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Record No. 1236

EDWARDS COMPANY, INCORPORATED,

VS.

ROBERT D. DEIHL.

FROM THE CIRCUIT COURT OF NORTHUMBERLAND COUNTY, VA.

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

160 Va 587

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

EDWARDS COMPANY, INCORPORATED,

vs.

ROBERT D. DIEHL.

PETITION FOR WRIT OF ERROR.

*To the Honorable Chief Justice and Associate Judges of the
Supreme Court of Appeals of Virginia:*

Your petitioner, Edwards Company, Incorporated, a corporation, chartered under the laws of the State of Virginia with its principal office at Reedville, Northumberland County, Virginia, respectfully represents that the circuit court of Northumberland County, Virginia, on the 9th day of January, 1932, rendered a final judgment against it in favor of Robert D. Diehl in the amount of five hundred dollars, with interest from the date of said judgment and costs, all of which is shown by a certified copy of the judgment of said court entered on the 9th day of January, 1932, and filed with the record in this case, and your petitioner exhibits as a part of this petition a transcript of the record of the proceedings in said action.

Your petitioner is advised and represents that the said judgment is erroneous and that it is aggrieved thereby.

STATEMENT OF FACTS.

The Edwards Company, Inc., operates a Menhaden Fish Fertilizer and Oil Factory near Reedville in Northumberland County, Virginia, and four fishing steamships, which go out into the waters of the Chesapeake and the Atlantic Ocean and with purse nets catch the fish known as Menhaden and

bring them in to the factory, where they are cooked and the oil is pressed out of them, and they are dried and ground and converted into a product having a high percentage of ammonia, which is used either in the making of commercial fertilizer or food stuffs for animals and fowls. The species of fish known as Menhaden runs usually in schools and are usually caught in large numbers. Reedville, Virginia, is the world center of this business which has been operated there for many years and there has grown up a class of skilled fishermen and workmen in this business. There are at present eight factories, located on the harbor at Reedville known as Cockrell's Creek, which maintain a fleet of thirty-five fishing steamships, which fish the Chesapeake Bay and the Atlantic Ocean from Long Island, New York, to Charleston, South Carolina. A purse net is a net varying in depth but usually between fifty and sixty feet deep and from nine hundred to twelve hundred feet long, around the top of which there is a series of corks which hold it on the surface of the water, and around the bottom of which is a series of leads which will cause the purse net to assume somewhat of a perpendicular position. Around the bottom of the net where the leads are is a series of rings, through which passes a purse line. When a school of fish has been located from the mast-head the drive-boatsman rows out in a small boat and points out to the captain the location of the fish, and also indicates the direction in which they are travelling, he always keeping his boat a little ahead of the fish. The purse net is carried in two purse boats, which are boats about thirty-five feet long and eight feet wide and very heavily built. When the purse boats leave the steamer to make a set they are clamped side by side and rowed around the body of the fish and far enough ahead of them to allow the net to be thrown out and encircle the fish before they hit the net. The boats are then separated and are rowed around the body of the fish, the net being cast out of the stern of each purse boat. When the fish have been encircled the boats are brought side and side and a large piece of iron or lead, known as a "Tom", and in which there are two eye-bolts, and through which eye-bolts is attached a block, through which each end of the purse line spoken of above passes, is then dropped overboard and the two ends of the purse line, the boats being then clamped together, runs across the two boats several times through blocks attached for that purpose. The crew then proceed to pull on this purse line and thereby to close the bottom of the purse net and in this method the school of fish are enclosed as it

were in a big bag. There are usually about fifteen men in each of the purse boats.

There is on every fishing steamer a tall mast, near the top of which men can stand or sit in a place known as the "Crow's Nest". Here the captain, who is generally not only master of the boat but head fisherman, as was the case in this proceeding, takes his position to look for fish, frequently using an ordinary set of field glasses. The captain, mate or drive-boatman are supposed to be in the Crow's Nest at all times during daylight and while on the fishing ground and the presence of the fish is detected at considerable distance by the difference in the color and appearance of the water or by the whip of the fish, the difference in the color and appearance frequently being extremely slight. It is therefore quite evident that a considerable degree of experience and skill and the most excellent eyesight is absolutely necessary not only in the catching of the fish after they are found but more particularly in the finding of the fish. When fishing is good large numbers of this species, which is a non-edible fish, are caught, occasionally as many as five or six thousand in the course of a day. During the past years this industry has suffered a great deal financially, partly on account of the scarcity of the fish but in recent years mainly on account of the low price of the product. Many of the concerns have become insolvent and gone out of business and those that are still operating have lost heavily.

It appears from the evidence that Robert D. Diehl had been captain of Menhaden fishing steamships for twelve or thirteen years prior to the season of 1931, said season being fixed by law as beginning on the third Tuesday in June of each year and ending on the first day of December of every year. On December 9, 1930, Captain Diehl wrote to Mr. W. A. Edwards, the general manager of the Edwards Company, Inc., and applied to fish the steamer, "W. L. Messick", belonging to said company. On the same day the company replied through Mr. Edwards and suggested that Captain Diehl come around to their office and talk the matter over. Some time later that month Captain Diehl went to the office of the company and had a talk with Mr. Edwards, the general manager. Both Captain Diehl and Mr. Edwards agreed in their testimony that Mr. Edwards explained to Captain Diehl that it was uncertain whether or not the Edwards Company would fish at all during the coming season; that even if they did fish, it was uncertain when the fishing would begin and when it would stop, as this would depend

on the amount of fish caught and the value of same. Nothing was agreed to during that talk but some time later after or during the Christmas Holidays of 1930, Captain Diehl came again to the office of the company and according to the evidence of both Captain Diehl and Mr. Edwards, Mr. Edwards again explained to him that there was no certainty as to whether or not the company would fish and if it did, there would be no certainty when they would begin fishing or when they would stop as this would depend entirely upon the amount of fish caught and the value of same. On this occasion the evidence shows a verbal agreement was entered into between the company and Captain Diehl to the effect that if the company did fish at all, Captain Diehl would be given command as captain and head fisherman of the steamer, W. L. Messick, but that there would be no certainty as to when the company would begin fishing or how long it would fish, all of which would depend on the amount of fish caught and the value thereof, and it was further agreed that Captain Diehl should employ the fishing crew, the pilot and the mate; that the company would employ the engineers and firemen, and that they would receive compensation in accordance with a scale of wages that would be agreed upon later by all the managers of the companies operating in that section. According to the evidence no agreement was made and in fact nothing was said by either party as to how long Captain Diehl was to remain captain and head fisherman of said steamer in case the company should operate. The wage scale was first fixed some time prior to March 17th as on that date the company wrote a letter to Captain Diehl setting out said wage scale which letter concluded with the following language:

“There is no certainty that we can even fish at the above scale of wages under existing conditions but if things improve, we want to fish and will try our best, but there is no obligation on our part that we will fish the steamer, W. L. Messick.”

After the abovenamed date and shortly before any of the factories started fishing, the scale of wages was again changed by agreement among the fish factory managers and placed on a purely percentage basis, by the terms of which Captain Diehl was to receive 20c per thousand for each thousand fish caught, the members of the crew were to receive from 2½ to 3c per thousand fish caught and the engineers, pilot and mate a graduated percentage between the above named fig-

ures, and Captain Diehl was duly notified, proceeding to assemble his crew, and with his crew consisting of about thirty-six men took charge of the steamer, W. L. Messick, on July 6, 1931, and began fishing the next day and fished continuously, with the exception of one day in Norfolk on account of boiler trouble and with the exception of Sundays, from July 7th to July 25th, inclusive, which made fifteen days actual fishing. During this period Captain Diehl caught 364,000 fish while, during the same period, another steamer, the "Hannah Lennen", belonging to said company, which is not quite as good for catching Menhaden fish as Diehl's boat, caught 599,000 fish and another of the company's steamers, the "Wilbert A. Edwards", which is a little better boat for the purpose of catching Menhaden than Diehl's boat, caught 705,000 fish, while the "E. Warren Edwards", another boat of the company under Captain Charles Williams, caught 288,000 fish. These embrace all the boats owned by the company, and it appears from the evidence that the company started to discharge Captain Williams on the night of July 25th on account of his small catch of fish but upon his request to give him another chance, he was continued for two weeks longer when they were forced to discharge him, as they were losing money heavily on his boat. While it appears that there was some complaint on the part of all the crews on the fleet going out of Reedville Harbor, largely by reason of the fact that for the first time they were placed on a purely commission basis and were required to pay their own board bills, it appears from the evidence that complaints began to be made by the crew on the steamer, Messick, commanded by Captain Diehl within a very short time after Captain Diehl began fishing and that his good men began to leave him for the reason that they were not making any money, which necessitated his replacing them with inexperienced men and boys. On the night of July 21st when the steamer came in from the fishing grounds the firemen and engineers notified Mr. Edwards, the general manager, that they were not making one-half as much as engineers and fireman on similar boats under the same percentage basis and that they were going to quit, and according to the testimony of Captain Diehl himself several days prior to July 25th his pilot told him that he was not making anything and that he would have to quit unless he caught more fish, while the pilot, Ewell Dunaway, testified that on or about Tuesday, July 21st, he notified Captain Diehl that his catch of fish was unsatisfactory; that he had tried it for nearly three weeks and had made only one

dollar a day, and that he would have to leave at the end of the week unless conditions grew better. On Friday night, July 24th, the firemen, engineers and pilot notified the general manager that they could not work any longer; that they were not making anything and would have to leave, and Mr. Edwards, in order to keep the boat fishing voluntarily guaranteed to the engineers and firemen a minimum wage for the next day and upon this guarantee on his part they did agree to go out with the boat next day. On that same night the general manager told Captain Diehl not to put on any more than enough coal for the next day as the pilot, engineers and fireman had informed him they were leaving the next night.

