. Rounsavell, Comptroller”, was mailed, advising the Commissioner to change his records so that all correspondence pertaining to the income liability of Signal Gasoline Company for 1922 to 1924 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

3. On January 20, 1932, a letter to the Commissioner, signed by “Signal Gasoline Company, Inc. by J. H. Rounsavell, Comptroller” was mailed, advising the commissioner to change his records so that all correspondence pertaining to the income tax liability of Signal Gasoline Company for 1925, 1926, 1927 and 1928 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

4. On July 27, 1931, a letter signed “Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller” was mailed to the Collector at Los Angeles, California, stating that there was pending before the United States Board of Tax Appeals the question of whether Signal Gasoline Corporation was

liable for the 1923 income tax liability of Signal Gasoline Company.

(z) That no assessment was ever made against the Signal Oil and Gas Company for the 1923 and 1924 tax liabilities of the Signal Gasoline Company; that no assessment was ever made against the Signal Oil and Gas Company for the tax liabilities due from the Signal Gasoline Corporation for the year 1924; that no assessment was ever made against the Signal Gasoline Company for the said 1924 tax liability of the Signal Gasoline Company; that an assessment against the Signal Gasoline Company was made on July 3, 1931, in the amount of \$468.33 plus interest for its said tax liability for the calendar year 1923.

(aa) On May 13, 1929, a corporation income tax return for 1928 was filed with the Collector of Internal Revenue at Los Angeles, California on behalf of the Signal Gasoline Corporation and was signed by S. B. Mosher, as President, and O. W. March, as Treasurer of the said corporation. In said return it was stated in Affiliation Schedule No. 3 thereof that the Signal Gasoline Corporation had been dissolved in December of 1928.

(bb) In a Revenue Agent's report, dated August 26, 1930, it was stated that the Signal Gasoline Corporation had distributed all of its assets to its sole stockholder, the Signal Oil and Gas Company, upon its dissolution in December, 1928. In a letter dated March 30, 1931 from the Commissioner of Internal Revenue and addressed to the

Signal Gasoline Corporation, which letter was the 60-day letter proposing additional taxes for the year 1928, it was stated that the Signal Gasoline Corporation had been dissolved in December, 1928.

PLAINTIFF'S EXHIBIT 1

SIGNAL GASOLINE CORPORATION

NOTICE RE: CONVEYANCE OF ASSETS

Know All Men By These Presents:

That whereas, on the 12th day of December, 1928, The Superior Court of the State of California in and for the County of Los Angeles made and filed its decree dissolving the Signal Gasoline Corporation, which decree was, on the 13th day of December, 1928 entered in Book 701 at Page 165 of Judgments, Records of said County of Los Angeles, and whereas, in the aforesaid Decree it was ordered and decreed that S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and R. H. Green were entitled to be, and were by the Court therein appointed Trustees for the stockholders of said corporation, with power and direction to settle all the affairs of said corporation and to distribute and convey all of the property of said corporation to the stockholders thereof a copy of which decree is hereunder annexed and made a part hereof, and whereas the Signal Oil and Gas Company, a Delaware corporation, is the owner and holder of all the issued and outstanding stock of

said Signal Gasoline Corporation and as such is entitled to distribution of all of the property of said Signal Gasoline Corporation; Now therefore, in consideration of the premises S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and E. H. Green, as Trustees for the stockholders of said Signal Gasoline Corporation, a dissolved corporation, and also in their individual capacities, do hereby assign, transfer, grant, convey, deliver and distribute to said Signal Oil and Gas Company, a Delaware corporation, all of the assets, business and property as a whole and of every kind, character and description, both tangible and intangible, legal and equitable and wherever situated, including all real property and all interests therein situate in the State of California and elsewhere, possessed by said dissolved corporation at the time of its dissolution, including all cash on hand and all bills and accounts receivable of said dissolved corporation from whomever due and wheresoever evidences thereof, if any, may be held, and all contract rights, rights of action, vouchers and things in action, and without any limitation or exception whatsoever, and subject to all outstanding obligations and liabilities thereon, and subject to the payment of income taxes that may be due to the United States Government covering operations of said dissolved corporation during the current year and all sums that may be found due covering income taxes for previous years. We further

give to said Signal Oil and Gas Company, its successors and assigns, both power and authority for its own use and benefit, but at its own cost, to take all legal measures which may be proper and necessary for the complete recovery of any of the property hereby assigned, and in its own name to prosecute and withdraw any suit at law or equity therefor. The transfer of the foregoing property shall take effect as of the date of this instrument, to-wit: the 14th day of December, 1928.

In Witness Whereof, we have executed this instrument in the manner hereinafter appearing, in the capacity and pursuant to the authority above related and also in our individual capacities, this 14th day of December, 1928.

R. H. GREEN

C. LaV. LARZELERE

O. W. MARCH

ROSS McCOLLUM

S. B. MOSHER

H. M. MOSHER

as Trustees for the Signal Gasoline Corporation,
a Dissolved Corporation.

R. H. GREEN

C. LaV. LARZELERE

O. W. MARCH

ROSS McCOLLUM

S. B. MOSHER

H. M. MOSHER

as individuals.

(Subscribed and sworn to before May E. Martin, Notary Public, December 14, 1928.)

[Endorsed]: U. S. Exhibit No. 1. Filed 1/16/40. R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk.

PLAINTIFF'S EXHIBIT 2

In the Superior Court of the State of California,
in and for the County of Los Angeles

No. 263815

In the Matter of the Application of
SIGNAL GASOLINE CORPORATION, a corporation, for Dissolution.

DECREE OF DISSOLUTION

The voluntary application for dissolution of the Signal Gasoline Corporation, a domestic corporation, coming on regularly this day for hearing and determination, the Court finds: 1. That on October 19, 1928 in accordance with the order of the Judge of this Court, the said Signal Gasoline Corporation filed with the Clerk of this Court its application for its dissolution as a corporation. 2. That in accordance with the order of a Judge of this Court the Clerk of said Court has given thirty days' notice of said application for dissolution, by publication in the Los Angeles Daily Journal, a newspaper of general circulation printed and pub-

lished in the said County of Los Angeles, which thirty days' notice which said publication thereof was completed and expired on November 27, 1938.

3. That no objection to said application for dissolution has at any time been filed. 4. All allegations and statements in said application for dissolution made are true and to this court, by this evidence introduced herein, have been shown so to be. 5. And it further appears to the Court from evidence introduced herein that the Board of Directors of said corporation under its Articles of Incorporation consisted of six (6) members and does now consist of six (6) members, namely:

- S. B. MOSHER
- O. W. MARCH
- ROSS McCOLLUM
- H. M. MOSHER
- C. LaV. LARZELERE
- R. H. GREEN

Wherefore, it is Ordered, Adjudged and Decreed, that said Corporation, the Signal Gasoline Corporation be, and the same is, and is hereby declared to be dissolved. It is further Ordered and Decreed that said S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and R. H. Green are entitled to be, and are by the Court herein appointed, trustees for the stockholders of said corporation, with power and direction to settle all the affairs of said corporation, and to distribute and convey all the property of said corporation to each of said stockholders, in proportion to the number of

shares owned and held by said stockholders when said distribution and conveyance shall be made.

Done in open Court this 12th day of December 1928.

(Signed) MARSHALL McCOMB,

Judge.

#1816 Copy of original recorded at request of Signal Oil and Gas Company, 503 Roosevelt Building, Los Angeles, Calif., March 6, 1929 at 58 minutes past 2 p. m.

Copyist #61. Compared.

C. L. LOGAN,

Recorder,

By W. WHITNEY,

Deputy.

[Endorsed]: U. S. Exhibit No. 2. Filed 1/16/40.
R. S. Zimmerman, Clerk. By Louis J. Somers,
Deputy Clerk.

PLAINTIFF'S EXHIBIT "J"

ASSESSMENT CERTIFICATE

COMMISSIONER'S ASSESSMENT LIST

6th District of California

Month September 2 Year 1932

Additional Assessments made by Commissioner:

Personal	\$ 70,966.13
Corporation	4,933.98
Total Assessments	75,900.11

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties,

etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, September 10, 1932

(Signed) DAVID BURNET

Commissioner of Internal Revenue

ASSESSMENT LIST

Page No. 0

District 6th California, Income Tax, List September 2 1932

	Old Balance	Date	Debit	Credit	New Balance	Remarks
1. Signal Gasoline Corp		Transferee	468.33			1923 2105
505 Roosevelt Building		Int to 9-10-32	227.96		696.29	274B & 280 1
Los Angeles Calif		Transferor Signal Gasoline Co				OL 10-2-28
		6th Calif Dist				
Sept 01 C#2			No Assessment			
2. Signal Gasoline Corp		Transferee	2672.53		3873.23	1924 2105
505 Roosevelt Building		Int to 9-10-32	1200.70			274B & 280 2
Los Angeles Calif		Transferor Signal Gasoline Co.				OL 12-28-29
		6th Calif Dist				

Sept 02 C#2

No Assessment

[Endorsed]: U. S. Exhibit No. J. Filed 1/16/40.

R. S. Zimmerman, Clerk. By Louis J. Somers,
Deputy Clerk.

PLAINTIFF'S EXHIBIT 4

CONSENT FIXING PERIOD OF LIMITATION
UPON ASSESSMENT OF INCOME AND
PROFITS TAX

For Taxable Years Ended Prior to January 1, 1926.

November 21, 1928

In pursuance of the provisions of existing Internal Revenue Laws Signal Gasoline Corporation, a taxpayer of Los Angeles, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return made by or on behalf of the above-named taxpayer for the year (or years) 1924 and 1925, under existing acts, or under prior revenue acts, may be assessed at any time on or before December 31, 1929, except that, if a notice of a deficiency in tax is sent to said taxpayer by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

[Seal]

SIGNAL GASOLINE
CORPORATION

S. B. MOSHER, Pres.

Taxpayer

By.....

D. H. BLAIR Commissioner

If this consent is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the Board of Directors, giving the officer authority to sign the consent.

(U. S. Board of Tax Appeals Div. 8 Docket 47621—Admitted in Evidence June 3 1931 Petitioner's Exhibit "A")

(Received Dec. 3 1928 Office of Head Audit Review Division)

[Endorsed]: U. S. Exhibit No. 4. Filed 1/16/40.
R. S. Zimmerman, Clerk. By Louis J. Somers,
Deputy Clerk.

PLAINTIFF'S EXHIBIT 6

Power of Attorney

Los Angeles, California,

November 21, 1928.

Commissioner of Internal Revenue,
Washington, D. C.

Sir:—

The undersigned corporation, Signal Gasoline Corporation, a corporation duly organized and existing under the laws of the State of California, with its principal place of business at Los Ange-

les, California, does hereby make, constitute and appoint Dana Latham and Melvin D. Wilson, of Miller, Chevalier & Latham, 819 Title Insurance Bldg., Los Angeles, California; Robert N. Miller and Ward Loveless, of Miller & Chevalier, 922 Southern Bldg., Washington, D. C.; Walker S. Clute, Roosevelt Bldg., Los Angeles, California, and Roger F. White, 804 Hellman Bank Bldg., Los Angeles, California, and each of them, its true and lawful attorneys, for it and in its name to represent it before the Treasury Department of the United States, any bureau or official thereof, and the United States Board of Tax Appeals, in all matters pertaining to the determination, assessment, collection or payment of any taxes under the laws of the United States and to all claims for abatement, refund or credit based on the assessment or payment of any such taxes; and, without limiting the foregoing powers, to examine and to request and receive copies of all returns, claims and other documents; to receive and receipt, in its behalf, for all checks and warrants made by the United States on account of any refunds; and generally to do, execute and perform all acts and things necessary or convenient in the premises (including authority to verify petitions to the said Board of Tax Appeals), with full power of substitution and revocation, hereby ratifying and confirming all that its attorneys and substitutes from time to time shall do or cause to be done by virtue thereof, and hereby expressly revoking all previous Powers of Attorney given by said corporation.

The foregoing powers shall apply to each of the transactions heretofore directed or authorized, with respect to taxes for the years 1924 and 1925.

Respectfully,

(Seal) SIGNAL GASOLINE
CORPORATION,

By S. B. MOSHER,

By O. W. MARCH.

State of California,
County of Los Angeles—ss.

On this 23 day of November, A. D. 1928, personally before me appeared the above named S. B. Mosher and O. W. March, to me known to be the parties who executed the foregoing Power of Attorney, who, first being duly sworn, stated: that they are the President and Secretary respectively, of the above-named corporation; that they signed, sealed and delivered the above instrument, pursuant to authority duly conferred upon them in that behalf, as the free and voluntary act of the said corporation, for the uses and purposes therein set forth.

In Witness whereof, I have hereunto set my hand and affixed my official seal this 23 day of November, A. D. 1928.

(Seal) MARY E. MARTIN,

Notary Public, in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. Exhibit No. 6. Filed 1-16-40.
R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk.

PLAINTIFF'S EXHIBIT 7

Power of Attorney

Los Angeles, California.

November 20, 1929.

Commissioner of Internal Revenue,

Washington, D. C.

Sir:—

The undersigned corporation, Signal Gasoline Corporation, a dissolved California corporation, through its statutory trustees whose principal place of business is at 505 Roosevelt Building, Los Angeles, California, does hereby make, constitute and appoint the law firm of Miller, Chevalier, Peeler & Wilson, 819 Title Insurance Bldg., Los Angeles, California, particularly Joseph D. Peeler and Melvin D. Wilson of that firm; and the law firm of Miller & Chevalier, 922 Southern Building, Washington, D. C., particularly Robert N. Miller, Ward Loveless, and J. Robert Sherrod of that firm; Walker S. Clute, Roosevelt Bldg., Los Angeles, California; and Roger F. White, Hellman Bank Bldg., Los Angeles, California, and each of them its true and lawful attorneys for it and in its name to represent it before the Treasury Department of the United States, any bureau or official thereof, and the United States Board of Tax Appeals, in all matters pertaining to the determination, assessment, collection or payment of any taxes under the laws of the United States and to all claims for abatement, refund or credit based on the assessment or

payment of any such taxes; and, without limiting the foregoing powers, to examine and to request and receive copies of all returns, claims and other documents; and generally to do, execute and perform all acts and things necessary or convenient in the premises (including authority to verify petitions to the said Board of Tax Appeals), with full power of substitution and revocation, hereby ratifying and confirming all that its attorneys and substitutes from time to time shall do or cause to be done by virtue thereof, and hereby expressly revoking all previous Powers of Attorney given by said corporation.

The foregoing powers shall apply to each of the transactions heretofore directed or authorized, with respect to taxes for the years 1926 and 1927.

Respectfully,

SIGNAL GASOLINE
CORPORATION,

By S. B. MOSHER.

R. H. GREEN
O. W. MARCH
ROSS. McCOLLUM
H. M. MOSHER
C. L. LARZALERE

State of California,
County of Los Angeles—ss.

On this 23 day of November, A. D. 1929, personally before me appeared the above named to me known to be the parties who executed the forego-

ing Power of Attorney, who, first being duly sworn, stated: that they are the statutory trustees of the above-named dissolved corporation; that they signed, sealed and delivered the above instrument, pursuant to authority duly conferred upon them in that behalf, as the free and voluntary act of the said dissolved corporation, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal this 23 day of November, A. D. 1929.

(Seal) MARY E. MARTIN,

Notary Public, in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. Exhibit No. 7. Filed 1-16-40.
R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk.

PLAINTIFF'S EXHIBIT 9

Assessment Certificate

Commissioner's Assessment List

6th District of California. Month October 1 Year 1932.

