12200

No._____

Supreme Court of Illinois

Chicago & Rock Island R.R.Co.

---

vs.

Warren, et al

The Chicago & Rock Island Rail Road Co

vs.

William S. W. Warren
George C. Smith

Supreme Court of Illinois

And now comes the said Defendant by Judd & Frink its Attorneys and alleges that there is manifest error in said record and proceedings in this, to wit;

First, that the said Court erred in overruling the motion for a nonsuit made by said Defendants Attorneys upon the close of the testimony of said plaintiffs

Second; That the said Court erred in giving judgment for said plaintiffs instead of said Defendant

Third; That the Court erred in giving judgment for said plaintiffs for the full amount claimed by them, the delivery having been proved pro tanto

Wherefore by reason of said errors said Defendant prays that said judgment may be reversed

Judd & Frink
Defts Attys

Joinder

And the said Plaintiffs Come and say there is no error wherefore they pray that the judgment of the Court below may be affirmed.

Henry Clarkson
Plaintiffs Attorneys

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Supreme Court of Illinois

The Chicago & Rock Island R.R. Co.

vs

William G.W. Warren &
George C Smith

State of Illinois }
County of Cook } S.S.

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a Vacation Term of said Court begun and holden at the Court House in the City of Chicago in said County and State on the first Monday being the sixth day of November in the year of our Lord one thousand eight hundred and fifty four and of the Independence of the United States the Seventy ninth.

Present the Hon: John M. Wilson Judge
Cyrus H. Bradley Sheriff
Attest Walter Kimball Clerk.

Be it Remembered that heretofore to wit on the first day of September in the year of our Lord One thousand eight hundred and fifty four came William C. K. Warren and George L. Smith Plaintiffs by Harvey & Clarkson their Attorneys and filed in the Office of the Clerk of the Cook County Court of Common Pleas a Precipe for Summons against The Chicago and Rock Island Rail road Company defendants, which precipe is in words and figures as follows to wit:

In the Cook County Court of Common

Pleas.

William G. W. Warren
& George C. Smith . . .

vs

The Chicago & Rock Island Railroad Company . . . . } The Clerk will please issue a Summons in this cause directed to the Sheriff of Cook County and returnable to the September Term of this Court.

Assumpsit
Dgs $200.

Hervey & Clarkson
Plffs Attys

And thereupon summons issued out of the Office of the Clerk of said Court in words & figures as follows to wit

State of Illinois }
County of Cook } S. S.

The People of the State of Illinois to the Sheriff of said County Greeting.

We command you that you Summon the Chicago and Rock Island Railroad Company, if they shall be found in your County personally to be and to appear before the Cook County Court of Common Pleas of said 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 first day of the next Term thereof, to be holden at the Court house in the City of Chicago in said County on the 2nd Monday of September instant to answer

unto William G. W. Warren & George C. Smith in a plea of Trespass on the case on promises to the damage of the said Plaintiffs as they say in the sum of Two hundred dollars.

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

(Seal.) Witness Walter Kimball, Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 1st day of September A. D. 1854.

Walter Kimball - Clerk.

Served by reading to John E. Henry Superintendent of the within named Chicago and Rock Island Railroad Company, and delivered him a copy of this Writ September 1st 1854, the President of said Company not found in my County -

C. P. Bradley - Sheriff
By S. N. Norton - Dept.

And thereafter to wit on the said first day of September A. D. Eighteen hundred and fifty four the said Plaintiffs by Hervey and Clarkson their Attorneys filed in the office of the Clerk of said Court their Declaration in this cause in words and figures as follows to wit.

In the Cook County Court of
Common Pleas September Term

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A. D. 1854.

State of Illinois } ss. William G. W. Warren and
Cook County } George C. Smith Copartners in Trade carrying on business at Chicago in said County under the firm of Warren & Co by Harvey and Clarkson their Attorneys complain of The Chicago and Rock Island Railroad Company in a plea of Trespass on the case upon promises.

