No. 14809

Supreme Court of Illinois

Cincinnatti & Chicago Air Line R. R. Co.

vs.

Marcus

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 201

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

241-127

Supreme Court of Illinois.

THIRD GRAND DIVISION — APRIL TERM, 1865.

NACHMANN MARCUS, APPELLEE,

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THE CINCINNATI AND CHICAGO AIR LINE RAILROAD COMPANY, APPELLANT.

APPEAL FROM COOK COUNTY CIRCUIT COURT.

BRIEF AND ARGUMENT OF CHASE & INGERSOLL,

FOR APPELLEE.

Beach & Barnard, Printers, 14 South Clark Street.

Filed April 21. 1865
S. Strawbridge

SUPREME COURT OF ILLINOIS,

April Term, A. D. 1865.

APPEAL FROM COOK COUNTY CIRCUIT COURT.

NACHMANN MARCUS,
v.
THE CINCINNATI & CHICAGO AIR LINE RAILROAD COMPANY.

STATEMENT OF FACTS.

THIS case was tried at the January Term of the Circuit Court of Cook county, before Hon. E. S. Williams, circuit judge, and a jury.

The action was brought to recover the value of a certain Trunk, and contents, consisting of gold and silver watches and chains, and other jewelry, alleged to be of the value of one thousand dollars.

The declaration charges that, as common carriers, the defendant received such trunk and contents, at Indianapolis, in the State of Indiana, to be transported by them to Chicago, Ill., and that plaintiff paid the price of such transportation; that through the negligence of defendant, the same was lost, the goods abstracted, stolen, and converted.

The defendant pleaded the general issue.

The evidence in the case shows, that the plaintiff, who was a peddler, left Cincinnati in July last, taking the cars at that place, and came to Indianapolis, on his way to Chi-

cago. That prior to his leaving Cincinnati, he, in company with Mr. Newbergher, procured his ticket for Indianapolis, and had his trunk (which was an ordinary Russett trunk), containing the gold and silver watches, chains, jewelry, and other articles, together with his peddling pack, containing a quantity of dry goods, checked to Indianapolis, paying therefor fifty cents on account of over weight—being double first class freight rates. The goods, watches and chains, were packed in the trunk, in the presence of witness Newbergher, the night previous to his departure from Cincinnati, and left in the room in which plaintiff and the witness Newbergher slept, and so remained in the room after the same were packed, until they left in the morning train for Indianapolis, where the witness Newbergher and plaintiff went together, carrying the trunk and pack to the depot, where they were checked for Indianapolis, as before stated. That on arriving at Indianapolis about noon of the same day, the plaintiff remained there until nearly night, when he and Newbergher went to the depot and took the trunk from the baggage master, giving up the check, and carried same to the depot of the defendant, and then and there had the same, with the pack, checked through to Chicago. That at that time the trunk was securely locked as when it left Cincinnati; and that on account of extra weight, the plaintiff paid one dollar extra for the transportation of both parcels to Chicago, defendant at first objecting, for the reason that he only paid fifty cents from Cincinnati to Indianapolis, but was advised by Newbergher not to dispute the price, and he accordingly paid the one dollar extra, and placed the same in charge of the baggage man of the defendant, and received his checks therefor, and left on the same train for Chicago.

On arriving at Chicago, the defendant called for his

trunk and pack, but the trunk was missing, although the pack had come safely, and was received.

On calling the next day, it was not yet received at the depot at Chicago, and the agents of the defendant caused search to be made at the different hotels, but the same was not found; and the plaintiff thereupon left the *key* to his trunk with the agent of defendant, giving him description of the property contained in the trunk, naming gold and silver watches, gold and silver chains, jewelry, and other goods, to enable him the more readily to find it.

Upon calling again another day for the trunk, he was informed that it arrived, but that the check was *mismatched*, and that by mistake it had been sent back to Indianapolis, and the defendant telegraphed for it.

The trunk was not received until Saturday, one week following the day when the same should have been received, and when received, the lock was broken, and gold watches, silver watches, chains, and other articles, of the value of EIGHT OR NINE HUNDRED DOLLARS, HAD BEEN ABSTRACTED THEREFROM.

These were the principal facts relied upon by the plaintiff.

The defendant introduced testimony, showing that when they opened the trunk, before its receipt by defendant, the same was locked in good order; but, that no such jewelry was at that time in the trunk.

The defendant also introduced evidence of custom of railroads, not to accept trunks containing jewelry, or other valuables as baggage, on their passenger trains; and also, showing the amount of baggage allowed to each passenger, and the fact that they charged double first class freight rates for over weight.

Upon the foregoing state of facts, the case was submitted to the jury, who returned a verdict in favor of the plain-

tiff, for EIGHT HUNDRED AND TWENY-FIVE DOLLARS, upon which verdict, judgment was afterwards entered, and from which the defendant brings an appeal to this court.

POINTS.

I.

Were the gold and silver watches and chains, and other articles, in the plaintiff's trunk when it came into the possession of the defendant; and while in defendant's possession, was any part thereof abstracted therefrom, and what amount?

This question was submitted directly to the jury as a question of fact, and they decided in the affirmative, and assessed the value of the property so taken away, at $825, for which they rendered their verdict; and which verdict is fully sustained by the evidence in the case.

II.

Was the defendant a common carrier, and as such, guilty of gross negligence in transportation of plaintiff's trunk, and was the property lost or abstracted because of such gross negligence? That the defendant was a common carrier there is no disputing. The question of gross negligence on the part of the defendant, was submitted to the jury, and they were expressly instructed, that if they found the evidence, that the trunk and contents had been placed in defendant's possession, at Indianapolis, and the sum of one dollar for transportation of same to Chicago had been paid

thereon; and if they believed, from the evidence, the property was abstracted from said trunk, through *the gross negligence* of the defendant, while said trunk was in defendant's possession, then the plaintiff was entitled to recover the value of the goods so negligently lost by defendant.

This was a proper question of fact for the jury, which, on being submitted to them, from all the facts in the case, they decide by their verdict, finding defendant guilty of gross negligence.

III.

Was there any fraud or concealment on the part of the plaintiff in the case, which should prevent a recovery?

The plaintiff was a *peddler*, and had his pack with him, and also his trunk. There is no evidence that he had any knowledge whatsoever of the regulations of the railroad company, as to the kind of baggage they would receive from passengers, for transportation. *His pack was a good sign to the agent that he was a peddler, and had goods.* The jury decided there was no fraud, or concealment, or negligence, on the part of the plaintiff.

But the defendant insists he is not liable for the jewelry, watches, &c., for the reason that it is not ordinary baggage.

In answer to which, we say, whether this trunk, and the watches, chains, and jewelry in it, is denominated as baggage or freight, we have not alleged. The plaintiff, by his declaration, only alleges the loss of the trunk and contents, describing them. Now, it is in evidence, that at the time it came into possession of defendant, as a common carrier, it was checked from Indianapolis to Chicago, and *one dollar extra charged for its transportation*, which, in the language of the witness for the defendant, is double first class

freight rates. Then it must have been regarded as freight, especially all over the eighty pounds, else they would not charge double extra *freight rates* for transportation. But the defendant, having undertaken for the hire, to carry the same to Chicago, was bound to use ordinary care, at least, in and about its transportation; and for gross negligence they would of course be liable; for, as Lord COKE says, "The carrier hath his hire, and thereby implicitly under-"taketh the safe delivery of the goods delivered to him."

Co. Litt., 89.

It is not ordinary care for the agent of the railroad company to give a mis-matched check. *It is gross negligence.* It was gross negligence that the same was not sent by the first train after it was checked.

It was gross negligence, that the defendant did not know when it was received at the depot.

It was gross negligence, that after its arrival at Chicago, it was resent to Indianapolis.

It was gross negligence, that it should, for any cause, be retained from the possession of the plaintiff for a full week after it should have been delivered; and finally, it was gross negligence, that the same should have been so exposed as to be allowed to have been broken open, and the watches, chains, and jewelry, extracted therefrom, and the lock broken.

We can hardly conceive of a case where gross negligence is shown more clearly; and it is expressly settled by the courts, that railroad companies are in all cases liable for gross negligence. The court says, in the case of *Ill. Central Railroad Company* v. *Morrison & Crabtree*, 19 Ill., 136—

"Railroad companies are common carriers, and as such, "have a right to restrict their liabilities by such contracts

" as may be especially agreed upon, *they still remaining* " *liable for gross negligence.*"

See, also—

Ill. Cen. R. R. Co. v. *Goodwin*, 30 Ill., 118.
Galena & C. U. R. R. Co. v. *Jacobs*, 20 Ill., 478.
Same v. *Dill*, 22 Ill., 270.
Chicago & Miss. R. R. v. *Patchen*, 16 Ill. 198.

IV.

Again, it is claimed that a failure to disclose to the defendant what the trunk contained, was fraud upon the defendants, which should prevent a recovery.

In answer to this, we say, he was not bound to disclose, *unless interrogated* in relation to the contents, and had notice that such articles as were contained in his trunk would not be received. Should he be asked, and give improper, untruthful, or evasive answer, there might be some show of fraud; or if he had knowledge of the regulations of the railroad refusing such articles; but in any event the defendant would be liable for his gross negligence; and it was no fraud on the part of plaintiff not to disclose the contents unless notice was brought home to him.

His Honor, Judge Brownson, in giving the opinion of the court, in *Hollister* v *Nolan*, 19th Wend., 234, says:

" Fraud cannot, I think, be imputed to the owner, from " the mere fact that he delivers the goods after having seen " a general notice, published by the carrier, whatever may " be its purport. If the carrier wishes to ascertain the ex- " tent of his risk, he should inquire at the time the goods " are delivered, and then if he is not answered, he will have " a defence."