Additional Assessments made by Commissioner:

Personal—\$39706.99.

Corporation—\$104301.15.

Total Assessments—\$144008.14.

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these

lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C., Office of Commissioner of Internal Revenue, October 1, 1932.

(Signed) DAVID BURNET,
Commissioner of Internal Revenue.

ASSESSMENT LIST

District 6th California, Income Tax List October #1 1932

	Old Balance	Date	Debit	Credit	New Balance	Remarks
0	Signal Gasoline Corp		14137.05		20217.82	1924 5/1-12/31
	505 Roosevelt Bldg	Int to 10/1/32	6080.77			403117 274B
	Los Angeles Cal					WVR RAR 0
						OL 12/28/29
	Oct 00 C #1					
	Signal Gasoline Corp.		19340.18		26933.72	1925 402913
1	505 Roosevelt Bldg	Int to 10/1/32	7593.54			274B RAR WVR
	Los Angeles Cal					OL 12/28/29 1
	Oct 01 C #1					
	Signal Gasoline Corp		40804.19		54376.89	1926 401212
2	505 Roosevelt Bldg	Int to 10/1/32	13572.70			274B RAR 2
	Los Angeles Cal					OL 12/28/29

Oct 02 C #1

[Endorsed]: U. S. Exhibit No. 9. Filed 1-16-40.

R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk.

[Endorsed]: No. 9813. United States Circuit Court of Appeals for the Ninth Circuit. Signal Oil and Gas Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed May 6, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 9813

SIGNAL OIL AND GAS COMPANY, a Cor-
poration, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

SIGNAL OIL AND GAS COMPANY, a Cor-
poration, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON
THE APPEAL.

1. There was no evidence introduced at the trial showing that the taxes sued on were due from anyone. The alleged assessments relied on by the Appellee for that purpose were void and prove nothing, having been purportedly made long after the corporations against which they were supposed to have been made had been dissolved and utterly destroyed by their dissolution. Said alleged assessments were based upon alleged proceedings in the Board of Tax Appeals wherein the Appellee was guilty of laches in that it did not move for a dis-

missal or substitution of the parties petitioner although long having knowledge that the petitioners had been dissolved and destroyed by their dissolutions.

2. The suits by Appellee were barred by the statute of limitations as they were not brought within four years of the filing of the returns of the corporations whose taxes were involved and no assessment was made against the Appellant, but the Appellee was relying upon a six-year period within which to sue Appellant after alleged assessments against a prior transferee, but the alleged assessments against the prior transferee were invalid for the reason stated in Point 1, and even if the assessments against the prior transferee had been valid, they would not give Appellee six years within which to sue subsequent transferees.

3. Appellant is not estopped from asserting the bar of the statute of limitations, Appellee having at all times been in possession of all the material facts and having initially made an error of law which error misled the Appellant into further errors of law, if appellant made any errors of law, but estoppel does not arise from errors or mutual errors of law.

4. The judgments against Appellants should be reversed.

Dated: May 1, 1941.

MELVIN D. WILSON,
JOSEPH D. PEELER,

By M. D. W.

819 Title Insurance Building, Los Angeles, California, Counsel for Appellant.

Received copy of the within this 1 day of May, 1941.

WM. FLEET PALMER,
U. S. Atty.

By ARMOND MONROE JEWELL,
Attorney for Appellee.

[Endorsed]: Filed May 6, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING THOSE PORTIONS OF THE RECORD ON APPEAL DEEMED MATERIAL AND WHICH ARE THEREFORE TO BE PRINTED.

Pursuant to Rule 19, Subdivision 6, of the Rules of Court of the United States Circuit Court of Appeals for the Ninth Circuit, It Is Hereby Stipulated by and between the respective parties hereto, through their respective counsel, that the following are deemed the material portions of the record on appeal in the above entitled cases and which are therefore to be printed:

1. Order Transferring Case Pursuant to Rule 19, dated February 8, 1939 (Case 1461 R.J.) (R. p. 23.)
2. Complaint (Case 1460-Y) (R. p. 2 to p. 6 inc.)
3. Complaint (Case 1461-Y) (R. p. 7 to p. 11 inc.)
4. Answer (Case 1460-Y) (R. p. 12 to p. 17 inc.)
5. Answer (Case 1461-Y) (R. p. 18 to p. 22 inc.)
6. Stipulation (Case 1460-Y) (R. p. 24 to p. 29 inc.)
7. Stipulation (Case 1461-Y) (R. p. 30 to p. 36 inc.)
8. Minute Order of Court before Hon. Leon R. Yankwich, Tuesday, January 16, 1940 (Cases 1460-Y and 1461-Y) (R. p. 37)
9. Amended and Supplemental Answer (Case No. 1461-Y) (R. p. 38 to p. 40 inc.)
10. Minute Order (Case No. 1460-Y) (R. pp. 41, 42)
11. Minute Order (Case 1461-Y) (R. pp. 43, 44)
12. Findings of Fact and Conclusions of Law (Cases 1460-Y and 1461-Y) (R. p. 45 to p. 54 Inc.)
13. Judgment (Cases 1460-Y and 1461-Y) (R. pp. 55, 56)
14. Notice of Appeal (Case 1460-Y) (R. p. 57)
15. Notice of Appeal (Case 1461-Y) (R. p. 58)
16. Stipulation for Consolidated Record on Ap-

peal and Order attached (Cases 1460-Y and 1461-Y) (R. pp. 59, 60)

17. Stipulation for Order Extending Time for Filing Record on Appeal and Docketing the Action, and Order (Cases 1460-Y and 1461-Y) (R. pp. 61, 62)

18. Designation of Record on Appeal (Cases 1460-Y and 1461-Y) (R. pp. 63, 64)

19. Order Permitting Original Exhibits to be Sent to Circuit Court in lieu of Copies on Appeal (Cases 1460-Y and 1461-Y) (R. pp. 65, 66)

It is further stipulated by and between the respective parties hereto, through their respective counsel, that in lieu of printing the material portions of the admissions in the pleadings, the written stipulations of fact, the documents admitted into evidence, and the verbal stipulations contained in the transcript of record, that for the purpose of this appeal, the following statement may and should

be printed as a summary of the facts adduced therefrom:

Dated: May 2, 1941.

MELVIN D. WILSON,
JOSEPH D. PEELER.

Attorneys for Apellant.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Asst. United States Attorney.

ARMOND MONROE JEWELL,
Asst. United States Attorney.

By ARMOND MONROE JEWELL,
Attorneys for Appellee.

Approved:

LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed May 6, 1941. Paul P. O'Brien,
Clerk.

No. 9813.

IN THE

10
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

MELVIN D. WILSON,

819 Title Insurance Building, Los Angeles,

Attorney for Appellant.

FILED

JUN 16 1941

PAUL F. O'BRIEN,

CLERK



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No. 9813.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the District Court of the United States for the Southern District of California, Central Division [R. 45 to 47] is unreported.

Jurisdiction.

These appeals involve Federal income tax for the years 1923 and 1924 and were taken from judgments of the District Court of the United States for the Southern District of California, Central Division, entered December 26, 1940. [R. 61 to 63.] The notices of appeal were filed March 20, 1941 [R. 64 to 65] pursuant to provisions of Section 128 of the Judicial Code. The District Court took jurisdiction under the provisions of Section 24 (1) of the Judicial Code. [R. 2.]

There were two separate proceedings below which were consolidated for trial [R. 42] and which have been con-

solidated for purposes of this appeal. [R. 65.] One proceeding, Case No. 1460-Y, involved a suit by the appellee against the appellant in equity under the trust fund theory for the 1923 and 1924 Federal income tax of Signal Gasoline Company [R. 2 to 9], while the other involved a suit in equity by the appellee against the appellant under the trust fund theory for Federal income taxes for the year 1924 of Signal Gasoline Corporation. [R. 9 to 15.]

The appellant, Signal Oil and Gas Company, is a corporation organized under the laws of the State of Delaware, and has its principal place of business at Los Angeles, California.

Questions Presented.

1. Whether any taxes were due from the Signal Gasoline Company or Signal Gasoline Corporation, the only evidence thereof being purported assessments made in the name of Signal Gasoline Corporation years after it had been dissolved and, by virtue of California law, completely destroyed.

2. Assuming without conceding that the said alleged assessments were valid, were the suits against appellant barred by the statute of limitations where appellant in each case was the transferee of a transferee of the corporation whose taxes are alleged to be due?

3. If the suits are *prima facie* barred by the statute of limitations, is appellant estopped from asserting the bar of the statute of limitations where the appellee had all the facts and simply made errors of law?

Statutes Involved.

The statutes involved are set out in the appendix.

Statement.

The pertinent facts are set out in the record [pp. 72 to 83 incl.] and the exhibits set out in the record [pp. 83 to 100 incl.]. The facts in Case No. 1460-Y may be briefly stated as follows:

On May 1, 1924, Signal Gasoline Company transferred all its assets to Signal Gasoline Corporation in exchange for the assumption of outstanding liabilities not exceeding \$51,076.80 including all income taxes that might be due the Government as of the date of the assignment, plus 400,000 shares of the stock of Signal Gasoline Corporation. On September 11, 1924, Signal Gasoline Company was dissolved and distributed its assets, being the 400,000 shares of stock of Signal Gasoline Corporation, to its stockholders. [R. 72 to 73.]

The appellant, Signal Oil and Gas Company, was organized under the laws of the State of Delaware in 1928 and by November 30, 1928, had acquired 100% of the stock of Signal Gasoline Corporation in exchange for its own stock. [R. 73.]

Signal Gasoline Corporation was liquidated as of December 1st, 1928, and all its assets and liabilities were assigned in accordance with a certain instrument of conveyance and the Decree of Dissolution of the Superior Court. [R. 74.] The Decree of Dissolution set forth that S. B. Mosher, O. W. March, Ross McCollum, H. M. Mosher, C. Lav. Larzalere and R. H. Green were the members of the Board of Directors of the Signal Gasoline Corporation. They were appointed by the Court as trustees for the stockholders and creditors of the corporation, with power and direction to settle all the affairs of the corporation and to distribute

and convey all the property of said corporation to each of said stockholders in proportion to the number of shares owned and held by said stockholders when said distribution and conveyance was made. [Plaintiff's Exhibit 2; R. 87-88.] On December 14, 1928, the said trustees of Signal Gasoline Corporation executed a notice re conveyance of assets which recited the court decree and the appointment of the statutory trustees, and which recited that the Signal Oil and Gas Company was the owner of all the outstanding stock of Signal Gasoline Corporation and was entitled to the distribution of all the assets of that company. Said notice did assign to the Signal Oil and Gas Company all the assets of the Signal Gasoline Corporation subject to all the outstanding liabilities and to the payment of income taxes that might be due to the Government covering operations of the dissolved corporation during the current year, and all sums that might be found due covering income taxes for previous years. [Plaintiff's Exhibit 2; R. 83-84.]

The original income tax return for 1923 of Signal Gasoline Company was filed on behalf of that company on March 15, 1924, and an amended return for that year was filed May 13, 1925. A tentative return for 1924 was filed March 16, 1925, and the final return for 1924 was filed May 13, 1925. [R. 74.]

On October 2, 1928, and again on December 28, 1929, the Commissioner of Internal Revenue addressed and mailed a letter to the Signal Gasoline Corporation setting

forth certain transferee deficiencies; the letter of October 2, 1928, claiming a deficiency of \$468.33 for 1923 to be due from Signal Gasoline Corporation as transferee of the assets of Signal Gasoline Company; the letter of December 28, 1929, claiming a deficiency of \$2672.53 for the period ended December 11, 1924, to be due from Signal Gasoline Corporation as transferee of the assets of Signal Gasoline Company. [R. 74.]

On November 19, 1928, Signal Gasoline Corporation filed with the United States Board of Tax Appeals an appeal from the deficiency proposed in the letter of October 2, 1928. This petition was docketed with the Board under No. 41532. [R. 75.]

On February 24, 1930, a petition was filed in the name of Signal Gasoline Corporation, appealing from the deficiency proposed in the letter of December 28, 1929. This petition was docketed with the United States Board of Tax Appeals under No. 47620. This petition, in its first paragraph stated that: "The petitioner is a dissolved corporation acting through its statutory trustees * * *". The verification of the petition was signed by the six persons who had been appointed by the Court as statutory trustees of Signal Gasoline Corporation, and the verification stated that these six persons were "* * * the statutory trustees of Signal Gasoline Corporation, a dissolved corporation * * *". [R. 75.]

Both of the petitions mentioned above were signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners. [R. 75.]

These matters were pending before the Board of Tax Appeals from November 19, 1928, and February 24, 1930, respectively, until February 16, 1932. [R. 75.] No substitution of parties was ever made and no motion of such substitution was ever made by either of the parties though the Commissioner of Internal Revenue was informed of the dissolution of Signal Gasoline Corporation in December of 1928 as follows [R. 79]:

1. On May 13, 1929, a corporation income tax return for 1928 was filed with the Collector of Internal Revenue at Los Angeles, California, on behalf of the Signal Gasoline Corporation. In said return it was stated in affiliation schedule No. 3 thereof, that the Signal Gasoline Corporation had been dissolved in December of 1928. The return was signed by S. B. Mosher as president, and O. W. March as treasurer. [R. 82.]

2. On November 20, 1929, a power of attorney was executed whereby certain attorneys were authorized to represent Signal Gasoline Corporation, a dissolved corporation, before the Treasury Department in connection with the tax liabilities of said corporation for the calendar years 1926 and 1927. Said power of attorney stated that the Signal Gasoline Corporation was a dissolved California corporation acting through its statutory trustees. It was signed by Signal Gasoline Corporation, by S. B. Mosher and five other persons, and the verification stated that the persons who had signed it were the statutory trustees of the above named dissolved corporation. [Plaintiff's Exhibit 7; R. 95-96.]

3. On February 24, 1930, the petition to the Board of Tax Appeals was filed as indicated above, stating that Sig-

nal Gasoline Corporation was a dissolved corporation acting through its statutory trustees, and the verification was signed by six persons who stated that they were the statutory trustees of Signal Gasoline Corporation, a dissolved corporation. [R. 75.]

4. In a Revenue Agent's report dated August 26, 1930, it was stated that Signal Gasoline Corporation had distributed all its assets to its sole stockholder, Signal Oil and Gas Company, upon its dissolution in December of 1928. [R. 82.]

5. In a letter dated March 30, 1931, from the Commissioner of Internal Revenue, addressed to the Signal Gasoline Corporation, which letter was a 60-day letter proposing additional taxes for the year 1928, it was stated that the Signal Gasoline Corporation had been dissolved in December, 1928. [R. 82-83.]

6. Except for the matters set out above, no other correspondence with the Collector of Internal Revenue was filed by and on behalf of Signal Gasoline Company or Signal Gasoline Corporation after their dissolution and prior to February 16, 1932, excepting as follows:

(a) On January 20, 1932, a letter to the Commissioner was written and signed "Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller" advising the Commissioner to change his records so that all correspondence relative to the income tax matters of Signal Gasoline Corporation for 1924 to 1928 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California. [R. 81.]

(b) On January 20, 1932, a similar letter was written signed "Signal Gasoline Company, by J. H. Rounsavell,

Comptroller” with respect to the Signal Gasoline Company for 1922 to 1924. [R. 81.]

(c) On January 20, 1932, a similar letter was written and signed by Signal Gasoline Company, Inc., by J. H. Rounsavell, Comptroller, with respect to the 1925, 1926, 1927 and 1928 taxes of the Signal Gasoline Company, Inc. [R. 81.]

