

No. **8730**

Supreme Court of Illinois

Ohio & Mississippi R.R.Co.

vs.

Sidney Durban, et al

71641  7

1858 — — No 9-

Of M. Railroad
by

Durban et al

Ernest
Marin

Reversed and
Remanded

8730

Pleas and proceedings had in
the Circuit Court within for
the County of Marion & State
of Illinois in a certain cause
heretofore pending in said Court
wherein Sidney Dunbar, Charles
Hull & Joseph Wilbanks were
plaintiffs and The Ohio and
Mississippi Railroad Company
was defendant

Be it remembered
that heretofore to wit: on the 3rd day of April
AD 1856 the said plaintiffs filed in the office
of the clerk of the Circuit Court aforesaid their
declaration against the said defendant, which
said declaration is in the words & figures following
to wit:

Sidney Dunbar	}	Trespass on the Case
Charles Hull &		
Joseph Wilbanks		
vs		
Ohio and Mississippi	}	In the Marion Circuit
Railroad Company		Court, May Term AD 1856

The Ohio & Mississippi
Railroad Company, defendants in this suit were
summoned to answer Sidney Dunbar, Charles
Hull and Joseph Wilbanks plaintiffs in this suit

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of a plea of trespass on the case, and thereupon the said plaintiffs by their attorneys complain

Now that whereas, heretofore to wit on the 25th day of January A D 1856 at the County of Marion and State of Illinois, it was agreed between them the said plaintiffs and the said defendants, at the special instance and request of the said defendants that they the said defendants would carry and convey a certain drove of pork hogs to wit: 242 head of pork hogs of them the said plaintiffs of great value to wit of the value of \$2000, from the Station house of them the said defendants near the Town of Salem in the County of Marion aforesaid, to Uniontown in the County of St. Clair and State aforesaid and that they the said defendants would start from said station house near Salem in Marion County aforesaid, on the morning of the following day for Uniontown aforesaid with said hogs - and it was further then and there agreed by them the said defendants that they would furnish hog cars suitable for the carriage and conveyance of said hogs - for the carriage and conveyance of which said hogs by them the said defendants as aforesaid they the said plaintiffs then and there agreed to pay them the said defendants the sum of \$18.50, for each car so furnished

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(4)

from the station house aforesaid, for a long space of time to wit: for several days thereafter furnish cars suitable for the Carriage and Conveyance of said hogs - by means and in consequence whereof the plaintiffs in fact say, that they the said plaintiffs were put to great trouble and expense in and about the taking care of said hogs and feeding them for and during the said time and were necessarily forced and compelled to pay out a large sum of money to wit: the sum of \$200 therefor and the plaintiffs in fact say that by means of the delay aforesaid and the failure on the part of them said defendants to furnish said cars according to their said agreement they the said plaintiffs were forced and compelled to start with their said hogs from the station house aforesaid for Deinoistown aforesaid with 3 suitable cars only, and from suffocation and being crowded too much in pens at the said station house and on the cars aforesaid, a large number of said hogs to wit: thirty head of great value to wit the sum of \$500, died and were wholly lost to them the said plaintiffs, and the said plaintiffs suffered great loss and damage on the remainder to wit the sum of \$600, for shrinkage and also were put to great cost and expense in and about making & renewing engagements for the

3 by them the said defendants for the purpose of carrying and conveying said hogs as aforesaid and in consideration that they the said plaintiffs had then and there faithfully undertook and promised to do and perform all things on their part to be done and performed, according to the true intent, meaning and effect of the said agreement, they the said defendants afterwards, to wit: at the day and year last aforesaid at the County aforesaid undertook and then and there faithfully promised to do and perform all things in the said agreement on their part to be done and performed.

But the said defendants, wholly unminful of and disregarding their said promises and undertakings so made by them in that behalf, as aforesaid, did not nor would although often by them the said plaintiffs requested so to do start with the said hogs from the station house aforesaid for Illinois town aforesaid on the morning of the next day, nor did nor would they the said defendants furnish hog cars, or cars suitable for the carriage and conveyance of the said hogs, according to their said promise and undertaking so made by them in that behalf as aforesaid - but on the contrary thereof wholly failed and refused so to do, and did not start

3 - Sale of said hogs while they were so delayed and had necessarily in consequence thereof to lay out and expend a large sum of money therefor to wit; the sum of \$100, - to wit. at the County aforesaid

And whereas afterwards to wit; on the day and year last aforesaid, at the County of Marion aforesaid the said plaintiffs at the special instance and request of the said defendants caused to be delivered to them the said defendants a certain other lot of pork hogs, that is to say 242 pork hogs of the plaintiffs, of great value to wit; of the value of \$2000, at the station house of the said defendants at the Town of Salem, at Marion County aforesaid to be carried and conveyed by the said defendants, by and upon the Ohio and Mississippi Railroad aforesaid from the station house at Salem aforesaid to Illinois town in the County of St. Clair aforesaid to be then safely & securely delivered by the said defendants for them the sd. plaintiffs and in consideration thereof and of certain reward to be paid to them the said defendants in that behalf by them the said plaintiffs they the said defendants to wit; on the day and year last aforesaid, at the County aforesaid, undertook and then and there faithfully promised

6 them the said plaintiffs that they would carry and convey the said hogs from the station house aforesaid, to Illinois town aforesaid and would safely and securely deliver the said hogs for the said plaintiffs at Illinois town aforesaid, and that they would furnish a suitable number of hog cars, that is to say five hog cars, for the purpose of transporting said hogs as aforesaid, and that they would start with said hogs from the said station house the next morning, that is to say on the morning of the 26th of January A D 1856 and although the said defendants then and there had and received the said hogs for the purpose aforesaid, yet not regarding their promise and undertaking so made by them as aforesaid, did not nor would furnish a sufficient number of hog cars, that is to say, five hog cars, suitable for the purpose of carrying and conveying said hogs from the said station house aforesaid, to Illinois town aforesaid, nor did nor would start from the said station house to Illinois town aforesaid on the next morning being the morning of the 26th January A D 1856 aforesaid, nor safely & securely deliver said hogs for the said plaintiffs at Illinois town aforesaid, but on the contrary thereof wholly failed and refused to furnish

