

No. 14765

Supreme Court of Illinois

American Express Co.

vs.

Haggard

139 1860

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 110

J. W. Middleton & Co., Stationers, 196 Lake St.

Am Exp Co
8
Haggard

STATE OF ILLINOIS.
Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, A. D., 1865.

THE AMERICAN EXPRESS CO., —vs— DAVID D. HAGGARD.	}	Appeal from McLean.
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ABSTRACT OF THE RECORD.

BRIEF STATEMENT OF THE CASE.

PAGE OF RECORD. This was an action on the case by Appellee against Appellants as common carriers, for not delivering a package of money deposited with them by the Agent of Appellee, at Bloomington, Ill.

1 Declaration commences.

1 & 2 Declaration finished. A single count in case against Defendants as common carriers, for not delivering a package of money, \$170.30.

3 Summons.

4 Return as follows: "I have executed this writ this 20th day of November, 1864, by deliveridg a true copy of the same to L. A. Fuller, agent of the within named Express Company, at Bloomington, Illinois. The President of said Company not residing in this county.

A. DIXON, Sheriff.

By L. BURR, Deputy.

4 Motion to quash return on writ, founded on the following affidavit:

5 STATE OF ILLINOIS, }
McLEAN CIRCUIT COURT. } December Term, 1864.

DAVID D. HAGGARD, vs. THE AMERICAN EXPRESS COMPANY.	}	In Case.
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L. A. FULLER.

Subscribed and sworn to this 12th day of December, 1864, before
me.

E. R. ROE, Clerk.

By C. H. BLODGETT, Deputy.

Plea as follows:

SPENCER & WILLIAMS,
For the Defendants.

- 7 Hamilton Spencer being duly sworn, on his oath says that he is well acquainted with organization of the several companies composing what is called the American Express Company, and that the above plea is true in substance and in fact.

H. SPENCER.

Sworn to before me this 12th day of December, 1864.

E. R. ROE, Clerk.

This plea was demurred to, and demurrer sustained.

- 8 Other pleas.

First, General issue, not guilty.

- 9 Second, Plea of performance, avering a delivery of the package by Defendants to Plaintiff.

- 9 Third Plea, as follows:

And for a further plea in this behalf, by leave of the Court first had, &c., the said Defendants say that the said Plaintiff ought not to maintain his action, &c., because they say that the said Defendants are a private association or copartnership, without this, that the said Defendants at the commencement of this suit, or at any time before or since, were a body politic or corporate. And this the said Defendants are ready to verify, &c.

R. E. WILLIAMS, Def'ts. Att'y.

- 10 Demurrer to the second plea, because it amounts to the general issue.

General demurrer to the third plea.

- 10 Demurrers sustained.

- 11 Cause tried by the Court without a Jury, and taken under advisement.

PAGE OF RECORD.

- 11 & 12 Final judgment for Plaintiff below, for \$170.30.
 12 Appeal prayed and allowed.
 12 & 13 Appeal heard.
 14 Bill of Exceptions commences and proceeds as follows :

STATE OF ILLINOIS, } In the Circuit Court of said County.
 McLEAN COUNTY. } ss December Term, A D. 1864.

DAVID D. HAGGARD, }
 vs. } In Case.
 THE AMERICAN EXPRESS COMPANY. }

Be it remembered, that on the trial of the above entitled cause before the Court, a Jury having been waived by the parties, the Plaintiff, to maintain his case, introduced as a witness, William Clagg, who being duly sworn, testified as follows: In July, 1863, I was the agent for Plaintiff at Clinton, Dewitt county, for the sale of reapers, and on the 27th day of said month I enclosed to Plaintiff money in my hands belonging to him, amounting to \$170.30. This amount I sent in a package well sealed with common sealing wax, addressed to the Plaintiff at Bloomington, Illinois, and delivered it on the same day to the agent of the American Express Company, at Clinton, to be delivered to the Plaintiff at Bloomington, and took from the said agent this receipt, viz:

AMERICAN EXPRESS Co.,
 Clinton, Ills., July 27, 1863.

Received of Wm. Clagg & Son,

Package, said to contain Bank bills, valued at One Hundred and Seventy ³⁰/₁₀₀ Dollars, and marked D. D. Haggard, Bloomington, which we undertake to forward to the nearest point of destination reached by this Company, only, perils of navigation. And it is hereby expressly agreed that the said American Express Company are not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package, or thing, for over \$50, unless the true value thereof is herein stated. Nor for any loss or damage by fire, the act of God, or the enemies of the Government, the restraint of Governments, mobs, riots, insurrections, pirates, or from any of the dangers incident to a time of war. Nor upon any property or thing, unless properly packed and secured for transportation. Nor upon any fragile fabrics, unless so marked upon the package containing the same. Nor upon any fabrics consisting of or contained in glass. For the Proprietors.

JNO. RASBACH, Agent.

Do a general express business between all the principal cities and towns of the states of New York, Western Pennsylvania, Ohio, Indiana, Kentucky, Michigan, Illinois, Iowa, Wisconsin, Missouri and Canada, and connecting with other responsible Express Companies, to all parts of the world.