(d) On July 27, 1931, a letter signed by Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller, was mailed to the Collector at Los Angeles, stating that there was pending before the Board of Tax Appeals the question of whether Signal Gasoline Corporation was liable for the 1923 income tax liability of Signal Gasoline Company. [R. 81-82.]

On February 16, 1932, the Board of Tax Appeals purported to affirm the rulings of the Commissioner of Internal Revenue in asserting the deficiencies appealed from in petitions numbered 41532 and 47620, relating to the income taxes of the Signal Gasoline Company. Said decision of the Board is contained in an opinion reported in 25 B. T. A. 532. [R. 75.]

On September 10, 1932, the Commissioner purported to assess the Signal Gasoline Corporation as a transferee of the Signal Gasoline Company for the above described tax liabilities of Signal Gasoline Company in the amounts and for the taxable periods as follows:

For the taxable year 1923, \$468.33 plus interest of \$227.96; for the taxable period ended September 11, 1924, \$2672.53 plus interest of \$1,200.70. [R. 76; Plaintiff's Exhibit J; R. 88-89.]

By reason of the dissolution of the Signal Gasoline Corporation and the disbursement of all its assets to its statutory trustees as above set forth, Signal Gasoline Corporation was and is left without any money, assets or property of any kind, with which to pay said taxes and interest claimed herein by the United States. The assets which were acquired by the appellant, Signal Oil and Gas Company, as sole stockholder of Signal Gasoline Corporation as heretofore shown were far in excess of the taxes and interest prayed for in the complaint herein. [R. 79.]

Due demand for the payment of taxes and interest prayed for in the complaint herein has been made upon the Signal Oil and Gas Company but no portion thereof has been paid. [R. 79.]

At all times herein mentioned and considered, substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation, as were the officers and directors of the Signal Oil and Gas Company and officers and directors or trustees of the Signal Gasoline Company. [R. 79.]

An offer to compromise the taxes here involved, acknowledged October 31st, 1932, was filed shortly thereafter. It was signed by the Signal Gasoline Corporation, by S. B. Mosher, H. M. Mosher, O. W. March, R. H. Green, and C. Lav. Lazalere. The acknowledgment stated that the above named persons were the statutory trustees of Signal Gasoline Corporation, a dissolved corporation. In the body of the offer it was stated that Signal Gasoline Corporation was dissolved December 12, 1928. [R. 80.]

A similar offer, acknowledged January 23, 1933, and filed shortly thereafter, stated that Signal Gasoline Corporation was dissolved December 12, 1928. It was signed by the Signal Gasoline Corporation, by Melvin D. Wilson, Attorney-in-Fact. In the acknowledgment it was stated that Signal Gasoline Corporation was a dissolved corporation. [R. 80.]

No assessment was ever made against Signal Oil and Gas Company for 1923 and 1924 tax liabilities of the Signal Gasoline Company. No assessment was ever made against the Signal Gasoline Company for the said 1924 tax liability of Signal Gasoline Company. A purported assessment against the Signal Gasoline Company was made July 3, 1931, in the amount of \$468.33 plus interest for its said tax liability for the calendar year 1923. [R. 82.]

The appellee brought its suit against appellant on September 9, 1938, at the direction of the Attorney General, with the sanction and at the request of the Commissioner of Internal Revenue. [R. 2, 3.]

This case, Docket No. 1460-Y, was tried before the Honorable Leon R. Yankwich on January 16, 1940, upon a written stipulation of facts and upon documentary evidence being introduced into evidence. [R. 33-41.]

On July 27, 1940, the Judge of the District Court filed his minute order finding for the appellee. [R. 45-46.] The findings of fact and conclusions of law was signed by the District Judge on December 26, 1940, and filed the same day. [R. 48-61.] Judgment in favor of the appellee in the amount of \$4,569.52 together with interest at the rate of 12% per annum from September 10th, 1932, to October 24, 1933, and interest at the rate of 6% per annum from October 24, 1933, to date of pay-

ment, together with costs in the sum of \$27.14, was signed and entered on the 26th day of December, 1940. [R. 61-63.]

The facts in case No. 1461-Y may be briefly stated as follows:

All the facts stated above with respect to case No. 1460-Y relative to the dissolution of Signal Gasoline Corporation, the distribution of its assets to the statutory trustees, the conveyance by the statutory trustees of the assets to appellant, the various notices given to the Commissioner by the statutory trustees that Signal Gasoline Corporation had been dissolved, the fact that the dissolution of Signal Gasoline Corporation left it unable to pay any tax liabilities, and any other statements made above which are pertinent to this case, are incorporated herein as fully as though herein set forth at this point.

Signal Gasoline Corporation filed its income tax return for the calendar year 1924 on or about May 13, 1925. [R. 76.]

On December 3, 1928, Signal Gasoline Corporation signed and filed Form 852 which is entitled "Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax"; that document purported to give the Commissioner until December 31, 1929, in which to assess additional income taxes for 1924 against Signal Gasoline Corporation. [Plaintiff's Exhibit 4; R. 91-76.]

On December 12, 1928, the Signal Gasoline Corporation was dissolved as stated heretofore.

On December 28, 1929, the Commissioner of Internal Revenue addressed and mailed a letter to Signal Gasoline Corporation. This letter proposed an assessment of ad-

ditional tax liability against the Signal Gasoline Corporation for the period May 1st to December 31st, 1924, in the amount of \$14,137.05. [R. 76.]

On February 24, 1930, a petition was filed with the Board of Tax Appeals for a redetermination of the 1924 deficiency proposed in the Commissioner's letter dated December 28, 1929, above referred to; that said proceeding was therein given Docket No. 47621; that said petition was filed under the name of Signal Gasoline Corporation; that the petition stated in its first paragraph that: "The petitioner is a dissolved California corporation acting through its statutory trustees * * *"; that the verification of the petition was signed by six persons and the verification stated that these six persons were "* * * the statutory trustees of Signal Gasoline Corporation, a dissolved corporation * * *"; the petition was signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioner. [R. 77-78.]

Although the Commissioner of Internal Revenue had the various notices given him by the statutory trustees that Signal Gasoline Corporation had been dissolved December in 1928, he made no motion for substitution of the parties during the time the case was pending before the Board of Tax Appeals. [R. 79.]

On March 15, 1932, the Board of Tax Appeals purported to affirm the ruling of the Commissioner of Internal Revenue in asserting the deficiency appealed from in Docket No. 47621. Said decision of the Board is contained in an opinion reported in 25 B. T. A. 861. [R. 78.]

On October 1, 1932, the Commissioner of Internal Revenue purported to assess the Signal Gasoline Corpo-

ration for its tax deficiency for the calendar year 1924 in the principal amount of \$14,137.05 plus interest of \$6,080.77. [R. 78; Plaintiff's Exhibit 9; R. 97-98.]

Due demand for the payment of the taxes and interest prayed for in this case has been made upon appellant, but no portion thereof has been paid. [R. 79.]

No assessment was ever made against Signal Oil and Gas Company for the tax liability of Signal Gasoline Corporation for the year 1924. [R. 82.]

The appellee brought its suit against appellant on *September 9, 1938*, at the direction of the Attorney General, with the sanction and at the request of the Commissioner of Internal Revenue. [R. 9-16.]

This case, Docket No. 1461-Y, was tried before the Honorable Leon R. Yankwich on January 16, 1940, upon a written stipulation of facts and upon documentary evidence being introduced into evidence. [R. 33-41.]

On July 27, 1940, the Judge of the District Court filed its minute order finding for the appellee. [R. 46-47.] The findings of fact and conclusions of law was signed by the District Judge on December 26, 1940, and filed the same day. [R. 48-61.] Judgment in favor of the appellee in the amount of \$20,217.82 together with interest at the rate of 12% per annum from October 1, 1932, to October 24, 1933, and interest at the rate of 6% per annum from October 24, 1933, to the date of payment, and costs in the amount of \$27.06.

Specification of Errors Relied Upon.

1. There was no evidence introduced at the trial showing that the taxes sued on were due from anyone. The alleged assessments relied on by the appellee for that purpose were void and prove nothing, having been purportedly made long after the corporation against which they were supposed to have been made had been dissolved and utterly destroyed by its dissolution. Said alleged assessments were based upon alleged proceedings in the Board of Tax Appeals wherein the appellee was guilty of laches in that it did not move for a dismissal or substitution of the petitioner although long having knowledge that the petitioner had been dissolved and destroyed by its dissolution.

2. The suits by appellee were barred by the statute of limitations as they were not brought within four years of the filing of the returns of the corporations whose taxes were involved and no assessment was made against the appellant, but the appellee was relying upon a six-year period within which to sue appellant after alleged assessments against a prior transferee, but the alleged assessments against the prior transferee were invalid for the reason stated in Point 1, and hence do not give a six year period for suit, and even if the assessments against the prior transferee had been valid, they would not give appellee six years within which to sue subsequent transferees.

3. Appellant is not estopped from asserting the bar of the statute of limitations, appellee having at all times been

in possession of all the material facts and having initially made an error of law which error misled the appellant's predecessors into further errors of law, if they made any errors of law, but estoppel does not arise from errors or mutual errors of law.

4. The judgments against appellant should be reversed.
[R. 101-103.]

Summary of Argument.

The specification of errors relied upon also constitutes a brief summary of the argument.

ARGUMENT.

1. **No Evidence Was Introduced at the Trial Proving That the Taxes Sued Upon Were Due From Anyone. The Alleged Assessments Relied Upon by the Appellee for That Purpose Being Void.**

The appellee brought suits in equity against appellant to collect from appellant taxes alleged to be owing from other corporations now dissolved.

Appellee, of course, *has* the burden of proving all the material allegations of its complaints. The appellee, in its complaint, did not even allege that the taxes were due from anyone.

Appellee did allege that assessments had been made against Signal Gasoline Corporation and appellee relied on those assessments as proving that the taxes were due. As will be hereinafter shown, the alleged assessments against Signal Gasoline Corporation were void and raise no presumption that the taxes sought to be recovered herein were due from Signal Gasoline Company, Signal Gasoline Corporation, Signal Oil and Gas Company, or from anyone else.

As shown in the statement of facts, Signal Gasoline Corporation was dissolved in December of 1928. The alleged assessments relied on by the appellee were not made until September 10, 1932, and October 1st, 1932, respectively. [R. 75-78.]

Thus the alleged assessments were made nearly four years after Signal Gasoline Corporation had been dissolved. Said alleged assessments were absolutely void and of no effect whatsoever.

In December of 1928, when Signal Gasoline Corporation was dissolved, Section 400 of the Civil Code of the

State of California read as shown in the appendix to this brief. It will be noted that under such section the last directors ordinarily became the statutory trustees for the creditors and stockholders and had full power to settle any of the affairs of the corporation, collect and pay outstanding debts, sell the assets, and distribute the proceeds to the stockholders. It will be noted that no provision was made for the extension of the corporate existence whatsoever.

Under this provision of the Civil Code, the dissolution of the corporation absolutely destroyed it. In Ballentine on California Corporations, 1931 Edition, P. 476, this proposition is set forth as follows:

“Corporations dissolved prior to August 14, 1929, are not governed by Section 399, Civil Code, and their corporate existence came to an end under the former Code provision. When a corporation was dissolved, the persons constituting the last Board of Directors became the statutory trustees *ex officio* of the defunct corporation and were charged with the duty of winding up its affairs, even though the technical legal title may have vested in the shareholders. Pending actions against the corporation abated and the directors, as trustees, had to be substituted. As to such corporation, the effect of dissolution was to terminate the legal entity and render the corporation incapable of acting, or of suing, or being sued.”

The above quotation is based upon the California Supreme Court cases of *Crossman v. Vivienda Water Company*, 150 Cal. 575, 89 Pac. 335, and *Brandon v. Umqua Lumber Company*, 166 Cal. 322, 136 Pac. 62, 47 A. L. R. 1407. See also 7 *Cal. Jur.* 137-138.

In 7 *Cal. Jur.* 138, the following statement appears:

“A dissolved corporation is incapable of suing or being sued as a corporate body or in its corporate name, there being no one who can appear and act for the corporation, all actions pending against it are abated, and any judgment attempted to be given against it is void—a mere nullity, except as otherwise as provided by statute. Such a void judgment, therefore, is no bar to a subsequent action against the trustees of the corporation.”

The above principle of law has been recognized by the United States Circuit Court of Appeals for the Ninth Circuit in *G. M. Standifer Construction Corporation v. Commissioner*, 78 Fed. (2d) 285. In that case an Oregon corporation had dissolved on August 30, 1927, and under the laws of Oregon it continued to exist for five years for the purpose of winding up its affairs. On November 1, 1930, the Commissioner of Internal Revenue sent it a 60-day letter notifying it of a deficiency in its 1928 income tax. On December 29, 1930, the corporation filed with the Board of Tax Appeals a petition for redetermination. On October 2, 1933, after the expiration of the five-year period, the matter was heard by the Board and on June 7, 1934, the Board rendered its decision, to review which a petition was filed in the United States Circuit Court of Appeals for the Ninth Circuit, on October 29, 1934. The Circuit Court, at 78 Fed. (2d), page 286, said:

“The general effect of the dissolution of a corporation is to put an end to its corporate existence for all purposes whatsoever, and to extinguish its power to sue or be sued, but, if the law of the state of incorporation so provides, its existence may continue for a specified period after dissolution for the pur-

pose of winding up its affairs, and during that extended period of corporate life, it may sue or be sued. Thompson on Corporations, Third Edition, Vol. 8, Secs. 6505, 6530; 14a C. J. 1200, 1201; 7 R. C. L. 735, 743. The rule is stated as follows in Oklahoma Natural Gas Company v. State of Oklahoma, 273 U. S. 257, 259, 47 Sup. Ct. 391, 392, 71 L. Ed. 634:

“It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. (Citing cases.) It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes, it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.’”

This Court, in the *Standifer* case, at page 286, then said:

“Here, the five-year period expired, the corporation became defunct, and the proceeding before the Board of Tax Appeals abated on August 30, 1932, twenty-one months before the Board rendered its decision.

The petition filed in this court in the name of the defunct corporation presented nothing for review. The only thing we can do with such a petition is to dismiss it.”

In that case, the proposed deficiency against the defunct corporation of course became abated and a nullity and it was incumbent upon the Commissioner to proceed against the transferees of the assets of the corporation subject to all the defenses they might raise.

In other tax cases, the principle has also been recognized that a corporation whose legal existence has been completely terminated cannot have a valid assessment, order, or judgment made against it. (*Sanborn Brothers, Successors, etc.*, 14 B. T. A. 1059; *Union Plate and Wire Company*, 17 B. T. A. 1229; *Iberville Wholesale Grocery Company*, 15 B. T. A. 645 and 17 B. T. A. 235; *S. Hirsch Distilling Company*, 14 B. T. A. 1073.)

In the case of *S. Hirsch Distilling Company, supra*, decided January 9, 1929, a Missouri corporation was involved. The statutes of Missouri were like the statutes of California in effect at the time Signal Gasoline Corporation was dissolved. There was no provision for continuing the corporate existence for any purpose, but the last directors were the statutory trustees for the creditors and stockholders. The Board, in discussing the effect of this dissolution of the Missouri corporation, said:

“In *Scanlan v. Crawshaw*, 5 Mo. App. 337, it was held that a judgment against the corporation that had ceased to exist at the time it was rendered was a nullity and that an order to issue execution on such judgment against the stockholder was void.”