a sufficient number of hog cars suitable for
 the transportation of said hogs, as aforesaid,
 and did not start from the said station house
 for Uniontown aforesaid for a long space
 of time to wit: for the space of seven days
 thereafter and the plaintiffs in fact say that
 so carelessly and negligently did they the defendants
 conduct themselves in reference to the carriage
 conveyance & delivery of sd. hogs that by reason thereof
 a large number of said hogs to wit: thirty head
 of said hogs of great value to wit: of the value of
 \$500, from being crowded too much in the
 pens and on the cars belonging to said defendants
 for so long a time, died and were wholly lost
 to them the said plaintiffs in consequence of
 the failure and neglect of the defendants as
 aforesaid and the delay in transporting the
 said hogs as aforesaid lost a large amount of
 money, to wit: the sum of \$600, for shrinkage
 in the weight and were from the time the
 said hogs were so delivered to them the said
 defendants, necessarily forced and compelled
 to hire and employ a large number of hands
 to superintend, feed and take care of said
 hogs from the time of their delivery as aforesaid
 until the delivery of the said hogs by them
 the said defendants at Uniontown aforesaid

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and were necessarily obliged to pay out therefor
a large sum of money, to wit: the sum of \$200,
and in consequence of the delay aforesaid
in transporting said hogs, the said plaintiffs were
necessarily put to great expense of their monies
in and about renewing their engagements for
the sale of said hogs, that is to say \$100, to wit:
at the County aforesaid

And whereas, also, afterwards to wit on
the day and year last aforesaid, at the County
aforesaid, in consideration that the said plaintiffs
at the special instance and request of the said
defendants had then and there caused to be delivered
to them the said defendants divers other pork hogs
to wit: 242 pork hogs of great value to wit: of the
value of \$2000, to be safely and securely carried and
conveyed by the said defendants from their Station
house at Salem, Marion County Illinois aforesaid,
to Illinois town, in the County of St. Clair, State
of Illinois aforesaid to be delivered by them the
said defendants to the said plaintiffs for certain
rewards to the said defendant in that behalf,
they the said defendants undertook, and then
and there faithfully promised to safely and
securely carry and convey the said last mentioned
pork hogs from the Station house aforesaid to
Illinoistown aforesaid and there to wit:

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at Ullinoistown aforesaid to deliver the same for the plaintiffs in a reasonable time then next following, and although they the said defendants had and received the said last mentioned hogs for the purpose aforesaid, yet the said defendants not regarding their said promise and undertaking so made as aforesaid, but contriving &c did not nor would within such reasonable time as aforesaid, although often requested so to do, safely and securely carry and convey said last mentioned hogs from the station house aforesaid to Ullinoistown aforesaid, nor there to wit at Ullinoistown aforesaid within such reasonable time aforesaid deliver the same to the said plaintiffs, but wholly neglected and refused so to do, whereby a large number to wit thirty head of the last mentioned hogs being of the value of \$500, aforesaid, have been and are wholly lost to the plaintiffs, and the plaintiffs have in consequence of the failure of the said defendant as aforesaid to deliver said hogs in a reasonable time lost a large amount of money to wit: the sum of \$600, on account of the loss in the weight of the said hogs, and were also put to great trouble and expense after the expiration of such reasonable time in watching superintending said

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hogs in the pens at the Station House aforesaid, as well as on the cars, amounting to a large sum of money to wit: to the sum of 200, and was also in consequence of the failure as aforesaid on the part of the said defendants, forced to lay out and expend a large sum of money in and about the renewing of engagements for the sale of said hogs to wit: the sum of \$100, to wit: at the County aforesaid, by means of which said several wrongs and grievances so committed by them the said defendants, as in the said several Counts in this declaration mentioned the said plaintiffs say that they have been injured and have sustained damage to a large amount that is to say, in the sum of \$1,500, for the recovery whereof, they bring this suit.

Sidney Dunbar
Charles Hull &
Joseph Wilbanks
By Nelson & Johnson
their Attys,

(Account sued on)

Ohio & Miss. R R Company to
Sidney Dunbar, Charles Hull & Joseph Wilbanks Dr.
To shrinkage on loss of weight on hogs \$600.00
To loss of hogs dead - - - - 500.00

11 Expense of feeding & tending hogs for
one week, night and day \$200.00
To expense of making three trips from
Salem to St. Louis to renew engagements
of hogs at the packers 100.00

And upon the filing of said declaration and Aect.
by said plaintiff a summons issued against said
defendants in the words & figures following, to wit:

State of Illinois ss
Marion County ss The people of the State of
Illinois: To the Sheriff of Marion County:
Greeting; We command you to summon the
Ohio and Mississippi Railroad Company
if to be found in your County to appear before the
Circuit Court of Marion County, on the first day of
the next term thereof, to be holden at the Court
House in Salem, on the first Monday in the
month of May next to answer Sidney Dunbar,
Charles Hull & Joseph Wilbanks of a plea of Trespass
on the case to the damage of them the said Sidney
Dunbar, Charles Hull and Joseph Wilbanks fifteen
hundred dollars as they say and hereof make
due return to our said Court as the law directs

Witness B. F. Marshall clerk
of our said Court, and



the judicial Seal thereof
at Salem this 3^d day of
April A.D. 1856
B. F. Marshall clerk

And upon the reverse of said Summons
is the following, Sheriff's return
April 4th 1856

Served the within summons on the defend-
-ants by leaving a correct copy thereof with
J. A. J. Blair the agent of said defendants at
Salem Illinois

James Chance Sheriff
By Logan Skelton Deputy,

And afterwards to wit at the May term
A.D. 1856 the following order was made by
the Court and entered of record to wit:

Sidney Dunbar et al	} Tuesday May 6 th A.D. 1856 } Dismiss on the case
v	
The O & M. R. R. Co	

And now at this day
came the said defendants by Hargis their Atty.
and files his Demure to plaintiff's declaration
herein, which said Demure is in the
words and figures following, to wit:

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Sidney Dunbar et al }
 vs } Case
 O & M. R. R. Co. }

And the said defts come
 and defends the wrong & injury when he and says
 that the matters and things in plffs. Dec. in manner
 & form as therein set forth are not sufficient in
 law for said plffs. to have or maintain their action
 thereof agst. said defts. and that they the S^d defts.
 are not bound in law to answer the same, wherefore
 they pray judgt. &c

1st And for assigning special causes of demurrer
 defts say there is a misjoinder of counts in
 Case & a fpt. in said declaration.