PROPRIETORS :

Livingston, Fargo & Co.,		Wells, Butterfield & Co.,
Buffalo.		New York.

A copy of the receipt proved by the witness Haggard, is appended hereto, marked "SCHEDULE A," and is made a part of this Bill of Exceptions.

The above was all the evidence offered or given on the trial of this cause.

The Court found the issues for the Plaintiff, and rendered Judgment for the Plaintiff for the sum of \$170.30, and costs of suit, to all which decisions, rulings and judgment of the Court the Defendants then and there excepted, and the Defendants now tender their Bill of Exceptions, and ask that the same be signed, sealed, and made a part of the record, which is done in open Court.

Given under my hand and seal this 26th day of December, A. D. 1864.

JOHN M. SCOTT, **L.S.**
Judge.

SCHEDULE "A."

Article	Dolls.	Cts.	Consignee	Destination	Amt Charges	Signature.
1 Pa	170	30	D. D. Haggard.	B.	30	D. D. Haggard,
			<i>Appral Bond</i>			Per W.

20 Clerk's certificate.

The Appellants assign the following errors upon the record:

1st. The Court erred in overruling the motion to quash the return on the summons.

2d. The Court erred in sustaining demurrers to the pleas.

3d. The Court erred in finding the issues for the Plaintiff below, and in giving judgment for the Plaintiff below.

4th. The Court erred in not finding the issues in favor of, and giving judgment for the Defendant below.

For these errors, and others that will be apparent on inspection of the record, the judgment should be reversed, and the cause remanded.

H. SPENCER and
R. E. WILLIAMS,
Counsel for Appellants.

⁷⁷⁰
The American Express Co

⁷¹³⁹
vs
David D. Haggard

Appeal from McLem

Abstract of the Record

Filed April 3, 1865

J. L. Land etc,

R. E. William

State of Illinois

Supreme Court 3^d Grand Division
Ottawa April Term 1855

The American Express Co

v

David D Haggard -

Appeal from M Leam

The Appellants Assign the
following errors upon this record.

1st The Court erred in overruling the
Motion to quash the return on the
Summons -

2^d The Court erred in Sustaining
Demurrers to the Pleas

3^d The Court erred in finding the issues
for the plaintiff below. And in giving
judgement for the plaintiff below

4th - The Court erred in not finding the
issues in favor of, And giving judgement
for the the Defendant below.

For these errors, And others that will be
apparent on inspection of the record, the
judgement should be reversed And the cause
remanded

M Spencer and
R E Williams

for Appellants

Pleas begun and held at the Court house
in Bloomington, before the Hon. John M. Scott,
Judge of the Circuit Court of the Eighth Judicial
District of the State of Illinois, in a certain
cause pending in the Circuit Court of McLean
county in said State, wherein David D.
Haggan was Plaintiff and the "American
Express Company" was defendant.

State of Illinois,
McLean county } ss Be it remembered that
heretofore to-wit: on the ^{31st day of October, 1864,} said Plaintiff, David
D. Haggan, by his attorney, filed in the office
of the Clerk of the Circuit Court of said county,
his Declaration against the "American Express
Company", which Declaration was in words and
figures as follows, to-wit:

State of Illinois, In the McLean Circuit Court,
McLean county } ss December Term, A. D. 1864.

David D. Haggan, Plaintiff in this
suit, complains of the "American Express Company",
Defendant, in a plea of Case.

For that, whereas, heretofore to-wit: on the
twenty-seventh day of July, in the year
Eighteen hundred and sixty-four, at the county
of McLean of State of Illinois, the said defend-
ant was a common carrier of goods, bank-
bills, money and personal property for him, from

Clinton, in De Witt county, Illinois, to Bloomington in said county of McLean & State of Illinois; and the said plaintiff, then and there, to-wit: at at Clinton aforesaid, through his Agent, Wm. Clegg & Sons, delivered to said defendant as such carrier, of the said defendant then and there received from the said plaintiff One Hundred and Seventy Dollars & thirty cents, in Bank bills, of the value of One hundred and Seventy dollars & thirty cents of the plaintiff, to be carried by the said defendant as such carrier from Clinton aforesaid to Bloomington aforesaid; and at Bloomington aforesaid to be delivered by the said defendant to the said plaintiff for new and to the defendant; and it then and there became the duty of the said defendant to safely and securely carry & convey and deliver the said Bank-bills to the said plaintiff as aforesaid. Yet the said defendant, neglecting his said duty, did not safely carry and convey ~~and deliver~~ the said Bank-bills from Clinton to Bloomington, and deliver the same to the said plaintiff as aforesaid, but the said defendant then and there so negligently and improperly behaved in that behalf that by and through the negligence, carelessness and default of the said defendant in the premises, the said Bank-bills became and were

wholly lost to the said plaintiff, to-wit, at
the county aforesaid,

To the damage of the said plaintiff of
three hundred dollars; and hence he sues, &c.
W. H. Hanna, Pet'r's Atty.