This case is fully approved, and the opinion of Justice Brownson sustained, by Judge Cowan, in *Cole* v. *Goodwin*, 19th Wend., and also in the United States Supreme Court, in the case of *The New Jersey Steam Navigation Co.* v. *The Merchants' Bank of Boston*, 6 Howard, and in *Phillips* v. *Earle*, 8 Pick., 182, the Judge says: "The owner "is not bound to disclose the nature or value of the goods, "but if he is inquired of by the carrier, he must answer "truly."

Notwithstanding this abundant weight of authority upon the question of limitation of liabilities, by notice, custom, or agreement, there are in cases of this kind abundant reasons why the principle referred to should prevail.

1st. The officers and agents of the corporation, are *all* of whom it consists; and they are the ones who are entrusted by the passenger with care of his goods, and are, and would of course in all cases be, especially interested in so testifying as to screen their principal from any liabilities.

2d. Could the rule contended for by the defendant prevail, viz: that the plaintiff was in all cases, except with reference to his ordinary baggage, bound to disclose each article contained in it, else the company would not be responsible therefor—such a theory would be virtually granting a license to the employees of a railroad company or other carrrier, to steal any such articles as came into their possession, which they did not regard as baggage; and as in this case, where a peddler came with his pack, and his trunk, or jewelry box, the agent could say to himself: my time to steal with license has come; this is a jewelry peddler, and must have jewelry and watches in his trunk. I will not inquire of him about it, and he don't know our new laws of which I am advised by the corporation coun-

sel, and will not inquire or disclose what it contains, and soon as I get it in possession, I will extract from the trunk all that is not what I call baggage; the railroad company will not be responsible for it. Reasoning thus, the agent goes at work with this license, based on the theory of the defendant's counsel, and pilfers from every traveler's trunk each article of value, except his ordinary clothing, and perhaps an extra night shirt, and then asks for a decision of this court to the effect that no one is responsible for it.

Such a rule would be *monstrous*, and much to our own gratification, is not the law.

The law, as stated in the foregoing cases, makes it the duty of the carriers, if they would charge fault upon the plaintiff, to make the inquiry when they receive the property for transportation.

V.

Again. The learned counsel is much incensed because, although allowed to give evidence of the custom of the railroad, the same is not allowed to govern this case; or, in other words, because the rules and customs of the Cincinnati & Chicago Air Line Railroad Company are not allowed to regulate, and take precedence of the common law in the circuit court.

The law was fully settled in the old case of *Hinton* v. *Locke*, 5 Hill, 437, and has always since been regarded as a settled principle. Judge BROWNSON, in giving the opinion of the court, says: "A usage or custom cannot be "given in evidence, for the purpose of contradicting the "rules of law, nor is such evidence admissible, when it "contradicts the agreement of the parties."

Again, in the case of *Ill. Central Railroad Co.* v. *Morrison & Crabtree*, 19th Ill., 136, the court says: "Railroad

" companies are common carriers, and as such have a right " to restrict their liabilities, by such contracts as may be " especially agreed upon, they still remaining liable for " gross negligence, or willful misfeasance."

These authorities are hardly consistent with defendant's theory of custom making laws, or by-laws of a corporation controling the rights of parties, in violation of the well known principles of the common law. As well might the common council of the city of Chicago pass an ordinance saying they would not thereafter be liable for any damage done by occasion of pitfalls, defective streets or sidewalks, or sewers of the city. They would find it as difficult to maintain their defence in a court of law, against the principles of the common law, for an injury occasioned by gross negligence in that regard, as the defendant to maintain his law of custom in this case—no more, no less.

VI.

The burden of proof is on the defendant in case of loss, if any notice or custom is relied upon, to show that the same was brought home to the knowledge of plaintiff.

Angel on Law of Carriers, Sec. 251.
Story on Bailments, " 650.
2 General Ev., " 216.
Hollister v. *Nolan*, 19th Wend., above referred to.
Kerr v. *Wilan*, 2 Stark R., 53.

The question, as to whether in this case the same was brought home to the knowledge of plaintiff, was submitted to the jury with the other facts in the case, as will be seen by the instruction; and the jury having passed upon the fact, the defendant ought not to complain.

VII.

This case differs materially from that of *Orange Co. Bank* v. *Brown*, 9 Wend., 85, *Pardee* v. *Drew*, 25 Wend., 359, *Chicago & Aurora R. R. Co.* v. *Thompson*, 19 Ill., 578, and *Davis* v. *Mich. S. & N. I. R. R. Co.*, 22 Ill., 278, for the reason, that an extra compensation was paid for its transportation. The rule, as would appear from the evidence of the defendant, in relation to the amount of baggage to which each passenger paying fare is entitled, without paying railroad companies extra compensation, is *eighty pounds*. If this, then, is the rule of the defendant, it must be upon the basis that eighty pounds is sufficient weight to cover all the necessary baggage of a passenger. *The defendant, having adopted such a rule for its own government, on the receipt of a passenger's baggage, must know that all that is over that amount in weight, is something else beside the ordinary baggage of a passenger.* If they take it then, they do so knowing the fact that it is not ordinary baggage; and when they charge extra freight rates for transportation of same, they do it without deception, and with full knowledge, under their own rule, that it is not ordinary baggage, but more, or different, from ordinary baggage, and for which the defendant demands, and the plaintiff pays, an extra amount.

Hence, it can be no fault, or fraud, in the plaintiff, that he do not, without being interrogated in relation thereto, disclose the contents of the trunk, for the reason, that it is known to the defendant by its own rule that it is not ordinary baggage. And why should the plaintiff disclose to the defendant what it is bound, by its own rule, to know itself? The railroad company is liable in this case, as any other carrier, having received the trunk and payment of charges for its safe delivery at its place of destination.

VIII.

The second and fourth instructions asked for by the defendant, without reference to the modifications made by the court, are based upon the broad ground, that the defendant would be liable in any event, if guilty of gross negligence.

The modification of the court complained of, in no respect changes the meaning of the instruction. It simply adds the proposition, that if it was believed, from the evidence, that the plaintiff paid the extra price for transportation, the trunk carried was not ordinary baggage. This was in accordance with the plaintiff's own showing, and the reasons are fully set forth above. The question of gross negligence of defendant's, is submitted to the jury at defendant's own request, by these instructions asked for and given as a fact for the jury to determine. That there was evidence upon which the jury might reasonably decide there was gross negligence on the part of defendant, cannot be truthfully denied; and the question having been submitted and decided against the defendant, it is conclusive.

CHASE & INGERSOLL,
Of Counsel for Appellee.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

TO APRIL TERM, A. D. 1865.

THE CINCINNATI AND CHICAGO AIR LINE RAILROAD COMPANY, *Appellant*, vs. NACHMANN MARCUS, *Appellee*. } APPEAL FROM COOK CIRCUIT COURT.

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ABSTRACT.

1 to 5. Declaration filed in Cook County Circuit Court, June 28th, 1864, by appellee, being in case for lost goods, vs. appellant, as common carriers—in two counts. Damages claimed, $2,000.00.

6. Plea filed July 11th, 1864, general issue as to both counts.

7 to 10. Trial by jury December 8th, 1864; verdict for $250.00 set aside, and new trial granted on motion of appellee—no exception.

10, 11. Trial by jury January 12th, 1865; verdict 13th, for appellee, for $825.00.

11, 12. Reasons for new trial filed January 14th, 1865, by appellant.

12, 13. Motion for new trial argued January 19th, 1865, and overruled, and exception by plaintiff in error. Judgment on verdict, appeal prayed and granted, and time to file bill of exceptions and appeal bond till February 1st.

14. Bill of exceptions filed January 28th, 1865.

38, 39. Time to file appeal bond extended on February 1st, 1865, to Saturday next (February 4th), and on the 4th extended to first day of next term (February 20th).

39. Appeal bond filed February 20th, 1865.

PLAINTIFF'S CASE.

16. *Philip Neuberger* testified, that he came from Cincinnati to Chicago with plaintiff, in May, 1864; that plaintiff had a quantity of watches and other goods in his trunk at Cincinnati; that he checked the trunk for Indianapolis, paying fifty cents to baggage man for overweight, and did not see it again till at Indianapolis. That they left Cincinnati early in the morning, got to Indianapolis about noon, and were there till late in the evening. "We took the trunk from one baggage room to the other at Indianapolis. The baggage man asked plaintiff a dollar, and plaintiff replied that he only paid fifty cents from Cincinnati. I said to plaintiff there is no use quarreling, and he took out a ten dollar bill and paid the dollar. The trunk was checked. Plaintiff had a bundle also, and got it checked at the same time." On cross-

17, 18. examination he testified, "We got to Indianapolis about the ordinary dinner time, and walked about town till evening. We went to the depot late in the evening, and from half an hour to an hour before the train left got the trunk checked and the bundle also. I can't tell which was checked first, we carried both at the same time. The baggage master asked the plaintiff a dollar. Plaintiff paid him the dollar. The baggage man said he must pay him a dollar as the baggage was overweight. I think he didn't check either before the dollar was paid, though I can't recollect. I can't tell which he charged for, the trunk or the pack; together they would weigh one hundred and fifty pounds. The trunk was very heavy. In the pack were the plaintiff's clothes and some dry goods. Plaintiff is a traveling pedlar."

20. As to the trunk he says, "It was a common trunk, such as men carry when they travel." Being re-called by the Court, he testified more particularly as to the contents of the trunk—watches, chains, &c.—and fixes the value at from $800 to $900.

18, 19. *Boaz Cohen* testified, that on the day plaintiff arrived in Chicago, in the afternoon he went with plaintiff to defendant's depot for the trunk and it wasn't there, and again in the evening, but it had not been found. This was on Saturday. On Tuesday they went again, and were told that the trunk had been there, but by mistake had been sent back to Indianapolis. On Saturday they went again and found the trunk, with the lock broken, but fastened by the straps; no gold watches or chains in the trunk, but the goods tossed about. Being re-called, he testified as to the value of divers articles.

