

12589

No. _____

Supreme Court of Illinois

Davis- Moody & Co.

vs.

Michigan, Southern and
Northern Ind.R.R.Co.

United States of America }

STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Pleas, before the Honorable

George Maniaco

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

Second

Monday, (being the *Twelfth* day) of

April

in the year of our Lord one thousand eight hundred and

Fifty Eight

and of the Independence of the said United States the

Eighty Second

Present, Honorable

George Maniaco

Judge of the 7th Judicial

Circuit of the State of Illinois.

Charles Warren

States Attorney.

John S. Wilson

Sheriff of Cook County.

Attest;

Wm L. Church

Clerk.

Be it remembered that heretofore, to wit, on
the 17th day of October in the year of our Lord,
one thousand, eight hundred and fifty six
Samuel C. Davis et al by Messrs Blackwell
Thomas & Roberts their Attorneys filed in the
office of the Clerk of the Court aforesaid their
certain Precept which is in the words & figures
following, to wit;

State of Illinois } Cook County Circuit Court
Cook County } October Term 1856

Samuel C. Davis, Mathew Moody
Henry J. Tomlinson & Nathan W. Perkins
Partners under the style of
Davis Moody & Co.
vs.

The Michigan Southern & Northern
Indiana Rail Road Company

The Clerk
will please issue in Trespass on the case on
promises. Damages \$4000 - Returnable as
above

Blackwell Thomas & Roberts
attys for Plffs.

Chicago Oct. 17. 1856

(Damages \$4000)

And afterwards, to wit, on the day &
year last aforesaid there was issued out of

the office of the Clerk of the Court aforesaid & under
 the seal thereof the Peoples writ of summons di-
 rected to the Sheriff of Cook County to execute &
 clothed in the words & figures following, to wit,
 State of Illinois }
 County of Cook }^{ss}

The People of the State of Illinois
 to the Coroner acting Sheriff of said County; Greeting

We command you that you summon the
 Michigan Southern and Northern Indiana
 Rail Road Company if it shall be found in
 your County, personally to be and appear before
 the Circuit Court of Cook County, on the first day
 of the next term thereof, to be holden at the Court
 House in the City of Chicago, in said County,
 on the fourth Monday of Oct inst to answer unto
 Samuel C. Davis, Mathew Moody, Henry J.
 Tomlinson & Nathan W. Perkins in a plea
 of trespass on the case on promises, to the
 damage of the said plaintiffs as is said in
 the sum of four thousand Dollars.

And have you then and there this writ,
 with an endorsement thereon, in what manner
 you shall have executed the same.

Witness, Louis D. Hoard, Clerk of our
 said Court and the seal thereof at
 Chicago aforesaid. This seventeenth
 day of October A. D. 1856



(L. D. Hoard Clerk)

And afterwards, to wit, on the day & year last
aforesaid, said writ was returned into the Court
aforesaid by said Sheriff endorsed as follows.
to wit; Served by reading to John Wilkinson
President of Michigan Southern and Northern
Indiana Rail Road Company and leaving
with him a copy of this writ the 17th day of October
1856. Fees - Service, 50. Copy, 50. 1 Mile .. 5
Return, 10 - \$115 Jas. S. Beach Coroner and
Ex officio acting Sheriff By S. C. Lunn Deputy

And afterwards to wit, on the 7th day of
November in the year last aforesaid, the said
Plaintiffs by the said Attorneys filed in the
office of the Clerk of said Court their certain
declaration which is in the words & figures
following, to wit;

State of Illinois } Cook County Circuit Court
Cook County } October Term A.D. 1856

Samuel C. Davis, Mathew Moody
Henry T. Tomlinson & Nathan W. Perkins Partners
trading under the name & style of Davis, Moody
& Co. Plaintiffs, complain of the Michigan South
ern & Northern Indiana Rail Road Company
Defendants of a plea of trespass on the case on
promises.

For that whereas the said Defendants before
& at the time of the making of their promise &
undertaking hereinafter next mentioned were

possessed of a certain Rail Road, to wit, a Rail
 Road from Toledo in the State of Ohio to Chicago
 in the State of Illinois, and the said defendants
 were common carriers of goods & merchandise for
 hire & reward to them the said defendants in that
 behalf in & by certain cars used & employed by
 them in running in & upon the said Rail Road
 from Toledo aforesaid to Chicago aforesaid to wit,
 at the County aforesaid, and the said defendants
 being such carriers as aforesaid the said plaintiffs
 heretofore, to wit, on the first day of August A. D. 1856
 at Toledo aforesaid, to wit, at the County aforesaid
 at the special instance and request of the said
 Defendants caused to be delivered to them the
 said Defendants so being such carriers as afore-
 said at Toledo, to wit, at the County aforesaid a
 box ^{of merchandise} containing the following chattels, to wit;

14	60	pieces	Amber Noire Antique Ribbons	
1	"	64	"	do
1	"	54	"	"
1	"	56	"	"
1	"	48	"	"
1	"	24	"	"
1	"	20	"	"
1	"	16	"	"
1	"	45	"	Paris dress Trimming
1	"	36	"	watered do
1	"	30	"	figured velvet do
1	"	24	"	Lyon Black silks Ribbon
1	"	22	"	do
1	"	18	"	do
1	"	17	"	do
1	"	15	"	do
1	"	13	"	do
1	"	7	"	do
1	"	36	"	Fancy cap Ribbon
1	"	36	"	black & white do
1	"	20	"	Fancy do do
1	"	18	"	do Bonnet do
1	"	18	"	do do

1 " 18 "	Do	Do
1 " 15 "	Do	Do
1 " 18 "	Do	Do
7 " 15 "	Do	Do
1 " 15 "	Do	Do
1 " 12 "	Do	Do
4 doz black cravats		
9 " " Italian	Do	
15 " " "	Do	Do
375 1/4	Taffeta Ribbon	
153 "	Do	Do
117 "	Do	Do
210 "	Do	Do
264 "	Do	Do
108 "	Do	Do
15 "	Do	Do
24 "	Do	Do
75 "	Satin	Do
54 "	Do	Do
135 "	Do	Do
105 "	Do	Do
24 "	Do	Do
18 "	Do	Do
3 " Flat Gripe		
15 " do do		
8 " Black & white do		
3 lbs Silk Twist		
10 doz Super Shirt Bosoms		
5 " do do do		
1 " Gents Chamais Lined Buck gloves		
2 " " Furtop & Fur do do do		
10 Gross bonnet wire		

The said chattels being then
 & there ^{being} the property of the Plaintiffs & then & there being
 of great value to wit the value of Two thousand
 two hundred & seventy four dollars & thirteen
 cents, to be taken care of & safely & securely carried
 & conveyed by the said Defendants as such carriers
 as aforesaid in & by the said Rail Road cars
 running in and upon the said rail road from
 Toledo aforesaid to Chicago aforesaid & there
 to wit, at the County aforesaid to be safely &
 securely delivered by the said defendants to the
 said Plaintiffs and in consideration thereof
 & of certain hire & reward to them the said