And thereupon, there issued out of the office the
Clerk of the said Court, a writ of summons, as
follows, to-wit:

State of Illinois } The People of the State of Illinois
McLean county } ss. To the Sheriff of said county,
Greeting: We command ~~the~~ you to summon
the American Express Company, if found in
your county, personally to appear before the Circuit
court of said county of McLean, on the first day of
the next term thereof to be holden at the Court house
in Bloomington on the first Monday in the month of
December next to answer unto David D. Haggart in a
plea of Case - Damages Three Hundred Dollars,
And have you then and there this writ, and make
return thereon in what manner you execute the
same.

Witness Edward R. Roe Clerk of said
Circuit court and the seal thereof
here to affixed at Bloomington this 31st
day of October A.D. 1864

Edward R. Roe Clerk
By C. H. Bloodgett, Deputy.

Seal

Revenue Stamp
for 50 cents.

Which said Summons was afterwards returned into the office of the Clerk of the said court, endorsed as follows, to-wit:

"I have executed this writ this 20. day of November 1864 by delivering a true copy of the same to L. A. Tullen, Agent of the within named American Express Company at Bloomington Illinois - the President of said company not residing in this county. H. Dixon, Sheriff
By L. Burr, Deputy

And afterwards, to-wit at the regular December term of the said Circuit court,
Present, Hon. John M. Scott, Presiding Judge
Edward R. Rue, Clerk,
Henry A. Ewing, Sheriff,
The following proceeding were had as appears of record, to-wit.

Monday December, 12th. 1864

David D. Haggard

vs.

In Case,

The American Express Company }

And now at this day comes the said defendant by its attorney, and enters its motion to quash the Sheriff's return upon the summons issued herein, which ^{predicated on affidavit filed,} motion is overruled by the Court.

Which said affidavit therein above
referred to was filed on the 12th day of
December, A.D. 1864, and was in words
and figures as follows, to wit:

State of Illinois, McLean Circuit Court,
December Term, 1864

David D. Haggan

vs,

} In Case

The American Express Company }

Luther A. Fuller being duly sworn
on his oath says that the summons in
the above case was served upon affiant;
and affiant says he is not now and was
not at the date of said service, and never
has been the agent of any such corporation
as The American Express Company; and
that he knows of no such corporation.

And further saith not.

L. A. Fuller

Subscribed and sworn to this
12th day of December, 1864,
before me,

E. R. Roe Clerk

By C. H. Blodgett,
Deputy.

Whereupon, the defendant by its Attorney filed
its Plea ~~to certain affidavits~~ in said behalf, as
follows - ~~both of the said affidavits~~ being filed
on the 12th day of December, 1864, to-wit -

First.

McLean Co. Circuit Court, December Term, 1864,

Johnston Livingston,
William G. Hargo &
Henry Wells, & others,
who are sued by the
name of the American
Express Company.
ads

David D. Haggard } The said Livingston,
Hargo & Wells say that they as the firm of
Livingston, Hargo & Co. together with others under
the firm of Wells, Butterfield & Co. are engaged
in the business of transporting by express
between various points in the state of Illinois
under the general name of the American
Express Company; that there is not now and
never has been any body public or corporate
under the name or style of the American Express
Company, either in the state of Illinois or
elsewhere. And that they are ready to verify;
wherefore they pray judgement of the said Court
with and Declaration, and that the same may be
granted.

Spencer & Williams, pro-defendants

7

Hamilton Spence being
duly sworn, on his oath says -
that he is well acquainted
with organization of the
several companies com-
posing what is called the
American Express Company,
and that the above plea is
true in substance and in
fact

H. Spence.

Sworn to before me this
12th day of December, 1864.

E. R. Rue Clerk.

~~And upon the same day, to wit, on the 12th day
of December, aforesaid, the defendant filed an affi-
davit in said behalf, which said affidavit was
as follows, to wit,~~

~~State of Illinois, Alleen Circuit Court.
December Term, 1864.~~

~~David D. Haggard~~

~~vs,~~

~~The American Express Company~~

}
} In Case
}

~~Sather A. Fuller being duly sworn, on
his oath says that the summons in the above
case was served upon affiant; and affiant
says he is not now and was not at the date
of said service, and never has been the agent of~~

any such corporation as the American Express
Company, and thus he knows of no such cor-
poration. And further saith not,
E. A. Fuller,

Subscribed and sworn to the
12th day of December, 1864,
before me,

E. R. Roe Clerk

By C. H. Blodgett, Deputy,

And afterwards, to-wit, on the 13th day of December,
1864, said defendant by its attorney filed its
certain ^{other} pleas ^{in said behalf}, as follows, to-wit:

McLean County Circuit Court:

December Term, 1864

The American Express Company }

vs }

David D. Haggart }

And now the said defendants by Robert
E. Williams, their attorney, come and defend
the wrong and injury &c. and say that they
are not guilty in manner and form as the
said plaintiff has above complained against
them, and that they pray may be inquired of
by the country.