19 *Alexander Wimberg* testified that he was present when plaintiff got his trunk, that the lock was broken, and that there were no gold watches nor chains in it.

DEFENDANT'S CASE.

21. *Henry J. Page* testified, that he is defendant's General Freight Agent. From Indianapolis to Chicago is 181 miles; from Cincinnati to Indianapolis is 115 miles. "The custom of railroad companies is to allow each passenger eighty pounds of baggage, and to charge for the weight beyond that. I know that to be the custom with all railroads." That he has been employed on four railroads. "I know the custom I have stated to be uniform with all the railroads leading out of Chicago. The amount charged is regulated by double first class freight rates. The one dollar charged plaintiff would be double freight for about one hundred pounds. At that time the regular rate was for first class freight, sixty cents per hun-
22. dred ponnds. It is customary with railroad companies to refuse merchandise offered to their agents to be carried as baggage, and transfer it or direct the owner to the Express Companies. I don't know of a single railroad where the custom is not enforced by the baggage men."

23, 24. *Henry Staring* testified, that he was General Baggage Agent for six different railroads, but not for defendant. In the business ten years, on eight different railroads. "The general rule is to allow eighty pounds of baggage to a passenger; so with all the roads I name, and beyond eighty pounds to charge double first class freight rates. The general custom when merchandise is offered as baggage is to refuse it, and refer the party offering it to the Express Companies. I think these customs general on all railroads leading in and out of Chicago." That in May last he saw plaintiff's trunk at defendant's depot; saw it opened; common russet trunk with spring lock; contents various, but no gold watches or chains. "The trunk seemed to be full." "The trunk came checked as ordinary baggage by the train; it had been there twenty-four hours. The plaintiff brought two checks from Indianapolis, when he first came. I think probably the trunk was there then but the check was mismatched." Has charge of men, and the baggage is kept locked up. Cross-examined, he said, "There was trouble about the trunk. I telegraphed for it and it was three or four days before we got it." He also testified that he had known merchants to carry merchandise on checks as baggage at their own risk.

24, 25. *George J. Johnson* testified, that he was clerk, &c., in baggage department, where baggage from defendant's railroad came in; that in May, 1864, plaintiff brought two checks and called for trunk and bundle; found bundle but not the trunk. Telegraphed to Indianapolis for trunk and it came next evening "in comparative good order." Took it to office and opened it; contents various. "The trunk was well packed and full." "There were no gold watches nor anything of that kind in the trunk." Common russet trunk with spring lock. "There is a general rule to allow a passenger eighty pounds of baggage, and for all over that charge him double first class freight rates. If trunks of merchandise are offered as
25, 26. baggage we always refer them to the Express Companies." Cross-examined: "We opened the trunk with the key. I was not present when the trunk was delivered. The evening after I opened it it was sent back to Indianapolis by mistake. I ordered it back and it came the next morning, and I locked it up in the baggage room." Re-direct: "The trunk came back in as good order as it went away. It was not broken at all."

26, 27. *William H. Lowe* testified, that he was station baggage master at Chicago. "Some time in May last the plaintiff presented two checks from Indianapolis to Chicago and called for a trunk and bundle. We found the bundle but not the trunk, and thought there was a mismatch. We telegraphed to Indianapolis for the baggage and it came that night, Saturday night, and was taken to the office. The plaintiff had told us that it contained watches, jewelry and goods. We examined it, found" various goods, "but no gold watches nor gold chains." "We locked it up again. This was on Sunday morning. We moved it out among the other baggage and that night it went back to Indianapolis. We got it back

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after three or four days. It was in good condition, the lock appeared in good order." The plaintiff called frequently, and got it the first time after it came. "When it was opened it appeared very full. I saw it opened when the plaintiff got it; it appeared as we had left it. No goods were taken out that were not put back."

28, 29. PLAINTIFF'S REBUTTING EVIDENCE.—*Orlin P. Ingersoll* testified: Was present when plaintiff got the trunk. Contents various. Cross-examined: "There was not a piece of ordinary traveling baggage in the trunk."

This was all the evidence.

21, 22. Upon the direct examination of the witness Henry J. Page, the defendant offered to prove by him "that the defendants, had they or their agents known that a trunk offered to be checked as baggage by a passenger over their roads, contained valuable merchandise, such as gold watches, jewelry and silk goods, they would have refused to check or carry it as baggage," to which the plaintiff objected and the Court sustained the objection, to which defendant excepted.

INSTRUCTIONS.

The defendant asked various instructions, found on pp. 31 and 32, which the Court refused and defendant excepted.

33, 34, 35. The Court instructed the jury as follows, viz.:

"1. This is an action against the defendants as common carriers, for the value of certain goods alleged to have been delivered to the defendants as freight, to be carried from Indianapolis to Chicago, and lost or stolen while in the defendants' possession. To enable the plaintiff to recover he must show the following facts, viz.:

"1st. A delivery of the goods to the defendants as freight, upon an agreement, express or implied, to safely carry them from Indianapolis to Chicago.

"2d. A loss of the goods, or some portion thereof, while in the possession of the defendants, or a failure of the defendants to deliver them when called for.

"3d. The value of the goods lost.

"4th. That the goods lost were lost without the fault or negligence of the plaintiff, *or that the plaintiff, having been guilty of fault or negligence, the defendant was also guilty of fraud or gross negligence.* These facts being shown, the defendants are liable for the value of the goods lost.

"2. If, however, you should believe from the evidence, that the defendants were induced to take charge of and undertake to carry the goods in question from Indianapolis to Chicago, by means of any false or fraudulent representation or concealment of the kind or value of the goods on the part of the plaintiff, *for the purpose of getting his goods transported at less than he would otherwise be obliged to pay, and thus imposing upon defendant*, then the defendant would not be liable for the loss of said goods, unless the loss occurred through the gross negligence or fraud of the defendants.

"3. Gross negligence is the want of the care which prudent men ordinarily take of their own property of like apparent value.

"4. If you believe, from the evidence, that the plaintiff, traveling over the road of the defendants, as a passenger, concealed in an ordinary traveling trunk a large amount of valuable watches and jewelry and other goods, owned and carried about by him for purposes of sale and traffic, and procured the trunk with its contents to be checked and carried by the defendants as a part of his ordinary traveling baggage, and that while said trunk and contents were being so carried, and without any gross negligence or fraud on the part of the defendants, a portion of the contents were lost or stolen, then the law is for the defendants, and you will so find. *But if the jury shall believe from the evidence, that the plaintiff, at Indianapolis, in the State of Indiana, paid, and the defendant then and there received, the sum of one dollar, for the transportation of the plaintiff's trunk from Indianapolis to Chicago, over and above the baggage, the transportation of which would be included in the plaintiff's fare as passenger, then the said trunk would not be a part of the ordinary traveling baggage of the defendant.*"—all which, except the 3d, were excepted to by the defendant, and which are identical with the instructions asked by the defendant and refused by the Court, except the parts in *italics*, which were inserted and added by the Court.

The Court also, at the request of the plaintiff, instructed the jury as follows:

29, 30. "1. The Court instructs the jury, as a matter of law, that a rule or custom of any railroad company, or other common carriers, does not affect their liability as such common carriers, unless such rule or custom is brought to the knowledge of the party having goods shipped by such common carriers prior to the goods or freight having been shipped.

"2. Is as to measure of damages.

"3. If the jury believe, from the evidence, that the plaintiff's goods were lost or stolen while in the care and custody of the defendant as a common carrier, through the gross fault or negligence of the defendant, in such case the plaintiff is entitled to recover the value of the jewelry and goods so lost, according to such value as it might have been proven to be at the time when such property came into the possession of the defendant.

"4. If the jury believe, from the evidence, that the plaintiff, at Indianapolis, in the State of Indiana, paid, and the defendant received, the sum of one dollar, for the transportation of the plaintiff's trunk in its passenger train from Indianapolis to Chicago, and that said sum was the usual price of transportation of trunks of this size and weight from Indianapolis to Chicago, and that after the said plaintiff had delivered the said trunk to the defendants at Indianapolis, and before its delivery to the plaintiff at Chicago, a part of the contents thereof were lost or stolen, through the fraud or gross carelessness of the defendant, or its servants or agents, then the plaintiff is entitled to recover the value of the property so lost or stolen—such value to be estimated of the time when such property came into the possession of the defendant,"—all which were excepted to.

ERRORS ASSIGNED.

1. The verdict is unsupported by the evidence.
2. The verdict is contrary to law.
3. The Court erred in giving the instructions asked for by the plaintiff.
4. The Court erred in refusing to give the instructions asked for by the defendant, in the same form in which they were asked.
5. The Court erred in giving the instructions asked for by the defendant, with the modifications and changes inserted therein by the Court.
6. The Court erred in excluding the evidence of the witness Henry J. Page, offered by the defendant, the same being competent and material for the defence.
7. The Court erred in overruling the motion for a new trial, made by the defendant.

GEO. GARDNER,
Attorney for Appellant.

201-127

The C & C. A. R. R. Co
vs
N. Mancus

Abstract

Filed April 21. 1865
L. Leland Clk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

TO APRIL TERM, A. D. 1865.

THE CINCINNATI AND CHICAGO AIR LINE RAILROAD COMPANY, *Appellant*, vs. NACHMANN MARCUS, *Appellee*.	APPEAL FROM COOK CIRCUIT COURT.

BRIEF FOR APPELLANT.

In this case, the points made by the appellant will be grouped under three heads, viz:

1st. The evidence does not make out a case.

2d. The Court refused proper and pertinent evidence offered on the trial by the appellant.

3d. The instructions given by the Court are not law.

I.

The evidence does not make out a case.