2^d And the said declaration is allured informal
 insufficient & defective
 Said declaration is a fpt.

Haynie for Defts.

It is not shown in the 1st Count that the hogs
 were delivered so that defts could start the
 next day. Defts are not declared against as
 a Common Carrier.

And afterwards to wit: at the September Term
 A.D. 1856 of said Court, the following order
 was made by the Court and entered of
 Record to wit:

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(14)
Sidney Dunbar et al. } Sept. 20th A.D. 1856
vs }
O & M. R. R. Co. } Trespass on the Case

Ordered by the Court
that this Cause be continued until the next term
of this Court.

And afterwards to wit: at the March Term
A.D. 1857 the following order was made
by the Court and entered of record to wit:

Sidney Dunbar et al. } Friday March 15th 1857
vs }
The Ohio & Mississippi } Trespass on the Case
Railroad Company }

And now at this day
came said plaintiffs and ask leave of the Court
to amend their declaration herein, It is
therefore ordered that this Cause be continued
until the next term of this Court with leave
to plaintiffs to amend the declaration herein

And afterwards to wit: at the August
Term A.D. 1857 the said defendants filed
their pleas herein which pleas are in
the words & figures following to wit:

13-
 Dumbas et al }
 vs } Case
 O & M. R. R. Co. }

1st Plea. And the said defts. come and defend the wrong & injury when &c and say that they are not guilty of the said supposed grievances in the declaration of said plffs. set forth in manner and form as therein alleged, and of this they put themselves upon the Country &c
 Haynie for Defts.

2nd And the said defendants come and defend the wrong & injury when &c. And for a further plea in this behalf by leave &c the s^d defts. say actio non because they say, that they did not undertake ~~and~~ promise in manner and form as the said plffs have above in their declaration alleged and of this they put themselves upon the Country &c
 Haynie for Defts.

3rd And for a further plea in this behalf by leave &c the said defts. say actio non because they say, that heretofore to wit: on the — day of — 185 and before the commencement of this suit and before the 2nd day of January 1856 or the time of the accruing of the cause of action in plffs. declaration mentioned that the said defts. did lease and let

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the said Ohio and Mississippi Railroad with all appurtenances & fixtures, Cars, Engines & machinery thereto belonging to one George W. Jenkins and depts, over the truth to be that the time when &c in said declaration mentioned the said George W. Jenkins as lessee of said road & fixtures engines, machinery, Cars &c had the entire control and management of said road, and by his agents and employees completely & absolutely managed and controlled said railroad free from restraint or control of said depts in all matters pertaining to the carrying business thereon and that the contract in plaintiffs declaration mentioned if any such was made by said plaintiffs was made and entered into by & with the said Jenkins & his agents lawfully in the possession, management and control of said road, to wit at &c aforesaid and this they are ready to verify, wherefore they pray Judgment &c

Hayne for Defendants

And afterwards to wit, at the August Term AD 1857 of said Court the following proceedings were had and entered of record to wit.

1) Sidney Dunbar et al Tuesday, Aug 20th A D 1857
 vs Trespass on the Case
 The O & M, R, R, Co, }

And now at this day
 came the said defendants by Haysie their
 atty; and files his demurer to the pliffs.
 declaration which said demurer is sustan-
 ed by the Court as to the 1st Count of said
 declaration, whereupon the said pliffs,
 takes a Nol Pro as to said 1st Count, and
 it is ordered by the Court that said defendants
 be ruled to file their pleas herein by 12 O'clock
 M, which pleas are accordingly filed. and
 the said plaintiffs filed their demurer
 to the said defendants 3^d plea which said
 demurer is sustained by the Court, whereupon
 issue being joined let a jury come &
 thereupon came the Jurors of the jury to wit;
 Willis H Synch, Samuel P Wilson, Wm
 H. Huff, Jonas Tucker, Jeremiah Williams,
 William McGuire, Elias Meader, Wm R
 Black, John W White, John J Holt,
 William Branson and John R Easley,
 twelve good and lawful men who being
 elected tried & swore well and truly
 to try the issue joined after having heard
 the evidence and arguments of Counsel

18 retired to consider of their verdict and afterwards returned into Court the following verdict, "We the jury find for the plaintiffs and assess the damages at \$371.72" whereupon the defendants enter their motion for a new trial which said motion is denied by the Court. And the Court being fully and sufficiently advised of and concerning the premises orders and adjudges that said plaintiffs do recover of & from the said defendants the said sum of \$371.72 damages as aforesaid assessed together with their costs in this behalf expended & may have Execution therefor &c

It is further ordered by the Court that the said defendants be allowed until the 5th day of September next to prepare their bill of Exceptions herein

And afterwards the said defendants filed in the Office of the Clerk of said Circuit Court their bill of exceptions which is in the words & figures following to wit:

Be it Reminded that at the August Term of the Marion Circuit Court A.D. 1857, a certain Cause came on to be tried wherein Sidney Rumber and others were Plaintiffs and The Ohio and Mississippi Rail Road Co were Defendants and the said Cause was then and there tried before the Hon. Sidney Bruce Judge &c and a Jury - Upon the Trial of said Cause the Plaintiff introduced the ^{the} following Depositions of Witnesses to wit:

1st "Niley Knowles, Michael Fitzgerald & Henry M. Williams - which Depositions were in the words and figures following to wit:

Depositions of Niley Knowles, Michael Fitzgerald and Henry M. Williams, Residents of the County of Jefferson and State of Illinois, Taken on the fourteenth day of August, in the year of our Lord one thousand eight hundred and fifty six between the hours of 9 o'clock A.M. and 1 o'clock P.M. of said day, before me John S. Bogan Clerk of the Circuit Court of said County of Jefferson and State of Illinois at his office in Mount Vernon in said County pursuant to the notice hereunto annexed to be read in evidence in a certain case now pending in the Circuit Court of Marion County and State of Illinois, aforesaid wherein Sidney Rumber, Charles Hull and Joseph Wilbanks are

Plaintiffs and the Ohio and Mississippi Rail
Road Company: Defendants. The said Plaintiffs
by R. S. Wilson Esq their attorney being present
and W. H. Green Esq for the Defendants
The said Wiley Knowles
being first duly sworn deposes and says

Int 1st Are you acquainted with the Parties to this
suit Plaintiffs and Defendants?