The next day, Saturday, July 25th, after spending the entire day on the fishing grounds the boat came in without having caught a fish and the two engineers, the firemen, and the pilot and several members of the crew informed the general manager that they were quitting the boat and would not be back Monday. On the next day, Sunday morning, the general manager saw Captain Charles Williams, who was captain of the "E. Warren Edwards", another steamer belonging to the company, and told him that the crew had tied up the steamer, Messick, at the dock and suggested to him that he invite Captain Diehl to pick out the best of his crew and join with him, Captain Williams, and they fish the steamer, "E. Warren Edwards", with the best men from Diehl's crew and Williams' crew on a fifty-fifty basis as between Diehl and Williams. Captain Diehl testified that Captain Williams saw him that same morning and made this proposition to him and that he, Diehl, told Williams that he would not do it. Later that same Sunday morning Captain Diehl came to the home of Mr. Edwards, the general manager, and was told by the general manager that the boat could not go out again as the engineers, the pilot, and the firemen and some of the crew had refused to work any longer. It must be borne in mind that under the original agreement Captain Diehl was to provide a pilot, a mate and a fishing crew but, under the uncontradicted evidence, Captain Diehl did not offer to attempt to secure another crew or another pilot. The steamer, W. L. Messick, remained tied to the company's dock until Wednesday morning.

In the meantime, Mr. W. A. Edwards, general manager, had gotten in touch with another fish boat captain, Captain Will Bowen, and had asked him if he could secure a crew, including engineers, firemen, mate and pilot, to fish the steamer, Messick, on the same percentage basis that Captain

Diehl had been fishing her as the crew had refused to fish any longer with Captain Diehl and the boat was tied up at the dock. Mr. Edwards said that he would co-operate with Captain Bowen as far as he could in securing a crew, and on Monday and Tuesday a full crew was finally secured, including a number of men who had been with Captain Diehl but had refused to work with him any longer and on Wednesday morning Captain Bowen took the boat out on the fishing grounds and continued to fish her until the company stopped operating some time in October. The general manager of the company testified that his company would have been in bankruptcy at the time this case was tried in the lower court had he kept the boat fishing with Captain Diehl as captain, and that as it was during the season of 1931 the company lost over \$17,000 on operations. Captain Diehl testified that he not only refused to accept the offer made to him by Captain Williams upon the request of the general manager of the company, which was that they jointly fish the steamer, "E. Warren Edwards", putting together the best portions of the two crews and on a fifty-fifty basis, but he further testified that he applied to no one for work and made no effort to secure work and that from the time his connection with the company as captain of the steamer, Messick, was terminated to the time of the trial of this case in the lower court, he had only made \$6.50. It appears from the evidence that the Edwards Company stopped operating about October 1, 1931, and started again in about two weeks, finally stopping some time in the month of October. Mr. Edwards, the general manager, testified that he employed Captain Diehl on the same terms that he employed Captains Treacle and Corsa, who were captains at the same time of the two other boats of the company, that he had had a written contract with Captain Treacle for some years previous but that for the year 1931 on account of the uncertainty of operating and the uncertainty of when operations would begin and when they would stop he had no written contract with him.

Captain Treacle testified that when Mr. Edwards employed him he, Edwards, told him that there was considerable uncertainty as to whether or not the Edwards Company would fish at all during the season of 1931; that it would be uncertain when he would start fishing, or when he would stop; that this would depend upon the number of fish caught and the value of same. Captain Treacle does say that while nothing was said about it, he, Treacle, understood that he was being employed for the season of 1931 as long as the steamer

was fishing; that the company had the right to stop his boat from fishing at any time if it were losing money but that he, Treacle, was to fish as long as the boat fished in 1931.

The pilot, Ewell Dunaway, testified that he was not hired by Captain Diehl for any definite period. Bob Davenport, who was drive-boatman on the steamer Messick in 1931 when Captain Diehl was Captain, testified that Captain Diehl told him about July 17, 1931, that he did not know when the Edwards Company would start fishing and how long they would continue fishing; that nearly all the good men of the crew left the boat on Friday night, July 24th, and boys came aboard in their place. This was the same night that Mr. W. T. Edwards guaranteed the engineers and firemen a daily wage if they would go out on the boat the next day. He also testified that Captains Treacle and Corsa, whose boats were on the same percentage basis as the Messick, kept their good men and that the men left Captain Diehl because of his small catch of fish. This man, Davenport, was a witness introduced by Captain Diehl. Paul Muir, the bookkeeper of the company, testified that he heard Mr. Edwards tell Captain Diehl in his office of the uncertainty of fishing at all and of the uncertainty as to when they would begin and as to when they would stop as it would depend on the number of fish caught and the price.

Littleton Haynie, a fireman on the Messick, testified that he left the boat on the night of July 25, 1931, because he was not making anything on account of the small catch and that he returned on Wednesday when Captain Bowen took command under the same percentage and continued with him until he got a better position. Lloyd Walker, chief engineer, testified that he had to leave the boat because he was not making enough money to live on and that he returned when Captain Bowen took command on Wednesday on the same percentage basis and continued until the end of the season. Seth Blundon, the second engineer, testified that he left the boat on July 25th after telling Captain Diehl several times that he could not remain with him as he was not catching any fish and that he returned to the boat when Captain Bowen took charge Wednesday morning; that he continued with him until the end of the season; that he was willing to return with Captain Bowen but would not have returned while Captain Diehl was in command.

On the 28th day of November, 1931, Captain Diehl instituted suit against the Edwards Company on the ground that he had been hired by the company to fish the said steamer for

the season for the year 1931; that he had begun fishing said boat on July 6th, 1931, and that on or about July 25, 1931, he had been discharged by the said company without cause and asking for damages in the amount of ten hundred eighty-six and 20/100 dollars (\$1,086.20), the same being the amount due him at 20c per thousand on the number of fish he would have caught had he been permitted to perform his contract. The company pled *non assumpsit* and the matter was submitted to a jury, which jury returned a verdict against the company in the amount of five hundred dollars (\$500.00). Whereupon the company in the amount of five hundred dollars (\$500.00). Whereupon the company moved to set the verdict aside as contrary to the law and evidence, which motion was overruled by the court and the judgment was entered.

ASSIGNMENT OF ERRORS.

Your petitioner is advised and represents that the said judgment is erroneous and that he is aggrieved thereby in the following particulars:

(1) The court erred in refusing to sustain the motion of the defendant company that the verdict of the jury be set aside upon the ground that the same is contrary to the law and the evidence and in entering up judgment against the defendant company in the amount fixed by the verdict of the jury.

(2) The said verdict of the jury should have been set aside by the court on the ground that it was contrary to the evidence for the following reasons:

(a) Because the uncontradicted evidence shows that the contract of employment on which this action was based was for no fixed period and therefore was a hiring at will and the said employment could have been terminated by either party at any time.

(b) Because even if the contract of employment had been for a fixed period, it was agreed in said contract that the company could terminate said employment whenever the amount of fish caught by the plaintiff Diehl and the value of same did not make the undertaking a reasonably profitable venture.

(c) Because even if the contract of employment had been for a fixed time, the uncontradicted evidence shows that the plaintiff Diehl did not show that degree of skill, efficiency and knowledge, which is possessed by those of ordinary skill, competency and standing in the business for which he was employed, and under the law the company therefore had a right to discharge him.

(d) Because even if the contract of employment had been for a fixed time, the uncontradicted evidence shows that under said contract it was Diehl's duty to provide a pilot and a fishing crew, exclusive of engineers and firemen, for the steamer, W. L. Messick, and the uncontradicted evidence further shows that the pilot and a number of the fishing crew abandoned the steamer on the night of July 25, 1931, thereby leaving said boat tied up at its dock where she remained until the following Wednesday and until said company had procured another captain, pilot and crew.

(e) Because even if the contract was for a fixed time and was breached by the Edwards Company, the uncontradicted evidence shows that the plaintiff Diehl not only did not attempt to secure other work of a similar kind but was actually offered work of a similar kind by Captain Charles Williams, and refused it, which might have enabled him to make an amount sufficient to off-set the amount of damages.

ARGUMENT AND AUTHORITIES.

It is submitted to the court that all of the evidence in this case, both that offered for the plaintiff and for the defendant, shows that there was nothing in the agreement of employment between Diehl and the Edwards Company to fix the period of said employment and that said contract was one of indefinite hiring. Indeed, it was specifically agreed between the parties that the period of service would be indefinite as it was understood that the length of time during which Diehl would be employed would depend upon the number of fish caught by him and the value of same. There is no evidence in the case with reference to any general custom or business usage. It is true that Diehl testified that, "While nothing was said about it in either of the conversations above referred to, it was my understanding of the contract that I was employed to fish the steamer as long as she was fished during the 1931 season for the fishing season of 1931". As

he admits that nothing was said about this, he is merely giving his own inference which does not hold water when considered along with the statement of the company's manager to him that they would stop whenever the amount of fish caught and the value of said fish would not justify continuing.