The Board concluded that the S. Hirsch Distilling Company ceased to exist at the time of its dissolution, namely, June 20, 1920, and that all the rights which it, as a corporation, had theretofore had were completely extinguished; that it no longer had any right to do anything and no legal existence or status to institute the proceeding before the Board (in 1926), and the Board's determination of the deficiency under such circumstances would be a nullity, and accordingly, the Board, on its own motion, held that it had no jurisdiction.

As noted above, under California law, a judgment attempted against a corporation dissolved prior to July 14, 1929, is void and a mere nullity. (7 *Cal. Jur.* 138; *California National Supply Company v. Flack*, 183 Cal. 124, 190 Pac. 634; *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, 128 Pac. 1040; *Crossman v. Vivienda Water Company*, 150 Cal. 575, 89 Pac. 335.)

It seems clear therefore that the alleged assessments against Signal Gasoline Corporation in 1932 were an absolute nullity as the corporation had been destroyed by its dissolution in 1928. Consequently, the void assessments do not prove that the alleged tax was due. The taxes involved were never assessed against appellant Signal Oil and Gas Company.

Since there is no evidence that the tax was due from anyone, the appellee cannot collect the said alleged tax from anyone.

2. **The Alleged Assessments Being Void Do Not Start a Six-Year Period in Which the Appellee Could Sue Transferees.**

The alleged taxes involved in these proceedings related to the years 1923 and 1924 for which returns were filed in 1924 and 1925. The statutory time for bringing suit against the taxpaying corporation or anyone else based on the returns was four years after the returns were filed. (Section 277 (a) (1) of the Revenue Act of 1924.) It is obvious, therefore, that the appellee was not suing the appellant under that section as the suits were not brought until 1938.

No assessment has been made against Signal Oil and Gas Company (for the alleged taxes of its predecessors) and hence the appellee could not have been relying upon Section 278 (d) of the Revenue Act of 1926 which gave the Commissioner six years after an assessment within which to collect tax from the entity assessed.

The appellee was relying upon a six-year period for bringing suit against transferees, under the trust fund theory, based upon alleged assessments against the Signal Gasoline Corporation. (Section 278 (d) of the Revenue Act of 1926.) In other words, the appellee relied upon assessments made in September and October of 1932 and brought the suits just within six years from the date of said purported assessments.

The assessments on which the appellee relied for starting the six-year period for bringing suit were, as shown

above, absolutely void. Consequently, they did not give the Government six years within which to sue anyone. No argument or citation of authority is necessary to support the proposition that legal rights cannot be based upon a nullity.

The alleged assessments on which the appellee was relying to commence the six-year period of limitation for bringing suit being void, the appellee is relegated to the provisions of law which give it four years after the returns for 1923 and 1924 were filed within which to sue alleged transferee. Since the returns were filed in 1924 and 1925, the time for filing suit expired in the spring of 1928 and 1929. The suits having been brought in 1938 are barred by the statute of limitations.

On May 13, 1929, on November 20, 1929, and on February 24, 1930, the Commissioner was advised that Signal Gasoline Corporation had been dissolved. Under Section 280 (b) (1) of the Revenue Act of 1926, appellee had until March 15, 1930, within which to assess the trustees of Signal Gasoline Corporation or the Signal Oil and Gas Company, as the transferee. The appellee's failure to do so was due to its erroneous interpretation of the California law respecting dissolved corporations and not to any fault of the trustees or appellant. The present proceedings are barred by the statute of limitations.

3. If, Contrary to Appellant's Contention, the Alleged Assessments Are Held to Be Valid, They Were Made Against the First Transferees of the Tax-paying Corporations and Said Assessments Did Not Give the Appellee Six Years in Which to Sue Subsequent Transferees.

In Case No. 1460-Y, the facts clearly show that the taxes involved were the 1923 and 1924 taxes of Signal Gasoline Company; that this company dissolved, distributed its assets to Signal Gasoline Corporation; that Signal Gasoline Corporation dissolved and its assets eventually, after passing through its statutory trustees, came over to appellant, Signal Oil and Gas Company.

It is obvious, therefore, that Signal Oil and Gas Company is a transferee of the transferee of the assets of Signal Gasoline Company, the taxpaying corporation.

The Government is relying on a six-year period based upon an assessment made upon the first transferee to sue the second transferee. But the Supreme Court, in *United States v. Continental National Bank and Trust Company*, 305 U. S. 398, very clearly and definitely held that a timely assessment against the first transferee of the assets of the taxpayer did not give the Government six years in which to sue the second transferee of the assets of the taxpayer.

That case is, therefore, squarely in point and directly bars the action in the case of 1460-Y.

The important facts in the two cases are very similar and are as follows:

Description	Continental Case	Case 1460-Y
Taxable years involved:	1920,	1923, 1924
Character of original taxpayer:	Corporation	Corporation
Relation of Appellant to original taxpayer:	Transferee of a	Transferee T. of a T.
Did first transferee file a petition with the Board of Tax Appeals:	Yes	Yes
Was an alleged assessment made against the first transferee?		
Date	Yes-2-14-31	Yes-9-10-32
Was suit brought against second transferee without assessment against the defendant? Date	Yes-5- 6-32	Yes-9- 9-38
Period between filing of return of original taxpayer and bringing of suit in years	11	13-14
Period between assessment on first transferee and suit against second transferee in years	1¾	6

It is well established, therefore, that even if the assessment against Signal Gasoline Corporation for the taxes alleged to be due from Signal Gasoline Company for the years 1923 and 1924 was valid, that assessment, being on the first transferee, did not give the Government six

years in which to sue the second transferee, namely, appellant.

At the time appellee brought its suit, an assessment against the first transferee was thought to give the Government six years in which to sue subsequent transferees. The appellee doubtless relied on this misapprehension of the law, as it waited five years, eleven months and twenty-nine days before bringing suit. If appellee had not made that mistake of law, it might have taken some other timely action. But appellee did make that mistake of law, and is now casting about, trying to fasten the blame on appellant, by pleading estoppel.

As to the facts in Case No. 1460-Y, therefore, it is clear that the Supreme Court's decision in *U. S. v. Continental Nat. Bk. & Tr. Co.*, is squarely in point, and bars the suit.

In Case No. 1461-Y, the Supreme Court's decision in *U. S. v. Continental Bank and Trust Company* also bars the complaint but the facts do not stand out quite so clearly.

In this case the tax involved was the 1924 tax of Signal Gasoline Corporation. That corporation was dissolved in December of 1928 but the Commissioner of Internal Revenue purported to make an assessment against Signal Gasoline Corporation in October of 1932.

The appellee thought that it had six years from the alleged assessment in October of 1932 against Signal Gasoline Corporation to sue appellant.

Now it is not entirely clear as a matter of law whether the alleged assessment made in October, 1932, was purportedly made against Signal Gasoline Corporation or

against the statutory trustees of Signal Gasoline Corporation.

If the alleged assessment was purportedly made against Signal Gasoline Corporation, then said alleged assessment was void, as Signal Gasoline Corporation had been destroyed in 1928 on its dissolution, and the void assessment would not start a six-year period of limitations within which the Government could sue the transferees and this suit would be barred.

If the appellee contends that the assessment was really against the statutory trustees of the dissolved Signal Gasoline Corporation, then appellant contends that the suit is barred because the statutory trustees were the first transferees of Signal Gasoline Corporation, and an assessment against them as first transferees does not give the Government six years within which to sue appellant who was the second transferee of Signal Gasoline Corporation. (*U. S. v. Continental National Bank and Trust Company*, 305 U. S. 398.)

Appellant suggests that the alleged assessment made in October, 1932, in the name of Signal Gasoline Corporation was really made against the statutory trustees. Section 400 of the Civil Code of California as it stood in 1928 when Signal Gasoline Corporation was dissolved, provided in part as follows:

“* * * Such trustees shall have authority to sue for and recover the debts and property of the corporation, *and shall be jointly and severally liable to the creditors* and stockholders or members, to the extent of its property and effects that shall come into their hands.” (Emphasis supplied.)

It is thus indisputable that the trustees were the first transferees of the assets of Signal Gasoline Corporation.

Section 416 of the Code of Civil Procedure of the State of California as it stood in 1928 and as it stands today, reads in part as follows:

“In all cases where a corporation has forfeited its charter or right to do business in this state, *the persons who become the trustees of the corporation* and of its stockholders or members *may be sued in the corporate name of such corporation* in like manner as if no forfeiture had occurred and from the time of the service of the summons and a copy of the complaint in a court action, upon one of said trustees, or of the completion of the publication when service by publication is ordered, *the court is deemed to have acquired jurisdiction of all said trustees*, and to have control of all subsequent proceedings * * *” (Emphasis supplied.)

The jurisdiction which the court acquires is not jurisdiction of the dissolved corporation, however, but only of the trustees. (*Crossman v. Vivienda Water Company, supra*, and 7 Cal. Jur. 176.)

Consequently, the deficiency letter issued on December 28, 1929, in the name of Signal Gasoline Corporation was really issued to the trustees of the dissolved corporation and the petition filed in the name of Signal Gasoline Corporation was really the petition of the trustees. The Board proceedings and assessment were therefore probably valid as to the trustees but not as to the corporation.

The Government had six years from October 1, 1932, to sue the trustees, but did not do so. The suit against

the appellant herein, the second transferee, was not brought within four years of the filing of the return and is barred by the statute of limitations, the assessment against the trustees (the first transferees) not giving the Government six years within which to sue subsequent transferees. (*U. S. v. Continental Bank and Trust Company, supra.*)

In *Buzzard v. Helvering*, 77 Fed. (2d) 391, the statutory trustees of a dissolved California corporation filed an appeal with the Board of Tax Appeals, as trustees, but the petition was filed in the name of the dissolved company. The Court, after citing Section 400 of the Civil Code of California and *Crossman v. Vivienda Water Company, supra*, at page 395, said:

“* * * The appeal from the deficiency notice, we think, was an appeal by the trustees of the lumber company, however it may have been styled in the hearings or in the pleadings.”

Again at page 395 the court said:

“* * * and we think it also clear that the decision of the Board, sustaining the deficiency notice of the Commissioner, was no more or less than an ascertainment of the validity of the debt of the lumber company for which, under the tax statutes, petitioners, as trustees, were liable and bound to account under the tax laws and under the California statute.”

Also on the same page the court said:

“In this view we hold (1) * * *; (2) that the petition filed April 11, 1925, by the trustees for a redetermination of the deficiencies, however styled, was in legal effect an appeal by the trustees appointed to administer the affairs of the dissolved corporation; * * *”

Similarly in the case at bar the appeal filed by the statutory trustees of Signal Gasoline Corporation, though styled in the name of the corporation, was really an appeal by the trustees.

Since the appeal was filed by the trustees, the subsequent assessment was also against the trustees.

But as shown by the decision of the Supreme Court of the United States in *U. S. v. Continental Bank and Trust Company, supra*, an assessment made against the statutory trustees as first transferees does not give the Government six years within which to sue the second or later transferees, namely, the appellant herein.

It is apparent, therefore, that the deficiency letter issued by the Commissioner of Internal Revenue addressed to Signal Gasoline Corporation after that corporation has been dissolved and under California law utterly destroyed, was really addressed to the statutory trustees as transferees, and the petition they filed was in the capacity as trustees and transferees.

Under that view of the case, the proceeding before the Board and the assessment were valid as to the trustees, but since this was an assessment against the first transferees of the taxpayer corporation, Signal Gasoline Corporation, that assessment did not give the Government six years within which to sue the second transferee, namely, Signal Oil and Gas Company. (*U. S. v. Continental Bank and Trust Company, supra.*)

Summarizing as to Case No. 1461-Y, it seems clear from the law and the facts that if the purported proceeding before the Board and the purported assessment related to Signal Gasoline Corporation, they were entirely null

and void and there is no evidence that any additional tax is due, as that corporation had been dissolved long before the purported assessment was made. Consequently, the appellee cannot base a six year period to sue appellant upon such void assessment.

On the other hand, if the proceedings before the Board and the assessment related to the statutory trustees of Signal Gasoline Corporation, a dissolved corporation, then such assessment was probably valid and is evidence that the additional tax is owing but such assessment was against the first transferees of Signal Gasoline Corporation and this assessment does not give the Government six years within which to sue the subsequent transferee, namely, appellant.

Consequently, the complaint in Case No. 1461-Y is barred by the statute of limitations.

4. Statute of Limitations Provisions in Taxing Statutes Must Be Strictly Construed Against the Government.

In *United States v. Updike*, 281 U. S. 489, the Supreme Court of the United States, p. 496, said:

“In any event, we think this is a fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, including provisions of limitations embodied therein, to be construed strictly in favor of the taxpayer. *Bowers v. New York & Albany Company*, 273 U. S. 346, 349, 47 Supr. Ct. 389, 71 Law Ed. 676.”

In *Bowers v. New York & Albany Lighterage Company*, *supra*, the court, among other things, said at page 390:

“The provision (limitation) is a part of the taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. *Eidman v. Martinez*, 184 U. S. 578, 583, 22 S. Ct. 515, 46 Law. Ed. 697; *Shwab v. Doyle*, 258 U. S. 529, 536, 42 S. Ct. 391, 66 Law. Ed. 746, 26 A. L. R. 1454.”

If there is any doubt about the statute of limitations point in this case, the doubt must be resolved in favor of the taxpayer and not in favor of the Government. There is nothing inequitable in pleading the statute of limitations; certainly nothing inequitable in pleading the statute of limitations when the appellee brings suit in 1938 on a presumed assessment made in 1932 for the 1923 and 1924 taxes of other corporations whose assets passed through the hands of three successive transferees before reaching the appellant.

As said by the Supreme Court in *United States v. Urdike*, 281 U. S. 489, 495:

“In such case, to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought.”

5. **Appellant Is Not Estopped From Asserting the Bar of the Statute of Limitations, Appellee Having at All Times Been in Possession of All the Material Facts and Having Initially Made an Error of Law Which Error Misled the Appellant's Predecessors Into Further Errors of Law, if They Made Any Errors of Law, But Estoppel Does Not Arise From Errors or Mutual Errors of Law.**

In the conclusions of law approved by the District Court [Tr. p. 60] the following is included:

“That the defendant is estopped from setting up the bar of the statute of limitations to the causes of action set forth in complaints No. 1460-Y and 1461-Y.”

Apparently the acts relied upon by the appellee to establish the estoppel are as follows:

1. A series of corporations each having in its name the word “Signal” have been in existence and have dissolved, distributing their assets to their successors, the assets finally reaching the appellant. But appellee never had any difficulty in determining the separate tax liabilities of the several corporate entities.

2. On May 13, 1929, the corporation income tax return for 1928 was filed with the Collector of Internal Revenue at Los Angeles, California, on behalf of the Signal Gasoline Corporation and was signed by S. B. Mosher, as president, and O. W. March, as treasurer, of the said corporation. But the return stated that Signal Gasoline Corporation had been dissolved in December of 1928.

3. Petitions in the name of Signal Gasoline Corporation were filed with the Board of Tax Appeals on February 24, 1930, after Signal Gasoline Corporation had been

dissolved. But these petitions stated that Signal Gasoline Corporation had been dissolved and that the statutory trustees were acting.

4. A protest against a proposed deficiency for 1927 income tax of Signal Gasoline Corporation was signed about November 20, 1929. This protest was signed "Signal Gasoline Corporation, by S. B. Mosher". But at the left of said signature five other trustees of the dissolved corporation signed their names. The protest was verified by Melvin D. Wilson, one of the attorneys in fact and in law, which stated that he had verified it for the reason that when the statutory trustees signed the protest, they neglected to acknowledge it before a notary public.