Defendants in that behalf they the said defendants being such carriers as aforesaid then & there to wit, on the day & year aforesaid at the County aforesaid undertook & promised the said Plaintiffs safely and securely to carry & convey the said box of merchandise as aforesaid in & by the said Rail Road cars running in & upon the said Rail Road of the defendants from Toledo aforesaid to Chicago aforesaid & there to wit, at the County aforesaid safely & securely to deliver the same to said Plaintiffs. And the said Plaintiffs say although the said defendants as such carriers as aforesaid ^{then and there} had & received the said box containing the merchandise & chattels as aforesaid for the purpose aforesaid. Yet the said Defendants not regarding their duty as such carriers nor their said promise & undertaking so made as aforesaid did not take care of the said box of Merchandise as aforesaid nor safely nor securely carry nor convey the same from Toledo aforesaid to Chicago aforesaid, nor did there to wit, at the County aforesaid safely or securely deliver the same to the said Plaintiffs but on the contrary thereof they the said defendants conducted themselves so carelessly & negligently with respect to the said box of merchandise as aforesaid, that by & through the carelessness & negligence of the said defendants in this behalf the said box

containing the chattels as aforesaid while the same was so in the possession & custody of the said Defendants was, to wit, on the 16th day of August A. D. 1856, to wit, at the County aforesaid destroyed & wholly consumed by fire & thereby then & there became wholly lost to the Plaintiffs to wit, on the day & year last aforesaid, at the County aforesaid, to the damage of the said Plaintiffs of Four thousand Dollars & therefore they bring suit

Blackwell, Thomas & Roberts
Atty for Plffs.

Copy of Bill of goods sued for
Michigan Southern & Northern Indiana Rail Road Co
To Davis Moody & Co Dr
For the following goods, Contained in one box and
destroyed by the burning of the Company's freight house
in August 1856

1812	1 c 60 ps	Amber Moire Anti Ribbons	37 ²	22	50
1821	1 " 64 "	do do	56	35	84
1814	1 " 54 "	do do	87 ²	47	25
1823	1 " 56 "	do do	100	56	
1808	1 " 48 "	do do	125	60	
1825	1 " 24 "	do do	150	36	
1815	1 " 20 "	do do	187 ¹	37	50
1827	1 " 16 "	do do	212 ²	34	
1865	1 " 45 "	Paris Dress Trimming	137 ²	61	88
25	1 " 36 "	Watered " "	137 ²	49	50
10	1 " 30 "	Figured Velvet "	1	30	
18	1 " 24 "	Lyns Blk Silk Ribbon	15	18	
20	1 " 22 "	do do	84	18	48
30	1 " 18 "	do do	105	18	90
46	1 " 17 "	do do	120	20	40
50	1 " 15 "	do do	140	21	
70	1 " 13 "	do do	165	21	45
130	1 " 7 "	do do	325	22	75
300	1 " 36 "	Fancy Cap Ribbon	62 ²	22	50

301	1	"	36	"	Blk + wht	do	do	62 ²	22	50
1864	1	"	20		Fancy	do	do	156	31	25
394	1	"	18		do	Bonnet	do	187 ²	33	75
395	1	"	18		do	do	do	187 ²	33	75
383	1	"	18		do	do	do	218 ²	39	38
392	1	"	15		do	do	do	218 ²	32	81
311	1	"	18		do	do	do	218 ²	39	38
377	1	"	15		do	do	do	281	42	19
348	1	"	15		do	do	do	312 ²	46	87
1782	1	"	12		do	do	do	312 ²	37	50
64781	5	do			Black	Cravats		875	43	75
30	9	"			do	Italian	do	1025	92	25
32 ⁿ	15	"			do	do	do	12	180	
1	375	ps			Taffeta	Ribbon		20	75	
2	153	"			do	do		25	38	25
3	117	"			do	do		37 ⁿ	43	88
4	210	"			do	do		50	105	
6	264	"			do	do		75	198	
9	108	"			do	do		112 ²	121	50
12	15	"			do	do		150	22	50
16	24	"			do	do		175	42	
1 ⁿ	75	"			Satin	do		20	15	
2	54	"			do	do		25	13	50
3	135	ps			Satin	Ribbon		37 ⁿ	50	63
4	105	"			do	do		50	52	50
6	24	"			do	do		75	18	
9	18	"			do	do		112 ²	20	25
8	3	"			Flat	Crape		87 ⁿ	2	62
10	15	"			do	do		106 ⁿ	15	94
a	8	"			Blk + White	do		220	17	60
1	3	lbs			Silk	twist		9	27	
10	10	doz			Super	shirt bosoms		312 ⁿ	31	25
21.357	5	"			do	do	do	375	18	75
1	1	"			Gents	Chamois lined buck	Gloves		4	38
20	2	"			do	Fur top	do	875	17	50
	10	Gro			Bonnet	wire		137 ⁿ	13	75
									82274	13

And afterwards, to wit, on the 19th day of November in the year last aforesaid, the said Defendant by its Attorney filed in the office of the Clerk aforesaid its certain Plea & affidavit of Merits which are in the words & figures following to wit

Michigan Southern & Northern Indiana Rail Road Company	}	Cook County Circuit Court
add		
Samuel C. Davis et al		

And the said Defendants by Mr. B. Judd their Attorney come and defend the wrong and injury when &c. and say that they did not undertake or promise in the manner & form as the said Plaintiffs have above thereof complained against them and of this they put themselves upon the Country

N. B. Judd
(Defts. Atty)

State of Illinois }
Cook County } ss

Norman B. Judd being duly sworn deposes and says that he is the Attorney for the Defendants in the above entitled suit that he has had a full statement of the facts laid before him by said Defendants and that Deponent believes said Defendants have a good and substantial defence to said suit upon the merits

Subscribed and sworn to } N. B. Judd
before me this 19th day of November }
1856 } L. D. Hoar
Clerk.

And afterwards, to wit, at the March Term of said Court to wit on the 5th day of March A.D. 1858 the following among other proceedings in said Court were had and entered of Record to wit,

Samuel C. Davis Etal

vs.

Case

The Michigan Southern and
Northern Indiana Rail Road Company

Now come the
said parties by their attorneys and here in open
Court by agreement submit this cause to the
Court for trial without the intervention of a jury

And afterwards, to wit, at the April term
of said Court, to wit, on the first day of May in
the year last aforesaid, the following among
other proceedings in said Court were had
and entered of Record, to wit;

Samuel C. Davis and others

vs.

The Michigan Southern and
Northern Indiana Rail Road
Company

Case

Come now again
the parties by their attorneys aforesaid and this cause
having been heretofore submitted to the Court for trial
by the consent and agreement of the parties without
the intervention of a jury, and the Court being suffi-
ciently advised of the premises find for the defend-
ant, whereupon the Plaintiff moves the Court for a
new trial, which motion is overruled. It is therefore
considered that the said defendant recover against
the said Plaintiffs their costs and charges in this

behalf expended. And thereupon the said Plaintiffs
pray an appeal to the Supreme Court, which is grant-
ed upon filing their bond with as his
surety in the sum of Two hundred and fifty dollars
conditioned for the due prosecution of said appeal
according to law.