The action is *case* against a carrier for lost goods carried as *freight*, not *baggage*. The evidence makes out a case of lost *baggage*, if anything, while it shows that the articles lost were in no sense of the word *baggage*, but *merchandize*, and nothing else, disguised as baggage. In such a case the authorities are abundant that no recovery can be had in an action for lost *baggage*.

9, Wend. 85, Orange Co. Bk. vs. Brown.
25, Wend. 459, Pardee vs. Drew.
6, Hill 586, Hawkins vs. Hoffman.
9, E. L. & E. 477, Great No. R. W. Co. vs. Shepherd.
13, Ill. 746, Woods vs. Devin.
22, Ill. 278, Davis vs. M. S. & N. I. R. R. Co.

The question then remains whether, under the evidence, a case is made out of lost *freight*. The goods were in a common traveling trunk, which was carried about by the plaintiff in the way that ordinary traveling baggage is carried; was checked by him in the usual manner to go by a passenger train, himself going by the same train; and there was nothing whatever in the appearance of the trunk, or the manner in which it was handled, to indicate that it contained anything else than his ordinary wearing apparel, and like articles. The plaintiff did not regard or treat the trunk and contents as freight, and there was nothing to indicate to the agents of the defendant that it was freight, or anything else than ordinary traveling baggage. The plaintiff, by his own conduct, is estopped to claim that his property can in any way be regarded as freight.

See the cases already cited.
19, Ill. 578, C. & A. R. R. Co. vs. Thompson.

But it will be claimed that a sum of money was charged and paid for the transportation of this trunk and contents, and that, therefore, they ceased to be regarded as baggage, and became technically, as well as in fact, *freight*. It is true that the plaintiff, upon getting his trunk *and* bundle checked, was charged and paid a dollar for the "overweight," the excess

above the eighty pounds of baggage usually allowed each passenger, in accordance with a custom abundantly proven in this case; but whether paid for the trunk, or for the bundle, or both, or a part of both, the evidence does not disclose—it was paid for the "overweight" of baggage. If, then, the character of the goods was changed by the payment, did it extend to the whole, or a part, and if to a part, what part?—the trunk alone, or the bundle alone; or an undivided part of one or both? Both were presented at the same time, payment demanded and made before either was checked, and no distinction was made by either party—and can one be made after a loss? The only answer to these questions is, that the trunk *and* bundle were either *all freight* or *all baggage;* if all *freight*, and there were no fraud or concealment on the part of the plaintiff, then this verdict may be sustained; if all baggage, it cannot be, unless the loss was caused by the gross negligence of the defendants.

Assuming that by the charge and payment for the "overweight" it became all *freight*, still the plaintiff was guilty of such a fraud and concealment as would bar his recovery, upon the principle of the following cases:

19, Ill. 578, C. & A. R. R. Co. vs. Thompson.
22, Ill. 278, Davis vs. M. S. & N. I. R. R. Co.
And the cases there cited.

But it will also be claimed, that whatever might have been the conduct of the plaintiff, and the character given the trunk and contents, whether freight or baggage, yet the defendants were guilty of *gross negligence*, and, therefore, liable in any event. Of this there is no evidence, unless it be found in the fact that the trunk was not sent forward by the same train with the plaintiff, but came twenty-four hours afterwards, during which time the loss must have occurred, if it occurred at all on the defendant's road; for the evidence shows that when the trunk was opened on Sunday morning (the plaintiff having arrived on the previous Saturday morning), at the defendant's depot, in Chicago, there were no gold watches nor chains in it, and there is no proof anywhere that anything else was missing from it. This fact does away with any argument or inference based upon the circumstance that the trunk was afterwards sent back to Indianapolis and not returned again for some days, as it shows that that circumstance could not in any way have contributed to the loss. It will hardly be contended that the single fact, that a trunk did not go forward until twenty-four hours after the owner, establishes *gross* negligence, which is defined to be "the omission of that care which even inattentive and thoughtless men never fail to take of their own property," and amounts substantially to a violation of good faith.

Angell on Carriers, § 10.
Jones on Bailments, p. 6.
Story on Bailments, § 17.
17, Ill. 541, C. M. T. R. R. Co. vs. Rockafellow.

Again, there is no proof that the loss occurred upon the defendant's road. The trunk came from Cincinnati to Indianapolis, 115 miles, and laid in a baggage-room there from about noon until late in the evening before it went into the possession of the defendant's agents, during all which time the plaintiff did not see it or make any examination of its contents. There is, of course, as much of a presumption in favor of the defendants as of the carrier who brought the trunk from Cincinnati to Indianapolis, and it rests upon the plaintiff to show "that the trunk could not have been rifled before it came into the possession of the defendants."

40, Maine, 117, McQueston vs. Sandford.

II.

The Court refused proper and pertinent evidence offered on the trial.

The defendants offered to prove by Henry J. Page, a competent witness, and their General Freight Agent, "that the defendants, had they or their agents known that a trunk, offered to be checked as baggage by a passenger over their road, contained valuable merchandise, such as gold watches, jewelry, and silk goods, they would have refused to check or carry it as baggage," which the Court held incompetent and ruled out.

As bearing upon the question of fraud or concealment by the plaintiff, before alluded to, the evidence was certainly pertinent, for it would establish that by the fraud and concealment the defendants were induced to take upon themselves the care of property, which, had they known its character, they would not have received at all in that way, and so would not have incurred the liability now sought to be fastened upon them.

III.

The instructions given are not the law.

This applies particularly to the *second* and *fourth* of the defendant's instructions, as modified by the Court.

The *second* is, "If, however, you should believe from the evidence that the defendants were induced to take charge of and undertake to carry the goods in question from Indianapolis to Chicago by means of any false or fraudulent representation or concealment of the kind, or value of the goods on the part of the plaintiff, *for the purpose of getting his goods transported at less than he would otherwise be obliged to pay, and thus imposing upon defendant*, then the defendants would not be liable for the loss of said goods, unless the loss occurred through the gross negligence or fraud of the defendants." This instruction is identical with one asked by the defendants, and numbered "2," save the part in *italics*, which was added by the Court.

The objection to the modification is, that it restricts the effect of a false or fraudulent representation by the plaintiff to a single object or result, while any false or fraudulent representation, for whatever purpose, that induced the defendants to assume a liability which they would not otherwise have done, would relieve them from responsibility, except for fraud or gross negligence, a proposition too plain for argument.

The *fourth* is, "If you believe from the evidence that the plaintiff, traveling over the road of the defendants, as a passenger, concealed in an ordinary traveling trunk a large amount of valuable watches and jewelry and other goods, owned and carried about by him for purposes of sale and traffic, and procured the trunk with its contents to be checked and carried by the defendants as a part of his ordinary traveling baggage, and that while said trunk and contents were being so carried, and without any gross negligence & fraud on the part of the defendants, a portion of the contents were lost or stolen, then the law is for the defendants, and you will so find. *But if the jury shall believe from the evidence, that the plaintiff, at Indianapolis, in the State of Indiana, paid, and the defendants then and there received, the sum of One Dollar, for the transportation of the plaintiff's trunk from Indianapolis to Chicago, over and above the baggage, the transportation of which would be included in the plaintiff's fare as passenger, then the said trunk would not be a part of the ordinary traveling baggage of the defendant.*" This is also identical with one asked by the defendants, and numbered "4," except the part in *italics*, which was added by the Court.

The modification introduces the proposition that the "overweight" of baggage a passenger upon a railroad may have, above the customary eighty pounds, if charged and paid for over and above the fare of the passenger, ceases from that time to be the *baggage* of the passenger, but becomes at once *freight*, in its technical sense, and the carrier becomes liable for its transportation as such.

Is this proposition defensible? A passenger has a trunk and contents, his ordinary wearing apparel, if you please, which weighs 180 pounds. His fare as passenger entitles him to carry 80 pounds, for the extra 100 pounds "overweight" he is charged and pays. Is the trunk and contents from that time part freight and part baggage, or all freight, or all baggage? Does the fact, if proven, that there were two pieces of baggage, one weighing eighty pounds, the other one hundred pounds, and, that while transportation of one is included in the fare of the passenger, the other must be paid for as "overweight," make any difference? It is not easy to see why it should. In point of *fact* it is all *baggage*, would be described as such, is treated by the owner as such, is checked as such, transported with other baggage, and in all its outward characteristics and manner of treatment, as well as intrinsically, it is *baggage*, and, in point of *law*, it is not readily to be seen that it is anything else.

But, if the modification be law, there is no evidence to which it is applicable, for it does not appear that the trunk was paid for rather than the bundle; on the contrary, it does appear that the agent refused to check either until the dollar was paid.

In any view of this case the stubborn fact is continually apparent, that the plaintiff imposed upon the defendants in the guise of his ordinary traveling baggage—the custody and carriage of a trunk filled with valuable merchandise; by his every act giving it the character of *baggage*, and giving them no reason to suppose it to be anything else—from what motive is known only to himself. A loss having occurred, he now seeks to recover, as for lost *freight*, for that which, by his own acts, he has stamped with another, and, to all ordinary intents and purposes, a totally different character, seeking thus to escape from the consequences of his own fraud, and to saddle upon the defendants a responsibility which it is certain they never *intended* to assume, and which it is believed no law will impose upon them.

GEO. GARDNER,

Of Counsel for Appellant.

201-127

The C. & C. A.R.R. Co.

vs

N. Moreus

Appellee's brief

Filed April 21. 1865

L. Solomon
Clk

1.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable Erastus S Williams Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the first Monday, (being the second day) of January in the year of our Lord One Thousand Eight Hundred and Sixty Five and of the Independence of the said United States the Eighty Ninth

Present, Honorable Erastus S Williams Judge of the 7th Judicial Circuit of the State of Illinois.

Charles H Reed States Attorney.

John A Nelson Sheriff of Cook County.

Attest, William B Church Clerk.