"In determining the duration of the employment under a contract whereby a person is hired or employed without any agreement as to the period of service or employment, regard must be had to the circumstances of each particular case. Where the contract is in writing, the court, in construing the instrument, will take into consideration the situation of the parties, and the objects they had in view. In case the contract is made with reference to a general custom or business usage, which enters into and becomes a part of the business usage, which enters into and becomes a part of the agreement, the contract is not, of course, indefinite as to its duration if such custom or usage fixes the term of the employment. As to the presumption to be indulged where the contract specifies no definite period, the courts are not in harmony. In some jurisdiction it is presumed to be a hiring for a year, regardless of the nature of the service, unless there is a custom relating to the subject, and it appears that the contract was made with reference to the custom. But in a majority of the states today such a contract is deemed to be a hiring at will and the burden of proving the contrary must be bore by the party who asserts that the employee is engaged for a definite period."

18 R. C. L. "Master and Servant", pages 508 and 509;
Rosener vs. Watts, 73 W. Va. 342, 80 S. E. 839, 51 L. R. A. (N. S.) 629;

8 Ann. Cas. 281; Ann. Cas. 1913D 218.

"The English rule is that every general hiring is presumed to be for one year in the absence of stipulations or circumstances to rebut the presumption. (1st Min. Inst., 4th Edition, page 209; 26 Cyc. 973).

In the United States the prevailing doctrine is that every such general hiring is terminated at the will of the parties."

Conrad vs. Ellison-Harvey Company, 120 Va. 466;

Lile's Notes on 1st Min. Inst., page 54;

20 A. & E. Enc., 2nd Edition, page 14; 26 Cyc., page 14.

“In the instant case, an action by a servant against his master for breach of contract, if the plaintiff refused in advance to commit himself for a definite term when he entered upon the employment on January 1, 1921, at the expiration of his former term of service, then the contract of employment was terminable either at his will or at the will of the defendant.

Canners' Exchange vs. Scheidt. 137 Va. 452, par. 3 of Syllabus.

In the instant case the evidence of both the general manager of the Edwards Company, W. A. Edwards, and of the plaintiff, Robert D. Diehl, absolutely agreed in that Edwards told Diehl at the time the contract of employment was made that there was absolutely no certainty as to how long his services would be needed, which was in itself a refusal in advance to commit the company for a definite term. In fact, there was no certainty as to whether or not the company would fish at all.

“In the United States a general or indefinite hiring is presumed to be a hiring at will, in the absence of evidence of custom, or of facts and circumstances showing a contrary intention on the part of the parties.”

26 Cyc., “Master and Servant”, 974.

There is not one scintilla of evidence to show that the contract of employment in this case was for a definite period save a statement of Diehl himself as to his inference of what the contract meant, nor do the facts and circumstances show such intention on the part of the parties, but, on the contrary, it was expressly understood that the time during which said contract would operate was uncertain and would depend entirely on what success attended the operations of Captain Diehl.

The jury was properly instructed as to the principle of law embodied in the foregoing quotations but for some reason unknown to your petitioner refused to abide by same. It is respectfully submitted that under the evidence in this case not only is the contract, on which this action is based, presumed to be a hiring at will but the evidence of both plaintiff and defendant shows that it was expressly agreed and understood to have been for an indefinite term and therefore a hiring at will and subject to termination by either party at

any time. The only logical conclusion that can be arrived at considering all the evidence and more particularly the conditions of the Menhaden fish business at that time is that the mutual undertaking entered upon by the company and Captain Diehl and upon which their minds met was that unless Captain Diehl made good as captain and head fisherman of the steamer Messick, the company would have the right to terminate his employment.

Even if said contract of employment had been for a fixed period of time, which it is submitted the evidence shows to the contrary, all the witnesses in the case who testified with reference to this agreed that the Edwards Company could terminate said employment whenever the amount of fish caught and the value of same made the undertaking an unprofitable venture in so far as the Edwards Company was concerned. The only testimony introduced relative to this question was the testimony of Mr. Edwards, the general manager, and the president of the Edwards Company. He testified that the company would have been bankrupt had Captain Diehl continued to fish and make the same proportionate catch until the end of the season; that as it was the company actually did lose \$17,000 that year; that practically all of the best men in Captain Diehl's crew had left his boat and the captain had been compelled to replace them with inexperienced men and boys; that he himself had pled with and persuaded members of the crew, engineers, firemen and pilot, to remain with Captain Diehl and had even gone so far as to guarantee to the engineers and firemen in one instance a minimum wage for their next days work; that all of this was seriously injurious to his company, and that Captain Diehl's actual catch for the fifteen days he was fishing was approximately 50% of the catch of one of his other boats of nearly similar capacity for the purpose of catching fish and approximately 50% of the catch of another boat of said company not quite as good as Diehl's boat for catching fish. This evidence is not contradicted and the jury was properly instructed as to this phase of the contract. While it is true that a number of witnesses testified that Captain Diehl had theretofore been a fair average fisherman, yet it was a fact that he did not catch fish in a sufficient amount to make the operation of his boat satisfactory or profitable to his employer and it was expressly agreed in his contract of employment that the duration of the term of his employment would depend upon this very thing.

Even if the contract of employment had been for a fixed

period, the evidence shows that the plaintiff Diehl did not show that degree of skill, efficiency and knowledge which is possessed by those of ordinary skill, competency and standing in the business for which he is employed and during the period of said employment.

“With respect to the skill required of a person who is to render service, it is a well settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge, which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which he is employed. In entering the employment the employee impliedly agrees that he possesses and will exercise this degree of skill.”

18 R. C. L., “Master and Servant”, pages 502-503, and authorities quoted in foot note.

The above principle of law is also stated in the case of *Hatton vs. Mountford*, 105 Va. 96.

It is quite evident that a considerable degree of experience, expert knowledge and skill is necessary in order that a man be successful as a Menhaden fisherman. His eye sight must be very good. He must be able to detect the presence of fish miles away by a slight difference in the color of the water. After he has located the fish he has to use a good deal of ingenuity, knowledge and skill in surrounding and capturing the school and in order that he may show ordinary skill in this work he must possess considerable knowledge, experience and efficiency. While it is true that a good many of the witnesses testified that Captain Diehl worked hard and apparently did everything he could to catch fish and that he had theretofore been a fair average fisherman, it is submitted that he did not show ordinary skill during the fifteen days in 1931 that he was fishing for the Edwards Company. His catch was only 60% of the catch of one of their boats and just a little over 50% of the catch of another of their boats during the same period, all of which boats were of very nearly similar capacity. His crew was dissatisfied and complaining and the testimony shows that nearly all of the best men had left him and he had been compelled to fill their places with inexperienced men and boys. The evidence shows that they were not making more than one-half as much as men who occupied similar positions on other boats of similar capacity.

On July 21st his pilot notified him that he would have to leave him at the end of the week unless conditions grew better. On the night of July 24th his pilot, his engineers, and his firemen told him that they were leaving him that night and would have left had it not been for the general manager of the company who paid them extra wages to remain over another day and see if they could not do better. As a matter of fact on that night nearly all of the good men of his crew did leave and were replaced with boys and inexperienced men. The next day he did not catch a fish and on that night practically his entire crew, pilot, mate, engineers, fireman and fishermen told him they were leaving and abandoned him, leaving his boat standing at the dock. These facts are undisputed and many of them were testified to by witnesses offered by Captain Diehl. The evidence further shows that Captains Treacle and Corsa, who, along with their crews, were operating on the same percentage compensation, had no trouble with their crews and lost none of their men. Under the circumstances, it is submitted that Captain Diehl did not show ordinary skill in the performance of the service he was employed to do by the Edwards Company.

Even if the contract of employment had been for a fixed period under said contract, it was the plaintiff Diehl's duty under the terms of the contract between him and the Edwards Company to provide a pilot and a fishing crew for the steamer, W. L. Messick, which he failed to do. A frank statement of the facts is that owing to the failure of Captain Diehl to locate and catch fish his pilot and crew simply abandoned him and his boat, leaving his vessel tied to her dock as a monument to his failure, and himself as her discredited commanding officer. Captain Diehl had ample notice that this was going to happen. His pilot, who was offered by him as a witness, testified that on July 21st he told Captain Diehl that on account of his poor catch of fish he would have to leave at the end of the week unless conditions changed. His crew had complained to him time and again and Captain Diehl himself, in his testimony, admits that the pilot did complain to him on or about July 21st and that the crew had complained likewise. Conditions did not improve and Captain Diehl knew this and yet on Saturday, the night of July 25th, he was confronted with the embarrassing spectacle of his pilot and crew leaving him and not only did not attempt to secure another pilot and crew to take their places but, under his own evidence, did not offer to do this, and although the boat remained tied at the dock for three successive days, Cap-

tain Diehl not only refused work of a similar character that was offered him at the suggestion and direction of the general manager of the Edwards Company but apparently washed his hands of the whole affair and did nothing and made no effort to do anything. The jury were properly instructed as to this phase of the case, but evidently made no effort to adjust the law to the facts. What was the Edwards Company to do? Was it to leave its boat at her dock for the several remaining months of the season? Surely it cannot be seriously contended that this contract of employment, or any reasonable inference therefrom, could have justified such a construction that would have so penalized the company.