And afterwards, to wit, on the same day &
year last aforesaid the said Plaintiffs filed in
said Court their certain bill of Exceptions which
is in the words & figures following, to wit;

State of Illinois } In the Cook Circuit Court
Cook County }⁰⁰ April Term 1858

Be it remembered that on the
trial of this cause which was submitted to the
Court by agreement of the parties without the
intervention of a Jury, the following agreed
case in writing was the only evidence given by
either party, to wit;

(Davis, Moody & Co } Nov Term 1857 of
vs. } Cook Co Cir Ct
Michigan Sou & Nor }
Ind R R Co }

The Parties Plaintiffs and
Defendants agree that the following are the facts
in this case & that the cause shall be submitted
thereon, to wit;

That Defendant was a common
carrier of goods & merchandise by rail road between

Toledo Ohio & Chicago Ills for hire & reward. The
Plffs purchased in Philad^a Pa a box of Merchandise
as per invoice attached hereto. That the same
was worth in Chicago on or about Aug 13. 1856
25[¢] per cent in addition to 1st invoice price.

That said box of Merchandise was owned by
Plffs & came into the possession of Defendants
at Toledo aforesaid to be conveyed by it as common
Carriers to Chicago aforesaid on its 1st Rail Road
& there delivered to the plaintiffs as by law required

That 1st box was so conveyed in car No. 4114 &
1st car containing 1st box arrived at the Depot
of Deft^s at 9 o'clock P M Aug 12th 1856. That 1st box
was unloaded from the 1st car into warehouse
or Depot of Deft^s by 12 o'clock M Aug. 13th 1856

That a notice of the arrival of 1st goods was
delivered to Plffs by Defendants between 3 & 4
o'clock P M of the 13th of August aforesaid. 1st
notice being in the following form, to wit;

No Freight car, on any account, be delivered
except to the consignee or his written order

Michigan Southern & Northern Indiana R.R.

Freight Agents office

Chicago Aug 13th 1856

Delivered ----- o'clock

----- Tol. -----

The following articles consigned to your
address, are now ready for delivery at this Depot viz

1 Box
Weight 445 lbs Total charges \$7²⁸

You are requested to remove the same within twenty four hours, otherwise it will be put in store at the expense and risk of the owner.

Yours, Respectfully
Agent

Sgt M. S. & N. T. R. R. - Please deliver the above named articles to -

The original notice being lost, the above is the form similar to lost one

That the Defendants were accustomed to deliver such notices to customers & others receiving freight on said R Road at & before the 13th of Aug aforesaid & Plffs before that time rec^d goods per R R of Deft & always rec^d a similar notice of the arrival thereof - That ^{Defendants} ~~Plaintiffs~~ were in the habit of closing their warehouse at six o'clock P M. That on the evening of Aug 13th aforesaid between the hours of 7 & 8 o'clock P M the Depot or warehouse of Defts containing sd box was destroyed by fire and sd box also destroyed at sd fire. That the sd fire did not originate in the buildings of Defendant but in another building and spread to it. That sd fire was not occasioned by negligence of Defts nor were Defts negligent in efforts to save sd box from burning.

Jury waived & case submitted to Court on facts & a judgment to be rendered at Nov 1 1857
Chicago Dec 17th 1857

N. B. Judd
Atty for Deft

Blackwell, Thomas & Roberts
Atty for Plffs

Davis, Moody & Co

Bot of Lewis Brothers & Co

Philadelphia Aug 4th 1856

1812	1	60	ps Amber Moire Anty Ribbon 1/2	30	18	00
1821	1	64	" " " " " "	45	28	80
1824	1	54	" " " " " "	70	37	80
1828	1	56	" " " " " "	80	44	80
1808	1	48	" " " " " "	100	48	00
1825	1	24	" " " " " "	120	28	80
1818	1	20	" " " " " "	150	30	00
1827	1	16	" " " " " "	170	27	20
1865	1	45	Paris Dress Trimmings	100	45	" "
25	1	36	Water " "	100	36	" "
10	1	30	Fig ^a Velvet	75	22	50
18	1	24	Lyons Blk Silk Velvet Ribbon	55	13	20
20	1	22	" " " " " "	60	13	20
30	1	18	" " " " " "	75	13	50
40	1	17	" " " " " "	87	14	88
50	1	15	" " " " " "	100	15	00
70	1	13	" " " " " "	120	15	60
80	1	7	" " " " " "	225	16	45
300	1	36	Fancy Cap	50	18	00
301	1	36	Blk & Wht " "	50	18	" "
1864	1	30	Fancy " "	125	25	" "
394	1	18	" J Bonnet	150	27	" "
395	1	18	" " " "	150	27	" "
383	1	18	" " " "	175	31	50
332	1	15	" " " "	175	26	25
311	1	18	" " " "	175	31	50
377	1	15	" " " "	225	33	75
348	1	15	" " " "	250	37	50
1782	1	12	" " " "	250	30	00
6478	5	dr	Blk Cravats	700	35	00
30	9	"	" Italian "	825	74	25
32	15	"	" " " "	950	142	50
12	375	ps	Taffeta Ribbon	16	61	88

2	153	"	"	"
3	117	"	"	"
4	210	"	"	"
6	264	"	"	"
9	108	"	"	"
12	15	"	"	"
16	24	"	"	"
1 1/2	75	"	Satin	" Ribbon "
2	54	"	"	" " " "
3	135	"	"	" " " "
4	105	"	"	" " " "
6	24	"	"	" " " "
9	18	"	"	" " " "
8	3	"	"	" " " "
10	15	"	"	" " " "
a	8	"	"	" " " "
1	3	"	Blk & Wht	" "
10	10	doz	"	Silk twist
721.357	5	"	Super shirt bosoms	
1	1	"	Gents "Chamois lined Duck Gloves	
20	2	"	Fur Top fur	" " "
10	10	"	Grö Bonnet wire	" " "

22	33	66
27	31	59
38 ²	80	85
58 ²	154	44
89	96	12
115	17	25
147 ²	35	40
16	12	00
21 ²	11	61
26 ²	35	78
37 ²	39	38
57 ²	13	80
87 ²	15	75
70	2	10
85	12	75
175	14	00
7 ²	21	00
250	25	00
300	15	00
	3	50
700	14	00
100	10	00
1782		84
445		71
82228		55

Add 25%

Add interest from Aug 15th 1856

to date of Judgt

And the Court having heard the evidence aforesaid find for the Defendant and therefore before the giving of judgment thereon the plaintiffs move the Court for a new trial of the issue joined between the parties for the following reasons, to wit; 1, The finding of the Court is contrary to law and the evidence, and 2nd Upon the evidence adduced the finding of the Court should have been for the Plaintiffs, which motion the Court overrule and gave judgment upon the said finding for the Defendant, To which opinions of the Court in finding for

the Defendant upon the evidence aforesaid, and in overruling the said motion for a new trial and in rendering judgment for the said Defendants, the Plaintiffs at the time of the said several rulings and decisions excepted, and because the said evidence, opinions, decisions & exceptions do not appear of record the Plaintiffs pray the Court here to sign and seal this their bill of Exceptions and make the same a part of the record, which is done accordingly. May first 1858

George Manierre (seal)
Judge of 7th Judicial
Circuit, Ills.