[And the said Plaintiff doth the like]

Wm. H. Hamme pro Pleff }

And for a further plea in this behalf, by leave

9

of the Court first had se. The said defendants say that the said plaintiff ought^{not} to maintain his action &c. because they say that they did ~~not~~ deliver the said property in the said declaration mentioned to the said plaintiff, to-wit, at Bloomington in said county, on the day in the said declaration mentioned; and this the said defendants are ready to verify &c.

20.

And for a further plea in this behalf, by leave of the Court first had se. the said defendants say that the said plaintiff ought not to maintain his action &c. because they say that the said defendants are a private association or co-partnership, without this that the said defendants at the commencement of this suit, or at any time before or since were a body politic & corporate; and this the said defendants are ready to verify &c.

R. E. Williams

Defends atty.

Whereupon the plaintiff by his attorney filed his demurrer to the plea of the said defendants; which demurrer was as follows, to-wit,

David D. Haggard

vs.

The American Express Company.

And the said plaintiff comes and

depends the wrong and injury, when, &c. and says, as to the second plea by the said defendants above pleaded, and say that the same is not sufficient in law, in this, to-wit, that said second plea amounts to the general issue; wherefore said plaintiff prays judgement, &c. and the said plaintiff comes and desires demurs to the said defendants' third plea, because he says that the same is insufficient in law, as a plea in bar to this action; and therefore prays, &c. W. H. Hanna
for Plaintiff.

And at the said term of the said Circuit Court, present as before, the following proceedings were had, as appears of record, in said cause, to-wit:

Tuesday, December 19th. 1864,

David D. Haggart

vs.

In Case,

The American Express Company

And now at this day come the parties hereto by their attorneys, and said Plaintiff enters his demurres to each of Defendants' pleasth by them herein pleaded; which demurres is sustained by the Court, and leave is given to the said defendants to amend their third plea. And now this cause coming on for trial, by consent of parties, the issues herein joined are

*And now defendant by leave of the Court files three additional pleas; to the 2d, & 3d, of which pleas Plaintiff demurs, and said demurres is sustained by the Court.
10

submitted to the Court without the intervention of a jury; and the Court having heard the evidence produced, and the arguments of counsel, and not being fully advised what judgment ought to be rendered in the premises, doth take the same ~~then~~ under advisement.

And afterwards, during the said term of the said Circuit Court, present as before, the following proceedings were had in said cause, as appears of record, to wit:

Wednesday, December 21st 1866

David Haggard,

vs,

The American Express Company

} In Case,

And now this day again come the parties hereto by their attorneys, and the Court being now fully advised in the premises, doth find the issues for the Plaintiff, and assesses his damages at the sum of One Hundred and Seventy Dollars and Thirty cents. And now said Defendant by its attorney, enters its motion for a new trial herein, which motion is overruled by the Court. It is therefore ordered by the Court that Plaintiff recover of and from the said American Express Company the sum of One Hundred and Seventy Dollars and Thirty cents, his damages aforesaid in form aforesaid.

assessed, and also his costs by him in this
wholly expended; and that he have execution thereon.
And now comes said defendant by its attorney
and moves the Court to grant an appeal from
the judgment of this Court to the supreme
court of this state; which is allowed, on
said defendants giving bond in thirty days
in the sum of Four Hundred Dollars, conditioned
as the law directs, with James W. Maynell
as security.

Which said bond, so required was afterwards filed,
to-wit, on the 26th day of December, A.D. 1864, by the
said defendants, in the office of the Clerk of the
said Circuit Court, as follows:

Know all Men by these Presents that me, the undersigned
Jesse Tappan's Company of James W. Maynell
of the county of _____ and state of Illinois
are held and firmly bound unto David D.
Haggan, in the penal sum of Four Hundred
Dollars, for the payment of which, me lawfully
to be made, me and each of us, bind ourselves,
our heirs, executors and administrators, jointly and
severally and firmly by these presents. Sealed
with our seals, and dated at Bloomington this
_____ day of December, Anno Domini, one thousand
eight hundred and sixty-four.

The condition of the above obligation is such

that, Whereas, the above bounden David S. Haggard did on the 21st day of December, one thousand, eight hundred and sixty-four, at a term of the Circuit Court then being holden within and for the County of McLean and State of Illinois, obtain a judgement against the above bounden American Express Company, for the sum of One Hundred and Seventy Dollars and thirty cents, and costs of suit; from which judgement said American Express Company has prayed for and obtained an Appeal to the Supreme Court of said State.

Now if the said American Express Company shall duly prosecute said appeal; and shall moreover pay the amount of the judgement, costs, interest and damages, rendered and to be rendered against it, the said American Express Company, in case the said judgement shall be affirmed in the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and virtue. The American Express Co. (Seal)

By Jas. C. Fargo, Genl. Supt.

J. W. Maxwell, (Seal)

Taken and entered into before me
and approved this Twenty-third
day of December, A.D. 1864

W. S. Morse

(Seal)

Notary Public

And after the said judgement of the said Court, as
aforesaid, the said Defendants tendered and filed
their Bill of Exceptions to the decisions of the
Court, aforesaid; which bill of exceptions was as
follows, to-wit:

State of Illinois,

McLean county,

} In the Circuit Court of said county.
December Term, A.D. 1864.