For that Whereas the said Defendants before and at the time of the making of their said promise and undertaking hereinafter next mentioned were common carriers of Goods and Chattels for hire in and by a certain Railroad from a certain place to wit from Joliet in the County of Will and State of Illinois to Chicago in the said County of Cook and State aforesaid to wit at Chicago aforesaid in the County aforesaid. And the said Defendants being such Carriers as aforesaid the said Plaintiffs heretofore to wit on the Seventh day of July in the year one thousand eight hundred and fifty four at Joliet aforesaid to wit at Chicago aforesaid at the special instance and request of the said Defendants caused to be delivered to the said Defendants so being such Carriers as aforesaid at Joliet to wit at Chicago aforesaid certain goods and chattels to wit certain bundles of rags (Weighing seventeen hundred and sixteen pounds) of the said Plaintiffs of great value to wit of the value of One hundred and twenty dollars of lawful money of the United States of America to be taken care of and safely and securely carried by the

said Defendants as such Carriers as aforesaid in and by the said Railroad from Joliet aforesaid to Chicago aforesaid and there to wit at Chicago aforesaid to be safely and securely ~~to~~ delivered by the said Defendants for the said Plaintiffs And in consideration thereof and of certain reward to the said defendants in that behalf they the said Defendants being such Carriers as aforesaid undertook and then and there faithfully promised the said Plaintiffs to take care of the said Goods and Chattels and safely and securely to carry and convey the same in and by the said Railroad from Joliet aforesaid to Chicago aforesaid and there to wit at Chicago aforesaid safely and securely to deliver the same for the said Plaintiffs And although the said Defendants as such Carriers as aforesaid then and there had and received the said Goods and Chattels for the purpose aforesaid. Yet the said defendants not regarding their duty as such Carriers nor their said promise and undertaking so made as aforesaid but contriving and fraudulently intending craftily and subtly to deceive and injure the said Plaintiffs in this behalf have not taken care of the said Goods and Chattels or safely or securely carried or conveyed the same from Joliet aforesaid to Chicago aforesaid nor have there to wit at Chicago aforesaid safely or securely delivered the same for the said Plaintiffs but on the contrary thereof they the said Defendants being such Carriers as aforesaid so carelessly and negligently behaved and conducted themselves with respect to the said Goods and Chattels aforesaid, that by and through the mere carelessness negligence and improper conduct of the said Defendants and their Servants in this behalf, the said goods and chattels being of the value

$2000.00

aforesaid afterwards to wit on the day and year aforesaid at Chicago aforesaid in the County aforesaid became and were wholly lost to the Plaintiffs to wit at Chicago aforesaid in the County aforesaid.

To the damage of the said Plaintiffs of One hundred and fifty dollars and therefore they bring their suit &c.

Hervey & Clarkson

Attys for Pltffs

Demand Sued on.

Chicago & Rock Island R. R. Co.

vs. Warren & Co.

1854 May 7. To a quantity of rags shipped from Joliet to our address at Chicago & lost. Weight 17th lbs as per receipt $120.00

Hervey & Clarkson - Pltffs Attys

And thereafter to wit on the Eleventh day of September A. D. Eighteen hundred and fifty four the said Defendants by Judd & Frink their Attorneys come filed in the Office of the Clerk of said Court in said cause their Plea and Affidavit of merits in words and figures as follows to wit.

Cook County Court of Common Pleas.

The Rock Island Railroad Company
vs
William G. N. Warren & George C. Smith

And the said Defendants by Judd & Frink their Attorneys come and defend the wrong and injury when &c. and saith

that they did not undertake or promise in manner and form as the said Plaintiffs have above thereof complained against them and of this they put themselves upon the Country &c.

Judd & Frink
Defts Attys

State of Illinois }
County of Cook } S.S.

John E. Henry being duly sworn says he is the Superintendent of the Chicago and Rock Island Railroad and the Agent of the Chicago and Rock Island Railroad Company the Defendants in the above entitled cause and has charge and knowledge of the business affairs of said Company and that said Defendants have a good and substantial defence upon the merits thereof.