And afterwards, to wit: on the third day of May in the year last aforesaid, the said plaintiffs filed in the office of the Clerk of the Court aforesaid their certain appeal bond, which is in the words and figures following to wit

Know all men by these Presents that we Nathan Moody and George Steokirk of the County of Cook and State of Illinois are held and firmly bound unto the Michigan Southern & Northern Indiana Rail Road Company also of the same County and State in the penal sum of Two Hundred and fifty Dollars lawful money of the United States, for the payment of which we

and truly to be made we bind ourselves our
heirs executors and administrators jointly severally
and firmly by these presents

Witness our hands and
seals this third day of May A.D. 1858. The Condition
of the above obligation is such that whereas
the said Michigan Southern & Northern
Indiana Rail Road Company did on the
third day of May A.D. 1858 in the Circuit
Court in and for the County and State aforesaid
and of the April Term thereof A.D. 1858, recover
a judgment against Samuel C Davis and
others constituting the firm of Davis & Son
the partners for the sum of Dollars
and cents being costs of suit; from which
said judgment of the said Circuit Court the said
Samuel C Davis & others have prayed for and obtained
an appeal to the Supreme Court of said State
Now Therefore if the said Samuel C Davis
& others shall duly prosecute their said appeal
with effect and moreover pay the amount of the
judgment, costs interest and damages rendered and
to be rendered against them in case the said
judgment shall be affirmed in the said Supreme
Court then the above obligation to be void; otherwise
to remain in full force and virtue

Taken and entered into before me
in my office in Chicago this

day of

A.D. 1858

at

Matthew Moody (seal)

Geo Newton (seal)

State of Illinois, }
COUNTY OF COOK. } s. s.



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 all the papers filed & processing, had
sent to & received
in a certain cause later pending in said Court on the
Common Law side thereof, wherein Orman
C. Davis & Co were Plaintiffs and
Mich. Son & Mr. Du. & Rail Road Co defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our
said Court at Chicago, this 7th day of May A. D. 1858

Fee for Record \$4.⁵⁰

Wm L Church

Clerk.

State of Illinois }
Supreme Court }^d April Term 1858

Samuel C Davis et al }
vs }
The Mich Sou & Mon } appeal
Ind^a Rail Road Co }

afterwards took
on the 10th day of May 1858 at this same
Term of the Court before the justices thereof
came the said appellants by their atty
and say that in the record & proceedings
aforesaid & also in the rendition of the
judgment aforesaid there is manifest
Error in this to wit

- 1 The Court Erred in finding for
The Defendant upon the proof
adduced
- 2 The Court Erred in overruling the
motion of Plaintiffs for a new trial
- 3 That by the said record it appears
that judgment was given for the De-
fendant against the Plaintiffs whereas
the said judgment ought to have been
given for the Plaintiffs against the De-
fendant

and the appellants therefore
pray that the said Judgment for

the errors aforesaid & for other errors
apparent in the record & proceedings aforesaid
said may be viewed & held for nothing
& that they may be rectified to all things
which they have lost by reason of the
said judgment &c

Lookins Thomas & Roberts
attorneys for appellants

The Michigan Southern
RR Co
ats
said C Davis & al

} appeal

and hereupon
afterwards to wit at the April Term
of the said Supreme court AD 1858
the said appellee by Judd & Munston its
Counsel & attorneys comes into court &
says that there is no error either in the
record & proceedings aforesaid or in the
 rendition of the judgment aforesaid & prays
that the Justices of the said Supreme court
now here may proceed to examine as well
the record & proceedings aforesaid as the matters
assigned for error & that the judgment aforesaid
in form aforesaid given may be in all
things affirmed &c

W. B. Dineen

attys for appellees

337
Samuel C. Davis Esq

74

Mich. Sou. & Nor. Ind. R.R. Co

Received

Filed May 10. 1858.
L. Seland
Clerk.

per 74 50

In Deep Receipt

Wm. Bowditch }
 And R. R. Co }
 vs }
 Davis & Moody }

The facts agreed upon in this case are correctly stated by plaintiff Counsel except in this the agreed case shows the goods in the warehouse or depot instead of on the platform. From the deduction attempted to be made from the conclusions drawn as well as from the ^{arguments} ~~arguments~~ and the law as stated and laid down by the learned Counsel the Defendants ^{dispute} ~~are~~ is entirely and absolutely.

It is not the intention of the defendant to argue against or to ask the Court to overrule or subvert in any manner or to any extent any of the well established principles of the Common Law as to the liability of the Common Carriers however harsh inequitable and ~~unjust~~ contrary to the public Policy of the present day some of these rules may be but we do ~~are~~ and insist that this Court ^{shall} not be asked to extend beyond its well settled application one of the hardest of those rules one which presumes fraud and wrong in every one without regard to his character or his actions who shall while exercising the employment of a Common Carrier suffer or permit any

loss or damage to occur to the subject
matter in relation to which he is discharging
his duty and which is under his care and
trust!

The Common Law makes Common Carriers liable as Insurers of the goods received to be carried against every thing but the acts of God and the Public enemies but the Common Law does not extend the severity of this rule one instant beyond the time when the relations of Common Carriers as such towards the goods under their charge shall cease, ^{which is at once} by delivery to the owner himself to a third party authorized to receive them or by a deposit thereof in a warehouse or other safe place.

The only question involved in this case is when did the defendant's liability cease as Common Carrier cease. It is not insisted on the part of ^{the} Plaintiff that the Common Carrier by Rail Road is bound to deliver goods personally to the owner or consignee thereof as soon as it is practicable to do so which it is not the law does not require such delivery. And we insist that neither does that law hold the Common Carrier by Rail Road liable as such and as an owner of the good after their arrival at the place of destination and deposit thereof in some safe place of custody whether with a third person or in a warehouse or place of deposit of the Carrier himself.

What reason would be given which would recommend for one moment to any unprejudiced mind why the Common Carrier by Rail Road after he ceases to act as carrier should be liable to any stricter degree of Responsibility or why his contract or actions should be controlled by any other rules than those which are held to apply to another Bailor who stands in the same relation to his bailor.

Frequently mention is made by some of the Courts particularly in the old decisions of the opportunity which a Carrier enjoys for robbing himself as if when ever any loss to the goods while under his care should occur ^{no matter} in what way or by what ^{means} ~~reason~~ such loss occurs - Fraud shall in all cases be presumed against the Carrier.

Such being the presumption established by the early decisions on the grounds of policy - and by subsequent ones because such was the law and upon the maxim. *Stare decisis*

It would ^{be} useless to argue against the rule. nor is it necessary for the defendant's ease that the law in that respect should be infringed upon. All that we ask in behalf of the defendant is that such presumption which might be well characterised as harsh and

and absurd and as having no foundation in the enlightened Public Sentiments of the present day! shall not be extended to the Common Carrier by Rail Road after he has ceased to be such and after he has become in fact and effect one of another class of Bailors - namely Warehouseman. Now is the Common Carrier by Rail Road after the goods have arrived and safely stored away in the Carriers Warehouse different from any other Warehouseman and what and what better opportunity does he have after such storing to commit a robbery or to dispoil the goods of his principal than is possessed by any other Warehouseman.