Answer Yes sir - I have known the Plaintiffs ten years
don't know the Defendants

Int 2nd Please state what you know in relation to the
Plaintiffs driving a gang of Pork Hogs to Salem
at the Rail Road Station there for shipment
on the Ohio and Mississippi Railroad - if so
please state when it was, the number of Hogs
and the description of the hogs and what was
done with said Hogs on their arrival at said
Station to the best of your knowledge and belief.

Answer I don't recollect the exact day that we started
with the hogs from my house in Jefferson County,
but I think it was on the 20th of January
last and they were driven to Salem and then
put up in the pens at the Station House about
12 o'clock on Friday or a little afterwards
when we got there - I believe there were

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240 or 242 hogs - they were very fat hogs and would weigh some where between 250 and 260 pounds net, on an average - they were taken out of the pens on Sunday following and taken down between a quarter and a half mile to a lot to be fed - The Locomotive passed there on Monday evening afterwards and left word for them hogs to be put in the cars on next morning, which was Tuesday morning, and the hogs were put in the cars on Tuesday morning and they stayed there in those cars until Friday morning following, when they started from there and run to Minnietown and arrived there just after night, and there were taken out of the cars that night at Minnietown on Saturday they were driven across the River and the most of them slaughtered that evening - a few were not slaughtered

Int³ How you present Mr Knowles when any Contract was made between the Plaintiffs and the said Company's Agent for the shipment of said hogs on their arrival at the Station House in Salem - if so state what you may know about said Contract if anything? who the agent was?

Answer I did not hear anything of it - Don't know the Agents name.

Q¹ Did you hear any person acting on behalf of said Defendants, as agent tell the Plffs or either of them anything about putting the hogs in the pen or pens on Friday when they got there so that they could be shipped on next morning to Illinois town?

A¹ No Sir I did not hear anything of it, as I recollect at this time.

Q² Do you recollect how many cars said hogs were shipped on and the description of the cars - if so please state all you know about them and whether they were large enough and suitable for the taking of that number of hogs?

A² There was four cars and the cars were suitable enough but there was hogs enough to put in five cars - there were five cars called for, as I understand.

Q³ Do you know whether any of the said hogs died after they were put on the cars at Salem, and before they got to Illinois town? If so, how many and the value of each of said hogs that died and whether their death was caused by being too much crowded on the cars or otherwise?

A³ There were five hogs that died -

Reply to Overland
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I think it caused by being too much crowded and the cold together - I reckon the Hogs were worth from Ten to Twelve Dollars at that time

Int 7th Do you know anything about Dunbar, one of the Plaintiffs, going on to engage the cars himself for the carriage of his own hogs and the agent afterwards dividing the cars between him and one Jennings and what the agent said about it, if anything?

Answer I know that Dunbar got on the cars, at least to go for that purpose - The cars were divided I know that - I know nothing about the Contract more than hearsay

Int 8th What cars were divided?

Answer He sent for five and four or five come there he let Jennings have two and there were used four in number by Plaintiffs they boxed up one or two cars making the six cars - I am not certain whether one or two cars were boxed up

Int 9th What was the loss by death of said Hogs from the time they were put in the pen on Friday evening until the time they were put on the cars on Tuesday morning? And also please state the loss in weight, if any on each Hog

during said time?

Answer There were five or six hogs that died - There was some loss, of course; - about a pound or two a day lost on each hog

Int 10th Do you know why or for what purpose the said hogs were penned on Friday evening?

Answer Well I can hardly answer that question - To be ready for shipping

Int 11th Whose pens were they put in, and by whose orders were they put in for shipping and when were they to be shipped?

Answer Well I don't know whose pens they were - don't know by whose orders, only Dunbar don't know when they were to be shipped

Int 12th State how near the Station House of the Company those pens were, and whether they were such pens as are usually built near the Station Houses on Rail Roads for the purpose of penning stock for shipment?

Answer Fifteen or twenty steps - they were the first pens I ever saw of the kind - I can't answer as to the kind of pens on Rail Roads

Answer

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tell they were squealing more or less all the time just like they were killing or smothering one another I hardly know how to tell it.

Int 1st Do you know whether a freight train passed by the Station House on the next day after the Hogs were penned? going to Minois town.

Answer Not that I recollect

Int 2nd If the Hogs had been shipped for Minois town on Saturday morning after their arrival at Salem on a sufficient number of Cars and carried right through, would there have been any loss by death or otherwise to the best of your knowledge and belief?

Answer Can't answer that - Hogs is always a subject to die

Int 3rd Please state whether they would have been in as much danger of dying had they been shipped through the next morning after they got to Salem or on Tuesday morning when they were put on the Cars, as they were in consequence of being kept penned up and confined on the Cars from Saturday until Friday following?

Answer There would not have been but little danger if they had been shipped through right at the start.

Int 22 Was four Cars a sufficient number to ship the Plaintiffs Hogs on?

Answer I think not sir.

Int 23rd You stated that the Locomotive came along on Monday evening. Some person on the Locomotive left word for the Hogs to be put in the Cars on Tuesday Morning. If so please state who it was that left word and whose Hogs it was, and whether the Plaintiffs Hogs were put on the Cars accordingly?

Answer It was a man who was superintending weighing &c in the agents office - He said the Conductor said the Hogs must be put on the Cars - I did not know his name and they were put on the Cars

Crops examined by William A Green esqr
for the Defendants

Int 1st Have you ever had any experience in shipping Hogs on Rail Road Trains before last winter and if so please state what amount of shipping

Answer I never had

Int 2nd Then from what do you judge that four

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Cars were not sufficient in Capacity to carry Plaintiffs Hogs from Salem to Illinois town?