Sworn before me this 29th day of September A. D. 1854 } John E. Henry.

W. Kimball. Clk

And afterwards to wit on the thirteenth day of November being one of the days of the November Vacation Term of said Court A. D. Eighteen hundred and fifty four the following proceedings were had in said cause and entered of record to wit.

William C. H. Warren & George C. Smith
(Pltfs)
vs
The Chicago and Rock Island Railroad Company . . . . . } Defts

And now come the said Plaintiffs by Harvey & Clarkson

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their Attorneys and the said defendants by Judd & Frink their Attorneys also come and issue being joined herein, by agreement of said parties this cause is submitted to the Court for Trial without the intervention of a Jury, and after hearing the testimony adduced by said Plaintiffs the said defendants moves the Court for a Nonsuit against said Plaintiffs, which on being heard is overruled by the Court- to which decision of the Court the said defendant excepts. And thereupon after hearing the testimony in behalf of said Plaintiffs and defendants and argument of Counsel, the Court being now fully advised in the premises finds the issue for the Plaintiffs and assesses their damages to the sum of Sixty eight dollars and sixty four cents.

Therefore it is considered that the said Plaintiffs do have and recover of the said Defendants their Damages of Sixty eight dollars and sixty four cents in form aforesaid by the Court here assessed and also their costs by them in this behalf expended and have execution therefor.

And afterwards to wit on the Eighteenth day of November, as yet of the November Vacation Term of said Court A. D. Eighteen hundred and fifty four, the following proceedings were had in said Cause and entered of Record to wit

William G. H. Warren and George, C. Smith ..... vs Chicago Rock Island Railroad Company .....

Asst.

And now again come the

said Defendants by Judd and Frink their Attorneys and pray for an Appeal in this cause to the Supreme Court which is allowed upon their filing Appeal Bond and Bill of Exceptions in Twenty days from this day, said Bond to be approved by the Judge of this Court.

And thereafter to wit on the twenty ninth day of November A. D. Eighteen hundred and fifty four there was filed in the Office of the Clerk of said Court in said cause a Stipulation and Appeal Bond in words and figures as follows to wit.

In the Cook County Court of Common Pleas.

William G. W. Warren and
George C. Smith .... Plts.
vs
The Chicago & Rock Island
Railroad Company .....

It is hereby stipulated that the Bond of the Hon: N. B. Judd may be filed in this Cause on the Appeal from the Judgment of this Court - without requiring the Execution thereof by any Officer of the Chicago & Rock Island Railroad Company the above named Defendants.

29. Nov. 1854.

Hervey & Clarkson
for Plffs.

Know all Men by these Presents That I Norman B. Judd of the County of Cook and State of Illinois am held and firmly bound unto William G. W. Warren and George C. Smith also of the same County and State in the penal

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sum of Two hundred dollars lawful money of the United States of America for the payment of which well and truly to be made, we bind ourselves our heirs our executors and administrators jointly severally and firmly by these presents Witness our hands and seals this 29th day of November A. D. 1854.

The Condition of the above obligation is such That whereas the said L. W. Warren and George S. Smith did on the 13th day of November A. D. 1854 before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas during the November Term of said Court recover a Judgment against The Chicago and Rock Island Railroad Company for the sum of Sixty eight 64/100 dollars damages and costs from which said Judgment of the said Court the said The Chicago and Rock Island Railroad Company has taken an Appeal to the Supreme Court of the State of Illinois Now if the said The Chicago and Rock Island Railroad Company shall prosecute its said Appeal with effect and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said Appeal then the above obligation to be void, otherwise to remain in full force and virtue.

N. B. Judd. (Seal)

And thereafter to wit on the Ninth day of November A. D. Eighteen hundred and fifty four the said Defendants by their said Attorneys filed in the Office of the Clerk of said Court their Bill of Exceptions in this cause in words and figures

as follows to wit:

Cook County Court of Common Pleas
of the November Term A. D. 1854.

William G. W. Warren and
George C. Smith . . . . .
(a)
The Chicago & Rock Island
Railroad Company . . . . . } Assumpsit.