He is just as liable to detection after such time as any other Warehouseman could be in such case.

The learned Counsel speaks of the provincial recklessness of the Stewards and agents of Common Carriers such ^{assumption} ~~assumption~~ is not authorized by this agreed case and if it was, still, no argument for the Plaintiff as it will be incumbent upon the Common Carrier in case of loss or damage to goods while under his care to

how when and how the loss occurred
and if under his care as Carrier
no degree of or diligence on his
part will protect him so if when
his duty as Carrier has ceased yet
if he has not done all that a
prudent & careful man could do
he will be liable for the loss as
any ~~any~~ other Warehouse man

As the law now stands with
respect to Common Carriers there
is no inducement or premium to care
or diligence on the part of his agents
or servants as whatever may have
been the extent of those qualities
on the part of those servants towards
the goods under their care the Carrier
is still liable for all losses not
brought ^{about} by the act of God or
the Public enemy but nevertheless
the rule to be as we insist it is
that after the arrival of the goods
at the place of destination and
their deposit in some safe Warehouse
or other place of deposit by the
Carrier then the law looks upon
the party with whom they are
deposited as a Warehouse man
and holds him accountable as such
and we shall have no difficulty
in compelling such an exercise of
care and diligence on the part of
the Warehouseman and his servants

as will afford an ample protection to the owners of property carried and deposited. The old rule that delivery to the owner or consignee himself is assented in order to discharge the Common Carrier from liability as such was established in very early times when in England and in this country all the business of Common Carriers was done by Wag-gons and Stages moving about all over the country wherever their business called them; having no special termini to the routes and no accommodations or means of storing the goods carried by them. When arriving at such termini and the rule was as much a matter of course ~~convenience~~ for the Carrier as the owner and was both practicable and useful.

That rule however, as we have stated, has no application to the convenience and customs of the present day in relation to carriers by Rail Road and has never been applied to Rail Road Corporations which have fixed termini between which alone they contract for the carriers & transportation of goods, and which having ample accommodations in their warehouses and depots, all along and at both ends of their lines for the safe and convenient storage of all their freight

which they carry - As we have before insisted it will always be incumbent upon the common Carriers by Rail Road to show what has been done with the goods left to their care - and if those goods have arrived at their destination it will be for him to show that they were safely and securely unloaded and deposited in some suitable warehouse, or place of deposit - Now in the case agreed upon it is ~~expressly~~ admitted on the part of the plaintiffs that the defendant performed its whole duty in respect to the goods lost that they were carried safely and deposited at their place of destination in a suitable warehouse (and not on the platform of depot as plaintiffs counsel several times states) and it did every thing which human care and diligence could accomplish to protect the rights and interests of the plaintiffs in that respect - and that the loss could have been avoided by no human skill or foresight with what grace then does it become the plaintiffs to state imaginary cases of robbery and fraud and insist upon the possible occurrence of such cases as a reason for applying a severe and technical rule of law which has no application in reason or justice

to the case now before the Court

Now let us pass for the present to another point arising in this case, that, ^{is} the question of notice -

It is not necessary to inquire whether the law requires the Common Carrier in all cases to notify the owner or consignee of the arrival of goods entrusted to his care - In this case there is a custom admitted which was known to both parties which was strictly carried out by the defendant and which controls any rule of law which may exist upon the subject

Notice was given in this case to the plaintiffs personally of the arrival of the goods lost within a reasonable time after this arrival - Now as to the object and effect of that notice we take an entirely different view ~~from~~ from the learned Counsel on the ~~other~~ ~~side~~ side of the plaintiffs - The defendant is a Rail Road Corporation doing a large freighting business to and from this City - Cars loaded with freight are constantly arriving at & departing from this depot - and it is absolutely essential for them in order to do this immense business business which the necessities of the community enforce upon them that all freight should be removed as soon as possible after its arrival and is unloaded - And it is equally for the

interests of the owner and consignee of
freight to receive it as soon as it is
ready for delivery. The notice therefore
is a convenience for both parties and
is not intended to change and does
not change the legal relations to
each other of the Carrier and owner
of the goods. The carrier ^{Days} to the owner.
Your goods have arrived - and are ready
for delivery at the Depot. You are
requested to come & take them away.
And as in a very short time other trains
with freight will arrive and we shall then
need the space which your goods occupy
for the storage of other goods. We give
you twenty four hours in which to re-
move your goods and if you fail to do
so within that time your goods will be
removed to a Warehouse at your risk
and expense and all liabilities even as
Warehouseman ^{shall} cease. In other words
we will keep your goods in our Depot
for you for twenty four hours after their
arrival without charge as warehouseman
but after that time if they are not
removed. We shall have ~~them~~ ^{to} removed
them to a Warehouse and for all the expense
and risk incident to such removal and
charges for storage thereafter you must
be responsible. The defendants do not
say that they will take charge of the
goods as Warehouseman after the time
specified in said notice - the fact being that

they have no Warehouse or place other than their depot in which Plaintiffs goods there were. For storing goods the notice simply says that after that time if not removed the goods shall ~~xxx~~ will be "put in store" that is removed to some Warehouse for storing at the risk and expense of the owner. We must construe the notice from its language and in connection with the facts agreed upon - it is then plain and simple enough.

The difficulty with the Plaintiffs Counsel is that he imagines a state of facts which have no existence either in the Record or out of it and then proceeds to argue upon those facts as if they constituted a part of the case agreed upon. We insist on the fact of the defendant that the liability of the Common Carrier by Rail Road ends and terminates when the goods arrive at their place of destination and (the owner or the consignee not being there and there ready to receive them) are deposited in a place suitable and safe for their reception and it being the duty of such Common Carrier to provide suitable ^{fall} Depot for the reception of goods carried by them and to store such goods safely under the charge of competent servants ready to be delivered when called for by the party authorized to receive them for any loss or damage happening to the goods after such storage the

Carrier is only liable as Warehouseman or Bailor for him - This is a simple rule and its uniform application, while doing no injustice to any one cannot ^{but} promote the interests of Commerce as well as meet all the exigencies of the large and increasing Rail Road business of the Country.

It has never been held in the case of Rail Road Companies acting as Common Carriers that personal delivery to the owner or consignee is necessary in order to discharge them from liability as such carrier - On the contrary they have been improperly exempted from the operation of that rule by all the cases cited by the Plaintiffs Counsel but in them thereof a new rule has been attempted to be introduced by some of the Courts - which was unknown to the Common Law and which is too vague uncertain and unreasonable to find much favor with Courts desirous of rendering the principles of Law as ^{certain and} well defined as they are equitable and just -

The rule to which we refer and which is contended for by the Plaintiffs Counsel as Law is that the Common Carriers Liability as such is not discharged after the goods have arrived and are stored away until notice has been given to the owner or consignee and he has had a reasonable time thereafter in which to remove the goods.

The ^{great} difficulty and we may say

the impossibility of the application of such a rule to a large portion if not the majority of cases which occur in actual cases practice will be obvious at once to other than Rail Road men.

Is the notice to be given to be in writing or a verbal one? Is it to be sent by hand or by the post? Suppose the whereabouts of the owner or consignee is not known or cannot readily be found.

