

debtor also. Certainly we find no prohibition in the bankruptcy law. *Myers v. International Trust Co.*, 273 U. S. 380. By making a separate contract, although in the same instrument, he calls the separate liability into being, as presumably he intends to and as he has a right to do. *Robinson v. Seaboard National Bank of New York*, 247 Fed. 667, 668, 669, *Ibid*, 1007. The intent and transaction are not illegal in Texas. Their specific effect depends on the Bankruptcy Act.

We have dealt with the only question which induced the granting of the writ. It does not appear to us necessary to go into further details.

Decree reversed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. JONES, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 349. Argued March 8, 1928.—Decided March 19, 1928.

An experienced car inspector was found dead with his lantern, at night, between a track on which a freight train was being made up and the main track parallel to it, over which a train, by which he was probably killed, had passed with much noise and a bright light, but with bell silent, twenty minutes before his body was discovered. He was last seen alive twenty minutes before the train passed. There were indications that there was nothing to inspect at the time when the accident occurred.

Held, that a verdict of damages based on the assumption that he was engaged in inspecting the freight cars, relying on the customary ringing of the bell, and so absorbed in his work that he did not hear the approaching train, was mere guess-work. P. 304.
291 S. W. 528, reversed.

CERTIORARI, 275 U. S. 514, to a judgment of the Supreme Court of Texas, which, reversing the Court of Civil Appeals, affirmed a judgment for damages recovered from

the railway in an action under the Federal Employers' Liability Act. The judgment of the Supreme Court was entered on the recommendation of the Commission of Appeals. See 282 S. W. 312; 287 *Id.* 304.

Mr. A. F. Smith, with whom *Messrs. Frank H. Moore, J. J. King, J. Q. Mahaffey*, and *S. W. Moore* were on the brief, for petitioner.

Mr. S. P. Jones, with whom *Mr. Franklin Jones* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action under the Employers' Liability Act for the death of one R. D. Ferguson, who was a car inspector on the petitioner's road. No one saw the death, but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train, but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witness say was not rung on this occasion. The Court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he

was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether if the case for the plaintiff were stronger the principle of *Chesapeake & Ohio Ry. Co. v. Nixon*, 271 U. S. 218, would apply.

Judgment reversed.

FAIRBANKS, MORSE & COMPANY ET AL. v. AMERICAN VALVE & METER COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 262. Returns to rule to show cause submitted February 20, 1928.—Decided March 19, 1928.

1. The Circuit Court of Appeals may decline to reexamine the evidence on appeal when not condensed and stated as required by Equity Rule 75b. P. 308
2. But where the evidence was stated and approved in accordance with a practice theretofore prevailing in the circuit with the implied sanction of the Circuit Court of Appeals, and where one of the judges of that court had made an order declaring that the transcript was received as a sufficient compliance with the equity rules, it was error to proceed to a determination of the case without considering the evidence before affording the appellants an opportunity to comply with Rule 75b, by remitting the transcript to the District Court for further proceedings in conformity therewith. *Barber Asphalt Co. v. Standard Co.*, 275 U. S. 372. P. 308.
3. Such opportunity was not given by an order allowing the appellants to withdraw the transcript for 30 days; they were entitled to a specific order operating as a direction to the District Court. P. 309.