Again even if the contract was for a fixed time, which is not admitted, and was breached by the Edwards Company, which this petitioner insistently denies, the uncontradicted evidence shows that the plaintiff Diehl not only did not attempt to secure other work of a similar character but was actually offered same when Captain Williams invited him to join with him in fishing the steamer, "E. Warren Edwards", which he indignantly refused, although had he accepted said employment he might have made an amount sufficient to offset the amount he claimed as damages.

"It is not a case where a breach of contract occurs before the party thereto claiming damages for its breach has fully performed the contract on his part. In such case indeed the latter party must, as a general rule, as soon as he knows of such breach of contract, minimize his damages by engaging in other employment, if he can obtain it, and not persist in thereafter continuing, in order to aggravate his damages, in a course of conduct which can under the circumstances be of no value to the party who has broken the contract."

New Idea Company vs. R. M. Rogers & Sons, 122 Va. 54; *Va. Tolc. etc. Co. vs. Hurkamp*, 124 Va. 721. Also *Davis vs. Laurel River Lumber Company*, 85 W. Va. 191.

It is respectfully submitted that upon a careful reading of the testimony in this case it is conclusive that the defendant did not breach the contract of employment in question but, on the contrary, co-operated in every way with the plaintiff Diehl to make their mutual undertaking a success, and that said company was finally forced by the acts of omission and commission on the part of Captain Diehl and by the condi-

tions which naturally resulted from the character of the service performed by Diehl to take over their boat, which had been left tied to its dock and stranded, and exercise such acts of control over it as the said company considered to its best interest.

And your petitioner further represents that the said final judgment of the court is erroneous in other respects.

Your petitioner therefore prays that a writ of *supersedeas* may be awarded it and that the said judgment may be reversed and annulled.

Your petitioner represents that it desires through its attorneys to state orally the reasons for reviewing the decision complained of.

Your petitioner further represents that a copy of this petition for a writ of error was mailed to Raymond Sisson, opposing counsel in the trial court and attorney for Robert D. Diehl, on the 26th day of April, 1932.

THE EDWARDS COMPANY, INC.,
By C. S. TOWLES and
R. O. NORRIS, JR., Attys.

We, C. S. Towles and R. O. Norris, Jr., attorneys practising in the Supreme Court of Appeals of Virginia, hereby certify that in their opinion there is error in the judgment complained of in the foregoing petition, for which the same should be reversed by the Supreme Court of Appeals.

C. S. TOWLES,
R. O. NORRIS, JR.

Received May 7/32.

J. W. C.

Writ of error allowed and *supersedeas* awarded. Bond \$1,000.00.

JOS. W. CHINN.

June 4, 1932.

Received June 4/32.

H. S. J.

In the Circuit Court of Northumberland County, State of
Virginia.

Robert D. Deihl

vs.

Edwards Company, Inc., a Corporation Incorporated Under
the Laws of the State of Virginia.

NOTICE OF MOTION FOR JUDGMENT.

RECORD.

To Edwards Company, Inc.:

You are hereby notified that on the 14th day of December, 1931, between the hours of 10 A. M. and 12 M. of that day, or as soon thereafter as it may be heard, the undersigned will move the Circuit Court of Northumberland County, State of Virginia at the Courthouse thereof for a judgment against you for the sum of One Thousand Eighty-six and 20/100 Dollars (\$1,086.20), which sum is due and owing by you to the undersigned for damages and wrongs resulting from breach of contract by you hereinafter set forth, to-wit:

That hereinbefore, to-wit: on or about the.....day of February, 1931, you entered into a verbal contract with the undersigned to employ the undersigned as master to fish the "W. L. Messick," a fishing steamer owned by you for the season prescribed by law for fishing menhaden, and you did employ, and hire the undersigned as captain, or master of said fishing Steamer "W. L. Messick" to fish said steamer for the season for the year of 1931, and the undersigned agreed to operate said fishing steamer and fish for menhaden fish in the Chesapeake Bay, and the Atlantic Ocean, and you offered to the undersigned as compensation for his services for fishing said steamer for the season of 1931 as aforesaid, the sum of twenty cents for each and every thousand of fish caught by said fishing steamer and the undersigned accepted said offer and this offer became the contract between you and the undersigned for operating, or fishing said steamer for said season aforesaid, and the undersigned a man of long experience as a master of a fishing steamer, and had been employed in said employment for other firms for about fourteen years, took charge of said fishing steamer "W. L. Messick" on the 6th day of July, 1931, and began fishing said steamer as was his right and duty to do, and the undersigned here alleges that he

page 2 } was diligent in his duties as master of said steamer and faithfully performed any and every duty which

was encumbent upon him as master of said steamer and faithfully performed every part of his contract in connection with said contract and by virtue of said employment, and furthermore you never made any complaint whatsoever to the undersigned in the way the undersigned was performing his contract, or performing his services under said contract, and you made no objection to the undersigned about the services the undersigned was rendering under said contract, and the undersigned performed and rendered every service possible under said contract and performed the same as agreed upon by you and the undersigned.

That the undersigned took charge of said fishing steamer aforesaid and began his services as master of said steamer on the 6th day of July, 1931, and fished said steamer faithfully and according to the terms of said contract until the 25th day of July, 1931, and obtained as good results as other steamers during that time, except when said steamer had to go to Norfolk, Virginia, for repairs to the boilers, and when the boat was short on crew, and you on the 24th day of July, 1931, told the undersigned; that is to say, Wilbur Edwards, the manager of your firm told the undersigned, that he did not want much coal loaded on said steamer that the steamer would cease fishing, and within two or three days thereafter you employed William Bowen, as master of said steamer and said steamer began fishing as had been under the command of the undersigned; and you failed and refused the undersigned to perform his contract any longer, and said refusal and failure on your part to permit the undersigned to continue to perform his contract as aforesaid was a breach of the contract by you, without any reason, cause, or justification as the undersigned had faithfully performed, and rendered every service of his contract and offered to continue to perform his duties of said contract as aforesaid; and said steamer continued to fish after you in an underhand and unfair manner failed to employ the undersigned and perform your part of said contract; and said steamer during the remainder of said fishing season caught five million four hundred thirty-one thousand (5,431,000) fish which amounts to the sum of

\$1,086.20 at twenty cents per thousand; and by your
page 3 } breach of contract as aforesaid, you caused the undersigned to loose his employment, and was unable to secure employment any more during said season; thereby causing the undersigned to loose as compensation the said

sum of \$1,086.20 which said amount of \$1,086.20 is the damages resulting from your breach of said contract which the undersigned has suffered by your breach of said contract as aforesaid. The said contract was entered into at the office of said Edwards Company, Inc., at Fairport, Virginia, Northumberland County, by and between the undersigned and the Edwards Company, Inc., through Wilbur Edwards its manager, empowered with authority to engage into contracts between said Edwards Company, Inc., and other persons.

That although you are aware of the said breach on contract as aforesaid, and the damages suffered by the undersigned as aforesaid, you have failed and refused to pay the undersigned therefor. Wherefore, judgment therefor will be asked at the hands of the said Court at the time and place hereinbefore set out.

Given under my hand this 27th day of November, 1931.

Respectfully,

ROBERT D. DEIHL, Plaintiff.

RAYMOND SISSON, p. q.

ENDORSEMENT OF NOTICE OF MOTION.

Virginia:

Circuit Court of Northumberland County.

Robert D. Deihl

vs.

Edwards Company, Inc.

Notice of Motion.

Filed, November 30th, 1931, at 2 o'clock P. M.

H. M. WALKER, Clerk.

\$2.00 Writ tax paid by Raymond Sisson, Atty.

RETURN OF OFFICER.

1931 November 28—

Executed the within "Notice of Motion for a judgment" by delivering a true copy thereof to W. A. Edwards, General Manager of the Edwards Co., Inc., in person.

J. E. ANDERSON,
Sheriff of Northumberland Co., Va.

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VERDICT OF JURY.

We the Jury upon the issue Joined find for the plaintiff;
and assess his damages at the sum of \$500.00.

WILSON A. SMITH, Foreman.

Circuit Court of the County of Northumberland on Friday,
the eighth day of January in the year of our Lord, nineteen
hundred and thirty-two.

Present: The Honorable E. Hugh Smith, Judge.

Robert D. Deihl

vs.

Edwards Company, Inc.

Motion for Judgment.

This day came the parties in person and by counsel, and
thereupon came a jury, to-wit: A. Y. Headley, L. E. Brom-
ley, F. K. Sampson, T. D. Hinton, Leslie L. Edwards, W. A.
Smith and R. J. Shirley, who were sworn to well and truly
try the issue joined, and having heard a part of the evidence
were adjourned until tomorrow morning at 9:30 A. M.

E. HUGH SMITH.

Circuit Court of the County of Northumberland on Satur-
day the ninth day of January in the year of our Lord, nine-
teen hundred and thirty-two.

Present: The Honorable E. Hugh Smith, Judge.

Robert D. Deihl

vs.