How long a time must be spent or how many miles traveled in looking for him? What is a Reasonable time during which the goods must be left after notice has been given? It seems to ^{me} that such a rule once established instead of fixing a principle of law for the guidance of future cases would be to open the question to endless litigation - This being a new question in this state it behooves the Court to examine into the reason of the rule, as well as the authorities themselves before making its decision -

The names which we take a peep of the law upon this point are sustained by ^{some of} the first if not the ablest Jurist of this Country, Chief Justice Shaw of Massachusetts - and in two decisions of the Supreme Court of that State as well as one of our own State the law is laid down in favor of the rule as contended for by the defendant in this case -

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On the first case in Massachusetts -
Thomas against Boston and Providence
R. R. Co 10 Me 473 - It was proved
that four rolls of leather the plain-
- tiff's property were delivered to the defend-
- ant a Rail Road Corporation at
Providence to be carried to Boston where
they arrived safely & were deposited
safely at the Station house of defend-
- ant in Boston - Hubbard Dodge in
deciding the case will remarks - "The
transportation of goods and the storage
of goods are contracts of a different
character and although one person
or company or firm may render both
services yet the two contracts are not to be
confounded or blended! because the legal
liabilities attending the two are differ-
- ent - The proprietors of a Rail
Road transport merchandise on
their road receiving it at one depot
or place of deposit and delivering
it at another equally to the directions
of the owner or consignee -

But from the very nature and
peculiar construction of the road
the proprietors cannot deliver merchan-
- dice at the warehouse of the owner when
situated off the line of the road as a
common waggoner can do - To make such
delivery of ~~goods~~ a distinct species of
transportation would be required and
would be the subject of a distinct contract

They can deliver it only at the
terminus of the road. Or at a given
depot where goods can be safely unloa-
ded and placed in a place of safety.
After such delivery at a depot
the carriage is completed - But owing
to the great amount of goods transported
and belonging to many different persons
and in consequence of the different hours
of arrival by night as well as by day
it becomes equally convenient and
necessary both for the proprietors of
the road and the owners of the goods
that they should be unloaded and
deposited in a safe place protected
from the weather and from exposure
to thieves and pilfers - And when
such suitable warehouses are provided
and the goods which are not called
for on their arrival at the place of
destination are unloaded and separated
from the goods of other persons and
stored safely in such warehouses or
depots. the duty of the proprietors as
Common Carriers is in our judgment
terminated -

They have done all
they agreed to do! they have received
the goods they have transported them
safely to the place of delivery and the
consignees not being present to receive
them have unloaded them and have
put them in a safe and proper place

for the consignees to take them away and he can take them at any reasonable time. - The liability of the Common Carrier being ended, the proprietors are by force of Law depositaries of the goods and are bound to reasonable diligence in the custody of them and consequently are only liable to the owners in case of want of ordinary care.

In this case as was remarked by the plaintiffs Counsel there had been a part delivery; but the Court place no stress upon that but lay down the general rule as above stated.

The above doctrine was defined by an important case in the same state - *Norway Plains Co and Boston and Me R.R. Co v Gray* etc a case in which the only point of distinction between it and the case at bar consists in the fact that there was no possibility for the plaintiff in the Massachusetts case to have received and carried to the place of destination his goods whereas in the present case there was abundant time to have received and carried to plaintiffs store the goods turned. In deciding the Massachusetts Case Chief Justice Shaw says in speaking of transportation by Rail Roads - "From the necessary conditions of the business and from the practice of the transportation companies to have platforms on which to

place the goods from the cars in
in the first instance and warehouse
accommodations by which they may
be securely stored, the goods of each
Company by themselves in accessible
places ready to be delivered. The Court
are of opinion that the duty assumed
by the Rail Road Corporation is, and
this being known to the owners of goods
forwarded, must in the absence of proof
to the contrary, be presumed to be assum-
-ted to by them, so as to constitute the
implied contract between them that
they will carry the goods safely to the
place of destination and then discharge
them on the platform and then and
then deliver them to the consignee or
party entitled to receive them if he
is there ready to take them forthwith
or if the consignee is not there ready
to take them, then to place them secure-
-ly and keep them safely a reasonable
time ready to be delivered when
called for.

From this ^{new} of the duty
and implied contract of the Carriers
by Rail Road - We think there result
two distinct liability - First that of
Common Carrier and afterwards that
of Kupus for hire or Warehouse Kupus.
the obligations of which are regulated
by law.

This view of the law is also

sustained by the case of Chicago & Rock
Island R. R. Co vs Warren et al 16 Ill 512
in which Chief Justice Deas says Rail
Road Companies may and doubtless do
act in relation to the same goods both
as common carriers and warehouse men
and these relations and liabilities
are very different in the strictness
and extent of their responsibility.

"The responsibility of the Carrier
must last until that of some other
begins and he must show it" Laying
down the rule that a delivery from the
Carrier himself to himself as Warehouse
man is sufficient to discharge the Carrier
as such. This rule we consider sanc-
tioned by both principle and authority.

It is admitted in the record in
this case that there was no fault on the
part of the defendant that the loss was
the result of inevitable accident occurring
eight hours after the goods were unloaded
and safely deposited in the warehouse and
after the Plaintiff had three hours notice
in which which to ^{receive} ~~receive~~ and take away
a single load of goods.

John O. Winston
for Deft

Cook Co. Circuit Ct.

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Michigan Southern
and Northern Indiana
Rail Road Company

vs.

Davis, Moody & Co

Filed May 14, 1898
L. Leland
clerk

Argument for Def.

Saml C Davis ~~vs~~ ~~vs~~ ch &c

Mich Son & Nor
Inda Rail Road Co

Cook County Circuit
Court

Appeal To Supreme Court

The facts in this case as agreed
upon disclose

That the box of Merchandise belonging to
the plaintiffs was received by defendants who were
common carriers to transport from Toledo to Chicago
and then to wit at Chicago deliver to plaintiffs.

That said box was unloaded from the cars upon
the platform in the depot of defendants about 12
o'clock M August 13th 1856, That notice of the arri-
val of said box & of the readiness of defendants
to deliver the same was served by defendants on
plaintiffs between 3 and 4 o'clock P.M. & that
the defendants depot was destroyed by fire between
7 and 8 o'clock P.M. of said date in which fire
said box being in said depot was destroyed.

It is also admitted that the doors of defendants
depot were closed at 6 O'clock P.M. & no goods
delivered after said hour. That said fire was not
occasioned by negligence of defendants nor were they
negligent in efforts to save said box; That it was
the usage of defendants to give the notice aforesaid
on the arrival of goods at their depot to customers &
on former occasions like notices were served by de-
fendants on plaintiffs when any goods of plaintiffs
arrived at the depot of defendants and were ready
for delivery.

It is contended on the part of the plain-
tiffs that upon this state of facts ~~the~~ defendants
are liable to pay plaintiffs the value of said box
of Merchandise at Chicago on the 13th of August
1856 with interest thereon to date of judgment.

as the damages sustained by Plaintiffs

The law is assumed to be that a Rail Road Company which delivers merchandise at its depot is not discharged from its liability as common carrier of such merchandise to deliver the same to the consignee until it gives him notice of the arrival thereof & of the readiness of the Company to make delivery & he has a reasonable opportunity after receipt of such notice to go & examine the merchandise & remove the same.