David D. Haggard

vs.

In Case.

The American Express Company }

Be it remembered that on the trial
of the above entitled cause before the Court -
a jury having been waived by the parties -
the plaintiff to maintain his case introduced
as a witness William Clagg, who being
duly sworn testified as follows: In July 1863
I was the agent for Plaintiff at Clinton,
De Witt county, for the sale of Reapers; and
on the 27th day of said month, I enclosed
to plaintiff money in my hands belonging
to him, amounting to the sum of \$170.30 -
this amount I sent in a package well
sealed with common sealing-wax addressed to
the plaintiff at Bloomington, Illinois, and
delivered it on the same day to the agent
of the American Express Company at Clinton
to be delivered to the plaintiff at Bloomington

and took from the said agent this receipt, viz:

American Express Co.

Clinton, Ills, July 27. 1863,

Received of Wm. Clagg of Son

package said to contain Bank-bills
valued at One Hundred & Seventy 80/100

Dollars, and marked D.D. Haggan, Bloomington,

which we undertake to forward to the nearest
point of Destination reached by this Express
Company only, perils of Navigation. And it is
hereby expressly agreed that the said American
Express company are not to be held liable
for any loss or damage except as forwarders
only; nor for any loss or damage of any box
package or thing for over \$50, unless the true
value thereof is herein stated; nor for any loss
or damage by fire, the acts of God, or the
enemies of the government, the restraints of
government, mobs, riots, insurrections, pirates,
or from any of the dangers incident to a
time of war; nor upon any property or thing
unless properly packed and secured for trans-
portation; nor upon any fragile fabrics unless
so marked upon the package containing the same;
nor upon any fabrics consisting of or contained
in glass.

For the Proprietors -

Jno. Rasbach, Agent

Do a General Express business
Between all the principal cities and towns of the States of New York, Westm, Pennsylvania,
Ohio, Indiana, Kentucky, Michigan, Illinois, Iowa, Wisconsin, Missouri and Canada,
and connecting with other responsible Express Companies to all parts of the world;
Livingston, Harpoff & Co. Buffalo,
Wells, Butterfield & Co. N.Y.

I sent this money Express in accordance with the direction of the Plaintiff. The defendants were at that time common carriers of money and other packages between Bloomington and Clinton.

To the examination of this witness the counsel for the defendants objected on the ground of his interest in the case; which objection was overruled by the Court; and the defendants then and there duly assented to said ruling.

The Plaintiff then called W. Haggart, who being duly sworn testified as follows:

In July 1863, I was in the employment of the plaintiff at Bloomington as Clerk. The package of money spoken of by the last witness was never delivered to me. I went to the office of the defendant in Bloomington about a week after it was sent, with the Plaintiff, and there saw a receipt for said package which I had signed. The receipt was in the book in which in which the Express Co. took receipts, and was in my hand-writing. I did not at first remember anything about it. After reflecting, and seeing the receipt, I then recollect of Jacob Shook - the driver who delivered packages for the Express Co. coming to the store of the plaintiff, and of my signing the receipt. I did not get the

package at the time I signed the receipt. I supposed that it was for a package of castings, and was left on the side-walk. The plaintiff is a Hardware merchant, and sells Reapers and other agricultural machinery. I was in the habit of signing for packages of castings, often - sometimes two or three times a day, and had receipts for money, and had authority to do so. After it was discovered that the package was lost, I wrote to my father in Chicago about it, stating the facts, and he paid the plaintiff, (who is my uncle) the amount of the loss and charged it to me. I did not request my father to pay it. I was then under 21 years of age, and am still so.

The counsel objected to the examination of this witness on the ground of his interest, which objection was overruled by the Court, and the defendant then and there stippled.

Being cross-examined, the witness further testified: When Shock, the driver, came to the store, I gave him the receipt now shown to me. I think some customers were in the store at the time. Plaintiff was not in the store. I think the Receipt-Book was on the show case when I signed the receipt. Shock stood by the counter. I saw no package, nor did he call my attention to any package. Shock was

in the habit of laying packages of cartons on the side-walk, and coming in and getting the receipt. If Shook had laid it down on the counter it might have been taken up by somebody else. I did not look for any package then, nor at any time afterwards. I did not think of it again till I was told that it was lost, and then I had receipts for it. I did not then recollect anything at all about it. After two or three days, when I saw the receipt, I recollected that I had given to Shook a receipt, as I have stated.

The plaintiff here rested his case.

The defendant then called a witness - L. M. Fuller, who being duly sworn testified as follows:

I have been in the employ of the defendant about eight years as agent having charge of offices. The business of Drivers is to deliver packages and collect the charges and get receipts for packages. He is not allowed to deliver without getting a receipt, and always takes the package to the Consignee when he calls for the receipt.