Be it remembered that on the 18th day of
November A. D. 1854 being one of the days of the said
Term of said Court this cause came on for Trial at Chicago
in said County of Cook before the Honorable John M. Wilson
Judge of the Cook County Court of Common Pleas. And
thereupon come as well the said William G. W. Warren
and George C. Smith by Hervey & Clarkson their Attorneys
as the said The Chicago & Rock Island Railroad Co by
Judd, Frink & Winston its Attorneys and submit the case
to the decision of the Court on the law and facts agreeing
to waive a trial by Jury.

And thereupon the plaintiffs introduced D. C. Ashley
who being duly sworn testified, that in the Month of July
A. D. 1854 he was the Agent of the Plaintiffs for
purchasing and shipping rags from different parts to Chicago
That on the seventh day of July in said year he delivered
to the said Defendants as the Agent of the said Plaintiffs
at their depot in Joliet in the County of Will in the State
of Illinois a quantity of rags, weighing Seventeen hundred
and sixteen pounds, to be transmitted on the road of the

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said Defendants from Joliet aforesaid to Chicago aforesaid that the said rags were all well put up in bags and were worth cents per pound, that the said defendants by their Agent received the said rags at Joliet aforesaid and gave the witness a receipt for the same dated said 7th day of July 1854 as seventeen hundred and sixteen pounds of rags to be transported by the said Defendants for the said Plaintiffs to Chicago aforesaid. And the Plaintiff further offered the said receipts in evidence which was admitted without objection by the said Defendants. And the said Plaintiffs then next called Edward E. Ostrander who being duly sworn deposed as follows. That the said Plaintiffs upon Notice from the said Defendants that the said rags were at their Depot in Chicago for the said Plaintiffs, sent the witness to the depot of the said Defendants to receive the rags shipped by the said Plaintiffs at Joliet aforesaid. That the witness went to their depot and in behalf of the said Plaintiffs demanded the quantity of rags receipted for by the said Defendants at Joliet aforesaid. That the Agent of the said Defendants pointed out to the Witness a quantity of rags not exceeding in all Five hundred pounds lying scattered loosely about, not in bags, outside of the depot of said Defendants, that the said Plaintiffs by the Witness, who was their Agent to receive the said rags, refused to receive the said rags so pointed out as and for the rags delivered by the said Plaintiffs to the said defendants as aforesaid. The said Witness further testified that a day or two after he called upon

the said Defendants Agent at their said depot and again demanded the said rags, that the Agent of the said ~~w~~ Defendants informed witness that the said rags were not at their said Depot, and that they had been sent by mistake to Butler and Hunts in Chicago aforesaid, who also had rags at said Defendants depot. that witness called upon said Butler and Hunt and was informed by them that they had not received the said rags, and had not received all their own rags from said Defendants. That the witness then returned to the said defendants said Depot and informed the Agent of the said Defendants what said Butler & Hunt had said and again demanded said rags and that the said defendants said Agent then informed the witness that the said rags were not in the possession of said Defendants and could not be found. And the witness further testified that the said rags so delivered as aforesaid were worth the sum of Four cents per pound. The same witness stated upon cross Examination that he did not weigh the rags pointed out to him by the said Defendants Agent at the depot of said Defendants in Chicago as the rags of the said Plaintiffs but was satisfied from the appearance of them that there were not more than five hundred pounds in all.

This was all the Evidence offered in the part of the said Plaintiffs whereupon the Counsel of the Defendants moved the Court for a nonsuit, which Motion was then and there overruled by the Court, to which ruling the Counsel for the Defendants then and there excepted.

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And the said Defendants then introduced as a witness in their behalf , the Court permitting it who being duly sworn testified that the said rags were billed on the freight list of the defendants as "a lot of rags" and were so talled out at the depot of the said Defendants in Chicago by its Agent that the same were not weighed either at Joliet or Chicago by the Defendants Agents. That the bags were made of old cloth which was rotting and very liable to be torn by use, that the rags offered at said depot to said Plaintiffs Agent were scattered and outside of the depot, that the bags were torn. He also testified that it was usual for rags to fall short in weight when brought by the Railroad. The same witness upon cross Examination testified that the said bags might be transported in cars from Joliet to Chicago as the same were transported without the said bags being torn or broken open.