Edwards Company, Inc.

Motion for Judgment.

This day came again the parties in person and by counsel,
and again came the jury, to-wit: A. Y. Headley, L. E. Brom-
ley, F. K. Simpson, I. D. Hinton, Leslie L. Edwards, W. A.
Smith and R. J. Shirley, who having heard the remainder
of the evidence, argument of counsel and received the instruc-

tions of the court, retired to their room to consider their verdict, and after sometime returned into court having
 page 5 } found the following verdict, to-wit: "We, the Jury
 upon the issue joined find for the plaintiff and assess his damages at the sum of \$500.00, Wilson A. Smith, Foreman." Whereupon the said defendant, by its counsel, moved the court, to set aside said verdict upon the grounds that the same is contrary to the law and evidence; which motion the Court overruled and ordered the same to be recorded as rendered. Therefore, it is considered by the Court that the plaintiff, Robert D. Diehl recover of the defendant, the Edwards Company, Inc., the sum of \$500.00 with interest thereon from this date until paid and his costs by him in this behalf expended. And the said defendant having signified its purpose to apply for a writ of error to the Supreme Court of Appeals of this State and having requested this Court to suspend the execution of said judgment to allow him so to do; the Court doth therefore suspend the same for a period of eighty days from the date hereof; but the said defendant shall not have the benefit of this suspension order until it shall, or some person for it, enter into and acknowledge a bond, as required by law, before the Clerk of this Court in the penalty of \$700.00 conditioned according to law and with security to be approved by said clerk.

page 6 } Virginia:

In the Circuit Court of Northumberland County.

R. D. Diehl

vs.

The Edwards Company, Incorporated.

BILL OF EXCEPTION NO. 1.

Be it remembered that upon the trial of this case, the plaintiff, R. D. Diehl, to maintain the issue on his part introduced before the jury the following evidence, to-wit:

The witness,

R. D. DIEHL,

being duly sworn, testified as follows:

"I am the plaintiff in this suit and I have been captain of

menhaden fishing steamers for the past twelve or thirteen years. In November, 1929, I was in Norfolk, Virginia, and I saw Mr. Wilbert Edwards and he said that his company, the Edwards Company, would like to have me as captain of their fishing steamer, W. L. Messick, and if I ever made a change, to let him know. In December, 1930, I wrote Mr. Edwards the following letter:

Tibitha, Va.
Dec. 9, 1930

Mr. Edwards

Dear Sir:

I heard that you didn't have anyone to fish the "Messick". If you haven't I would like to have her to fish.

Yours truly,

R. D. DEIHL.

(Page two)

In reply thereto I received from him the following letter:

December 9, 1930

Mr. R. D. Deihl
Tibitha, Va.

Dear Sir:—

We have your favor of the 9th inst. about fishing the W. L. Messick. Suppose you come around some day and we will talk this over.

page 7 }

Yours very truly,

WAE:PM

THE EDWARDS CO., INC.

In December, 1930, I went around to his office at the Edwards Company and he wanted me to fish their steamer, W. L. Messick, on a purely percentage basis of 20c per thousand fish caught. I told him I would not be the first to hire for 20c per thousand fish. We did not come to any agreement and I went later to his office and he employed me for the

Supreme Court of Appeals of Virginia.

menhaden fishing season of the year, 1931, to fish the steamer W. L. Messick, with the understanding between us that I would be paid at whatever scale of wages agreed upon by the menhaden fish factory managers. No one was present on either occasion that I went to his office. On both occasions when I went to see Mr. Edwards he said that he was not sure he could start fishing at all but if others started, he would try to start also and there would be no certainty how long he could fish; that it would depend on the amount of fish caught and the value of same. While nothing was said about it in either of the conversations above referred to, it was my understanding of the contract that I was employed to fish the steamer as long as she was fished during the 1931 season for the fishing season of 1931. I was willing and did take the risk of whether or not he would start fishing and the risk of how long he would fish after starting. On March 17, 1931, he wrote me this letter:

Reedville, Va., March 17, 1931.

Captain Robert Deihl
Tibitha, Va.

Dear Sir:—

If conditions are such that we can go fishing at or near the beginning of the season the following will be the scale of wages you will use in hiring men:

(Page three)

7 men at \$30.00 per month and 1½ cents per M.

15 men at \$25.00 per month and 1½ cents per M.

Mate \$50.00 per month and 6 cents per M.

Pilot \$90.00 per month and 3 cents per M.

Cook \$45.00 per month and 2 cents per M.

Drive boat \$45.00 per month and 2 cents per M.

page 8 } Chief engineer \$90.00 per month and 3 cents per M.

Asst. engineer \$70.00 per month and 2 cents

per M.

Captain 20 cents per M.

3 firemen \$30.00 per month and 1½ cents per M.

At the above scale the men are to board themselves, but we will sell all provisions at cost plus a reasonable handling charge. There is no certainty that we can even fish at the above scale of wages under existing conditions, but if things

improve we want to fish and will try our best, but there is no obligation on our part that we will fish the Str. W. L. Messick.

We trust we will have your co-operation.

Yours very truly,

THE EDWARDS CO., INC.

1/2 cents of above bonus to be paid if make full season

(signed) J. PAUL MUIR, Secretary.

I was placed in charge of the steamer, W. L. Messick, on July 6, 1931, but did not go out fishing until July 7th. I employed the mate, the pilot and the crew and the Edwards Company employed the engineers and fireman. There were one pilot, one mate, two engineers and three firemen on board of the said steamer. We fished continuously, with the exception of one day in Norfolk, on account of boiler trouble and with the exception of Sundays, from July 7th to July 25th, 1931, inclusive, which made fifteen days fishing. We caught during that period 360,000 fish. Nobody was doing anything and fishing was very poor. Before we started fishing on July 7th, the scale as stated in the letter of March 17th was again changed to a purely commission basis, under the terms of which I was to receive 20c on each thousand fish caught and the crew was to receive from 2 1/2 to 3c on each thousand fish caught. July 25th was on a Saturday and several days before early that week, the pilot complained to me that he was not making anything and said that he would have to quit unless fishing improved. On Friday night, July 24th, Mr. Wilbert Edwards the general manager of said Company told me not to put much coal on as the engineers were going to leave the next night and the steamer would necessarily be tied up. On Friday, July 24th, we brought in 90,000 fish and the firemen refused to work any more but Mr. Edwards paid the \$1.50 each for going out Saturday. That same
page 9 } night the pilot again complained that he was not making a living. On

(Page four)

Saturday night, July 25th, the pilot, the two engineers and the three firemen all quit work. On the following morning,

Sunday, July 26th, 1931, I went to Mr. Wilbert Edwards' home to see him about nine A. M., Mr. Edwards told me that the engineers and the pilot had tied the boat up and said "We will consider it a season". I said "You may but I don't and I will make my money if possible". That same morning Captain Charles Williams, who was master of another fish steamer belonging to the Edwards Company, saw me and asked me to pick out my best men in my crew and join with him and the best men in his crew and fish his steamer the E. Warren Edwards together on a fifty-fifty basis beginning immediately. I told him that I would not do it. Since I have been *dischaed* as captain of the steamer, Messick, I have made \$6.50. I did not try to get a job. All the places on the boats at Reedville were taken—I did not want to take another man's job—I would gladly have worked, if any one wanted me. No complaint was made to me as to how I was doing and how many fish I caught by Mr. W. A. Edwards, before I was discharged. Mr. Edwards was hiring a crew all day the following Sunday and Monday (after the 25 of July) and I am informed some of them were hired before. During the season of 1930 I caught about five and one-half million fish, beginning the third Tuesday in June and ending on November 12th. In 1929 I caught over six million fish and the season was about the same as that of 1930. I have caught as much as ten million fish in a season. In 1930 I was below the average season's catch and in 1929, I was above average season's catch that is average of what other boats in the same locality caught. In 1931, the Edwards Company stopped fishing about October 1st and started again in about two weeks but caught very little fish, 1930 was only year I was below the average catch of other boats in the locality. September was the best month of 1930 and 1931 season. I believe my catch in 1931 would have been as good or better than my catch in 1930, had I been permitted to continue fishing. A short time after I was discharged the compensation to boat crews and officers was changed to the extent that they were guaranteed a monthly minimum amount. The menhaden fishing business generally has been in bad condition for several years and when I started fishing in 1931 the following factories had failed: Douglas Company, Palmer Fisheries, Marine Products, Edwards-Slaughter Company, Morris Fisher Company, Eubank-Tankard Company, Taft Fish Company and the C. E. Davis Packing Company. Before I was discharged the second engineer on the Messick, Seth Blundon, claimed that he was

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being guaranteed two dollars a day. I never accepted Captain William's proposition to fish with him and I would not have gone with him anyway. I don't know how much coal the steamer burned a day, whether it was one ton or a thousand tons." I have lived about 2 miles from Reedville all my life and during most of the past 12 or 13 years I have fished steamers going out of Reedville harbor where the Edwards Co. is located.

I didn't try to hire any pilot because I was discharged the next day. I could have gotten a pilot."