5. On July 27, 1931, a letter signed "Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller", was mailed to the Collector at Los Angeles, California, stating that there was pending before the United States Board of Tax Appeals the question of whether Signal Gasoline Corporation was liable for the 1923 income tax liability of Signal Gasoline Company. But this letter, and the letters mentioned in the following three paragraphs, were not written until more than two years after the Commissioner had been informed of the dissolution of Signal Gasoline Corporation. Furthermore, J. H. Rounsavell was not the statutory trustee of the dissolved corporation; nor even one of them. Consequently, he had no standing or authority to represent the dissolved corporation, or the trustees.

6. On January 20, 1932, a letter to the Commissioner of Internal Revenue was written and signed "Signal Gasoline Corporation, by J. H. Rounsavell, Comptroller", advising the Commissioner to change his records so that all

correspondence relative to the income tax matters of the Signal Gasoline Corporation for 1924 and 1928 inclusive would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California. [Tr. p. 81.]

7. On January 20, 1932, a letter to the Commissioner signed "Signal Gasoline Company, by J. H. Rounsavell, Comptroller", was mailed advising the Commissioner to change his records so that all correspondence pertaining to the income tax liability of Signal Gasoline Company for 1922 to 1924, inclusive, would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

8. On January 20, 1932, a letter to the Commissioner signed "Signal Gasoline Company, Inc., by J. H. Rounsavell, Comptroller", was mailed advising the Commissioner to change his records so that all correspondence pertaining to the income tax liability of Signal Gasoline Company, Inc. for 1925, 1926, 1927, and 1928, inclusive, would be sent to 1200 Signal Oil Building, 811 West Seventh Street, Los Angeles, California.

9. An offer to compromise the taxes here involved, acknowledged October 21, 1932, was filed shortly thereafter. It was signed "Signal Gasoline Corporation, by S. B. Mosher, H. M. Mosher, O. W. March, R. H. Green, C. Lav. Lazalere". In the body of the compromise and in the acknowledgment it was stated that the corporation had been dissolved and that the persons who signed the protest were the statutory trustees of the dissolved corporation.

10. A similar offer, acknowledged January 23, 1933, and filed shortly thereafter, stated that Signal Gasoline Corporation was dissolved December 12, 1928. It was

signed "Signal Gasoline Corporation, by Melvin D. Wilson, Attorney in Fact". The acknowledgment as well as the offer itself stated that Signal Gasoline Corporation was a dissolved corporation.

11. That at all times herein mentioned and considered, substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation, as were the officers and directors of the Signal Oil and Gas Company and officers and directors or trustees of Signal Gasoline Company. [Tr. p. 57, par. 22.]

12. That in addition to the acts heretofore described, the statutory trustees of the Signal Gasoline Corporation after its dissolution, who were those persons who were the officers and directors of the defendant, persisted in transacting business affairs of the dissolved corporation in the name of the Signal Gasoline Corporation, and in particular the negotiations with the United States of America regarding the tax liabilities of the Signal Gasoline Corporation. [Tr. p. 58, par. 25.]

13. The attorneys who represented the former corporations before the Board and before the Bureau of Internal Revenue are now representing the appellant in the case at bar.

The appellee argued for estoppel in the court below and induced the court to include the doctrine of estoppel in the court's conclusions of law.

It is difficult to understand the District Court's minute order in Case No. 1460-Y [Tr. pp. 45-46] unless it is assumed that the court relied on the doctrine of estoppel. The court said that the assessment against Signal Gasoline Corporation was valid. It then said that the case

was not the case of a suit against the transferee of a transferee and hence the taxpayer could not invoke the doctrine of *United States v. Continental National Bank and Trust Company*.

It was perfectly clear before the District Court as it is here that Signal Gasoline Corporation was the transferee of the assets of the Signal Gasoline Company and that appellant is the transferee of the assets of the Signal Gasoline Corporation. Since the tax involved in Case No. 1460-Y relates to the 1923 and 1924 taxes of Signal Gasoline Company, it is too clear for argument that the case involved here is a suit against the transferee of a transferee.

If we assume that the District Court understood the facts, then we must assume that the District Court in effect held that this entire chain of corporations constituted one corporation by the doctrine of estoppel, and that the assessment against the Signal Gasoline Corporation for the tax of the Signal Gasoline Company was in effect an assessment against the appellant.

In Case No. 1461-Y, the District Court apparently did not rely on the doctrine of estoppel, but simply relied on the case of *McPherson v. Commissioner*, 54 Fed. (2d) 751, to the effect that the assessment against Signal Gasoline Corporation was valid as against that corporation and was not an assessment against the statutory trustees.

In other words, in Case No. 1460-Y the court seems to have relied on the doctrine of estoppel, whereas in the Case No. 1461-Y it did not rely on that doctrine but apparently relied on the case of *McPherson v. Commissioner*, *supra*.

(a) THE ESTOPPEL POINT.

The elements of estoppel are too well known to this court to require extensive citation of authority. In *Van Antwerp v. U. S.*, 92 Fed. (2d) 871, statements relative to estoppel were made at page 875 as follows:

“The burden of proving every essential element of an estoppel is upon the parties seeking to set up an estoppel. *Hanneman v. Richter*, 177 Fed. (2d) 563, 566; *Merrill v. Tobin*, 30 Fed. 738, 743; *Mackey Wall Plaster Company v. U. S. Gypsum Company*, 244 Fed. 275, 277; *Hull v. Commissioner*, 87 Fed. (2d) 260, 262; *Commissioner v. Union Pacific Railroad Company*, 86 Fed. (2d) 637, 640.

“These essential elements of estoppel, each of which the Government must prove in this case, are set up in an authority cited in the Government’s brief;

“To constitute estoppel (1) there must be false representation or wrongful misleading silence. (2) The error must originate in a statement of fact and not in an opinion or a statement of law. (3) The person claiming the benefits of estoppel must be ignorant of the true facts, and (4) be adversely affected by the acts or statements of the person against whom an estoppel is claimed.

“*U. S. v. Scott & Son*, C. C. A. 1, 69 Fed. (2d) 728, 732.”

See, also, to the same effect, *Helvering v. Brooklyn City Railroad Company*, 72 Fed. (2d) 274; *Tidewater Oil Company*, 29 B. T. A. 1208; *Merten’s Law of Federal Income Taxation*, 1939, Cum. Suppl. 2511-12-13.

The evidence shows very clearly that the Commissioner of Internal Revenue treated all the corporations involved

as separate corporations, computed their income and their tax liabilities separately, issued separate deficiency letters, and throughout clearly recognized the separate corporate entities.

The evidence shows that the Commissioner was notified of the dissolution of Signal Gasoline Corporation as follows :

On May 13, 1929 [R. 82, par. aa];

November 20, 1929 [R. 79-80-95-6-7; Plaintiff's Ex. 7];

February 24, 1930 [R. 75].

The Commissioner indicated that he knew of the dissolution in 1928, of Signal Gasoline Corporation as early as August 16, 1930, and March 30, 1931, as his communications so stated. [R. 82-3.]

Thus the Commissioner knew within six months after the dissolution of Signal Gasoline Corporation that it had been dissolved. The Commissioner knew this for approximately twenty months before the Board of Tax Appeals purported to render its decision against Signal Gasoline Corporation.

Consequently there was no misrepresentation or concealment of material facts by Signal Gasoline Corporation to the Commissioner of Internal Revenue. The facts were as well known to the Commissioner as they were to the trustees of the former corporation. There was no intention on the part of the trustees of the dissolved Signal Gasoline Corporation that the Commissioner, the Board of Tax Appeals, or anyone else should treat Signal Gasoline Corporation as though it were still in existence. The

trustees notified everyone with whom they came in contact that Signal Gasoline Corporation had been dissolved.

The Commissioner did not rely upon the supposed continued existence of Signal Gasoline Corporation. The Commissioner knew long before he proceeded against Signal Gasoline Corporation for the 1923-1924 taxes that the latter had been dissolved. He knew in May of 1929 that the Signal Gasoline Corporation had been dissolved whereas he did not proceed against it for the 1924 taxes until December of 1929.

When, in the petition filed February 24, 1930, the Commissioner was again notified that Signal Gasoline Corporation had been dissolved, he had until December 31st, 1930, to assess the trustees or the appellant herein. (Sec. 280 (b) (1) Revenue Act of 1926.) That he did not do so was due to no fault of the trustees or the appellant.

As a matter of fact, the Commissioner simply made a mistake of law as to the effect of Section 400 of the Civil Code of California. The Commissioner was presumed to know the law of California and therefore was presumed to know that Signal Gasoline Corporation had been completely destroyed upon its dissolution in December of 1928. In fact, the Commissioner had knowledge that under California laws a corporation was completely destroyed by its dissolution. See *Sanborn Bros. Successors*, 14 B. T. A. 1059, decided Jan. 8, 1929. In that case the head-note of the Board's decision reads as follows:

"A corporation of California had forfeited its charter in 1917 under the California statute of 1915, and under California law its affairs thereafter were in the hands of the former directors as trustees. Respondent determined deficiencies against the corpora-

tion for 1919 and the former stockholders, by one of their number, filed a petition with the Board. Held, since the stockholders are not the persons against whom the deficiency has been determined and has no authority to represent such persons, the Board has no jurisdiction.”

Inasmuch as the Commissioner at the time he issued his deficiency notice on December 28, 1929, had been informed that Signal Gasoline Corporation had been dissolved, the Commissioner's action in addressing the dissolved corporation as Signal Gasoline Corporation really led the trustees of Signal Gasoline Corporation to file an appeal with the United States Board of Tax Appeals in the name of Signal Gasoline Corporation. The petition stated, however, that the corporation had been dissolved and the dissolved corporation was acting through its statutory trustees.

If the petition was not properly entitled in order to constitute a pleading by the trustees as such, the error was one of law and was induced by the manner in which the Commissioner addressed the deficiency letter.

It is well established that estoppel cannot exist as to a mistake or mutual mistake of law, or as to an expression of opinion, as distinguished from a representation of facts. (*Helvering v. Salvage*, 297 U. S. 106; *Van Antwerp v. U. S.*, 92 Fed. (2d) 871; *Hawke v. Commissioner*, 109 Fed. (2d) 946; *Tidewater Oil Co.*, 29 B. T. A. 1208; *S. F. Scott & Son v. Commissioner*, 69 Fed. (2d) 728; *Union Pacific R. R. Co.*, 32 B. T. A. 383, affirmed in *Commissioner v. Union Pacific R. R. Co.*, 86 Fed. (2d) 637; *U. S. v. Dickinson*, 95 Fed. (2d) 65; *Grand Central Public Market, Inc. v. U. S.*, 22 Fed. Supp. 119, appeal dismissed 98 Fed. (2d) 1023, C. C. A. 9.)

The Commissioner had a large number of skilled employees, attorneys and others engaged in collecting taxes in California, and certainly had as much opportunity to know the law of California as did the trustees of the dissolved corporation. The Commissioner deals with hundreds of cases of corporations and dissolved corporations, whereas the trustees had only the one case. When the Commissioner wrote to the dissolved corporation in the name of the former corporation, he led the trustees and their counsel into thinking that that was the proper manner in which the trustees of a dissolved corporation would handle its tax matters.

It is very doubtful if any mistake of law has been made by appellant's predecessors or their trustees.

As a matter of law, the deficiency letters issued in the name of Signal Gasoline Corporation, after it had been dissolved, was probably a letter issued to the trustees, and the petition filed by the trustees in the name of the dissolved corporation was a petition by and for the trustees. (See the discussion on this point, pp. 26 to 31, incl.)

But an assessment against the trustees (first transferees) would not give the Government six years to sue the appellant, who was a subsequent transferee (second transferee). (*U. S. v. Continental National Bank & Trust Co., supra.*) Probably the only mistake which has been made, was the appellee's erroneous opinion that a valid assessment against the first transferee would give it six years to sue the second transferee.

Furthermore, the acts upon which appellee would base its estoppel are not the acts of the appellant, but of corporations whose existence has long since been terminated by law, or the trustees thereof.

Appellant should not be estopped from pleading the statute of limitations.

(b) THE MCPHERSON CASE.

In its minute order in Case No. 1461-Y, the court below relied on the case of *McPherson v. Commissioner*, 54 Fed. (2d) 751, as its authority for the proposition that the purported assessments against Signal Gasoline Corporation were valid, even though that corporation had long before been dissolved.

The *McPherson* case was decided by this court, and related to a dissolved California corporation. The lower court apparently felt bound by that decision, even though, in *G. M. Standifer Construction Corporation v. Commissioner*, 78 Fed. (2d) 285, this court more thoroughly considered the law as to the effect of the dissolution of a corporation, when no provision is made for continuing the corporate existence. In the latter case, this court held that a dissolution under laws similar to California's applicable law completely destroys the corporation and no subsequent proceedings affecting it are valid.

It is very apparent that, in the *McPherson* case, there was not called to the attention of the court the California cases holding that corporations dissolved before July 14, 1929, were absolutely destroyed, whereas corporations dissolved thereafter continue to exist for the purpose of winding up their affairs.

Furthermore, in the *McPherson* case, the statutory trustees signed a waiver of the statute of limitations, designating themselves as surviving trustees of Leighton's, Inc., a dissolved corporation taxpayer. It will be noted that the waiver was by the trustees and not by the cor-

poration and that the trustees did not appeal a later deficiency notice and consequently an assessment was made in the name of the corporation, but apparently against the statutory trustees, as a matter of law. Within the statutory time thereafter, the Commissioner proceeded against the trustees individually, as transferees of the assets of the former corporation.

The court, in the *McPherson* case, said that whether the former corporation was designated by its name or under the term "a dissolved corporation", or as "a dissolved corporation in the hands of trustees", served to suggest a matter of form only and not one attended by substantial differences. That was possibly true in the *McPherson* case since the statutory trustees had given a waiver as trustees, and it is reasonable to suppose that the further proceedings by the Commissioner were against the statutory trustees.

In Case No. 1461-Y, however, it makes a difference whether the alleged assessment was against Signal Gasoline Corporation, or against the statutory trustees. If against the corporation, and if, contrary to appellant's contentions, it were held valid, it would possibly give appellee six years within which to sue first or even second transferees of the assets.

On the other hand, if the assessment was against the statutory trustees, it would be valid. But since the statutory trustees were the first transferees of the assets of Signal Gasoline Corporation, a valid assessment against

them would not give the appellee six years in which to sue the second transferee, namely, appellant. (*U. S. v. Continental National Bank & Trust Co., supra.*)

It should be noted that the decision of this court in *McPherson v. Commissioner*, *supra*, is not based upon the grounds of estoppel; consequently, it must be considered that the decision was overruled by this court in its later decision in the case of *G. M. Standifer Construction Company v. Commissioner*, 78 Fed. (2d) 285; or if not so overruled, then it is submitted that the *McPherson* case is not, since the decision of the Supreme Court in *U. S. v. Continental National Bank & Trust Co., supra*, good law, since to ignore the difference between making a void assessment against a dissolved corporation or a valid assessment against its statutory trustees, does not give the principle announced in the *U. S. v. Continental* case a chance to operate.

In any event, in the *McPherson* case, the suit before this court (and probably the assessment itself) was against the first transferees, namely, the statutory trustees, whereas in the cases at bar, the suits are against the second transferees. Since the *McPherson* case was decided, the Supreme Court has held that an assessment against the first transferees does not give the Government six years in which to sue second transferees.

Consequently, the *McPherson* case does not establish the solidity of the assessment against Signal Gasoline Corporation.

Summary.