This was all the Evidence offered by the said defendants. The Counsel of the said Defendants contended before the Court that the delivery proved was a sufficient delivery pro tanto of the rags delivered to the said Defendants by the said Plaintiffs at Joliet aforesaid.

The Court ruled that such a delivery as that shown was not a delivery of the Goods even pro tanto as the goods were not delivered in proper Order and the Court gave judgment for the said Plaintiffs for the sum of Sixty Eight dollars and sixty four cents being the full value of

the rags delivered by the said Plaintiffs to the said defendants at Joliet aforesaid and costs of suit to which ruling and judgment of the Court the said Defendants by their Counsel then and there excepted.

And because none of the said Exceptions so offered and made to the opinions and decisions of the said Judge do appear upon the Record of said Trial therefore on the prayer of the said Defendant by its said Counsel the said Judge hath to this bill of Exceptions set his seal according to the Statute in that case made this 20th day of November one thousand eight hundred and fifty four.

John M. Wilson. (Seal)

State of Illinois
Cook County } S.S.

I Walter Kimball Clerk of the Cook County Court of Common Pleas within & for said County & State do hereby Certify that the foregoing is a full true and Correct Transcript of the Original papers and also of the Orders & Proceedings entered of Record in said Court & now on file in my office in the Case of William G. W. Warren and George C. Smith vs. The Chicago and Rock Island Rail Road Company.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at the City of Chicago in said County this 4th day of June A.D. 1855.

Walter Kimball Clerk

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William F. A. Moore
& George C. Smith

vs

The Chicago & Rock
Island Rail R^d Company

Transcript

34
1.60

Filed June 12. 1855.
L. Leland Clk.

Fee Transcript $4.60

The Chicago & Rock Island Rail Road Company

v.

William G. W. Warren & George C. Smith

Supreme Court of Illinois.
June Term A.D. 1855.
Argument on behalf of the Appellant.

This was an action brought by the plaintiffs below against the defendant a corporation (being a common carrier,) under the laws of this State for the loss of a quantity of rags. The declaration consists of one Count in assumpsit against the defendant as such carrier for not safely and securely carrying and conveying certain bundles of rags weighing fourteen hundred and sixteen pounds which the plaintiffs delivered to the Rail Road Company at Joliet to be carried to Chicago. The plea, being the general issue, makes the gist of the action that saidcom is to carry and convey the said rags.

The plaintiffs, by their first witness Ashley Pond the delivery of the rags at Joliet to the defendant, and that the rags were put up in bags at the time of their delivery. There was no special contract made with reference to the carriage of the rags, or as to the place or manner of the delivery to the plaintiffs at Chicago the plaintiffs must therefore rely entirely upon the contract which the law implies on behalf of the defendant in that regard.

Let us inquire then. First what contract did the law imply on behalf of the defendant in this case? And

Secondly. Was there such a breach of the contract on the part of said defendant as entitled the plaintiff to the judgment obtained in this action?

The implied duty of common Carriers may be succinctly stated in the words of Judge Story to be - "Safely and securely to carry the goods to their place of destination, and there to deliver them in a reasonable time, and in a reasonable manner."

See Story on Bailments Sec 509.

The receipt in this Case is not incorporated in the Bill of Exceptions, the writing does not testify that the goods were delivered to the defendant in good order, the Court cannot therefore presume such delivery the law ~~presumes~~ at the utmost only implies on the part of the defendant a contract to deliver the goods at Chicago in like good order as when received at Joliet

Hyde & Trent & Mersey Navigation Co 5 Term R. 389.

Secondly. There was no breach of the implied contract on the part of said defendant — There was no evidence to show that the goods were not in as good order when they arrived at Chicago as they were when sent from Joliet. The plaintiff should therefore have been nonsuited

It is a well established principle of law that a delivery at the place of destination and notice to the Consignee

ner will discharge the Carrier from responsibility as such.