It may not be inapposite at the outset of the argument to recur to some of the familiar principles lying at the basis of carrier liability.

The law makes a Common Carrier an insurer against every thing save the act of God & the public enemy. Lord Holt says "It is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliged them to trust these sorts of persons."

Coggs vs Bernard 2 Lord Ray 918

"Chancellor Kent says "The rule is intended as a guard against fraud and collusion & & The law presumed against the public carrier & & If it were not for such a rule the carrier might contrive by means not to be detected to be robbed of his goods in order to share the spoils. & & It is founded on broad principles of public policy and convenience & & . It was intended to prevent the necessity of going into circumstances impossible to be unravelled

2 Kent's Com Vol 2 p 598. 603.

The liability is

discharged only upon delivery of the goods to the consignee and the law is well settled that *prima facie* the carrier is bound to make delivery to the consignee personally.

Edwards on Bailments 515

17 Wendell 305

But this *prima facie* obligation to make actual personal delivery may be controlled by usage to the contrary so uniform and well established that it may be presumed to have made a part of the contract.

In certain cases as when the transportation is by vessels or boats notice of the arrival and place of deposit is sufficient and comes in lieu of a personal delivery.

Edwards on Bailments 521-2

But the landing of the goods on the usual wharf with notice does not constitute a delivery until a reasonable time has elapsed after such notice for the consignee to come & receive the goods.

Edwards on Bailments 522

Bourne vs Gatliffe 4 Bing NC 364 & appealed & decided in 3 Man & Gr 642-90

3 Comstock 322. 17 Wendell 305, 3 Dana 91

Pierce on R R Law 436. Story on Bailments § 544. Replied on Railways p 252

A Rail Road Company continues liable as a common carrier of goods after their arrival at the depot of such road and until the consignee has had a reasonable opportunity to take them away after notice of their arrival, and the relation of warehouseman does not attach upon the unloading of the

goods on the platform in the depot.

Moses vs Boston & Maine R R Co
32 New Hampshire 523. Michigan
Central R R Co vs Ward 2 Gtts
(Mich R) 538 Rome R R Co vs
Sullivan 14 Georgia 277
15 Ill 561 (arguendo) Pierce's American
R R Law 436. Redford on Railways p 252

The only case as is conceived
in conflict with the authorities last cited is
that of Norway Plains Co vs The Boston
& Maine R R Co 1 Gray 263 in
which the opinion of the court was deliv-
ered by Chief Justice Shaw. But it will
be observed in that case that it was not the
usage or custom of the company to give notice
to consignees of the arrival of goods ^{as in the case at bar} but a
bill of lading was usually forwarded by
the consignor to the consignee at the date of
shipment ~~which reached~~ which reached
the consignee simultaneously with the
arrival of the goods. Besides it appears
that the consignees employed as their agent
a truckman who was at the depot in the
afternoon before the fire & who inspected the
company's bills of lading & who knew from
such inspection & otherwise that certain of
the goods of plaintiffs were then in the depot
ready for delivery & that other packages would
arrive by the train of that day say at 12 M.

He could have inspected & received them
before the doors closed in the evening but not
in time to forward them that afternoon to a

distant point where they were to be sent. He was therefore guilty of negligence in allowing them to remain after the company were ready for delivery, at least the company were prepared for delivery but he did not choose to take the goods away that afternoon one of the packages was ready the day before & he knew it.

It is true the court in this case choose in order to establish a simple & uniform rule to place their decision upon the ground that the liability of the company ceased as common carriers immediately upon removal of the goods from the cars upon the platform of the depot but the facts of that case should not be kept out of view in quoting the opinion of the court & it is conceived that even under the rule contended for by the plaintiffs in the case at bar that decision might be sustained.

But it was well remarked by Justice Sawyer in the case in 32 N. H. quoted above in commenting upon the opinion of C. J. Shaw that the learned C. Justice in laying down a rule which should be simple & efficacious & applicable to every variety of case seems to have sacrificed the common law to his desire to adopt such a rule.

Another case which perhaps may be regarded as sustaining the rule as contended for by defendants in the case at bar is that of Thompson v. The Boston & Providence R. Road Company 10 Met 472

But in that case the leather was separated from the other goods in the depot & plaintiffs cartman came

& inspected it & actually removed a portion of it the defendants had clearly complied with the rule as contended for by the plaintiffs in the case at bar.

The company turned the goods over to the cartman & took no further charge of it, he inspected and had time to remove them the company were not held liable as warehouseman even being guilty of no negligence.

But in the case at bar the question of negligence is not in issue. The point for consideration is, does the particular mode ~~of~~ carriage appertaining to Rail Road companies exempt them from the operation of the rule that applies to every other description of carriers which rule requires either personal delivery or (when it is impracticable as in the case of water craft) notice & reasonable time to the consignee to inspect & remove the goods.

Does not the reason of the Common Law rule apply with equal force to carriage by Rail Road as to the various other modes adopted for the transportation of merchandise. Chancellor Kent says the rule is adopted to "prevent" the necessity of going into circumstances impossible to be unravelled.

Trains are arriving at all hours of the day & night, freight is discharged to a great extent in the night time from the cars upon the platform ~~or~~ in the depot at an hour when the doors are closed and

none but the servants of the company present. Are not the opportunities ample at such times for the servants of the company to commit depredations indeed are not the opportunities greater than when the trains are in motion & the cars locked.

It is possible under such circumstances for the consignee to determine by any proof save that of the servants of the company whether the loss or damage was occasioned while the merchandise was in transit or in the night after they were placed from the cars upon the platform.

In the language of Chancellor Kent would not this be going into "circumstances impossible to be unravelled."

In the case at bar it was the custom of the company to give notice to consignees of the arrival of goods & in such notices they were informed that unless the goods were removed within twenty four hours the same would be stored at the risk and expense of the owner. The plaintiffs received such a notice between 3 & 4 o'clock P.M. of the 13th. Defts closed their doors at 6 o'clock P.M. leaving but from two to three hours to send and examine the merchandise - ascertain that it was in good condition & remove the same.

If the rule be adopted which is contended for on the part of the plaintiffs that the consignee is entitled to notice & reasonable time thereafter to remove the goods, the question will then arise was the time in this case reasonable. It is conceived that the affirmation of this proposition will not be seriously insisted on.

The jury in the New Hampshire case found that the time was not reasonable & in that

can about the same time elapsed after notice before the closing of the doors as in the case at bar and a similar clause was contained in that notice to the one found in the notice given in the cause at bar viz that unless the merchandise was removed in twenty four hours it would be held at the risk and expense of the owner.

Now if the law will hold a Rail Road company liable as a common carrier until notice given & reasonable opportunity to remove the goods independent of custom or usage as to notice a fortiori when as in the case at bar it was the custom of the company to give consignees such a notice as the one in proof the defendants cannot evade their liability indeed they are estopped from saying that they did not hold the merchandise of plaintiffs as carriers at their own risk at least for twenty four hours after notice given.