Answer I can answer that question in two ways - Mr Grunings had two Cars, and he lost one hog, and they were not so thick in his Cars as in Plaintiffs - and they were not squealing and taking on so, as in Plaintiffs Cars

Int 3rd Were the Plaintiffs or either of them or their Agents present when the Hogs were put into the four Cars?

Answer Two of the Plaintiffs were present

Int 4th Was it not unusually cold and severe weather for the season?

Answer Yes sir

Int 5th Would not Hogs be in much more danger of suffering from such weather, than in the ordinary winter weather of this climate

Answer Yes sir.

Int 6th How many Hogs died in all from the first Saturday morning after they reached Salem until they arrived at Illinois town?

Answer Five or six before they were put on the Cars
and five on the Cars - Ten or eleven in all

Int^{7th} What means have you of knowing that
the Hogs lost anything in weight before
they were put on the Cars?

Answer My own judgment and experience with it
in driving Hogs

Int^{8th} Do not fat Hogs always lose in driving
and put up in close pens?

Answer Yes sir - They lose some

Int^{9th} Who Told you Mr Dinbar started to Illinois
town to make a contract about Cars?

Answer He Told me so himself

Int^{10th} Do you know how much Corn the Hogs
eat while in the Cars?

Answer No I do not

Int^{11th} Did they eat as much as five Bushels?

Answer I do not know

Int 12th Were the Hogs taken to Illinois town on
31 the same day they left Salem?

Answer It was after dark on the same day

Int 13th Please state if you know whether about
that time the cars were hindered or delay-
ed by snow on the track

Answer The Passenger trains were running regularly
I also saw a Timber Train pass

Int 14th Did a freight Train pass at any time
between Saturday morning and Friday
morning following, on which day the Hogs
left Salem for Illinois town?

Answer If any passed as a freight train, I do
not recollect - there might have been.

Examined by R. S. Nelson for Plffs

Int 1st Was not the Agent of the Company, as well
as the Plaintiffs Hull and Willbanks present
when the hogs were put on the cars on Tues-
day morning - and did not the Plaintiffs
contract for more cars - and also please state
whether the said Agent did not insist upon
the said hogs being put upon the four cars

And stand at the door of the Cars, to force them into the Cars?

Answer The Plaintiffs Hull and Wilbanks, with the Agent were present - The Plaintiffs contended for more Cars - The Agent insisted that they should get put in and stood at the door and forced them in.

Q^d Would Agents be likely to die from the effects of cold weather when crowded up in the Cars or pens as they would in warmer weather and please explain this matter as well as you are able from what you saw of the condition they were in?

Answer If it had been warm, they would have smothered worse crowded as they were.

Subscribed before me
J. S. Bogan & Wiley ^{his} Knowles
mark

Michael Fitzgerald being first duly sworn deposes and says

Q^{1st} Are you acquainted with the parties to this suit, Plaintiffs and Defendants?

Answer I am acquainted with the Plaintiffs, but not with the Defendants.

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Int 2nd Please state all you know about the Piffs
driving Hogs for shipment upon the Chic
and Mississippi Rail Road to the Station
House at Salem - Marion County Illinois
when it was How many hogs and what was
done with them on arriving there How long
they remained at Salem - How they were treated
whilst there and anything else that you may
know in reference to the transaction of benefit
to the Plaintiffs.

Answer I think we started about the 20th of January
'56 and got there on Friday morning we stayed
there until Sunday evening and the pen
got in such a condition that they looked
like every one should die - We took them
out and put them in a field and then orders
come on Monday evening to put them on the
cars on Tuesday morning and the cars stayed
there until Friday morning There were five
or six Hogs that died in the pen and five
in the cars - they were crowded on the cars and
crowded in the pens - I think we started
with 244 and we lost 2 on the Road and
3 died and that left 239 Hogs

Int 3rd Please state if you know how many cars the
Plaintiffs were to have to carry their Hogs in
and when they were to start from the Station
House at Salem for Illinois town.

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{9730-12}

Answer I dont know from both Parties how many they were to have - I heard the Plaintiffs and the Defendants Agent Contending about it the Plaintiffs Contending for five Cars as agreed on, the Defendants Agent putting them off with four, and crowding the Hogs in the four Cars, saying they had shipped Hogs on the cars as thick as they were - The name of this man was Harmon to the best of my knowledge. He acted as weigher of all the freight that I saw put on and off there - I dont know when they were to start only from Dunbar. The Agent was not present at the time Dunbar told me

Int 4th - Were you present when the Hogs were put in the pens at the Station - if so, please state whether the Defendants or their Agents assisted in penning the Hogs, and what was the common talk amongst the hands and Company's Agent as to when the Hogs were to start for Illinois town whilst they were penning the Hogs?

3/ Excepted to by Defendants 3/

Answer I was present when they were put in and helped to put them in I dont think the Agent helped to pen them some of the

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Irish who were working on the Railroad
keeping the snow out of the way and sawing wood.
And bading water at the creek helped us to pen
the hogs - there was nothing said whilst we
were penning them; but on Saturday mor-
ning when we went up to see the Agent,
Dunbar asked him what was the reason
the Cars had not come and he said in
reply he did not know, and he had wrote
on to them to send the Cars, and they had
not done it - And then Dunbar asked
him if he knew they would - He said
he did not know - He had done all he
could - Dunbar asked him (the Agent)
if he had not better go to Illinois town and
engage his Port and forward the Cars -
Very likely he had replied the Agent, to the
best of my recollection

Ans 5th Do you recollect hearing the Station Agent
say on Saturday morning in said conversation
that Saturday morning was the regular time for
the freight train to pass going West to Illinois
town

3 Excepted to by Defendants 3

Answer I did not hear it

Ans 6th Now when you put the hogs in the pens, did
the Station Agent, or employers of the Company

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Around the Station House know that the Hogs were put in the pens belonging to the Company for shipment, on the Ohio and Mississippi Railroad for Illinois town?

Answer As I told you before there was none that helped but the Paddy.

Qth Have you any reason to believe from any circumstance within your knowledge that the Company's Agents knew the Hogs were penned for shipment on the Cars.

Answer That is a very hard question - All the circumstances go to show it - We drove the Hogs along the Line and Dunbar said he had made a Contract.