Chickering v Fowler 4 Pick. 371.

The case just cited is precisely in point It was an action brought for the non delivery of goods under a Special Contract to deliver to the consignee "Thomas Hazen of Portsmouth" they were landed at the "pier wharf" of Portsmouth and notice given to Hazen. This was held sufficient without Special delivery to Hazen at his wharf.

See also Ostrander v Brown et al. 15 John. 39.

In the case last cited it is admitted by Counsel as well as by the Court, that delivery at the wharf if there be notice to the owner is sufficient—

In the present case Ostrander the plaintiffs own witness, testified to the fact of notice and not only was there notice but actual delivery was made by the defendant to the plaintiffs agent. The plaintiffs refused to accept this delivery and without weighing the bags or taking any steps to ascertain the amount of them, leave the bags in the possession of the defendant, and now seek to charge the defendant as common carrier for the non delivery of the whole one hundred and sixteen pounds of bags—

We respectfully submit then that the delivery of the bags was complete and that after such delivery the defendants duty as common carrier ceased and that it cannot be charged in this action as such, that the question of the order and condition of the bags

[illegible]

at the time of the delivery was not involved in the case it not having been shown that the bags were in good order when received by the defendant at Joliet—

If this view of the case be correct then we are justified in saying that whatever the liability of the defendant after the delivery may have been, it is clearly not liable in this action; the declaration on contract of one count merely, against the defendant as Common Carrier.

The difference between the liability of a Common Carrier and a Warehouseman is clearly defined in all the Law Books.

Story on Bailments Section 444 and passim.

The responsibility of a common Carrier after delivery is no greater than that of a warehouseman Story on Bailments. Sect. 538.

The Court below erred therefore in refusing a nonsuit.

The defendants witness testified that the bags of the plaintiffs were not weighed either at Chicago or Joliet but were Billed as "a lot of rags" and were so tallied out at the depot in Chicago by defendants agent. That the bags were made of old cloth which was rotten and liable to tear by use, and that it was usual for rags to fall short in weight when brought by Rail Road.

We insist that this testimony answers the objections both as to the quantity of rags delivered by the defendant they having been weighed at neither end of the

route and as to the ~~wood~~ condition of the bags at the time when delivered, the Bags being old and rotten.

In the next place the judgment of the Court below having been for the full value of the seventeen hundred and sixteen pounds of rags delivered at Joliet to the defendant is erroneous and should be reversed.

We submit that the Court in giving such judgment made an application of the doctrine of abandonment and undward of befor in Courts of common law.

The delivery of a quantity of rags as proved by the plaintiffs own witness, and agent, to be at least five hundred pounds is proved. The order and condition of the goods at the time, has nothing to do with the fact of the delivery. The claim for a damage to the goods for their bad order is an independent claim for which the plaintiff had their remedy at law. it was therefore their duty to receive the goods when the delivery was made and to look to the defendant for whatever loss had been sustained by the bad care and negligence of its servants.

It would be monstrous to hold that Merchants or Consignees to whom goods are offered

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in bad order or in what they may consider bad order can refuse to receive such goods altogether, and by so doing, continue the obligations and duty of the common carrier as such with all its strictness and rigor. ——

It would be going very far to say that in such case the merchant could by refusing to receive the goods compel the carrier to become, with respect to the goods refused, a warehouseman (of which the defendant is not charged in this case. It would be going side further, and further than any adjudged case has yet gone to charge the defendant as common carrier as to the whole Seventeen hundred and Sixteen pounds of rags when his liability had been terminated by the delivery of Five hundred pounds of the same rags to the plaintiffs

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Supreme Court

Chicago & Rock Island
R. R. Co.

v

William L. W. Waman
et al

Argument for Appellants

Filed July 11. 1855.
D. Vollans Clk.

Ch. & R. I. R. R. Co.
vs
W. G. W. Warren
et al.

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1855

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