The witness,

IVIS WEBB,

being duly sworn, testified as follows:

"I was mate on the steamer, W. L. Messick, during the season of 1931 when R. D. Diehl was captain. During the period Captain Diehl was captain we worked every day. The steamer went out at 5:30 A. M. and stayed as late in the evening as daylight lasted. I don't see what he could have done that he did not do. We kept the boat going looking for fish and Captain Diehl did everything he could to find fish and when we did find them, he did all he could do to catch them. Fishing was poor in the month of July, 1931. When the engineers and pilot left on Saturday, July 25th, and the boat was tied up, I came ashore and stayed a week. After that I went aboard the steamer, E. Warren Edwards, and stayed two weeks. Then I worked the balance of the season for the Reedville Oil & Guano Company. The month of August, 1931, was poor fishing, September was better. I page 11 } was paid on a straight commission basis. I don't know how the catch of 1930 compared with the catch of 1931."

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The witness,

EWELL DUNAWAY,

being duly sworn, testified as follows:

"I worked as pilot for Captain R. D. Diehl on the steamer, Messick, from July 7th to July 25th, inclusive, 1931. During

this period Captain Diehl put forth every effort to catch fish. We worked from early every day until late and I know of nothing we failed to do that we could have done. The 1931 catch was better I think than the 1930 catch and the catch in August and September of 1931 was better than in July, 1931. Captain Diehl did not hire me for any definite period but I understood that I was hired for the season. On Saturday night, July 25, 1931, I notified Mr. Wilbert Edwards that I was quitting because I was not making anything, and I did leave that night. I notified Captain Diehl about Tuesday, July 21st, that his catch of fish was unsatisfactory to me; that I had tried it for three weeks and had gotten about one dollar a day, and that I would have to leave at the end of the week unless conditions grew better. I did not leave steamer on Capt. Diehl's account. I was satisfied that he could catch fish. He used good judgment but had poor luck."

The witness,

BILLY LEWIS,

being duly sworn, testified as follows:

"I was cook on the fishing steamer Messick in 1931 during the period that Captain R. D. Diehl was captain, that is from July 7th to July 25th, inclusive. Captain Diehl did all he could to catch fish. The boat was kept going looking for fish and whenever they could be seen we would go to them and throw out our nets and try and catch them."

(Page seven)

The witness,

page 12 }

BOB DAVENPORT,

being duly sworn, testified as follows:

"I was a member of the crew and drive-boatman on the steamer Messick in 1931 when Captain R. D. Diehl was captain. Captain Diehl told me about June 17, 1931, that he did not know when the Edwards Company would start fishing and how long they would continue fishing. We started on July 7th and continued to the night of July 25th. Nearly all the good men of the crew left the boat on July 24th and boys came aboard in their place. Mr. Wilbert Edwards told me that he wondered why other fishboat captains could get experienced crews on a percentage basis while Captain Diehl ap-

parently could only get a crew of boys. I was not making anything and I became dissatisfied and left on the night of July 25th. For the balance of the season I worked on shore for the Edwards Company. Captain Treakle, who fished the Wilbert A. Edwards, and Captain Corsa, who fished the Hannah Lennen, both for the Edwards Co., kept their good men. I know of none who left. The men left Captain Diehl because of his small catch of fish. I never heard of Captain Diehl trying to get another job. There was unrest everywhere aboard all the boats in Reedville harbor because of the small catch of fish and with the percentage plan of paying men. It was difficult to keep crews employed because of the small catch of fish."

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The defense, to maintain the issue on its part, introduced before the jury the following evidence, to-wit:

The witness,

WILBERT A. EDWARDS,

being duly sworn, testified as follows:

"I am president and general manager of the Edwards Company, Incorporated, which is engaged in the catching of menhaden fish and in the manufacture of same into fish oil and fish scrap. I live near Reedville in Northumberland County, Virginia, and our plant is located on Cockrell's Creek or Reedville harbor in the same county. We own and operate menhaden fishing steamers and a factory for the manufacture of the fish into fish oil and fish scrap. The business page 13 } has been very bad now for several years and our company, along with practically all the companies in the business, has annually for several years lost money. During the season of 1931 we lost over \$17,000.00.

After the season of 1930 our company, along with most of the companies in the business, was very doubtful as to whether or not to attempt to operate for the season of 1931. If possible, we wanted to operate in order to give employment to our people if for nothing else; but the price of fish oil had dropped more than 50% and the price on fish scrap was poor and the catch of fish was uncertain. In December, 1930, I received from Captain R. D. Diehl a letter written by him, which is filed in his evidence, and I at once wrote him the let-

ter, dated December 9th, 1930, and given in full in his evidence. A short time thereafter Captain Diehl came in and had a talk with me in my office at the Edwards Company in the presence of Mr. Paul Muir, our bookkeeper. I explained to Captain Diehl that I did not know whether or not we would fish at all for the season of 1931 but that we wanted to fish if conditions would permit us to do so from a financial standpoint; that even if we did fish, we did not know when we would begin or when we would stop; that this would depend on the catch of fish and the value of fish. I told Captain Diehl that in case we did fish I would be glad for him to

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take charge of the steamer Messick on a purely percentage basis based upon the number of thousand fish caught, and with the understanding that we did not know when we would begin or when we would stop or whether we would fish at all; that I thought this scale would be 20c per thousand fish for the captain but that it would be definitely fixed and agreed to by the managers of the companies engaged in the business in case it was decided to fish. Captain Diehl at that time did not seem to want to fish on a purely percentage basis. He came to see me again later, which I think was after or during the Christmas Holidays of 1930, and we talked again in my office and I again explained to him that I did not
 page 14 } know whether we would fish at all or if we did fish, when we would begin or when we would stop. That it all depended on the amount of fish caught and the value of same, and he agreed on this occasion that he would fish the Messick if we decided to fish on whatever compensation the scale of wages, to be fixed and agreed upon by the general managers of the companies, would provide for captains. On the 17th day of March, 1931, I wrote Captain Diehl a letter giving the scale of wages at the time agreed upon and which letter he has filed in his evidence. After that time and shortly before any of the factories started fishing the scale of wages was again changed by agreement among the fish factory managers and placed on a purely percentage basis, by the terms of which the members of the crew received from 2½c to 3c per thousand fish caught the engineers and pilot a certain number of cents per thousand and Captain Diehl was to receive 20c per thousand fish caught. I notified Captain Diehl of this and he accepted the change as he had agreed to do. I employed Captain Diehl on exactly the same terms and con-

ditions that I employed Captain Treacle and Captain Corsa, who were captains of two of our other boats during the season of 1931. I had had a written contract with Captain Treacle for the years previous but on account of the uncertainty of our operating and the uncertainty of when we would begin and when we would stop, I had no written contract with him for 1931.

Under our arrangement Captain Diehl was to hire the crew,

(Page ten)

the mate and the pilot and I was to hire the engineers & fireman. The Edwards Company was to pay everybody on boat; Captain Diehl started fishing the Messick with a fairly good crew of men, a mate and a pilot and three engineers on July 7th, 1931. He fished continuously, with the exception of one day spent in Norfolk on account of engine trouble, until the night of Saturday, July 25, 1931, making a working period, exclusive of Sundays, of fifteen days. During this period he caught 364,000 fish, which were caught as follows: July 7th, 63,000; July 8th, 19,000; July 9th, 48,000; July 11th, 8,000; July 13th, 45,000; July 15th, 21,000; July 17th, 24,000; July 18th, 29,000; July 20th, 11,000; July 24th, 96,000; July 25, none; making a total of 364,000. During this same time our steamer, Hannah Lennen, which is a steamer not quite as good for catching fish as Diehl's boat, the crew and captain being on the same percentage basis, caught 599,000 fish, and the steamer, Wilbert A. Edwards, which is a little better for the purpose of catching fish than the Messick, caught 705,000 fish, and the "E. Warren Edwards", my other boat commanded by Capt. Charles Williams, caught 288,000 fish. We started to discharge Capt. Williams on the night of July 25th, but he said to me to give him another chance and I continued him for 2 weeks longer when I was forced to discharge him as we were losing money on the boat. In a short time after Captain Diehl began fishing I began to receive complaints from the crew and his good men began to leave him. On the night of July 21st, the firemen and the engineers notified me that they were not making one-half as much *an* engineers and firemen on other similar boats under the same percentage basis and that they were going to quit. On Friday, July 24th, the firemen and engineers and the pilot told me that they could not work any longer; that they were not making anything and would have to leave, and in order to keep the boat fishing, I guaranteed to the en-

gineers and firemen a minimum wage for the next day if they would go out with the boat by making a bet with each of them that they would catch sufficient fish to make their compensation amount to two dollars each. They agreed to go out the next day, Saturday, on this basis but I told them not to put any more coal on the boat than would be sufficient for the next day as it looked as if the boat would be tied up when she came in the night of the next day unless she had caught some fish. The boat did not catch a single fish on Saturday. When the boat came in Saturday night, July 25th, the two engineers, the firemen, and the pilot advised me that they were quitting and I saw nothing to do but

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tie the boat up as there would not be any pilot or engineers or firemen to operate her the following Monday. Sunday morning I saw Captain Williams, who was at that
page 16 } time captain of another of our fishing steamers,
the E. Warren Edwards, and I suggested to him that he invite Captain Diehl to pick out the best of his crew and join with him, Captain Williams, and they fish the steamer E. Warren Edwards, with the best men from both Diehl's crew and Williams' crew on a fifty-fifty basis as between Diehl and Williams and upon the same percentage basis that Diehl had been fishing the steamer Messick. Later about nine A. M. Sunday morning Captain R. D. Diehl came to my house to see me and I told him that the boat could not go out again as the engineers and pilot, the firemen and some of the crew had refused to work any longer. Captain Diehl did not offer to attempt to secure another crew or another pilot at that time I did not give him further opportunity to get a crew. I knew that the boat could not go out without both a licensed pilot and two licensed engineers. In the early afternoon of that day, Sunday, I went to see Captain Will Bowen and asked him if he could secure a crew, including engineers, firemen, mate and pilot, to fish the steamer Messick on the same basis that Captain Diehl had been fishing her as the crew had refused to fish any longer with Captain Diehl and the boat was tied up at the dock. I agreed to co-operate with him as far as I could in securing a crew and on Monday and Tuesday he engaged a crew, a number of whom had been with Captain Diehl but had refused to work with him longer. By Tuesday night he was ready to take charge of the steamer and on Wednesday morning he went out on the fishing grounds and

he continued to fish this boat until we stopped some time in October.