Qth What did you put the Hogs in the pen for on Friday Evening - and was it not for the purpose of shipping them on Saturday Morning?

Answer I helped to put the Hogs in because I was in the employ of Dunbar - it was his order

Interrogatory { In regard to the loss in the weight of the hogs from the time they were put in the pens at the Station House until they were delivered at Illinois town

State if you have any means of knowing as to the average loss on each Hog and how much it would be as near as you can come at it

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Answer

I will answer that in two ways - First one certain hog was weighed, weighing 428 pounds gross netting about $33\frac{1}{2}$ pounds and then weighing out at St Louis 281 lbs I do not recollect the exact number; - that is one means of ascertaining the loss. The other is from what I know about weighing of the hogs and my judgment of what their average would be - which would be from 250 to 260 pounds net weight, at the start - and then at ^{that} ~~that~~ weighed at St Louis which was 210 lbs or near that - making a calculation of eight pounds loss to Salem from home leaving a loss of 40 or 45 pounds to each hog, or near that

Ans 11th

What was pork worth per hundred pounds at the time said hogs were shipped and delivered at Illinois town?

Answer

I can't answer that question exactly - I think the price was ranging from Five Dollars to Five Dollars and twenty five Cents

Ans 12th

What quantity of corn per day did it take

to feed said Hogs from the time they were put in the pens until they were delivered at Alton town? and what was the corn worth per bushel

Answer I believe we fed them four days and I believe we fed them twenty bushels per day, and the fifth day we fed them in the cars four bushels and the rise - Friday Saturday and Sunday we paid 25 cts per Bushel for 3 loads; - and the next load we paid 30 cts per Bushel being the 4th one - The four Bushels we fed in the Cars we paid 35 cts per Bushel.

Int 12th Were the Cars that the said hogs were shipped in sufficient for that number of hogs? and if not how many Cars were necessary for the purpose of shipping them?

Answer Well, my judgment was that they were too thick and if there had been another Car it would have been about right.

Int 13th Do you know anything about any others of said hogs being so trampled on and abused in the pens, that the Plaintiffs had to kill them before leaving Salem - and if so how many?

Answer

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Yes sir I think there was about 6 or 7 that was injured by Trampling, and then was 10 or 11 killed in all - there was 6 or 7 damaged by crowding and Trampling in the pen, and 3 or 4 were crippled before, making the 10 or 11 in all.

Adjourned by agreement until Tomorrow morning - Friday 15th August resumed examination Parties all present.

Int 14th How many hands did Plaintiffs have to attend to said Hogs from the time they were penned until they were delivered at Illinois town - what were they getting per day, and please state whether you know anything about Plaintiffs hands having to be up all night whilst the Hogs were penned and on the cars to watch said Hogs and keep them from trampling on and smothering each other, and what such hands got for watching extra all night over and above their daily wages if any thing?

Answer

Two hands besides the Plaintiffs - The hands got six bits per day and found and made no extra charge and we were up three nights to keep the Hogs from trampling on and smothering each other Board was worth one Dollar per day with the exception of two days which was six bits per day

Q¹⁵ You say the Plaintiffs and two of the hands were up all night for three nights - if so would it have been necessary for them to have been up all night if they would have had a sufficient number of cars to ship their hogs in, and what was it worth to be up all night watching the Hogs as stated by you to the best of your judgment.

Answer Some of them or all of them were up all the time - all the way I can answer the question is by the hogs being crowded and my judgment is they would not have been as much need of watching if they would have had more cars to put them in - I do not know how much it was worth to suffer all night as we did, but we did not charge anything - If I must make an estimate it was worth twelve Dollars a night - we watched the hogs for the Plaintiffs as an accommodation

Q¹⁶ State all you know about the condition of the Hogs in the pens and in the cars - How the 10 or 11 hogs that were killed in the pens and on the cars were crowded and trampled on by the other hogs - And also all you know about the damage done to said hogs whilst they were in the pens and on the cars - And please describe it as accurately as you can -

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Answer They were in the snow and the snow melted into water and mud in the pens - then they were mixed and heaped upon another which occasioned them to smother - then in the cars they were crowded and piled up on one another from the cold and smothering - 9 or 10 were killed in the pens and cars - I have no other way of describing the damage done to the hogs except by heaping and crowding - Four of the Hogs died in the cars, and mortified and the grease run all over the cars and there was a very bad stink
Crop examined by William A Green Esqr
for the Defendants

Int 1st Did you hear any contract made between any one of Plaintiffs or their Agents and the Defendants about shipping the said hogs or about the number of cars to be used in shipping said hogs?

Answer I never heard anything of a contract at all, when the Parties were present

Int 2nd Do you know that the man ^{whom} you call Harmon, was the agent of Defendants, and if so how do you know it?

Answer I don't know it

Int 3rd Were not two of the Plaintiffs present when

the hogs were put into the cars?

Answer Yes sir they were

Int 4th Did any freight Train pass the Salem Station going West, after the hogs reached Salem until the Train passed which took the hogs to Illinois town?

Answer If there was any freight Train except the timber freight Train, I did not see it

Int 5th State the condition of the weather about that time and whether a deep snow did not fall about the time you reached Salem, and state the depth of that snow as near as you can?

Answer The weather was moderately cold at the commencement and kept getting worse all the time, and a moderately deep snow fell at that time - as well as recollect, the snow was 6 or 7 inches in depth

Int 6th State if there was another snow on the Tuesday morning following, and how deep it was?

Answer The deepest snow fell after the hogs got to St Louis on Tuesday following

Int^{7th} Do not Hogs always lose in weight in
43 driving and penning in close pens during
cold weather?

Answer Yes sir - as far as my experience goes they do
Reexamined by R. S. Nelson for Plffs

Int^{1st} Were there any passenger trains or other trains
of any kind passing from the time the hogs
were penned until they started to Illinois town?

Answer Yes sir There were passenger trains and timber
trains passing daily

Int^{2nd} Is it customary to keep Pork Hogs penned
up for so long a time as from Friday until
Sunday evening - and what is the usual time
that hogs are penned up in close pens - and
please state whether they are only put up
for a short time in close pens for the purpose
of weighing or shipping?