Be it remembered, that heretofore to wit: on the 28th day of June A D 1864 Nachmann Marcus by Chase and Ingersoll his Attorneys filed in said Court his certain declaration in the words and figures following to wit:

State of Illinois } In the Circuit Court
County of Cook } ss. of Cook County.
July Term 1864.

Nachmann Marcus plaintiff in this suit by H. M. Chase and O. P. Ingersoll his Attorneys complains of the Cincinnati and Chicago Air Line Rail Road Company defendant in this suit who has been summoned &c, of a plea of trespass on the case: For that whereas the said defendant before and at the time of the delivery of the goods and chattels to it as hereinafter next mentioned was

and from thence hitherto has been and still is a common carrier of goods and chattels for hire to wit: from Indianapolis in the State of Indiana to Chicago in the State of Illinois, to wit: at said County of Cook. And whereas also the said plaintiff whilst the said defendant was such common carrier as aforesaid, to wit: on the sixth day of May A D 1864 at Indianapolis in the State of Indiana, to wit: at said County of Cook delivered to, and the said defendant then and there accepted and received of and from the said plaintiff a certain trunk containing divers goods and chattels to wit: Seventeen gold watches, Eleven silver watches, one linen table cloth, one dozen white linen handkerchiefs, five black silk handkerchiefs, sixteen mixed handkerchiefs, Eleven gold chains and five dollars in small silver coin, of great value, to wit, of the value of One thousand and forty five dollars, to be safely and securely carried and conveyed by the said defendant from Indianapolis aforesaid to Chicago aforesaid and there to wit: at the County of Cook ~~to wit~~ aforesaid, to be safely and securely delivered to the said plaintiff for certain reasonable reward to the said defendant in that behalf. Yet the said defendant not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently

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intending, craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said trunk and its contents aforesaid from Indianapolis aforesaid to Chicago aforesaid, nor there to wit, at Chicago in said County of Cook safely or securely deliver the same to the said plaintiff, but on the contrary thereof the said defendant so being such common carrier as aforesaid so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness negligence and default of the defendant in the premises, the contents of the said trunk as aforesaid being of the value of aforesaid afterwards to wit: on the 20th day of May A D 1864 at the County of Cook aforesaid became and were wholly lost to the said plaintiff to wit, at the County of Cook aforesaid.

And whereas also heretofore to wit, on the sixth day of May A D 1864 to wit: at the County of Cook aforesaid the said defendant was the owner and proprietor of certain Rail Road, locomotives and cars for the carriage and conveyance of goods and chattels from Indianapolis to Chicago for hire and reward to the defendant in that behalf, to wit: at the

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paid County of Cook. And the paid defend-
ant being such owner and proprietor on the day
and year last aforesaid at Indianapolis afore-
paid the plaintiff at the request of the defendant
delivered to the defendant a certain other trunk
containing certain other goods and chattels of the
like number quantity, quality, description and
value of those in the paid first count mentioned
of the paid plaintiff to be taken care of and
safely and securely carried in and by the paid
Rail road locomotives and cars and conveyed
by the paid defendant to Chicago aforesaid
and there to wit, at paid County of Cook to be
safely and securely delivered by the paid defend-
ant to the paid plaintiff within a reasonable
time then next following for certain hire and
reward to the defendant in that behalf and
although the paid defendant then and there
accepted and had and received the paid last
mentioned trunk and its contents aforesaid
for the purpose and on the terms aforesaid and
although a reasonable time for the carriage
conveyance and delivery thereof as aforesaid
hath long since elapsed, yet the paid defend-
ant, not regarding its duty in that behalf
(but contriving and fraudulently intending craftily
and subtilly to deceive and defraud the paid
plaintiff in this respect) did not nor would

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within such reasonable time as aforesaid, or at any time afterwards (although often requested so to do) take care of or safely or securely carry and convey the said last mentioned trunk and contents as aforesaid to Chicago aforesaid nor there to wit at said County of Cook safely or securely to deliver the same to the said plaintiff but has hitherto wholly neglected and refused so to do, and by means of the negligence and improper conduct of the said defendant in that behalf the contents of the said last mentioned trunk have not been delivered to the plaintiff at Chicago aforesaid or elsewhere and are wholly lost to the said plaintiff, to wit at the County of Cook aforesaid. To the damage of the said plaintiff of two thousand dollars and therefore he brings suit &c.

By H M Chase & O. P. Ingersoll
Plaintiffs Attorney

And afterwards, to wit: on the 11th day of July A D 1864 the said defendant by George Gardner its Attorney filed in said Court its certain pleas in the words and figures following to wit:

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State of Illinois
Cook County } Ss. In Circuit Court
To July Term 1864

The Cincinnati and
Chicago Air Line
Rail Road Company
ads. } Case
Nachman Marcus

And the said defendant
by Geo. Gardner her Attorney comes and defends
the wrong and injury when &c and says, she is
not guilty of the said supposed grievances laid
to her charge in manner and form as the said
plaintiff hath in the first count of his said
declaration thereof complained against her
and of this she puts herself upon the country &c

And the said defendant by Geo. Gardner her Attorney
comes and defends the wrong and injury, when &c
and says she is not guilty of the said supposed
grievances laid to her charge in manner and form
as the said plaintiff hath in the second count of his
said declaration thereof complained against her and
of this she puts herself upon the country &c

Geo. Gardner
Atty for Deft.
79 Dearborn St.

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And afterwards to wit: at the November Term to wit: on the 8th day of December A D 1864 the following among other proceedings were had in said Court and entered of record to wit:

Nachmann Marcus
vs
The Cincinnati & Chicago Air Line Rail Road Company
} Case

This day comes the said plaintiff by H M. Chase and C. P Ingersoll his Attorneys and the said Defendant by George Gardner its Attorney also comes and issue being joined herein, it is ordered, that a jury come Whereupon come the jurors of a jury of good and lawful men, to wit: Henry Dicke, James H McCausland James Manning, John K Muller, Henry Stypenbrock John Dolan, Clarendon Hyde, George W Terry Charles A Vogel, Henry Diginer, J H Robinson and David Halon, who being duly elected, tried and sworn well and truly to try the issue joined aforesaid and a true verdict render according to law and the evidence and after hearing a part of the evidence, the hour of adjournment having arrived, by consent of said parties, said jury is allowed to separate, to meet the Court at ten o'clock to morrow morning, to which time the further hearing of said cause is now adjourned

And afterwards to wit: at the Term last afore-
said, to wit: on the 9th day of December A.D. 1864
the following among other proceedings were had in
said Court and entered of record to wit:

Nachmann Marcus

vs.

The Cincinnati and Chicago Air Line Rail Road Company } Case

This day again come
the said parties by their Attorneys and the jurors
of the jury aforesaid also come and having now
heard all the evidence and arguments of counsel
addduced by the said parties and instructions from the
Court, retire to consider of their verdict and after-
wards return into Court and say: "We the jury
find the defendant guilty in manner and form
as charged in the plaintiffs declaration and assess
the plaintiffs damages by reason of the premises to
the sum of Two Hundred and fifty dollars"
Whereupon plaintiff by his counsel moves the
Court for a new trial of said cause

And afterwards, to wit: at the Term last afore-
said, to wit: on the 10th day of December A.D.
1864 the following among other proceedings were
had in said Court and entered of record to wit:

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Nachmann Marcus
vs
The Cincinnati and Chicago Air Line Rail Road Company
} Case

This day again come the said parties by their Attorneys and Counsel having been heard as well in support of the motion of the plaintiff heretofore entered for a new trial of said cause as in opposition thereto and the Court, being now fully advised in the premises, doth sustain said motion and orders that a new trial be and the same hereby is granted

And afterwards to wit: at the January Term, to wit, on the 12th day of January A.D. 1865 the following among other proceedings were had in said Court and entered of record to wit:

Nachmann Marcus
vs.
The Cincinnati & Chicago Air Line Rail Road Company
} Case

This day again come the said parties by their Attorneys and issue being joined herein, it is ordered, that a jury come. Whereupon come the jurors of a jury of good and lawful men, to wit: Jacob Conrad, Jacob Miller, Mathew Schultz, Frederick Kurth, Mathias

Boore, Charles Inghehart, W. Bidwell, & G
Walton, Louis Damitz, William Jaques, Brynell
Olson and C. D Miller, who being duly elected
tried and sworn well and truly to try the issue
joined aforesaid and a true verdict render accord,
ing to law and the evidence and after hearing
the evidence and arguments of counsel adduced
by said parties and instructions from the Court
retire to consider of their verdict with the further
instruction given by consent of said parties to
sign and seal up their verdict when they
shall have agreed upon the same and return
it into Court at ten o'clock to morrow morning

And afterwards to wit: at the Term last aforesaid,
to wit, on the 13th day of January A.D 1865
the following among other proceedings were had
in said Court and entered of record to wit:

Nachmann Marcus
vs.
The Cincinnati and Chicago Air Line Rail Road Company } Case

This day again
come the said parties by their Attorneys and the jury
aforesaid having agreed upon and sealed their
verdict, return into Court and say "We the
jury find the defendant guilty in manner

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and form as charged in the plaintiffs declara-
tion and apess the plaintiffs damages by reason
of the premises to the sum of Eight Hundred
and twenty five dollars" Whereupon the defend-
ant by its counsel moves the Court for a new
trial of said cause

And afterwards to wit: on the 14th day of
January in the year last aforesaid, the said
defendant by its Attorny filed in said Court
its certain reasons for new trial in the words
and figures following to wit:

Cook Circuit Court

January Term 1865

The Cincinnati and Chicago
Air Line Rail Road Company
ads
Nachmann Marcus
} Reasons for new trial

The defendant moves for a
new trial in said cause for the following reasons
to wit:

1. The verdict of the jury is contrary to law
2. The verdict of the jury is contrary to the evidence
3 The Court erred in giving the instructions
asked for by the plaintiff
4 The Court erred in refusing to give the
instructions asked for by the ~~plaintiff~~
defendant.