Being cross-examined this witness testified that Jacob Shook, formerly driver for defendant, stole property that had been brought by Express. We took our part of packages that came in

but order, and delivered the balance. He was discharged by the dependants: before he was discharged, he was arrested and gave up about \$850, and some valuable jewelry to the dependants. This was not equal to the amount he had stolen. I do not know that this claim of the plaintiff was included in the claim against Shock. I do not recollect about that. I think I spoke to the Detective who had Shock in custody about this claim of Plaintiff, and may have stated the amount to him, also about one claimed to have been lost by Mr. Hyde, together with other losses. The Detective got all the money and jewelry that was got from Shock, and delivered the same to me. The Detective turned Shock over to an officer of the law, from whom he escaped and fled from justice.

The defendant objected to the testimony called out on cross-examination, which objection was overruled by the Court, and the defendant then and there accepted.

A copy of the receipt proved by the witness, Haggan, is appended hereto, marked Schedule "A." and is made a part of this Bill of exceptions.

The above was all the evidence offered or given on the trial of this cause.

The Court found the issues for the Plaintiff and rendered judgement for the Plaintiff ^{for} the sum

\$170.30, of costs of suit. To all which decisions
rulings and judgement of the Court the
Defendant then and there Excepted. And the
defendants now tender this their Bill of
Exceptions and asks that the same be signed,
sealed and made a part of the record, which
is done in open court.

Given under my hand and seal this 26th,
day of December, A.D. 1864.

John M. Scott, 
Judge.

Schedule "A."

Article.	Dolls.	Cts.	Consignee.	Destination.	Amount.	charges.	Signature.
1 Pa.	170.	30.	D.D. Haggard.	B.	30	D.D. Haggard.	M.

State of Illinois,
McLean County } ss. I, Edward R. Rue, Clerk of
the Circuit Court in and for said county, do hereby
certify that the foregoing is a true and complete
Transcript of the records and files of my office,
pertaining to a certain cause, wherein David D.
Haggard is Plaintiff and The American Express
Company is Defendant.

In testimony whereof I have hereto set my
hand and attached the seal of said
Circuit Court, this 29th day of December,
A.D. 1864.

Edward R. Rue, Clerk



110 139
David D. Haggard

vs.

The American Express
Company

Transcript from
McLean Circuit Court.

The American Express Co
Appellant
v.

David D Haggard
Appellee

Filed March. 24 1885
L. Leland.
Clerk.

Transcript \$5.00.



STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

APRIL TERM, A. D., 1865.

AMERICAN EXPRESS CO. }
vs. } Appeal from McLean.
DAVID D. HAGGARD. }

ARGUMENT OF THE APPELLEE.

This is an action on the case against the appellants, defendants below, as Common Carriers, for the loss of a package of money.

The first error complained of is that the Court below erred in overruling the motion of Defendants below to quash the return on the summons. This motion was properly overruled for the reason that the objection should have been taken by plea and not by motion. This point is fully decided in the case of *Holloway et. al. vs. Freeman*, 22d Ill., page 201. In that case the Court says in substance, "that where the objection appears on the face of the papers a motion to quash will be entertained, but when extrinsic matters have to be shown, THAT must be done by plea in abatement, so that an issue of fact may be made up and tried upon such matter." The motion in this case to quash the return on the summons, is based on extrinsic matter, that is to say, on the affidavit of Fuller, and presents a question of fact to be tried, that could not properly be presented otherwise than by plea in abatement. Therefore the Court properly overruled the motion.

The next error complained of is, that the Court below sustained a demurrer to the plea in abatement of the defendants.

In the case just quoted, 22d Ill., page 202, the Court decides that the plea must be filed in apt time, and that interposing an insufficient motion, is a waiver of the right to plead in abatement. But the objections to the plea, as a plea in abatement, do not rest on this ground.

THE PLEA SHOULD GIVE THE PLAINTIFF A BETTER WRIT. It should point out and name in full the parties who compose the American Express Company, so that the Plaintiff could sue them; the plea does not do so, and for this reason is clearly defective. (See Chitty's Pleading, vol. 1, marginal page 446.

The same facts contained in the plea in abatement are set up in the Defendant's third plea in bar. To this third plea, there was a demurrer, and the same was sustained, for the reason that the matter set up in the plea was no bar to the action, but only matter in abatement, if well pleaded. The rule is "that matter which merely de-

feats the present proceeding and does not show that the Plaintiff is concluded forever, must be pleaded in abatement and not in bar." (1st Chitty's Pleading, marginal page 446.)

I am aware that this Court has decided that where a suit is brought by a corporation, that the Defendant may plead in bar *NUL TIEL CORPORATION*, but this doctrine does not apply where the corporation is defendant. If the suit is brought against the corporation by a wrong name, or if the claim is in fact against individuals, and they are sued as a corporation, and they appear, as in this case, to defend the suit, they must set up the misnomer or want of corporate authority by plea in abatement, and give the Plaintiff a better writ, and cannot set up the defence in *BAR* of the action.