Answer As far as my experience goes I never knew them
kept so long until that time - For weighing it is
as long as we are about it be it more or less -
when they got ready to ship we drove them from
the field and put them in the pen, and put
them in the cars in a few hours -

As far as my experience goes they are put up in close pens for the purpose of shipping or weighing

Int 3rd Did you ever know hogs put up in close pens for the purpose of shipping and kept as long as Plaintiffs hogs were in the pens of the Company's Station House?

Answer I never did - as far as my experience goes with three drives of hogs, from that Station or any other. The other two drives were not kept quite as long as this one

Int 4th Had the Plaintiffs anything to do with the other drives you speak of

Answer They had no interest that I know of

Int 5th Have you had considerable experience in the weighing and driving of hogs to market?

Answer I have been experienced more or less, with the exception of three years ever since I was eighteen years old. I have been raising and fattening hogs all that time with the exception referred to - and I am now forty five years old

Subscribed before me

J. H. Bogan

Michael Fitzgerald

Henry N. Williams being first duly sworn
deposes and says—

41- Int 1st Are you acquainted with the Parties to this
suit Plaintiffs and Defendants: if so how long
respectively.

Answer I am acquainted with the Plaintiffs I
suppose about fifteen years—I have frequently
seen the Company and their agents but as for
acquaintance I have none.

Int 2nd Please state what you know in relation to the
Defendants being common carriers of Passengers and
freight to and from the Station House at Salem to
Illinoistown and other points along the line of the
Ohio and Mississippi Rail Road—and also
please state how long you have known them to
be engaged in that business?

Answer It is a public Road of Conveyance for Passengers
and freight—I have frequently, I have frequently
and shipped freight on that Road for about
twenty months past.

Int 3rd Will you please state what name the Defendants
have gone by, whilst you were doing business with
them

Answer
Ohio and Mississippi Rail Road Company

46 28
Q Now will you be so good as to state all you know in reference to the delivery by the Plaintiffs of a drove of Hogs to the said Defendants or their agent, at the Station House of said Company at Salem in Marion County Illinois for shipment on the Ohio and Mississippi Railroad when it was?

A Answer I was not present when the hogs were delivered. I reached there ^{on Tuesday} while they were putting the hogs in the cars by the Plaintiffs and their hands and a man was present who claimed or acted as their agent who assisted also, but I do not know who he was only as he claimed to be acting as an agent of the Company - whilst the Hogs were being put in the cars, the Plaintiffs claimed they had not cars enough that they had engaged five, and the agent had let Mr Jennings have one for the purpose of shipping his hogs - The hogs were very much crowded in the four cars, being about from 40 to 60 head more than is usually shipped in that number of cars of such sized hogs. The hogs remained there in the cars until the Friday following except occasionally when some were taken out to get their breath and saw their lines, when they were shipped to Alton town taken off of the cars and put in the pens about

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11 o'clock at night - The hogs were in a very bad condition at that time some of them died before next morning I think I died before next morning in the pens that night perhaps more I am not certain

Int^l Would you be so good as to state all the conversation that took place between the Plaintiffs and the Defendants or their agents respecting the said Hogs and their shipment, and also please state whether you were there acting as agent for the Plaintiffs Dunbar in his absence

Answer

I cannot state all that was said, for there was a good deal said - The Plaintiffs claimed that the Hogs ought to have been shipped before that time - The agent for the Company said that he had expected to have had them shipped the Saturday before, that he had ordered the cars, and could not tell why they did not take them off, but said that he was looking for the Locomotive to come and take them away every minute, and did not think it was hardly safe for them all to go away and get dinner, or to sleep away from the house, for the train would come along and leave them - as for conversation there was a great deal said

More than I could tell - I was acting as agent for Mr Duntar in his absence

Int 6th What was he absent at St Louis for, if you know?

Answer For the purpose of prolonging an engagement that I had made for his hogs.

Int 7th State what you know in reference to the Plaintiffs or one of them having to go to St Louis to renew their engagement for the sale of said Hogs in consequence of the delay in their shipments and all you know about any additional costs or expenses the Plaintiffs were at in going and returning to St Louis, for the purposes aforesaid, as near as you can recollect the same.

Answer Plaintiff Duntar went to St Louis I suppose for that purpose and did renew said engagement as it had already twice run out. One time in consequence of their not arriving in time at Salem - The other in consequence of the delay in shipping - There was some expense but I do not know how much

Int 8th How often had the Plaintiff Duntar to go to St Louis to renew engagements after the Hogs were penned for shipping at Salem &

before they were delivered at Illinois town and what was the fare to and from St Louis and how often did you go yourself backwards and forwards between St Louis and Salem to renew engagements and on account of said hogs — also state what was your own and Plaintiff Dunbar's expenses whilst on the Road between Salem and St Louis for Road and Carriage hire from Illinois town to St Louis and back again — Please put a reasonable estimate upon the expenses as near as you can come at them

Answer Only once that I recollect of — I went once for that purpose — The fare was about two Dollars and forty Cents, as well as I recollect each way. I do not know what Dunbar's expenses were — My expenses for board was fifty cents while on the Road for dinner Carriage hire Twenty five cents — That is about the expenses I think — while in St Louis my expenses were two Dollars per day — I suppose Dunbar's expenses were equal to mine.

Int 9th Please look at Paper writing, marked as exhibit A. "purporting to be a freight Bill and receipt therefor for the shipment of the hogs of Dunbar & Company and state all you know about it?"

Answer This looks very much like the Bill and receipt for the Shipment of said Company's hogs I paid the money and took up the receipt for them and believe it to be the same receipt from the amounts on it. It was given by a man acting as agent in Illinois town in the Station office - I don't know the name of the man signing the freight Bill but I saw it signed.

Interrogatory State all you know in reference to the loss on said hogs or on each hundred weight from the time they were penned at Salem in the Company's pens for shipment, until they were delivered at Illinois town?

Answer The best estimate we could make upon that was, about from 18 to 21 pounds to the hundred weight.

Interrogatory Please state all you know about the way the said hogs suffered from being crowded on the Cars, and also what you know of anything in regard to the suffering and exposure of the Plaintiffs and their hands at Salem and on the Cars whilst engaged in shipping said hogs?