It cannot be urged that the defendants having placed the goods on the platform & therefore being warehousemen of them simply meant by the notice that they would continue to hold the goods as warehousemen without expense to the owner for twenty four hours for why would they say that the goods would be held at the risk of the owner after the expiration of twenty four hours?

They were presumed to know the law that as warehousemen they were only liable for ordinary neglect that the law only held them to ordinary diligence in the care of the goods & that they could not by any notice disist themselves of that liability they could not therefore have intended a mere idle notice words without mean

ing or efficacy, how then are we to interpret the language of this notice, why clearly that the defendants (well knowing that common carriers were insurers of goods until delivery & that there could be no delivery until notice & lapse of reasonable time for removing the same) intended to establish a time which should be at once reasonable and uniform applicable to all cases alike wherein consignees could come & inspect goods, see that they had been carried in good order & condition and remove the same & that if a consignee should neglect to come & remove the goods within that reasonable time then the defendants would place them in store at the expense and risk of the owner & thereby assume the new relation of warehouseman charging storage and assuming no other risk or liability than that incident to this new relation.

Such seems to be the only fair and reasonable interpretation of the language of the notice in this case & the plaintiffs could have given it no other. They were therefore by the act of the defendants led to infer that defendants would hold the goods at their own risk without expense to plaintiffs for twenty four hours and that defendants regarded that time as reasonable within which plaintiffs might examine the goods & remove them plaintiffs well knowing the extraordinary liability of defendants as insurers for a reasonable time and that defendants had fixed upon 24 hours as that time might be content to allow the goods to remain in the custody of defendants until the expiration of said time, while at the same time they might be very unwilling to allow de-

pendants to take charge of the goods as warehousemen after the expiration of the time.

They might have sought other warehousemen more prudent & careful in the management of their business than the servants of a Rail road company who are proverbially reckless and indifferent about the discharge of their duties. They might have been unwilling to employ the defendants in this new capacity well knowing their limited liability therein, from various considerations.

They might have been warehousemen themselves or associated in business with persons employed in that capacity a variety of considerations might have operated upon the minds of the plaintiffs to lead them to employ others than defendants as the warehousemen of their goods after the expiration of the twenty four hours while within that time they could have no motive for removing them from their custody holding them as defendants did under their extraordinary liability. If however it be urged that the defendants could not by a notice change the law or assume a liability which was not imposed upon them by law still the law will not relieve them until after the lapse of a reasonable time, which reasonable time is a question of fact & the notice may be regarded in evidence as the opinion of defendants as to what was a reasonable time & that opinion is certainly entitled to respect and consideration by the court. Two and one half hours could not under any circumstances be regarded as a reasonable time. It

could not be expected that the consignee immediately upon the receipt of the notice would dismiss his customers lay aside at once the business in hand repair with his cartman to the depot of defendants, examine the goods & if found in good order immediately remove them. The law does not exact such extraordinary diligence on the part of the consignee, while it pays due regard to the rights of the carrier and holds him to his extraordinary liability no longer than the demand of commerce and the exigencies of business require.

Having therefore due regard for the rights of the carrier as well as those of the owner of goods the law has in all cases save carriage by water and rail roads required a ~~personal~~ delivery and as by these modes of carriage that is inconvenient and impracticable the policy of the law will still require that there shall be some act on the part of the carrier tantamount to a delivery and substituted for it which shall for all practical purposes place the owner in as favorable a position to exact from the carrier a strict performance of his common law duty and furnish him the means of proof against the carrier for any breach of his duty as though personal delivery were made.

If this be the policy of the law it is clearly thwarted if the liability of the carrier ceases upon the removal of the goods from the cars to the platform, when as is most generally the case this removal is done at night after the doors of the depot are closed and the servants of the company are alone present. The common law with reason made the carrier

our insurer because among other considerations of the utter impossibility on the part of the owner in making proof of the collusion fraud or negligence of the carrier when goods were lost or embezzled while in transit. Is then not the same impossibility of making proof when the goods are purloined after they are placed upon the platform and before the owner has an opportunity to inspect and take them in charge.

Is not the owner in such case entirely within the power of the carrier? Do not the facts lie wholly in the knowledge of the servants of the company who perhaps are themselves the delinquents and who would therefore withhold the evidence of their own guilt? If this strict liability is intended as a guard against fraud and collusion does not the rule contended for by the defendants under this guard the merest illusion and mockery?

But it may be urged in mitigation of the hardship of the common law rule as applied to the case at bar that the fire which destroyed the plaintiffs goods occurred without the negligence of the defendants and that there was utter absence of fraud and improper conduct on their part but this it is conceived cannot affect the question.

Kent says Vol 2 page 602 "The books abound with strong cases of recovery against common carriers without any fault on their part and we cannot but admire the steady and firm support which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this

subject without bending to popular sympathies or yielding to the hardships of a particular case.

Although the fire in this instance was the result of accident without negligence on the part of the defendants yet it serves to show with what facility the servants of the defendants might purloin merchandise of great value after the removal from the cars upon the platform and then to conceal the means of detection set fire to the depot, how vain in such a case would be the efforts of the owner to prove that the goods had been purloined by the servants of the company and not in point of fact destroyed by the fire.

It is therefore conceived that the rule as contended for by the defendants is in derogation of the common law. That the policy of the common law rule applies in all its stringency to carriers by rail road, any departure from the strictness of this rule has been felt to be of serious inconvenience & detriment to the public and the strong leaning of the courts is towards exacting from carriers a strict performance of their common law duty. And now that rail roads are making almost a monopoly of inland carriage it becomes important in laying down a rule of conduct & liability affecting them that the rights of the public should be jealously guarded that they should feel the stimulus of a strict liability to the exact & faithful performance of their duty.

our
J. H. Roberts
of Lookins, Thomas & Roberts

~~Miner vs L & H R~~

Lawrenceburg Rail Road Co vs Miner & Indiana

Ret. p

Lawrenceburg vs

The State of Ind

Lawrenceburg vs

Argument for

Plaintiff

Since writing the foregoing argument
the treatise of Judge Redfield has come
to hand in which the subject is
discussed & all the cases reviewed
he says

"The prevailing opinion
seems to be at the present time that
the necessity of giving notice of the
arrival of the goods depends upon
custom & usage & the course of business
at the place" Red on Railways p 252 & 6

If this be the law it is conclusion
of the case at bar as it is admitted
that it was the usage of the Defendants
to give notice & of course Consignees would
await the receipt of such notice

But the author goes further & states as
the result of the authorities that inde-
pendent of notice the carrier continues
liable until the Consigner has an
opportunity to remove the goods pag 253 & 7, 8
and he remarks in reviewing the decision of
C & Shaw in *A Plains Co vs Boston & the RR Co* 1 May 1873
"We should therefore have felt compelled
to rule the case in favor of the Plaintiffs
and "we may be allowed to say that it
seems to us the opinion & argument of the
learned Chief Justice might for the most
part be quite as well applied to the rule
for which we contend as to have reached
the result which it did" pag 257

J. H. Roberts

Saml C Davis et al

The Merch Store & Char
Ind R R Co

Argument
for
appellants

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J. H. Roberts

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Miss Smith

1858

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~~XXXX~~
Parker