It is respectfully submitted that the suits herein are barred by the statute of limitations because brought more than four years after the taxpayer corporations filed their 1923 and 1924 income tax returns; because the Commissioner of Internal Revenue never assessed the alleged tax against the appellant herein; because the alleged assessments against Signal Gasoline Corporation were invalid and hence there is no evidence that any tax is owing from anyone, and do not create a basis for a six year period for suit; and even if there had been a valid assessment against that corporation or its trustees, this would not have given the appellee six years within which to sue appellant, second transferee of the assets of the taxpayer corporation; that the Supreme Court decision in *U. S. v. Continental National Bank & Trust Co.*, *supra*, is squarely in point; that neither appellant nor any of the predecessor companies nor trustees of dissolved corporations have concealed from, or misrepresented any facts to, the Commissioner of Internal Revenue; and if any mistake was made, it was originated by the Commissioner, who made a mistake of law, and if any of the taxpayers made a mistake, it was a mistake of law induced by the mistake of the Commissioner, but no estoppel is based upon innocent or mutual mistakes of law.

The judgments against appellant should be reversed.

Respectfully submitted,

MELVIN D. WILSON,
Attorney for Appellant.

APPENDIX.

Statutes Involved.

Section 277(a)(1) of the Revenue Act of 1924 provides as follows:

“The amount of income, excess profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921, and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.”

Section 278(d) of the Revenue Act of 1926 reads as follows:

“Where the assessment of any income, excess-profits, or war-profits tax imposed by this Title or by prior Acts of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint, or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.”

Section 400 of the Civil Code of California, in effect until August 14, 1929, provided as follows:

“Sec. 400. DIRECTORS, TRUSTEES OF CREDITORS, ON DISSOLUTION. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the

creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. Death, resignation or failure or inability to act shall constitute a vacancy in the position of trustee, which vacancy shall be filled by appointment by the Superior Court upon petition of any person or creditor interested in the property of such corporation. Such trustees may be sued in any court in this state by any person having a claim against such corporation or its property. Trustees of corporations heretofore dissolved or whose charters have heretofore been forfeited by law shall have and discharge in the same manner and under the same obligations, all the powers and duties herein prescribed. Vacancies in the office of trustees of such corporation shall be filled as hereinbefore provided; provided, however, that any deed executed in the name of such corporation by the president or vice-president and secretary or assistant secretary after a dissolution thereof or after a forfeiture of the charter of such corporation or after the suspension of the corporate rights, privileges and powers of such corporation, which deed shall have been duly recorded in the proper book of records of the county in which the land or any portion thereof so conveyed is situated, for a period of five years, shall have the same force and effect as if executed and delivered prior to said dissolution, forfeiture or suspension.”

No. 9813.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,

Appellant,

vs.

UNITED STATES,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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No. 9813.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY, a corporation,

Appellant.

vs.

UNITED STATES,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinions of the District Court [R. 45-47] are not reported.

Jurisdiction.

This is a consolidated appeal from judgments entered for the United States in the amounts of \$20,217.82 and \$4,569.52 with interest as provided by law on December 26, 1940. [R. 61-63.] Notices of appeal were filed on March 20, 1941. [R. 63-65.] The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether certain assessments against the Signal Gasoline Corporation are invalid and subject to attack in these suits against the transferee of the Signal Gasoline Corporation to collect such assessments.

2. Whether these suits are barred by the statute of limitations.

Statutes Involved.

The applicable statutes will be found in the Appendix, *infra*, pages 1 *et seq.*

Statement.

A. PRELIMINARY STATEMENT.

The basic facts indicating the nature of these suits which have been consolidated on this appeal may be briefly stated. Corporation A (Signal Gasoline Company) transferred its assets and liabilities to Corporation B (Signal Gasoline Corporation) in return for B's stock. Corporation A was dissolved and the stock distributed to its shareholders. Corporation C (the appellant Signal Oil and Gas Company) acquired all the stock of B which it liquidated, taking over all of B's assets. Two suits were brought by the United States against C to recover:

(1) Income taxes assessed against B for 1923 and 1924 as the transferee of A. (Case No. 1460-Y.)

(2) Income taxes assessed against B for 1924 as the original taxpayer. (Case No. 1461-Y, formerly 1461-RJ.)

B. DETAILS OF CORPORATE CHANGES AND ACTIVITIES.

On May 1, 1924, pursuant to an agreement between the Signal Gasoline Company, a California corporation, and the Signal Gasoline Corporation, a California corporation, all the assets of the Signal Gasoline Company were turned over to the Signal Gasoline Corporation for 400,000 shares of stock of the Signal Gasoline Corporation, and on September 11, 1924, the Signal Gasoline Company was dissolved; the 400,000 shares received by the Signal Gasoline Company in exchange for its assets and liabilities were distributed to its stockholders. [R. 49-50.]

The Signal Gasoline Company, Incorporated, a corporation now dissolved, was prior to its dissolution a holding company for the stock of the Signal Gasoline Corporation. On July 31, 1928, it owned 419,500 shares of the stock of the Signal Gasoline Corporation, which was 93.22% of the outstanding 450,005 shares of the Signal Gasoline Corporation; the balance of 30,505 shares of the stock outstanding of the Signal Gasoline Corporation (6.78%)¹ was owned by individual stockholders of the Signal Gasoline Company, Incorporated. [R. 50.]

On August 1, 1928, the appellant, Signal Oil and Gas Company, acquired all the assets of the Signal Gasoline Company, Incorporated, which, as noted above, included 93.22% of the stock of the Signal Gasoline Corporation. In November, 1928, the appellant acquired the remaining

¹Throughout the record this is referred to as 4.23%; obviously, a mathematical error.

6.78% of the outstanding stock of the Signal Gasoline Corporation from the individual stockholders of the Signal Gasoline Company. [R. 50-51.]

The Signal Gasoline Corporation was dissolved by court decree on December 12, 1928. This decree of dissolution reads in part as follows [R. 86, 87-88] :

The voluntary application for dissolution of the Signal Gasoline Corporation, a domestic corporation, coming on regularly this day for hearing and determination, the Court finds: * * * 5. * * * that the Board of Directors of said corporation under its Articles of Incorporation consisted of six (6) members and does now consist of six (6) members, namely:

S. B. Mosher
O. W. March
Ross McCollum
H. M. Mosher
C. LaV. Larzelere
R. H. Green.

Wherefore, it is Ordered, Adjudged and Decreed, that said Corporation, the Signal Gasoline Corporation be, and the same is, and is hereby declared to be dissolved. It is further Ordered and Decreed that said S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and R. H. Green are entitled to be, and are by the Court herein appointed, trustees for the stockholders of said corporation, with power and direction to settle all the affairs of said corporation, and to distribute and convey all the property of said corporation to each of said stockholders, in proportion to the number of shares owned and held by said stockholders when said distribution and conveyance shall be made. * * *

On December 14, 1928, all of the assets of the Signal Gasoline Corporation were conveyed to the appellant subject to all liabilities, including taxes, of the Signal Gasoline Corporation. [R. 51.] This conveyance reads in part as follows [R. 83, 84]:

That whereas, on the 12th day of December, 1928, the Superior Court of the State of California in and for the County of Los Angeles made and filed its decree dissolving the Signal Gasoline Corporation,
* * * Now therefore, in consideration of the premises S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and E. H. Green, as Trustees for the stockholders of said Signal Gasoline Corporation, a dissolved corporation, and also in their individual capacities, do hereby assign, transfer, grant, convey, deliver and distribute to said Signal Oil and Gas Company, a Delaware corporation, all of the assets, business and property * * * possessed by said dissolved corporation at the time of its dissolution, * * * and subject to all outstanding obligations and liabilities thereon, and subject to the payment of income taxes that may be due to the United States Government covering operations of said dissolved corporation during the current year and all sums that may be found due covering income taxes for previous years. * * *

By reason of this dissolution and distribution the Signal Gasoline Corporation was and is left without any money, assets or property to pay the taxes hereinafter shown to be due the United States. [R. 56.] The assets so acquired by the appellant were far in excess of such taxes. [R. 57.]

At all times involved substantially the same persons were officers and directors or statutory trustees of the Signal Gasoline Corporation as were the officers and directors of the appellant, and officers and directors of the Signal Gasoline Company, Incorporated. [R. 57.]

In addition to the acts subsequently described, the statutory trustees of the Signal Gasoline Corporation after its dissolution, who were those persons who were the officers and directors of the appellant, persisted in transacting business affairs of the dissolved corporation in the name of the Signal Gasoline Corporation and in particular in the negotiations with the United States of America regarding the tax liabilities of the Signal Gasoline Corporation. [R. 58.]

C. FACTS CONCERNING ASSESSMENTS AGAINST SIGNAL GASOLINE CORPORATION.

The details concerning the assessments against the Signal Gasoline Corporation are given under Argument I. The following general facts may here be noted.

In October, 1928, the Commissioner of Internal Revenue proposed a tax deficiency against the Signal Gasoline Corporation for the year 1923 as transferee of the Signal Gasoline Company. [R. 5-6.] In December, 1929, a similar tax deficiency was proposed for the year 1924. [R. 6.] The Signal Gasoline Corporation through its trustees prosecuted petitions for redetermination of these taxes by the Board of Tax Appeals. The Board sustained the Commissioner's determinations, 25 B. T. A. 532, and assessments were accordingly made on Septem-

ber 10, 1932. [R. 52-53.] Suit was instituted on September 9, 1938, against these appellants to collect the assessments. [R. 2-9.]

In September, 1929, the Commissioner of Internal Revenue proposed a tax deficiency against the Signal Gasoline Corporation as an original taxpayer for the year 1924. Through its trustees it prosecuted a petition for redetermination of the taxes by the Board of Tax Appeals. The Board sustained the Commissioner's determination, 25 B. T. A. 861, and an assessment was accordingly made on October 1, 1932. [R. 54-56.] Suit was instituted on September 9, 1938, against these appellants to collect the assessment. [R. 9-15.]

The District Court entered judgment for the United States in both cases [R. 61-63] and these consolidated appeals were thereafter taken. [R. 63-65.]

Summary of Argument.

The assessments against the Signal Oil Corporation are valid. They were entered pursuant to decisions of the Board of Tax Appeals in proceedings instituted and prosecuted by the corporation through its duly authorized trustees.

The statute of limitations does not bar these suits. Tax assessments may be collected by proceedings in court commenced within six years after the assessments were made. The assessments against the Signal Gasoline Corporation were entered on September 10, 1932, and October 1, 1932. These suits were instituted on September 9, 1938.

ARGUMENT.

I.

The Assessments Against the Signal Gasoline Corporation Were Valid and May Not Be Questioned by the Appellant.

These suits are based upon three assessments made in 1932 against the Signal Gasoline Corporation, the corporation whose assets were received by the appellant. The validity of the assessments is questioned by the appellant. The facts concerning them are as follows:

A. ASSESSMENTS AGAINST SIGNAL GASOLINE CORPORATION AS TRANSFEREE OF SIGNAL GASOLINE COMPANY.

On October 2, 1928, the Commissioner of Internal Revenue mailed a letter to the Signal Gasoline Corporation proposing a tax deficiency against that corporation as transferee of the Signal Gasoline Company in the amount of \$468.33 for the year 1923. [R. 52, 74.] An appeal from this proposed deficiency was taken in the name of the Signal Gasoline Corporation and was docketed with the Board of Tax Appeals on November 19, 1928 (Docket No. 41532). [R. 52, 75.]

On December 12, 1928, a Decree of Dissolution was entered by the Superior Court of the State of California dissolving the Signal Gasoline Corporation upon its own application. This decree also ordered that [R. 87-88]:

* * * S. B. Mosher, H. M. Mosher, O. W. March, Ross McCollum, C. LaV. Larzelere and R. H. Green are entitled to be, and are by the Court herein appointed, trustees for the stockholders of said corporation, with power and direction to settle all the

affairs of said corporation and to distribute and convey all the property of said corporation to each of said stockholders, in proportion to the number of shares owned and held by said stockholders when said distribution and conveyance shall be made
* * *

On December 28, 1929, the Commissioner of Internal Revenue mailed a letter to the Signal Gasoline Corporation proposing a tax deficiency against that corporation as transferee of the Signal Gasoline Company in the amount of \$2,672.53 for the period ended September 11, 1924. [R. 52, 74.] An appeal from this proposed deficiency was taken in the name of the Signal Gasoline Corporation and was docketed with the Board of Tax Appeals on February 24, 1930 (Docket No. 47620). This petition in its first paragraph stated that "The petitioner is a dissolved corporation acting through its statutory trustees." The verification on the petition was signed by six persons and stated that they were "the statutory trustees of Signal Gasoline Corporation, a dissolved corporation." [R. 52, 75.]

Both petitions for redetermination above referred to were signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners. [R. 75.]

On February 16, 1932, the Board of Tax Appeals promulgated a single opinion with respect to both petitions. (25 B. T. A. 532.) The petitioner was described as "a dissolved California corporation, acting through its statutory trustees" and the opinion recited that "The petitioner concedes the tax liability [of the Signal Gasoline Company], but contends that it is not liable at law or in equity for the deficiency asserted." (25 B. T. A. 533.) The

Board concluded that transferee liability existed, and accordingly, no appeal having been taken, an assessment was made on September 10, 1932, against the Signal Gasoline Corporation in the amount of \$468.33 plus interest of \$227.96 for the taxable year 1923 and \$2,672.53 plus interest of \$1,200.70 for the period ended September 11, 1924. [R. 52-53, 88-90.]

B. ASSESSMENT AGAINST SIGNAL GASOLINE CORPORATION FOR ITS OWN 1924 TAXES.

The Signal Gasoline Corporation filed its income tax return for the calendar year 1924 on or about May 13, 1925. [R. 53, 76.] On December 3, 1928, it signed and filed a consent extending the time for assessing any income taxes due for the year 1924 until December 31, 1929. [R. 54, 76, 91.]

On December 28, 1929, the Commissioner of Internal Revenue mailed a letter to the Signal Gasoline Corporation proposing a tax deficiency against that corporation in the amount of \$14,137.05 for the period May 1 to December 31, 1924. This letter also proposed an assessment of other additional tax liabilities for the calendar years 1925 and 1926 which are not now in issue. [R. 54, 76-77.] An appeal from these proposed deficiencies was taken in the name of the Signal Gasoline Corporation and was docketed with the Board of Tax Appeals on or about February 24, 1930 (Docket No. 47621). This petition, signed by Robert N. Miller and Melvin D. Wilson as attorneys for the petitioners, in its first paragraph stated that "The petitioner is a dissolved California corporation acting through its statutory trustees." The petition was verified by the six trustees. [R. 55-56, 77-78.]

On March 14, 1932, the Board of Tax Appeals promulgated its opinion with respect to this petition. (25 B. T. A. 861.) The petitioner was described as "a dissolved California corporation acting through its statutory trustees." (25 B. T. A. 862.) The Board concluded that the proposed deficiencies were correct, and accordingly, no appeal having been taken with respect to the year 1924, an assessment was made on October 1, 1932, against the Signal Gasoline Corporation, in the amount of \$14,137.05 plus interest of \$6,080.77 for the period May 1 to December 31, 1924. [R. 56, 78, 97-99.]

The appellant urges that because the Signal Gasoline Corporation was dissolved in December, 1928, the proceedings before the Board of Tax Appeals and the subsequent assessments were null and void. The decisions of this and other courts establish that this contention is erroneous.