Some time, I should say about ten days or two weeks, after Captain Bowen began fishing the steamer Messick by agreement among

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the fish factory managers, the scale of wages to crew and captain was again changed in that a minimum weekly amount was guaranteed but the percentage was left the same, and this continued until the boats stopped fishing for the season. We fished for a little longer period in 1930 than we did in 1931. Our four boats caught approximately 26,000,000 in 1930 and caught 21,749,000 in 1931.

My company would have been in bankruptcy now page 17 } had I kept the boat fishing with Captain Diehl as captain. All the boats in that section were having trouble more or less with their crews on account of the small catch of fish. Two of my boats were not having any trouble. I made no complaint to Capt. Diehl as to his operation of the boat or his catch of fish. I cannot say that Diehl did not use skill & diligence or make an honest effort to catch fish, I do know that he did not catch fish."

The witness,

PAUL MUIR,

being duly sworn, testified as follows:

"I live at Reedville, Virginia, and I am secretary and bookkeeper for the Edwards Company, Inc., and also filled those positions in 1930. I typed the letter written by Mr. Wilbert Edwards to Captain Diehl, which had been testified to by both Captain Diehl and Mr. Edwards. I was in the office with Mr. Edwards when Captain R. D. Diehl came in and my recollection is that it was on December 11th or 12th. Mr. Edwards explained to Captain Diehl that it was uncertain whether or not the Edwards Company would fish at all; that even if they did fish, it was uncertain when the fishing would begin and when it would stop, as this would depend on the catch of fish and the value of same. I recall that Mr. Edwards explained this very particularly. They had been talking for about forty-five minutes when I left and they had made no agreement at that time."

The witness,

LITTLETON HAYNIE,
being duly sworn, testified as follows:

"I live near Alfonso in Lancaster County, Virginia, and was a fireman on the fishing steamer, W. L. Messick, during the

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period when Captain R. D. Diehl was captain in 1931. I was engaged on a purely percentage basis and made practically nothing during the time I was with Captain Diehl. This was due to the fact that we did not catch any fish as we only caught 360,000 for the entire time I was on the boat from July 7th to July 25th, inclusive. On Tuesday night, July page 18 } 21st, I notified the chief engineer that I would have to leave at the end of the week. On the following Friday night I notified Mr. Edwards that I would have to leave that night but he guaranteed to me two dollars for my work the next day in the form of a bet that we would catch that many fish on the percentage basis so I went out the next day on the boat and we did not catch a fish. On Saturday night when we came in to the factory I notified the captain and Mr. Edwards that I would have to quit as we were not catching enough fish for me to make a living and I did quit. Either Monday or Tuesday Mr. Wilbert Edwards called me over the telephone and told me that Captain Bowen would take charge of the steamer Messick and that fishing was better and asked me if I would join a crew under him, which I agreed to do and did go back on the Messick the following Wednesday morning. I continued with Captain Bowen until some time in September when I got a position on a tug boat in Norfolk, which paid me better and gave me a winter's work. I would not have been satisfied if the boat had caught 650,000 fish."

The witness,

LLOYD WALKER,
being duly sworn, testified as follows:

"I live at Fairport in Northumberland County, Virginia, and was chief engineer on the fishing steamer, W. L. Messick, in 1931 when she was under Captain R. D. Diehl as captain, that is from July 7th to July 25th, inclusive. My second

engineer, Mr. Seth Blundon, and my firemen, having notified me that they would have to leave as they were not catching enough fish to make a living, on Tuesday night, July 21, 1931, when we came in to the factory I notified Mr. Wilbert Edwards that I would have to quit as my second

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engineer and firemen had told me they were going to quit and as I was not making enough money to live on. I told him that I would have to quit because other engineers on similar fishing steamers were making nearly twice as much as I was making. We were all working on a percentage basis and our boat was not catching any fish. Mr. Edwards asked me to stay at least until the end of the week and said that

Captain Diehl might do better. On Friday night, page 19 } July 24th, I again notified Mr. Edwards that I would have to quit and that my firemen were quitting that night. Mr. Edwards guaranteed me two dollars if I would go out again on Saturday by making a bet with me that we would catch fish and we all remained and did go out Saturday and did not catch a fish. That night when we came in we notified Captain Diehl and Mr. Edwards that we were quitting and we did quit. On the following day, Sunday, Mr. Edwards and Captain Will Bowen came to my house and asked me if I would continue to work on the Messick with Captain Will Bowen as captain and on the same percentage basis. I told them I would go with Captain Bowen but that I could not afford to go again with Captain Diehl. Mr. Edwards then asked me if I would try and get the second engineer and the firemen, which I agreed to do and did. We all went out with Captain Bowen on Wednesday morning on the steamer Messick and the entire engine crew, with the exception of one fireman who secured a better position, remained with Captain Bowen until the company stopped fishing in October. Some engineers were making double as much as I was. As far as I know Capt. Diehl was doing all he could to catch fish."

The witness,

SETH BLUNDON,

being duly sworn, testified as follows:

"I was second engineer on the steamer, W. L. Messick, from July 7th to July 25th, inclusive, 1931, when she was under

the command of Captain R. D. Diehl. From the beginning
Captain Diehl

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did not catch as many fish as other boats of the same size and capacity. I was under a purely percentage basis and I found that I was only making about one-half as much as engineers on other similar fishing boats and on boats not so good. I told Captain Diehl several times that I could not remain with him as he was not catching any fish. Early that week I told Mr. Wilbert Edwards that I could not fish any longer under Captain Diehl as he was not catching any fish and he guaranteed me two dollars a day for the last week in the form of a bet with me that we would catch fish. I stayed on her for the balance of that week and when we came in on July page 20 { 25th I told Mr. Edwards and Captain Diehl that I was quitting and I did quit. I would have remained on board with any good captain. On Monday Lloyd Walker, the chief engineer, informed me that Captain Will Bowen was going to take charge of the steamer Messick and asked me if I would go with him as second engineer and I told him I would but that I could not afford to go back with Captain Diehl and we went out on Wednesday morning and I continued on the boat until she stopped fishing."

The witness,

WILL BOWEN,

being duly sworn, testified as follows:

"I have been a fish boat captain for several years and live at Fairport, Virginia. I was fishing in June and July of 1931 and got 2,300,000 menhaden fish during that period. On Sunday, early afternoon; July 26th, Mr. Wilbert Edwards came to my house to see me for the first time and told me that the crew had refused to fish any longer with Captain R. D. Diehl on the steamer Messick and that the pilot had abandoned her and that the engineers had tied her up because they were not catching enough fish to make a living, and he asked me if I thought I could get a crew and take charge of her. He said that he had been employing Captain Diehl and his crew on a purely percentage basis

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based upon the amount of fish caught and would employ myself and my crew on the same basis, that is from 2½c to 3c per thousand fish caught for the crew and 20c per thousand fish caught to me the engineers & pilot got more than the crew. He offered to co-operate with me and on Monday and Tuesday I secured a crew, many of whom including the engineers had been with Captain Diehl and had left, and on Wednesday morning we started fishing the steamer Messick and continued to fish her until the company stopped fishing in the fall. I had no trouble with my crew."

The witness,

CAPTAIN S. B. TREACKLE,
being duly sworn, testified as follows:

page 21 } "I am and have been captain of fishing boats for a number of years and I live at Fleeton, Virginia. I was employed to fish one of the fishing steamers of the Edwards Company in 1931. I had no written contract but merely a verbal understanding. Mr. Wilbert Edwards when he employed me told me that there was considerable uncertainty as to whether or not the Edwards Company would fish at all during the season of 1931; that it would be uncertain when he would start fishing or when he would stop; that this would depend upon the number of fish caught and the value of fish. I understood, however, that I was being employed to fish their steamer for the season 1931 as long as the steamer was fishing. My understanding of my contract with Mr. Edwards was that he would have the right to stop my boat from fishing at any time if he was losing money but that I was to fish as long as she fished in 1931. Fishing was very poor in July, improved in August & September was the best fishing month of the season. I continued in command of the boat until about Oct. 1, 1931. I have fished in the same waters for several years with Capt. Diehl. I know his reputation as a fisherman and I consider him a good fisherman."