The plea is not good for another reason; it sets up a denial of matter, which is known to the Court as a matter of law. In other words it attempts to deny the statute. The American Express Company is incorporated and the act of incorporation is a *PUBLIC ACT*. (See Laws of 1859, page 379.) It can no longer be a matter of inquiry as to this corporation; the law has settled it, and the demurrer to the third plea was properly sustained.

The next point made by the Appellants, is that the witness, Haggard, was interested, and that his testimony should have been excluded. His evidence shows that he is not interested. It is true that his father paid to the Plaintiff the amount of money lost, but as the witness was under age, the payment of the money by his father to the Plaintiff could not create any legal liability on the part of the son to his father for the money, and the money being paid to the Plaintiff at the instance of the witness, certainly settled any supposed liability that the witness was under to the Plaintiff.

Could a suit be maintained now against this witness for the money, by any person? Certainly not. In order to disqualify him as a witness his interest must be a legal interest in the event of the suit, and it must be such an interest as could be certainly enforced at law. He has no such interest and is a competent witness.

It is further urged on the part of the Appellants, that inasmuch as this is an action on the case, and that as the loss occurred to the Plaintiff on account of the negligence of the Plaintiff's agent, or that as the Agent's negligence in some degree contributed to the loss, that the Defendants are not liable. This principle of law has no application to the case. This suit is brought against the Defendants as common carriers. They are bound by law to safely deliver the package at its place of destination, and they take all risks on themselves, the act of God or the public enemies only, excepted. Shook, the agent of the defendants, was in the course of his employment, in law, the Defendants themselves. He embezzled the package, or in other words the Defendants embezzled the package. The evidence of Fuller is in substance that they have the money now.

The Defendants reason thus: "We agreed to safely carry and de-

liver to you the package ; we embezzled it and we have the money on hands now, but your negligence allowed us to do so, and therefore we will keep the package."

It is not to be supposed that the public are bound by law to regard the agents of the Express Company as a set of thieves, and to be at all times on their guard against them as such, but the Company seem to insist on that principle, and will doubtless make it a general custom for the public to do so, by adhering to the position they assume in defending this suit.

If the Defendants did not deliver the package, then they are liable. On this point I only ask the Court to read the evidence of W. Haggard and L. W. Fuller, which sets the matter at rest beyond all doubt. The evidence of Haggard shows the non-delivery of the package, and the cross-examination of Fuller confirms and strengthens his evidence, and shows that Shook stole the package, and when arrested accounted to the defendants for it.

The Defendants insist further, that in as much as Samuel Haggard, (the witness Haggard's father,) paid the Plaintiff for the loss of the package, that that payment absolves them from all liability, as they say the Plaintiff could have but one satisfaction.

It will be observed that the payment by Samuel Haggard to the Plaintiff was made on account of the fact that the Defendants had his son's receipt for the package, and was in fact a voluntary payment, that it was in no way a settlement of any claim against the Defendants, and that they had nothing whatever to do with it. How could they then be absolved from liability. The legal title to sue is in the Plaintiff. Samuel Haggard could not purchase the right to bring the suit, but the suit must be brought against the Defendants by the Plaintiff, and the mere fact that the declaration does not show that the suit is brought for the use of Samuel Haggard, cannot alter the case. The question as to whether the Plaintiff would be liable to Samuel Haggard for the judgment, is, I apprehend, a matter that the Defendants have no interest in discussing.

But I am here to say, that the Plaintiff is in fact a nominal Plaintiff, and that the judgment will inure to the benefit of Samuel Haggard.

W. H. HANNA,
Att'y. for the Appellee.

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American Express Co

vs

David D. Haggard

Defendants argument

STATE OF ILLINOIS.

Supreme Court, Third Grand Division.

APRIL TERM, A. D., 1865.

THE AMERICAN EXPRESS CO.,
vs.
DAVID D. HAGGARD.

ARGUMENT ON THE PART OF APPELLANTS.

I. The service of the summons was made in the manner authorized by the statute in case of action against corporations.—[Laws of 1853, page 258.—Purple's Stat. 1261.

But the affidavit of Fuller, the person on whom the summons was served, shows that the Defendant below was not a corporation. The statute has therefore no application to this case, and the summons could be served properly only as in other cases of action against natural persons. The motion to quash the return should have been sustained.

II. The pleas alleging that the Defendant below was not a corporation were good in law, and the demurrers to them should have been overruled.

The fact whether the American Express Company was or was not a corporation is one essential to be ascertained. It is perfectly clear that if unincorporated, the mode of proceeding adopted in the case cannot be maintained. The question of corporation or no corporation presented by the pleas, is one material in the case, and on which important rights depend.

III. It being admitted, as it must be, that if the Defendant below is not a corporation, this action could not be maintained if that fact appeared; it seems to follow that the Court below erred in giving judgment as it did.

In every way in which it was possible to present the point, it was presented; by motion to quash, by plea in the nature of a plea in abatement, by plea in bar; the fact that the Defendant is not a corporation is confessed by the demurrers, and by the omission to traverse the affidavit of Fuller; and yet the action is maintained and judgment given, as it could be rightly done only if the Defendant below was a corporation.