The Signal Gasoline Corporation was a California corporation. Prior to the general statutory revision of the California corporation law in 1931, Section 400 of the California Civil Code, as amended in 1921 [Appendix, *infra*], provided:

Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation,

and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. * * *

When the Signal Gasoline Corporation was dissolved in 1928, a court order was entered as heretofore noted naming six trustees "with power and direction to settle all the affairs" of the corporation. All of the proceedings before the Board of Tax Appeals were prosecuted by these trustees who were clearly acting within the authority granted by the court. It therefore follows that such proceedings and the ensuing assessments adjudging the liabilities of the Signal Gasoline Corporation were valid. This conclusion is supported by the decision of this Court in *McPherson v. Commissioner*, 54 F. (2d) 751. There, a California corporation was dissolved in June, 1920. The trustees thereafter filed with the Commissioner of Internal Revenue a waiver of the time prescribed by law for making assessment of taxes against the corporation, and subsequently, within the proper time as extended, such assessment was made. Thereafter, in an action before the Board of Tax Appeals involving the transferee liability of these trustees individually they urged (p. 752):

* * * (1) That the commissioner was not authorized under the law to make the deficiency assessment against a corporation that had been dissolved. (2) That the waiver extending the time within which the assessment might be made was invalid.

* * * * *

This court rejected both contentions saying (pp. 752, 753):

Upon the dissolution of the corporation, the petitioner, together with Barthel, as directors of the corporation, became trustees, with the power and duty to adjust any unsettled affairs of the corporation; to collect its receivables and to pay its debts. Section 400 of the Civil Code of California, as it read during all of the time important to these tax proceedings, contained the following provisions:

* * * * *

Those provisions do not limit the period during which the trustees shall continue to act. Hence, the implication is plain that they shall continue to act so long as any of the affairs of the dissolved corporation remain unsettled. *United States v. Laflin* (C. C. A.), 24 F. (2d) 683; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. We find no reason to distinguish a case where trustees are acting to liquidate corporate affairs under the provisions of the California statute from those cases where liquidators are provided for to act in the corporate name. The corporation here concerned became liable for the tax during the year when it was functioning under its charter. That tax the commissioner was entitled to assess in some form, and whether he designated the corporation by name, as though it were still fully alive, or designated its estate under the term "a dissolved corporation," or designated it as "a dissolved corporation in the hands of trustees" seems to suggest a matter of form only and not one attended by substantial differences. It was necessary that the total amount of the tax which accrued against the corporation during its active existence be ascertained, in order that the tax might be

collected and the assets followed into whosoever hands they might be found. The fixing of the tax charge as it had accrued against the corporation was a necessary prerequisite to the ascertainment of the proportionate amounts due from the transferees of the assets. The former directors, acting as trustees, as the law provided they should act, were legally bound to take notice of the assessment proceedings of which they were given notice, following the return which they made to the commissioner.

* * * * *

The validity of proceedings before the Board of Tax Appeals by a dissolved corporation through its trustees was also questioned in *Buzard v. Helvering*, 77 F. (2d) 391 (App. D. C.). There, the corporation had been dissolved in 1922 and subsequently a petition before the Board of Tax Appeals was filed for the corporation by an attorney authorized to do so by the corporate trustees. In sustaining the jurisdiction of the Board of Tax Appeals the court said (pp. 394, 395):

Placing themselves squarely on the California law, as interpreted and pronounced by the Supreme Court of California in the Crossman case, petitioners say that, since the Navarro Lumber Company had been legally dissolved in 1922, it could not thereafter be served with process, could not appear, and could not itself admit anything, nor authorize anyone to do so for it. That, in these circumstances, all that was done in its behalf by its trustees in the matter of the appeal to the Board of Tax Appeals was a nullity, and there-

fore had no effect, and could have no effect, in extending the periods of limitations. * * * But, in our view, petitioners' premise is not sustainable on either of two grounds.

* * * * *

In taking the appeal, petitioners set out the authority on which they acted. They speak of themselves as the trustees of the lumber company "now in process of liquidation" and point to the statute of California for their authority to act. By reference to that statute (Civil Code, §400 as amended by St. Cal. 1921, c. 383, p. 574) we find that they have power to settle the affairs of the corporation, collect and pay outstanding debts, to sue and to be sued in relation to the debts and property of the corporation, and that they shall be jointly and severally liable to creditors to the extent of any property that shall come into their hands. It was in recognition of these duties and responsibilities that they filed the appeal. We think it cannot be urged that they were without authority, or the Board without jurisdiction. * * *

The case at bar does not involve the situation as in *G. M. Standifer Const. Corp. v. Commissioner*, 78 F. (2d) 285 (C. C. A. 9th), where an Oregon corporation, fully dissolved and without either statutory or judicially designated trustees, attempted nevertheless to litigate as a live corporation.² In the case at bar, to the contrary, the pro-

²In *California Iron Yards Co. v. Commissioner*, 47 F. (2d) 514, 516, this Court referred to a California corporation dissolved in 1921 as "one of suspended animation," citing 7 *Cal. Jur.* 640; *Hanson v. Choynski*, 180 Cal. 275, 180 Pac. 816; *Rossi v. Caire*, 186 Cal. 544, 199 Pac. 1042; *Ransomme-Crummey Co. v. Superior Court*, 188 Cal. 393, 205 Pac. 446.

ceedings before the Board on behalf of the corporation were prosecuted by its duly authorized trustees. Had it so desired the corporation could have appealed to this Court for a review of the Board's decisions. As a matter of fact, it did appeal to this Court from the previously mentioned Board opinion in 25 B. T. A. 861 in so far as it determined the corporation's tax liabilities for 1925 and 1926. This Court reversed the Board's decision on the merits and remanded the case for recomputation. (*Signal Gasoline Corporation v. Commissioner*, 66 F. (2d) 886.) The Board made such recomputation, 30 B. T. A. 568. Again the corporation effected an appeal to this Court at which time the Board's action was affirmed.

Signal Gasoline Corp. v. Commissioner, 77 F. (2d) 728.³

The appellant's brief (p. 20) cites four decisions of the Board of Tax Appeals dealing with the effect of corporate dissolution upon Board proceedings. They are not in point since none of them was an action prosecuted by the properly constituted trustees.⁴ Actually, the views of the Board of Tax Appeals with respect to dissolved California

³In both appeals, the counsel for the Signal Gasoline Corporation was the present attorney for the appellant.

⁴*Sanborn Brothers v. Commissioner*, 14 B. T. A. 1059, was a purely officious suit by a stockholder of a dissolved California corporation. *S. Hirsch Distilling Co. v. Commissioner*, 14 B. T. A. 1073, concerned a Missouri corporation totally dissolved without any person being authorized to maintain an action. The dismissal in *Iberville Wholesale Grocery Co. Ltd. v. Commissioner*, 15 B. T. A. 645, was entered because of lack of evidence as to the trustee's authority, but the case was reinstated when such authority was shown, 17 B. T. A. 235. *Union Plate & Wire Co. v. Commissioner*, 17 B. T. A. 1229, was also based upon the absence of a person authorized to act for the corporation.

corporations are in accord with the Government's views here expressed. See

Buzard v. Commissioner, 28 B. T. A. 247.

Apart from the foregoing reasons, it is clear that the appellant should not now be permitted to question the validity of the assessments made against the Signal Gasoline Corporation. The appellant as sole stockholder of that corporation acquired all its assets and, as will be shown hereafter, became liable at law as well as in equity for its unpaid taxes. The trustees of the Signal Gasoline Corporation were the officers and directors of the appellant and their actions before the Board of Tax Appeals were for the benefit of and in order to protect the interests of the appellant. In such circumstances, the appellant ought not to be permitted to assail the validity of the Board proceedings and the assessments against the Signal Gasoline Corporation. It has been so held in similar situations.

Warner Collieries Co. v. United States, 63 F. (2d) 34 (C. C. A. 6th);

Buzard v. Helvering, 77 F. (2d) 391 (App. D. C.).

II.

The Statute of Limitations Does Not Bar These Actions.

The appellant received the assets of the Signal Gasoline Corporation subject to the express condition that it assume payment of all taxes owing by the transferor. It thus became liable at law not only for the direct tax liabilities of the Signal Gasoline Corporation (*American Equitable Assur. Co. of New York v. Helvering*, 68 F. (2d) 46 (C. C. A. 2nd); *Helvering v. Wheeling Mold & Foundry Co.*, 71 F. (2d) 749 (C. C. A. 4th)), but also for the tax liabilities of that corporation as transferee of the Signal Gasoline Company.

Continental Baking Co. v. Helvering, 75 F. (2d) 243 (App. D. C.).

The appellant also became liable in equity for such taxes since as sole stockholder of the Signal Gasoline Corporation it acquired all the assets of that corporation.

United States v. Updike, 281 U. S. 489;

Phillips v. Commissioner, 283 U. S. 589;

Pann v. United States, 44 F. (2d) 321 (C. C. A. 9th).

Prior to the Revenue Act of 1926 such transferee liability could only be enforced by an action at law or by a bill in equity. That act, however, by Section 280(a)(1) provided that transferee liability could be enforced in the same manner and subject to the same limitations as that

of any delinquent taxpayer. Section 280(a)(1) reads as follows:⁵

(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

The time within which assessments could be made against transferees was specified in Section 280(b)(c) and (d). [Appendix, *infra*.] It will be observed that these subsections which followed Section 280(a) are concerned with limitations upon assessments and not upon collections. As the Supreme Court has stated, “the suc-

⁵Section 280 of the Revenue Act of 1926 is applicable to taxes imposed by the Revenue Act of 1926 and prior acts. Essentially similar provisions applicable to taxes imposed by subsequent Revenue Acts may be found in Section 311 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and Section 311 of the Internal Revenue Code. (See, also, amendments effected by Section 814 of the Revenue Act of 1938.)

ceeding paragraphs contain provisions of limitation in respect of assessment, they contain none in respect of collection.”

United States v. Updike, 281 U. S. 489, 494.

In order to ascertain the period of limitation upon collection against a transferee it is necessary to refer to Section 280(a) which states that the liability of a transferee shall be “* * * collected * * * in the same manner and subject to the same provisions and limitations as in the case of a deficiency in tax imposed by this title (including * * * the provisions authorizing * * * proceedings in court for collection * * *).” This section therefore incorporates the limitation provision which is normally applicable to all taxpayers, *i. e.*, Section 278(d). This interrelation of Section 280(a) and Section 278(d) was expressly recognized in *United States v. Updike, supra*. In that case the Court concluded (p. 494) that “the effect of the language above quoted from Section 280 is to read into that section and make applicable to the transferee equally with the original taxpayer, the provision of Section 278(d) in relation to the period of limitation for the collection of a tax.”

Section 278(d) of the Revenue Act of 1926 provides:

Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding

in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

Thus, a six-year limitation was placed upon proceedings in court to collect tax assessments. The applicability of this limitation to the consolidated cases at bar will now be discussed.

Case No. 1461-Y (Originally 1461-R J)—This action seeks to recover from the appellant the amount of taxes assessed for the year 1924 against the Signal Gasoline Corporation as an original taxpayer. The assessment was made on October 1, 1932. [R. 56.] This suit was instituted September 9, 1938. [R. 15.] Since the action was brought within six years after the assessment against the Signal Gasoline Corporation, it was timely.

Revenue Act of 1926, Secs. 280(a) and 278(d).

See

United States v. Updike, *supra*;

United States v. Adams, 92 F. (2d) 395 (C. C. A. 5th).

Case No. 1460-Y—This action seeks to recover from the appellant the amount of taxes for the years 1923 and 1924 assessed against the Signal Gasoline Corporation as transferee of the Signal Gasoline Company. These assessments were made on September 10, 1932. [R. 53.] This suit was instituted September 9, 1938. [R. 9.] Since the

action was brought within six years after the assessments against the Signal Gasoline Corporation, it too was timely.

Revenue Act of 1926, Secs. 280(a) and 278(d).

See

City Nat. Bank v. Commissioner, 55 F. (2d) 1073
(C. C. A. 5th).

The only difference between these two actions is that the former is to recover upon an assessment against the Signal Gasoline Corporation for an original tax liability and the latter is to recover upon an assessment against the Signal Gasoline Corporation for a transferee tax liability. The Revenue Act makes no distinction between these two situations and establishes a single rule of limitation with respect to both. If the liability of a transferee is not made the subject of an assessment then suit for collection from the transferee may be instituted within six years after the assessment was made against the transferor. (See *United States v. Adams, supra.*) If the liability of the transferee is reduced to an assessment, then suit for collection from the transferee may be instituted within six years from the date of that assessment.⁶ See

City Nat. Bank v. Commissioner, supra.

Case No. 1461-Y presents no problem. The Signal Gasoline Corporation was liable for 1924 taxes. The assessment for such taxes was timely made and within six

⁶The appellant in fact concedes that a suit against a transferee can be instituted within six years after a transferee assessment has been made against him. It views the assessment of October 1, 1932, as in effect a transferee assessment against the trustees of the Signal Gasoline Corporation and admits (Br. 28) that "The Government had six years from October 1, 1932, to sue the trustees * * *."

years thereafter suit for collection was instituted against the appellant.

Case No. 1460-Y presents a slight variation from the usual case since the tax assessments against the Signal Gasoline Corporation were for transferee liabilities. It is equally clear, however, that the six-year limitation applies. Had the Signal Gasoline Corporation retained assets, the Commissioner of Internal Revenue could have sued that corporation within six years after the transferee assessments were made against it. To urge that this period of collection can be reduced by a voluntary transfer of the assets of the Signal Gasoline Corporation to its sole stockholder is to urge a patent form of tax evasion. The Signal Gasoline Corporation with respect to its transferee liabilities was a "taxpayer." The Supreme Court has said that "it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property * * * is subjected to the burden." (*United States v. Updike, supra*, p. 494. Cf. *City of New York v. Feiring*, decided by the Supreme Court May 26, 1941.) The appellant as transferee of the Signal Gasoline Corporation was a transferee of a taxpayer within the meaning of Section 280(a), and therefore could be sued for the collection of any assessment which had been made within six years against the Signal Gasoline Corporation.

The appellant's case rests upon *United States v. Continental Bank*, 305 U. S. 398. In that case in 1926, James Duggan petitioned the Board of Tax Appeals to redetermine certain proposed tax deficiencies asserted to be due from him as transferee of corporate assets. In March, 1929, he died but no personal representative of the testator or other person applied for substitution of a party to carry

on the proceeding and none was ordered. The Board's order sustaining the Commissioner was entered in January, 1931. On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan. The administrator of his estate distributed the assets to various beneficiaries including the Continental National Bank and Trust Company as trustee. The United States thereafter instituted suit against these beneficiaries to recover the amount of the tax. In denying the Government's right to a recovery, the Supreme Court (Mr. Justice Stone and Mr. Justice Black dissenting) said that the statute was not broad enough to impose on "* * * testamentary transferees of the estate of the testator * * * any liability on account of the assessment against the testator" (p. 404) and moreover concluded that for stated reasons the assessment against the testator had not been made in time.

It seems clear that the decision in the *Continental* case has no bearing on case No. 1461-Y. That suit is simply a suit against a transferee to recover an original tax liability of the transferor which had been assessed against the transferor. It is not a suit against a transferee of a transferee as the appellant urges on the theory that the assessment was in effect against the trustees as transferees of the Signal Gasoline Corporation. The assessment was a determination of the tax liability of the Signal Gasoline Corporation⁷ which under Section 281(b) of the Revenue

⁷See *McPherson v. Commissioner*, 54 F. (2d) 751, 752 (C. C. A. 9th); *United States v. Russell*, 22 F. (2d) 249, 251 (C. C. A. 5th).