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And this being all of the testimony introduced before the jury, after being charged by the court and the case being argued, the jury retired to their room and after considera-

tion brought in a verdict finding in favor of the plaintiff, R. D. Diehl, and assessing his damages against the defendant, the Edwards Company, Inc., in the amount of five hundred dollars (\$500.00).

Whereupon the defendant by counsel after said verdict was rendered and recorded by the court, moved the court to set aside the verdict of the jury and grant the defendant a new trial on the ground that the verdict was contrary to the law and the evidence, which motion the court overruled and entered up the following judgment against the defendant in the amount of five hundred dollars as aforesaid and costs.

Circuit Court of the County of Northumberland on Saturday the ninth day of January in the year of our page 22 } Lord, nineteen hundred and thirty-two.

Present: The Honorable E. Hugh Smith, Judge.

Robert D. Deihl

vs.

Edwards Company, Inc.

MOTION FOR JUDGMENT.

This day came again the parties in person and by counsel, and again came the Jury, to-wit: A. Y. Headley, L. E. Bromley, F. K. Sampson, I. D. Hinton, Leslie L. Edwards, W. A. Smith and R. J. Shirley, who having heard the remainder of the evidence, argument of counsel and received the instructions of the court, retired to their room to consider their verdict, and after sometime returned into court having found the following verdict, to-wit: "We the Jury upon the issue joined find for the plaintiff, and assess his damages at the sum of \$500.00, Wilson A. Smith, Foreman." Whereupon, the said defendant, by its counsel, moved the court to set aside said verdict upon the grounds that the same is contrary to the law and evidence; which motion the Court overruled and ordered the same to be recorded as rendered. Therefor, it is considered by the Court that the plaintiff, Robert D. Deihl recover of the defendant, the Edwards Company, Inc., the sum of \$500.00 with interest thereon from this date until paid and his costs by him in this behalf expended. And the said defendant having signified its purpose to apply for a writ of error to the Supreme Court of Appeals of this state and having requested this Court to suspend the execution of said

judgment to allow him so to do; the court doth therefore suspend the same for a period of eighty days from the date hereof; but the said defendant shall not have the benefit of this suspension order until it shall, or some person for it, enter into and acknowledge a bond as required by law, before the Clerk of this Court in the penalty of \$700.00 conditioned according to law and with security to be approved by said Clerk.

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To which said action of the court in overruling the said motion of the defendant upon the ground that it is page 23 } contrary to the law and evidence and without evidence to support it and refusing to grant it a new trial and in awarding and entering up judgment against the defendant as aforesaid, the defendant by counsel excepts and tenders this his Bill of Exceptions Number 1, on March 3rd, 1932, and prays that same may be filed, sealed and enrolled and made a part of the record of this case, which is accordingly done; it appearing to the Judge of said Court that Raymond Sisson, attorney for the plaintiff, had in writng, reasonable notice of the time and place at which said bill of exceptions was to be so tendered.

Given under the hand of the Judge of the Circuit Court of Northumberland County, Virginia, this the 5 day of March, 1932.

E. HUGH SMITH,
Judge of the Circuit Court of Northumberland County, Virginia.

Virginia:

In the Circuit Court of Northumberland County.

R. D. Deihl, Plaintiff,

vs.

The Edwards Company, Incorporated, Defendant.

BILL OF EXCEPTION NO. 2.

Be it remembered that upon the trial of this case the Court at the request of the plaintiff gave the following instruction numbered 1:

INSTRUCTION NO. 1.

The Court instructs the jury that if they believe from the evidence and by a preponderance thereof, the following: that the Edwards Company, Inc., entered into an agreement with Robert D. Deihl to fish the steamer Messick for the season of 1931; as long as said steamer fished; and believe from the evidence that the plaintiff possessed ordinary skill and used such skill and effort in operating said steamer; and the catch of fish made by said steamer was not occasioned by the lack of skill and effort of the said plaintiff; and believe that said plaintiff fully performed his contract and further believe from the evidence that the plaintiff was discharged as master of said steamer by said defendant company without proper cause, then the defendant company is guilty of a breach of contract and the plaintiff is entitled to recover the value of his said contract; and in ascertaining the damages the jury may take into consideration the experience of the plaintiff, the amount of fish caught by him in previous years and compare the season of 1931 with the seasons of previous years and assess his damages in such an amount as the plaintiff has proved, not exceeding \$1,086.20.

And at the request of the defendant the court gave the following instructions numbered 2, 3, 4, 5, 6 & 7:

INSTRUCTION NO. 2.

The Court instructs the jury that if they believe from the evidence that the verbal contract, between the plaintiff Robt. D. Diehl, and the Edwards Company, Inc., the defendant, under which the said Robt. D. Diehl was employed to page 2 } act as master of one of the fishing steamships of the said Edwards Company, contained no agreement as to the period of said employment, after it began then this is termed in law a hiring at will, and the said employment may be terminated by either party at any time; and if the jury so believe they shall find a verdict for the defendant.

INSTRUCTION NO. 3.

The Court further instructs the jury that if they believe from the evidence that under the contract, whether verbal or written, between the plaintiff, Robt. D. Diehl, and the Edwards Company, the defendant, by which the said Robt. D. Diehl was

employed to act as master of one of the fishing steamships of the said Edwards Company, it was understood and agreed between the said parties that the continuation of said employment would depend upon the amount of fish caught by the steamer of which the plaintiff was master and while the plaintiff was master, and upon the value of said fish, and that in case said catch of fish or the value of said fish proved unprofitable or unsatisfactory to said Edwards Company, said employment could be terminated by said Edwards Company, and if the jury further believe that the catch and value of said fish caught by said fishing steamer, of which the plaintiff was master and while the plaintiff was master, was unprofitable and unsatisfactory to said Edwards Company, then the said Edwards Company had the right to discharge the said plaintiff, and the jury should find for the defendant.

INSTRUCTION NO. 4.

The Court further instructs the jury that in order for the plaintiff to recover in this action, he must show by a preponderance of the evidence:

(1) That there was a contract between the plaintiff and the defendant providing for the employment of the plaintiff by the defendant as master of one of its fishing steamships, for the Menhaden fishing season for the year 1931; after the Company began;

(2) That the defendant without just cause discharged the plaintiff and thereby violated said contract.

And unless the jury believe from a preponderance page 3 } of the evidence that both of the above stated propositions occurred, they shall find for the defendant.

INSTRUCTION NO. 5.

The Court further instructs the jury that an employer has the right to discharge an employee, if the said employee does not perform the duties of his employment with that degree of skill, efficiency and knowledge which is possessed by those of ordinary skill, competency and standing in the business for which he is employed; and in the event of such discharge for the reasons above set forth, the discharged employee cannot recover damages from his employer.

INSTRUCTION NO. 6.

Th Court instructs the jury that the laws of the United States require a licensed pilot to be on board of all vessels of the character of the fishing steamer "W. L. Messick" at all times when said boat is being navigated, and from the uncontradicted evidence in this case it was the duty of the master of said vessel, R. D. Diehl, to employ said pilot; and if the jury believe from the evidence in this case that the pilot, who had previously been employed for said boat, became dissatisfied and left said boat on July 25th, 1931, and that the said master of said boat, R. D. Diehl, failed to secure one in his place, within a reasonable time then the only alternative for the defendant to do was to tie said boat up; and if the jury so believe they shall find for the defendant.

INSTRUCTION NO. 7.

The Court further instructs the jury that a discharged servant cannot lie by unemployed for the remainder of his term, and then claim full compensation; he is bound to make the best use of his time and use reasonable diligence to seek other employment of a similar character; and that the aforesaid instructions given for the plaintiff and the defendant were all the instructions given in the case: to the granting of which said instructions for the said plaintiff and defendant; no exceptions were taken by either.

But in order to make the said respective instructions a part of the record in this case the said defendant tenders this his

Bill of Exceptions #2, on the 3 day of March, 1932, page 4 } and prays that the same may be filed, sealed and enrolled and made a part of the record in this case, which is accordingly done; it appearing to the Judge of said court that Raymond Sisson, attorney for the plaintiff, had, in writing, reasonable notice of the time and place at which the said bill of exceptions was to be so tendered.

Given under the hand of the Judge of the Circuit Court of Northumberland County, Virginia, this the 5 day of March, 1932.

E. HUGH SMITH,
Judge of the Circuit Court of Northumberland County, Virginia.

Virginia:

Clerk's Office of the Circuit Court of Northumberland County, April 12th, 1932.

I, H. M. Walker, Clerk of the Circuit Court of said County, do certify that the foregoing is a true transcript of the record in the Notice of Motion for Judgment of Robert D. Deihl vs. Edwards Company, Inc., lately pending in our said Circuit Court.

I further certify that said record was not made up and completed until the plaintiff had had due notice of the making of the same and the intention of the defendant to take an appeal.

I further certify that the bond required to be given by the defendant in the above mentioned case by an order duly entered therein on the 9th day of January, 1932, was duly executed before me in said office on the 22nd day of January, 1932, with approved security and conditioned according to law.

Given under my hand this 12th day of April, 1932, and in the 156th year of our Commonwealth.

Teste:

H. M. WALKER, Clerk.

A Copy—Teste:

H. STEWART JONES, C. C.

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