IV. The witness Haggard was interested and his testimony should have been excluded.

He was liable to Plaintiff for the value of the package lost by his

admitted negligence in not taking it when he receipted for it. The fact that he was under 21 years old makes no difference as to this. He was interested therefore in fixing the liability upon the Express Co., so as to relieve himself from Haggard's claim.

V. The loss of the package occurred by reason of the gross carelessness of the agent of the Plaintiff below.

It is impossible to read the testimony of the witness without perceiving this. A package described as containing \$170.30 in money is receipted for by him without, as he says, seeing it, or looking for it "then, nor at any time afterwards."

For aught that appears in the case, the package may have been laid upon the counter by the driver, when the receipt was given, and taken up by one of the persons in the store at the time. Indeed, but for the fact that the driver was afterwards discovered to be dishonest, this would be the natural conclusion of all, in reference to the loss.

But if the driver, Shook, did in fact steal the package, (of which there is no proof) he was enabled to do so by the great carelessness of the witness. The Company safely carried the package from Clinton to Bloomington, and took it to the place of business of the consignee for delivery. Instead of taking the package, his agent acknowledges that he has received it by a formal, written receipt, so as to put the Express Co. entirely off its guard, and then chooses to leave the package in the hands of the driver, who embezzles it.

If this is not the case of negligence contributing to the loss in suit it is difficult to conceive what could be. Indeed it may be said that the negligence of the clerk not so much contributed to, as occasioned the loss, since without that negligence the loss could not have happened.

In this action upon the case, therefore, upon well settled principles the Plaintiff below ought not to recover.

Hartfield vs Roper, 21 Wend, 615.

Brownell vs Flagger, 5 Ill, 282.

G. & C. U. R. R. Co., vs Jacobs, 20 Ill. 478.

C. & R. I. R. R. Co., vs Still, 19 Ill. 599.

VI. The fact of the non delivery of the package is not proved.

True the clerk testifies that he did not actually receive it, and says that when he signed the receipt he supposed it was for a package of castings on the side walk.

To this is opposed the fact that at the time, as he himself testifies, he did not look for the package, nor give himself, then nor afterwards a thought about it, till it was missed and it was found he had receipted for it.

The receipt, schedule A, of the Bill of Exceptions, plainly describes the package as containing \$170.30, and it is difficult to believe that such a package could have been mistaken for "a package of castings on the side walk."

It seems more probable from the proof that the package and receipt book were placed by the driver on the counter where he is proved to have stood, and that the clerk took the book to the show case, more convenient in height to rest the book upon while signing the receipt, leaving the package unnoticed perhaps, and that it was taken from that place by some one—perhaps by one of those shown to have been in the store—perhaps by the driver himself—it matters not which.

However the loss occurred, if the facts are as here supposed—and the proofs justify the belief that that they are—the delivery was complete and the liability of the carrier ended.

VII. The payment by the father of the clerk to the Plaintiff below of the value of the package, satisfied him for his loss, so that afterward he could not maintain this action.

He had originally a right of action against both the Express Co. and the clerk by whose negligence the loss happened. He might maintain an action against either, but not against both.—[Chitty pl. p. 89, and cases cited,] Much less after having obtained full satisfaction from one, can he sue the other.

The fact that the money was paid by the father of the clerk, and voluntarily, makes no difference. It did not the less satisfy the Plaintiff's claim.

The father recognizing the liability of his son for his negligent conduct, of which liability there can be no doubt upon the facts of the case, chooses to pay the amount, and to charge it to his son.—Whether he charged it in account as a sum to be repaid, or as an advancement, does not appear, nor is it material. The only material fact is that the claim of the Plaintiff below was fully satisfied. To allow him to recover against the Express Co. after this, would be to allow him to have two satisfactions for one injury.

It cannot be replied that the recovery against the Express Co. will inure to the benefit of the father of young Haggard :

1. Because the action is in form for the damages occasioned by the non delivery of the package, which damages are proved to have been already satisfied.

2. Because the payment to the Plaintiff below, having been voluntary and made under no mistake of facts, the person making it can have no claim to recover back the money in any case.

The loss of the Plaintiff below, having been made good by the party really in fault, there the matter ends.

VIII. The evidence of Fuller, called out on the cross examination, was irrelevant, and was properly objected to.

It cannot aid in maintaining the judgment. It is not pretended that the identical money contained in the package was surrendered by the driver. If it were, still the action is not trover for that, but in case for the non delivery of the package.

Even if the Express Co. has in its hands money to which the Plaintiff below is entitled, this action is not for money had and received. Nor does it appear how much of that money he was entitled to if his action had been brought to recover it. The sum surrendered by the driver was less than all he had obtained. How much less does not appear. But in any event this evidence has nothing to do with the issue on trial in this case.

R. E. WILLIAMS,
Of Counsel for Appellants.

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David D. Haggard

Brief and Argument
for Appellants

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Leland McK

R. E. Williams

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Argued for the Appellee
 W. H. HAZZARD.