Act of 1926 was to be collected from the assets of the corporation. Those assets were taken over by the appellant and this suit instituted against it within six years from the date of the assessment.

Nor is there any validity in the assertion that the *Continental* case controls in case No. 1460-Y. Here, the assessments against the Signal Gasoline Corporation were made timely, and whatever may be the propriety of denying recovery against the testamentary transferees of an individual taxpayer does not apply where the transferee is a corporation which as sole stockholder voluntarily acquired the assets of another corporation. This is particularly true where as here there was an express assumption of the tax liabilities of the transferor. The *Continental* case does not establish the broad ruling contended for by the appellant and no valid reason has been suggested for extending it beyond its facts. Certainly, it should not be extended to cases involving the acquisition of corporate assets by its sole stockholder, another corporation.

Where justice requires it the courts will not be bound by the fiction of the corporate entity.⁸ Here, the transferor and the transferee were separate entities in legal form only. The appellant was the sole stockholder of the Signal Gasoline Corporation. Its officers and directors were the trustees of the Signal Gasoline Corporation. In the transfer of the assets of the Signal Gasoline Corporation to the

⁸This principle has already been applied to the appellant in other litigation. See *Wiethoff v. Refining Properties, Ltd.*, 8 Cal. App. (2d) 64, 68.

appellant, there was at no time any change in either beneficial interest or control. It is therefore particularly appropriate that this Court should not permit the appellant to maintain before it the legal fiction of two distinct entities for the purpose of setting up the defense of the statute of limitations and to avoid the payment of taxes justly due.
Cf.

Higgins v. Smith, 308 U. S. 473.

Conclusion.

It is submitted that the decision of the District Court was correct and therefore that the judgment should be affirmed.

Respectfully submitted,

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July 22, 1941.



APPENDIX.

Statutes.

Revenue Act of 1926, c. 27, 44 Stat. 9:

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

Sec. 277. (a) Except as provided in section 278—

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

* * * * *

Sec. 278. * * *

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable

*of
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Taffere
cases*

thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

* * * * *

CLAIMS AGAINST TRANSFERRED ASSETS.

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suit for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

X

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter. (As amended by Sec. 505 of the Revenue Act of 1928.)

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a

transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

FIDUCIARIES.

Section 281. * * *

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

* * * * *

California Civil Code as amended in 1921 (Kerr's Biennial Supplement, Annotated (1921), p. 465):

§400. DIRECTORS TRUSTEES OF CREDITORS, ON DISSOLUTION. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full powers to settled the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands. * * *

No. 9813

IN THE

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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FILED

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SIGNAL OIL AND GAS COMPANY,

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vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

I.

The Alleged Assessments Against Signal Gasoline Corporation Are Invalid.

Appellee cites no authority for its contention that the alleged assessments against Signal Gasoline Corporation were valid, excepting *McPherson v. Commissioner*, 54 Fed. (2d) 751, and *Buzard v. Helvering*, 77 Fed. (2d) 391.

As shown in appellant's opening brief, the *McPherson* case has been substantially overruled by this Court in *G. M. Standifer Construction Corp. v. Commissioner*, 78 Fed. (2d) 285, and rendered inapplicable to cases of

this type by the decision of the Supreme Court of the United States in *United States v. Continental National Bank & Trust Co.*, 305 U. S. 398.

The decision in *Buzard v. Helvering*, *supra*, is not in point at all, as there the proceedings in the Court of Appeals of the District of Columbia were by the statutory trustees as an entity and not by the corporation. See page 29 of appellant's opening brief.

On page 15 of its brief, appellee attempts to distinguish the case of *G. M. Standifer Construction Corp v. Commissioner*, *supra*, by stating that it was a fully dissolved corporation and without either statutory or judicially designated trustee, attempting, nevertheless, to litigate as a live corporation. That decision establishes a principle which appellant is relying on in this proceeding, namely, that when a corporation is dissolved and there is no statutory provision for continuing its corporate existence for any purpose, the dissolution of the corporation absolutely destroys it and all pending actions against the corporation are abated, and the corporation is thereafter incapable of acting or suing or being sued. See, also, *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U. S. 257; *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335, and *Brandon v. Umpqua Lumber Co.*, 166 Cal. 322, 136 Pac. 62, 7 Cal. Jur. 37-38.

The only difference between the *Standifer* case and the case at bar was that in the *Standifer* case the corporation continued in existence for five years, acting through its statutory trustees, after which it became entirely de-

stroyed, whereas in the case at bar, Signal Gasoline Corporation became destroyed immediately, but a new entity, its statutory trustees, was set up to take over the assets and liabilities. In each case, however, the corporation was destroyed, one at the end of five years and the other immediately.

On page 17 of its brief, appellee contends that appellant should be estopped from questioning the validity of the alleged assessments made against the Signal Gasoline Corporation. Appellee cites *Warner Collieries Co. v. United States*, 63 Fed. (2d) 34; *Buzard v. Helvering*, 77 Fed. (2d) 391.

In *Warner Collieries Co. v. United States*, *supra*, there were grounds for estoppel, whereas in the case at bar, there are no grounds for estoppel, as is shown by the fact that appellee has not squarely met the issue of estoppel. It has merely asked for the benefits of the doctrine of estoppel, without squarely meeting the issue or discussing the subject.

In *Warner Collieries Co. v. United States*, *supra*, a petition was filed by the dissolved corporation in its name, which petition was signed by persons who designated themselves as officers of the corporation, and the corporate seal was used. No statement was made in the petition that the company had been dissolved. Before the Board of Tax Appeals, also, the representatives of the corporation signed a stipulation, substantially reducing the taxes and agreeing that the taxes could be assessed against the corporation. Furthermore, the successor corporation which was

held liable for the tax, ratified the acts of its directors who signed the petition as officers of the dissolved corporation. Consequently, the Board could safely proceed on the theory that it was dealing with an existing corporation. Naturally that corporation or its successors could not contend that the Board was put on notice of the dissolution, and therefore could not contend that the proceedings were void. There was a clear case of estoppel on the basis of the facts involved.

As to *Buzard v. Helvering*, also cited by appellant on page 17, as authority for its estoppel plea, as has been previously shown the proceeding there was not against the corporation but against the statutory trustees as an entity, hence it is not a case which holds that an assessment can be made against a dissolved corporation because of the estoppel of its representatives. No suit of a corporation was involved, but it was a suit against the new entities, the statutory trustees.

II.

The Statute of Limitations Bars These Actions.

Appellant, on pages 18 to 23, inclusive, of its brief, merely points out a few matters which have always been understood in this case, namely, that appellant, except for the statute of limitations, is liable under law and equity for the additional taxes (if any) of Signal Gasoline Company and Signal Gasoline Corporation; that Section 280 of the Revenue Act of 1926 has nothing to do with suits without assessment; that the statute of limitations involved in the case at bar is Section 278 (d) of the Revenue Act of 1926; that if the alleged assessments made against Signal Gasoline Corporation were valid, as to case No. 1460-Y, the only question remaining is whether under Section 278 (d), the Government had six years after an assessment against a first transferee to sue a second transferee, and as to case No. 1461-Y, one question is the same as that stated with respect to case No. 1460-Y, and the further question is whether the statutory trustees of Signal Gasoline Corporation constituted the first transferees and appellant the second transferee of the assets of Signal Gasoline Corporation.

CASE No. 1460-Y.

As to case No. 1460-Y, involving the taxes of Signal Gasoline Company, allegedly assessed against Signal Gasoline Corporation, and sought to be recovered in suit against appellant, the appellant sets up two defenses.

The appellant contends that the suit is barred for two reasons: First, that the alleged assessment against Signal

Gasoline Corporation was void; and second, that even if it was valid, it did not give the Government six years within which to sue appellant, because appellant is the transferee of the transferee of Signal Gasoline Company, and the case of *United States v. Continental National Bank & Trust Co.*, *supra*, decided that Section 278 (d) does not give the Government six years within which to sue the transferee of a transferee.

The appellee is apparently not satisfied with the decision of the Supreme Court in *United States v. Continental National Bank & Trust Co.*, seemingly casting some doubt upon its present validity, on pages 24 and 25 of the brief. Appellee also, on page 25 of its brief, says the *Continental* case is not applicable, except to transferees of an individual taxpayer, and bases this contention again on its plea of estoppel. But of course there was as strong an equity in favor of the Government in the *United States v. Continental* case as there is in the case at bar; that is to say, the tax was obviously owed in the *Continental* case, but the court held that the Government was delinquent in proceeding against the proper transferees. The tax that the Government lost there was huge, amounting to over \$295,000 with interest. Furthermore, the original taxpayer there, as in the case at bar, was a corporation.

The appellee says, on page 25 of its brief, that the fiction of corporate entity will be disregarded if justice requires it. The appellee impliedly contends that justice does not require the use of the statute of limitations specifically enacted by Congress. As a matter of fact, justice requires that there be a repose with respect to litigation, and that principle is just as important to the proper working of the national fisc as is the collection

of a tax in an individual case. The citizens of the United States have to have confidence in the taxing authorities and the courts construing tax statutes, including confidence in the protection afforded by the statute of limitations, or they will rely upon their own ingenuity for self protection, thereby requiring a great deal more tax litigation, which would be ruinous to the national fisc. No government can afford to have litigation with respect to but a very small percentage of its cases, but if people lose confidence in the tax tribunals to fairly decide all questions of taxation, including questions of the statute of limitations, the result would be very detrimental to the Government.

It need not be pointed out to this Court that there is a statute of limitations on suits for recovering taxes overpaid, nor that the Government very diligently invokes the statute of limitations on every possible occasion. Naturally, the Government pleads the statute of limitations in those cases because justice requires it.

What is justice for the Government is justice for the taxpayer. Furthermore, taxes are not determined by the application of equitable principles, but by the application of the statutory language. An exception is made in cases calling for the doctrine of estoppel, but the facts of the present case do not invoke the principle of estoppel in the Government's favor.

Appellee says, on pages 25 and 26 of its brief, that the various corporate entities involved in this matter, were separate entities in legal form only, and that in transferring the assets from one to another there was no change at any time in either beneficial interests or control, and that the Court should disregard the legal fiction of separate entities, and prevent appellant from setting up the defense of the statute of limitations.

This again is a plea for estoppel without squarely meeting the issues involved in the question of estoppel, and without proving the various elements of estoppel to be present. The question of estoppel is gone into quite extensively in appellant's opening brief. The facts were all fully and clearly known by the appellee, within proper time for it to act. The corporations were all separate and tax liabilities were separately recognized by appellee; the various procedures in the audit of the return were entirely separate, and appellee is simply trying to put the blame on others for its own delinquencies. When the Government brings suit in 1938 for 1923 and 1924 taxes of corporations which had long been dissolved, of which dissolution the Government had full and timely notice, it would seem that it was a proper case for the application of the statute of limitations to put a repose to the said litigation.

As can be seen from any daily paper, the stock of appellant is listed upon the stock exchange and it may be assumed that its stockholders constantly change from time to time. It would be entirely inequitable to hold appellant liable for the tax liabilities of other corporations which accrued seventeen and eighteen years ago, on account of transfers which occurred eleven years ago, because of the acts of a few of appellant's stockholders, who were trustees of predecessor corporation, taken approximately ten years ago.

Appellee, on page 25 of its brief, cites the case of *Wiethoff v. Refining Properties, Ltd.*, 8 Cal. App. (2d) 64, as authority for the proposition that the Court should look through the fiction of corporate entities.

The cited case has no bearing on the situation involved in the case at bar. Entirely different issues were involved.

Furthermore, none of the companies involved in the case at bar, except appellant, were involved in the cited case. Other corporations involved in the cited case were Signal Oil and Gas Company of California, Pacific Service Stations and Refining Properties, Ltd., all apparently organized after Signal Gasoline Company and Signal Gasoline Corporation had been dissolved. The situation there involved several companies which were in existence at the same time. In the case at bar, the situation involved corporations which had been dissolved before, or about the time appellant was organized.

Appellant also cites, on page 26 of its brief, *Higgins v. Smith*, 308 U. S. 473, as authority for the proposition that separate corporate entities in the case at bar should be disregarded.

But in *Higgins v. Smith. supra*, the question was the deductibility of a loss purportedly sustained by the sole stockholder of a corporation, on the sale of securities to that company. There a jury had found that the corporation was created for tax savings purposes of the sole stockholder and was simply an agent of the taxpayer. There, also, the issue involved was the matter of a deduction against gross income. The courts have uniformly held that in claiming deductions, the statute must be strictly construed and the taxpayer must prove that his claim comes strictly within the statutory language.

In the case of the statute of limitations, however, the courts have ruled that questions of doubt must be ruled strictly against the Government, and in favor of the taxpayer. See pages 31 and 32 of appellant's opening brief.

In *Higgins v. Smith*, the taxpayer deliberately sought to save taxes by setting up a corporation and had that

subject uppermost in his mind in making transactions with it. In the case at bar, all transactions involved were regular business transactions involving a substantial number of persons with no deliberate attempt or consciousness of tax saving, or tax avoidance.

CASE No. 1461-Y.

The principal contentions of the appellant with respect to Case No. 1461-Y can be restated as follows:

1. That the alleged assessment made against Signal Gasoline Corporation was invalid; hence no tax was shown to be due, and no six-year period for bringing suit was started by the void assessment;

2. That even if it were valid, it would not give the Government six years within which to sue a transferee of a transferee;

3. Appellant is the transferee of a transferee of the assets of Signal Gasoline Corporation, because its statutory trustees were the first transferees of the assets of Signal Gasoline Corporation, and appellant received the assets from the first transferees, namely, the statutory trustees of Signal Gasoline Corporation.

Appellee does not cite any authority in answering the last contention listed above. As shown on pages 27 to 30, inclusive, of appellant's opening brief, the statutory trustees of Signal Gasoline Corporation constituted the first transferees. Consequently, appellant was the second transferee of the assets of Signal Gasoline Corporation and under *United States v. Continental National Bank*

and *Trust Co.*, *supra*, the Government did not have six years after the alleged assessment was made against the first transferee to sue appellant, the second transferee of the assets of Signal Gasoline Corporation.

As pointed out in appellant's opening brief, the appellee made two mistakes of law and is now trying to shift the loss and blame to other persons. These mistakes were the following: First, after having been advised that Signal Gasoline Corporation had been dissolved, it failed to properly construe Section 400 of the California Civil Code, to the effect that the dissolution of a California corporation completely destroyed it. Appellee thereafter continued to regard the dissolved corporation as being in existence, instead of dealing with its statutory trustees as a separate entity; second, appellee construed Section 278 (d) of the Revenue Act of 1926 as giving it a six-year period within which to sue the transferee of a transferee of the assets of a taxpayer. This was erroneous, as shown by the decision of the Supreme Court of the United States, in *United States v. Continental National Bank and Trust Co.*, *supra*.

The appellee made these mistakes of law and took the wrong procedure and the present suits are barred by the statute of limitations, and appellee should not be permitted to do what this Court barred it from doing in *Van Antwerp v. United States*, 92 Fed. (2d) 871. There this Court said:

“* * * It was incumbent upon the Commissioner to reaudit her income for that year as soon as the

Malcom decision advised him of his error. This for the protection of the Treasury, which otherwise would lose what she owed, because of the Government's wrong interpretation of the law. Fourteen months remained for such reaudit and deficiency assessment, during which the Government did nothing. Having failed to do so, it seeks to transfer the loss from that neglect to the appellant taxpayer."

In conclusion it is submitted that the decisions for the District Court were incorrect and that the judgments should be reversed.

Dated: July 31, 1941.

Respectfully submitted,

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