5 The Court erred in giving the instructions asked for by the defendant as modified and changed by the Court.

6 The Court erred in excluding testimony offered by the defendant upon the trial of the cause and materials and proper for the defence

Geo. Gardner
Atty for defts

Due service of a copy of the foregoing is hereby admitted this January 13th 1865

Chase & Ingersoll
Pltffs Attys

And afterwards to wit: at the Term last aforesaid, to wit: on the 19th day of January AD 1865 the following among other proceedings were had in said Court and entred of record to wit:

Nachmann Marcus
vs
The Cincinnati and Chicago Air Line Rail Road Company } Case

This day again come the said parties by their Attorneys and Counsel having been heard as well in support of the motion of the defendant heretofore entered for a new trial of said cause, as in opposition thereto and the

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Court being now fully advised in the premises
doth order that said motion be and the same here,
by is overruled, to which ruling of the Court in
overruling said motion for a new trial the defendant
by its counsel now here excepts and on its motion
defendant is allowed until the first day of
February next to prepare and file its Bill of
Exceptions in said cause.
Therefore it is considered by the Court, that
said plaintiff do have and recover of said defend,
ant his damages of Eight Hundred and Twenty
five dollars in form aforesaid by the jury afore,
said assessed together with his costs and charges
by him about his suit in this behalf expended
and have execution therefor.
Whereupon the said defendant by its counsel
excepts to the rulings and judgment of this
Court in said cause and prays an appeal
therefrom to the Supreme Court of the State
of Illinois, which is granted by the Court
upon condition that said defendant shall by
the first day of February next execute and file
its appeal bond herein in the penal sum of
One Thousand and Two Hundred dollars con,
ditioned according to law with good and sufficient
surety thereto to be approved by the Court

And afterwards to wit: on the 28th day of January A D 1865 the said defendant by his Attorney filed in said Court his Bill of Exceptions in said cause, in the words and figures following to wit:

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State of Illinois
Cook County ss. In Circuit Court of said County January Term 1865.

Nachman Marcus

vs

The Cincinnati & Chicago Air Line Rail Road Company } Bill of Exceptions

Be it remembered, that upon the trial of said cause, at the term aforesaid of the Court aforesaid before the Honorable Erastus N. Williams sole judge of said Court, and a jury, which said trial was begun on the 12th day of January 1865, after the jury had been duly empannelled and sworn, and the grounds of action and defence had been stated by the Counsel for the parties respectively, the said plaintiff to maintain the issues on his part introduced as a witness.

Philip Neuberger, who being duly sworn testified as follows, upon his direct examination to wit:

"I know the plaintiff, was in Cincinnati with him in May last, and came from there to Chicago with him. When we left Cincinnati he had in his trunk dry goods, jewelry, watches and chains. I saw a lot of watches, of over two dozen, gold and silver - watches and a good many gold chains, maybe a dozen. I saw him put the watches and chains in his trunk on Thursday noon, when he locked up his trunk and didn't do anything with it till next morning when we started from

Indianapolis. After that I did'nt see the trunk again till we started from Indianapolis to Chicago. We were together all the time from Thursday noon till Friday morning, when we started from Cincinnati. The watches and chains were packed in a little square paper box, on the top of the trunk. We took the trunk from one baggage room to the other at Indianapolis. The baggage man asked plaintiff a dollar and plaintiff replied that he only paid fifty cents from Cincinnati. I said to plaintiff there is no use quarreling and he took out a $10.00 bill and paid the dollar. The trunk was checked. Plaintiff had a bundle also and got it checked at the same time. The trunk was a dark leather trunk, and when I saw it at Indianapolis was locked up as a trunk ought to be. After the trunk was checked I went into the sleeping car and plaintiff into another car, and I did'nt see him again till some days afterwards. I know nothing of what became of the trunk. We left Cincinnati on Friday morning and got here (Chicago) on Saturday morning.

On his cross-examination he testified as follows, viz:

I saw the plaintiff pack his trunk in Cincinnati. It was on Sixth St at a boarding house, on Thursday evening just after supper. The trunk was left in the room where we staid and out of

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which we did not go until the next morning before breakfast. We carried the trunk to the depot. The trunk was checked to Indianapolis and also a bundle which plaintiff had. The bundle was a regular gedlars pack, weighed over fifty pounds any way. Plaintiff paid the baggage-master fifty cents, which he asked him for overweight. From Cincinnati to Indianapolis I did'nt see the trunk nor pack. Plaintiff put in the trunk some calico delains, handkerchiefs, table-cloths, silks and jewelry. I saw the watches and chains, had them in my hands and looked at some of them. We got to Indianapolis about the ordinary dinner time, and walked about town till evening. We went to the depot late in the evening, and from half an hour to an hour before the train left got the trunk checked and the bundle also. I can't tell which was checked first; we carried both at the same time. The baggage-master asked the plaintiff a dollar. Plaintiff said, I only paid fifty cents from Cincinnati here, now you ask me a dollar. I said to plaintiff, it's no use quarreling, the man asks you a dollar, you'd better give it without trouble. Plaintiff paid him the dollar. The baggage man said he must pay him a dollar as the baggage was overweight. I think he did not check either before the dollar was paid, though I can't recollect. I can't tell which he charged

for, the trunk or the pack. Together they would weigh over one hundred and fifty pounds. The trunk was very heavy. In the pack were the plaintiffs clothes and some dry goods. Plaintiff is a travelling pedlar. The trunk was a tolerably good trunk, was'nt very new, nor not much worn, was in pretty good condition. It was a wood frame trunk, covered with leather. It was a common trunk, such as men carry when they travel.

The plaintiff then introduced as a witness Boaz Cohen, who on direct examination testified as follows: I went to the defendants depot with the plaintiff about his trunk on May 7th. 1864 between three and four o'clock P. M. The baggage man said it appears to him there was such a trunk there and that they were sent to a hotel. I did'nt see plaintiff get his packs. The baggage-man asked plaintiff to describe the trunk, which he did, said it had a patent lock and gave the baggage man the key, and told him how to open it. Plaintiff told him there was in the trunk a paper box containing gold watches and chains some silk and worsted goods and some small American coins, silver not larger than fifty cents pieces. This was Saturday between three and four o'clock P. M. The agent sent out a man to the hotels and told us to be back at

7 or 8 o'clock P. M., when we went and he told us it was'nt found. We went again on Tuesday morning and they promised him faithfully it would be there in the evening. We did'nt go again till Wednesday P. M. The baggage man then said the trunk had been there and by mistake had been sent back to Indianapolis. On Saturday P. M. we went again and the trunk was there. Plaintiff gave up his check and took the trunk. The lock was broken and the trunk was fastened only by the straps. I did'nt see any gold watches nor chains in it, and the goods were tossed around. There were a few silver-coins lying in the top-part of the trunk. There was no silk in it, but saw some worsted goods. I saw a paper collar box, there was nothing in it. It was a round box about 12 inches across and six or seven inches deep. The lock of the trunk was broken; it was a patent lock. I did'nt examine it particularly.

The plaintiff then introduced as a witness Alexander Weinberg, who being duly sworn testified as follows, on his direct examination, viz:
I was present when plaintiff got his trunk; the lock was broken. There were some delaines in it, some worsted goods, some calicos and other small articles. There were no watches nor gold chains. Think I saw some works of watches in the bottom of the top part of the trunk, wrapped up in paper.

The plaintiff by leave of Court, recalled Philip Neuberger, who upon examination by the Court testified; I can't tell exactly the number of watches in the plaintiffs trunk; there were over two dozen. There were gold watches and silver watches. I had one in my hand, said to plaintiff it was a nice watch. There were probably a dozen gold watches. The one I had was double cased, some were open face but most of them were double cases. I know of eight gold chains in the bill, saw them "for sure", and saw some others saw the marks on them, so many penny-weights but dont recollect how many now. I have dealt in watches some times, have bought and sold them. Know pretty near the value of watches. The watches and chains in plaintiffs trunk were worth from Eight Hundred to Nine Hundred dollars.

Upon further examination by plaintiffs attorney he testified. I dont know how many loose watches there were. I saw the one I had in my hand and there were others like it. The one I had in my hand was worth from Sixty to Seventy-five dollars.

The plaintiff then recalled Boaz Cohen, who upon examination testified: Last May common linen table cloths were worth from $ 18.00 to $ 40.00 per dozen; Linen handkerchiefs from $ 4.50 to $ 12.00 per dozen; Black silk handkerchiefs from $ 18.00 to $ 40.00 per dozen.

On his further cross-examination he testified:
In a city a pedlar would carry the best of the
middle quality of goods, in the country the cheapest.
So far as principles go Rail Road Companies
and pedlars are about alike.

The evidence for the plaintiff here closed.
The defendant then introduced as a witness.
Henry J. Page, who being duly sworn, on his
direct examination testified as follows viz:
I am the general Freight Agent of the defendant. From
Indianapolis to Chicago is 181 miles, from Cin-
cinnati to Indianapolis is 115 miles. The cus-
tom of Rail Road Companies is to allow each pass-
enger Eighty pounds of baggage and to charge
for the weight beyond that. I know that to be the
custom with all rail-roads. I have been employed
on the Little Miami Rail Road on the Indiana
Central, on the Marietta and Cincinnati and
on the defendants Rail Road. I know the cus-
tom I have stated to be uniform with all the Rail
Roads leading out of Chicago. The amount charg-
ed is regulated by double first class freight
rates. The $1.00 charged plaintiff would be doub-
le freight for about 100 pounds. At that time the
regular rate was, for first class freight 60 cents
per 100 pounds.

The defendant then offered to prove by this wit-
ness, That the defendants, had they or their agents

known that a trunk offered to be checked as baggage by a passenger over their road, containing valuable merchandise, such as gold watches, jewelry and silk goods, they would have refused to check or carry it as baggage" to which the plaintiff objected, and the Court sustained said objection and refused to allow such testimony to be given, to which ruling of the Court and the refusal to allow said testimony to be given, the defendant then and there, and at the proper time excepted.

The witness then further testified as follows:
It is customary with Rail Road Companies to refuse Merchandise offered to their agents to be carried as baggage and transfer it or direct the owner to the Express Companies. I don't know of a single Rail Road, where the custom is not enforced by the baggage men.

On his cross-examination he testified:
I don't know that merchants frequently bring goods over Rail Roads as baggage.

The defendant then introduced as a witness,
Henry Sharing, who being duly sworn testified:
I am now the Genral Baggage Agent of Six different Rail Roads, in May last was in the same capacity for five different Roads. I am not Baggage Agent for the defendant and never have been. I have been connected with the baggage department of Rail Roads something over Ten years, and with the follow-

ing Roads: Michigan Central, Illinois Central,
Chicago Burlington & Quincy, Hannibal & St.
Joseph, North Missouri and the Burlington & Mis-
souri River, am now connected with the Cleveland
& Pittsburg, Pittsburg Fort Wayne & Chicago, Chi-
cago Burlington & Quincy, Hannibal & St. Joseph
North Missouri & the Burlington & Missouri River
Rail Roads. The genral rule is to allow Eighty
pounds of baggage to a passenger, so with all
the roads I name, and beyond Eighty pounds
to charge double first class freight rates. The
general custom where merchandise is offered
as baggage is to refuse it and refer the party
offering it to the Express Companies. I think
these customs genral on all Rail Roads leading
in and out of Chicago. In May last I saw a
trunk at the Fort Wayne depot, saw it opened.
It was claimed by the plaintiff. It was a common
mixed trunk, with a spring lock, had been in
wear some little time. I saw in the trunk some
insides of watches, four or five or half a dozen
also a coil of plated or galvanised chains, a
lot of worsted goods, some silk and linen hand-
kerchiefs, and some goods looking like table
cloths. The trunk seemed to be full; they had
the goods pulled out; think there were some small
chains. The trunk came checked as ordinary
baggage, by the train, it had been there 24 hours.

The plaintiff brought two checks from Indianapolis when he first came. I think probably the trunk was there then, but the check was ~~p~~ mismatched I have charge of the men who handle the baggage comming over the defendants Road, the baggage not called for is put into the baggage room and locked up. On the train the baggage car is open, but the baggage man is in it. Strangers may pass in and out.

On his cross-examination he testified:

There was trouble about the trunk. I telegraphed for it and it was three or four days before we got it. I don't remember seeing a paper collar box in the trunk. I have known of Merchants carrying other articles than baggage with checks

On his re-direct examination he testified

I have done that where a merchant lived off the line of the Road, and at his own risk as an accommodation, but this is contrary to the usual custom.

The defendant then introduced as a witness. George J. Johnson who being duly sworn testified.

In May 1864 I was clerk in the General Baggage Department of the Pittsburg, Fort Wayne & Chicago Rail Road Company at Chicago and am the same now, have been since February 1864. I was with the Chicago, Burlington & Quincy Rail Road Company two years as train baggage

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man. The baggage cars are generally calculated to be kept closed except when taking in and putting out baggage, but passengers come in to smoke. Last May the Plaintiff came to me with two checks from Indianapolis calling for, as he stated a russet trunk and bundle. I found the bundle but not the trunk, and supposed there was a mistake. I telegraphed to Indianapolis described the trunk and ordered it forward. The trunk came the next evening, it was in comparatively good order. I took it to my baggage office and opened it to see if the contents agreed with his description. I found some watch cases, some plated chains, some works of watches, some silk handkerchiefs, some worsted goods, some cotton handkerchiefs and some drapering or towelling. I did'nt take everything out. The trunk was well packed and full. There were no gold watches nor anything of that kind in the trunk. I think there were some works of watches, in a paper box. It was a common-sized russet trunk with a spring lock and common hinges, a medium sized travelling trunk. There is a general rule to allow a passenger Eighty pounds of baggage and for all over that charge double first class freight rates. If trunks of Merchandise are offered as baggage we always refer them to the Express companies.

On his cross-examination he testified:
We opened the trunk with the key. I was not present when the trunk was delivered. The evening after I opened it it was sent back to Indianapolis by mistake. I ordered it back and it came the next morning and I locked it up in the baggage room.

On his re-direct examination he testified:
The trunk came back in as good order as it went away. It was not broken at all.

The defendant then introduced as a witness:
William H. Lowe, who being duly sworn testified:
I was in May last acting as station baggage master of the Pittsburgh, Fort Wayne & Chicago Rail Road Company at Chicago. I have been in the baggage department of that Road about two years. Some time in May last the plaintiff presented two checks from Indianapolis to Chicago and called for a trunk and bundle. We found the bundle but not the trunk and thought there was a mismatch. We telegraphed to Indianapolis for the baggage and it came that night, Saturday night, and was taken to the office. The plaintiff had told us that it contained watches, jewelry and goods. We examined it, found woolen goods, some plated chains, some watchworks and cases, some linen good some handkerchiefs and some table-cloths, but

no gold watches nor gold chains. We locked it up again. This was on Sunday morning. We moved it out among the other baggage and that night it went back to Indianapolis. We got it back after three or four days. It was in good condition the lock appeared in good order. The plaintiff called almost every day and got it the first time he called for it after it came. When it was opened it appeared very full. I saw it opened when the plaintiff got it, it appeared as we had left it. No goods were taken out that were not put back. There was a paper box in the trunk when we first opened it; in it were some watch-cases and works.

On his cross-examination he testified. I was present when it was opened the second time. I did'nt see any watch cases then nor the collar box. When it was opened the second time it was in the presence of myself and the baggage man and the plaintiff and no one else. I dont recollect that plaintiff refused to take the trunk. We did not send to the Hotels. The key was in Johnsons possession. When delivered to plaintiff the trunk was locked.

On his redirect examination he testified. When plaintiff got the trunk it was opened in my presence and that of the baggage man. Plaintiff gave up the check and took the trunk.

The evidence for the defendant here closed.
The plaintiff then introduced as a witness
Boaz Cohen, who testified as follows, viz:
When plaintiff got the trunk Mr Ingersoll delivered the check. I dont remember about watch-cases being in the trunk.
On his cross-examination he testified.
We got the trunk on a Saturday.
The plaintiff then introduced as a witness,
Orlin P. Ingersoll, who being duly sworn testifies
On Saturday May 14 1864 I went to the depot with the plaintiff, Cohen and Weinberg. I gave Mr Waring the check and called everybody's attention to the trunk. The trunk was brought in, the lock was out of order. There was a lot of hoods on the top. On a paper were some watch cases, wheels &c. In the under part was a large paper collar box. The plaintiff opened it and it was empty. Below it were delaines in pieces, then calico. There was no silk. There were some brass pins. In the bottom were some ten cents pieces and pennies. There was som diapering and some handkerchiefs a dozen or so. There were three or four brass chains, no stockings and no linen handkerchiefs. I went for a witness and took the others along for that purpose.
On his cross-examination he testified:

There was not a piece of ordinary traveling baggage in the trunk.

This was all the evidence given in the cause.

After agreement by the Counsel for the respective parties, the Court at the instance and request of the Counsel for the plaintiff instructed the jury as follows, viz:

1. The Court instructed the jury as matter of Law, that a rule or custom of any Rail Road Company or other common carriers does not effect their liability as such common carriers unless such rule or custom is brought to the knowledge of the party having goods shipped by such common carriers prior to the goods or freight being shipped.

2. If the jury believe from the evidence that the plaintiff is entitled to recover, in such case they should assess the damages at the value of the articles which may have been proved to have been taken from the plaintiffs trunk estimating such value at the time when such property came into the defendants possession.

3. If the jury believe from the evidence that the plaintiffs goods were lost or stolen while in the care and custody of the defendant as a common carrier through the gross fault or negligence of the defendant, in such case the plaintiff is entitled to recover the value

of the jewelry and goods so lost, according to such value as it may have been proven to be at the time when such property came into the possession of the defendants.

4 If the jury believe from the evidence, that the plaintiff at Indianapolis in the State of Indiana, paid and the defendant received the sum of one dollar for the transportation of the plaintiffs trunk in its passenger train from Indianapolis to Chicago, and that said sum was the usual price of transportation of trunks of this size and weight from Indianapolis to Chicago, and that, after the said plaintiff had delivered the said trunk to the defendant at Indianapolis, and before its delivery to the plaintiff at Chicago, a part of the contents thereof were lost or stolen through the fraud or gross carelessness of the defendant, or its servants or agents, then the plaintiff is entitled to recover the value of the property so lost or stolen, such value to be estimated at the time when said property came into the possession of the defendant.

To the giving of all which said instructions the said defendants by their counsel then and there and at the proper time excepted.

The defendants by their counsel then asked the Court to give the said jury, on behalf of said defendants, the following instructions, viz:

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Cook Cir Court

Nachmann Marcus

vs

The Cincinnati & Chicago Air Line Rail Road Company

The defendant asks the Court to instruct the jury as follows, viz:

1 This is an action against the defendants as common carriers, for the value of certain goods alleged to have been delivered to the defendant as freight, to be carried from Indianapolis to Chicago, and lost or stolen when in the defendants possession. To enable the plaintiff to recover he must show the following facts viz.

1st A delivery of the goods to the defendants as freight, upon agreement, express or implied, to safely carry them from Indianapolis to Chicago.

2d A loss of the goods or some portion thereof while in the possession of the defendants, or a failure of the defendants to deliver them when called for.

3d The value of the goods lost.

4th That the goods lost were lost without the the fault or negligence of the plaintiff.

These facts being shown the defendants are liable for the value of the goods lost

2 If however, you should believe from the evidence that the defendants were induced to take charge of and undertake to carry the goods in question from

Indianapolis to Chicago, by means of any false or fraudulent representation or concealment of the kind or value of the goods on the part of the plaintiff, then the defendants would not be liable for the loss of such goods, unless the loss occurred through the gross negligence or fraud of the defendants

3 Gross negligence is the want of that care which prudent men ordinarily take of their own property of like apparent value.

4 If then, you believe from the evidence, that the plaintiff, traveling over the road of the defendants as a passenger, concealed in an ordinary traveling ~~trunk~~ trunk a large amount of valuable watches and jewelry and other goods, owned and carried about by him for purposes of sale and traffic, and procured the trunk with its contents to be checked and carried by the defendants as a part of his ordinary traveling baggage, and that while said trunk and contents were being so carried, and without any gross negligence or fraud on the part of the defendants, a portion of the contents were lost or stolen, then the law is for the defendants and you will so find.

Geo. Gardner - Atty for defts.

All which said instructions the Court refused to give, as above requested, to which refusal the defendants by their counsel then and there and at the proper time excepted.

And thereupon the Court gave the instructions to the Jury, asked by the defendants but modified as follows, viz:

1. This is an action against the defendants as common carriers, for the value of certain goods alleged to have been delivered to the defendants as freight, to be carried from Indianapolis to Chicago, and lost or stolen while in the defendants possession. To enable the plaintiff to recover, he must show the following facts viz:

1st A delivery of the goods to the defendants as freight, upon an agreement, express or implied, to safely carry them from Indianapolis to Chicago.

2d A loss of the goods, or some portion thereof, while in the possession of the defendants, or a failure of the defendants to deliver them when called for.

3d The value of the goods lost.

4th That the goods lost were lost without the fault or negligence of the plaintiff, or that the plaintiff having been guilty of fault or negligence, the defendants was also guilty of fraud or gross negligence. These facts being shown the defendants are liable for the value of the goods lost.

2. If however, you should believe from the evidence, that the defendants were induced to take charge of and undertake to carry the goods in question

from Indianapolis to Chicago, by means of any false or fraudulent representation or concealment of the kind or value of the goods on the part of the plaintiff (for the purpose of getting his goods transported at less than he would otherwise be obliged to pay, and thus imposing upon defendant, then the defendant would not be liable for the loss of said goods, unless the loss occurred through the gross negligence or fraud of the defendants.

3 Gross negligence is the want of that care, which prudent men ordinarily take of their own property of like apparent value.

4 If you believe from the evidence, that the plaintiff traveling over the road of the defendants as a passenger, concealed in an ordinary traveling trunk a large amount of valuable watches and jewelry and other goods, owned and carried about by him for purposes of sale and traffic, and procured the trunk with its contents to be checked and carried by the defendants as a part of his ordinary traveling baggage, and that while said trunk and contents were being so carried, and without any gross negligence or fraud on the part of the defendants, a portion of the contents were lost or stolen, then the law is for the defendants, and you will so find; but if the jury shall believe from the evidence that the plaintiff, at Indianapolis in the State of Indiana, paid and

the defendant then and there received the sum of one dollar for the transportation of the plaintiffs trunk from Indianapolis to Chicago, over and above the baggage the transportation of which would be included in the plaintiff's fare as passenger, then said trunk would not be a part of the ordinary traveling baggage of the defendant.

To the giving of all which instructions, except the third, the said defendants by their counsel then and there and at the proper time excepted.

And thereupon the Jury, having retired for deliberation, returned into Court the following verdict viz:

"Chicago January 12th 1865

"We the Jury find the defendant guilty and assess the plaintiff damages at Eight Hundred and Twenty five dollars"

(Signed) "Jacob Miller. Foreman" and by all the other Jurors.

And thereupon the defendants by their Attorney, move the Court to set aside the said verdict so found and grant a new trial in said cause, in their behalf and file the following reasons in support of said motion to-wit.

"Cook Circuit Court

January Term 1865

The Cincinnati & Chicago Air Line Rail Road Company

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a.b. } Reasons for new trial
Nachmann Marcus }

The defendant moves for a New trial in said cause for the following reasons to wit:

1. The verdict of the jury is contrary to law.

2. The verdict of the jury is contrary to the evidence.

3. The Court erred in giving the instructions asked for by the plaintiff.

4. The Court erred in refusing to give the instructions asked for by the defendants.

5. The Court erred in giving the instructions asked for by the defendants as modified and changed by the Court.

6. The Court erred in excluding testimony offered by the defendants upon the trial of the cause and material and proper for the defence.

Geo. Gardner Atty for deft.

Due service of a Copy of the foregoing is hereby admitted this January 13th 1865.

Chace & Ingersoll Plffs Attys.

which motion after argument, the Court overruled and refused to grant a new trial in said cause but directed judgement to be entered upon the verdict, in favor of the plaintiff and against the defendants, to the overruling of which said motion, and the refusal to grant a new trial

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and the entering of said judgement in said cause
in said cause, the defendants by their attorney
then and there and at the proper time excepted.
And thereupon the defendants pray an appeal
to the Supreme Court, which is granted upon
condition that the defendants file their bond in due
form of law, in the sum of Twelve Hundred dol-
lars with surety to be approved by the Court
on or before the 1st day of February 1865.
and the defendants also pray that this their
bill of exceptions be allowed, signed and sealed
by the Judge of said Court which is accordingly
done.

Erastus S. Williams (Seal)
Judge of 7th Judicial
Circuit Illinois.

And afterwards to wit: at the January Term
to wit, on the first day of February A.D. 1865
the following proceedings in said cause were
had in said Court and entered of record to wit.

Nachmann Marcus
vs.
The Cincinnati and Chicago
Air Line Rail Road Company
} Case

On motion of
defendant by counsel, no objection being made
thereto, it is ordered, that the time for said

defendant to file its appeal bond in said cause be and the same hereby is further extended to Saturday next.

And afterwards to wit: at the Term last aforesaid, to wit, on the 4th day of February A D 1865 the following proceedings in said cause were had in said Court and entered of record to wit:

Nachmann Marcus

vs.

The Cincinnati and Chicago Air Line Rail Road Company } Case

By the agreement of said parties and on motion it is ordered, that the time of the said defendant, to file its appeal bond in said cause be and the same hereby is further extended to the first day of the next term of this Court.

And afterwards to wit: on the 20th day of February A D 1865 the said defendant filed in said Court its Appeal Bond in the words and figures following to wit:

Know all men by these presents, that we the Cincinnati & Chicago Air Line Rail Road Company and Elijah T Alexander of the County of Cook in the State of Illinois are held and firmly bound unto Nachmann Marcus

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in the penal sum of Twelve Hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents. Witness our hands and seals this 28th day of January AD 1865.

The condition of the above obligation is such, that whereas the said Nachmann Marcus, plaintiff, did on the 19th day of January 1865 in the Circuit Court of the County of Cook in said State of Illinois at the January Term thereof recover a judgment against the above bounden Cincinnati and Chicago Air Line Rail Road Company defendant in an action of trespass on the case for the sum of Eight Hundred and Twenty five dollars and costs of suit, from which judgment the said defendant has taken an appeal to the Supreme Court of the State of Illinois, now if the said defendant shall duly prosecute said appeal and shall pay such judgment, costs, interest and damages in case the said judgment shall be affirmed, then the above obligation to be void, otherwise of full force and effect.

Cinct Chi. A. L R R Co (Seal)
By I Brandt pr Supt
E S Alexander (Seal)

Feb. 20. 1865 Approved
E S Williams Judge pc

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of of the declaration, the pleas, all orders of record, the Bill of Exceptions & the Appeal Bond filed in a certain cause lately pending in said Court, on the Common Law side thereof, wherein Nachmann Marcus is plaintiff and The Cincinnati and Chicago Air Line Rail Road Company Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this 23d day of February A. D. 1865.

Wm L Church Clerk.

Fee for Transcript $11 00 paid by Plaintiff in Error

Nachmann Marcus

Cincinnati & Chicago
Air Line R.R. Co.

X 11 Co

State of Illinois ſct.

In Supreme Court 3d Grand Div.
To April Term 1865.

The Cincinnati Chicago Air Line R.R. Co
appellant
vs.
Nachmann Marcus, appellee

Assignment of Errors.

The appellant avers that there is manifest error in in the proceedings and record in said cause in these, to wit:

1. The verdict is unsupported by the evidence.
2. The verdict is contrary to law.
3. The Court erred in giving the instructions asked for by the plaintiff.
4. The Court Erred in refusing to give the instructions asked for by the defendant in the same form in which they were asked.
5. The Court erred in giving the instructions asked for by the defendant, with the modifications and changes inserted therein by the Court.
6. The Court erred in excluding the evidence of the witness Henry D. Page, offered by the defendant, the same being competent and material for the defence.
7. The Court erred in overruling the motion for a new trial, made by the defendant.

Geo. Gardner,
of Counsel for Appellant.

In nullo est erratum.
Chase & Ingersoll
Attorneys for Marcus

State of Illinois } In the Supreme Court,
Third Grand Division } ss. To April Term A.D. 1865.

Nachmann Marcus
ats
The Cincinnati & Chicago
Air Line Rail Road Company. } Joinder in Error

And the said Nachmann Marcus defendant in error now comes and says, that there is no error neither in the record and proceedings aforesaid, or in giving judgment aforesaid in manner and form as above assigned; and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him &c

By Chase & Ingersoll
for defendant in Error.

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In Supreme Court.
3d Grand Division

The Cincinnati and
Chicago Air Line Rail
Road Company

vs

Nachman Marcus.

Appeal from
Cook Circuit Court.

Filed April 5 1865
L. Leland
Clerk