Before they were delivered at Illinois town and what was the fare to and from St Louis and how often did you go yourself backwards and forwards between St Louis and Salem to renew engagements and on account of said hogs — Also state what was your own and Plaintiff Dunbar's expenses whilst on the Road between Salem and St Louis for Road and Carriage hire from Illinois town to St Louis and back again — Please put a reasonable estimate upon the expenses as near as you can come at them

Answer Only once that I recollect of — I went once for that purpose — The fare was about two Dollars and forty Cents, as well as I recollect each way. I do not know what Dunbar's expenses were — My expenses for board was fifty cents while on the Road for dinner Carriage hire Twenty five Cents — That is about the expenses I think — while in St Louis my expenses were two Dollars per day — I suppose Dunbar's expenses were equal to mine.

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Answer The best estimate we could make upon that was, about from 18 to 21 pounds to the hundred weight.

Interrogatory Please state all you know about the way the said hogs suffered from being crowded on the Cars, and also what you know of anything in regard to the suffering and exposure of the Plaintiffs and their hands at Salem and on the Cars whilst engaged in shipping said hogs?

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Answer As for the amount of the suffering of the hogs
I cannot tell; but if I was to judge from
the noise and shrinkage, it was very great - So
far as the hands were concerned, I can only
answer for myself directly - I suffered from
intense cold and want of sleep by stirring hogs
in open cars and was greater suffering than
I ever underwent before or since, and believe it
caused me to be sick for three weeks, and have
reason to believe that the balance of the hands
fared no better than I did

Int 12th Would there have been as much suffering among
the hogs and hags, if there had been a
sufficient number of cars provided?

Answer There would not, and my means of knowing
that was, that there was other cars loaded with
hogs at that time and place, - they were not
near so much crowded, and they did not get
more than half the attention - The hogs did
not complain so much, nor was the loss half
so great, as that of Dunbar & Company

Int 13th What do you think it was worth to sit up
with the hogs, and attend to them after they
were put on the cars, until they got to Minniston
by the night

Answer That is very hard for me to ~~answer~~ tell what it was worth, - I do not think a good hand could have been hired to sit up all night and attend to them for less than one Dollar per Hour

Int 14th How many hands did the Plaintiffs have attending to the hogs at night besides the Plaintiffs themselves, whilst they were on the cars?

Answer Three hands

Int 15th Please state what you recollect in relation to the Station Agents acknowledging the morning the hogs were shipped for Illinoistown that he had agreed to ship the Plaintiffs hogs on the Saturday morning previous?

Answer I do not recollect that he said anything about it that morning - Previous to that time, I had considerable conversation with him about the shipment of those hogs - I do not recollect the precise words, but I understood distinctly, from his conversation that him and Plaintiffs had made a contract to ship the hogs on Saturday previous to the time of their being shipped

Ans 16th If the Hogs had been shipped on Saturday Morning, when would they have got to Illinois town - And would there have been any difference in Shrinkage from that before stated by you, in case they had been shipped right through to Illinois town?

Answer Saturday Evening - There would have been a very material difference - If they had been shipped on Saturday I don't think they would have lost more than five or six pounds to the hundred from the time they left home until they arrived at St Louis

Ans 17th Do you know the regular time for the freight train to make its trips going West from Vincennes, and passing Salem on the Ohio and Mississippi Railroad according to their advertisements, at the time the said Hogs were penned for shipment?

Answer I don't recollect that I ever noticed one of their advertisements

Ans 18th Do you know whether the freight trains on the Ohio and Mississippi Railroad are running between Sandoval and St Louis

57) Whilst the Plaintiffs were at Salem waiting for shipment?

Answer I know that there was several freight trains on the road at that time as many if not more, than usually run there, they were engaged in the shipment of flour and other articles of merchandise to and from Illinois town to Sandoval, for the Illinois Central Railroad. The Mississippi was blocked up with ice at the time.

Subscribed before me
J. S. Bogan Henry M. Williams

State of Illinois
Jefferson County I John S. Bogan Clerk
of the Circuit Court within
and for said County and State certify that
Niley Knowles, Michael Fitzgerald and Henry
M. Williams Witnesses on behalf of Plaintiff.
and whose names are subscribed to the foregoing
Depositions, were severally sworn according
to Law, and that the foregoing Depositions
by them subscribed severally were taken at
the time and place according to the notices
herewith annexed and that previous to being
interrogated, they were duly sworn as before stated

And said examination by Mutual Consent
of Counsel and agreement of Parties was adjourned
over from the 14th of August to the 15th
of August aforesaid, and then resumed, both
Parties being present; And also that such
Interrogatories and answers were read to
the said Witnesses respectively before signing
the same - Paper writing marked "Exhibit A,"
referred to in Witness Williams' Deposition
is herewith annexed, also the Subpoena for
said Witnesses



Given under my hand and
Seal at office in Mount Vernon
in said County this 15th day of
August, W. D. 1856
John S. Bogan
Clerk

1st Objection Defendant objected to latter part of
answer to interrogatory 5 propounded to
Niley Knowles - as to his understanding
that there were 5 Cars called for which
objection was sustained by the Court

2^d Defendant also objected to 6th interrogatory
propounded to said Knowles and the answer
thereto, which was overruled by the Court and

The Defendant excepted at the time

3rd Defendants objected to 13th Interrogatory to Knowles and the answer thereto and objection overruled by the Court and Defendants excepted at the time

4th Defendants objected to 16th interrogatory to Knowles and the answer thereto. The Court overruled the objection, and the Defendants excepted at the time -

5th Defendants objected to 22^d interrogatory to Knowles, and the answer thereto - objection overruled - and Defendants excepted at the time -

6th Defendants objected to 23rd interrogatory to Knowles, and the answer thereto, which objection was overruled by the Court and the Defendants excepted at the time

7th Defendants objected to 1st interrogatory to Knowles, on ^{re} examination, objection overruled by the Court and Defendants excepted at the time -

1st Defendants objected to 9th interrogatory put to Michael Fitzgerald, which was overruled by the Court, and exception taken by the Defendants at the time —

2^d Defendants objected to 11th interrogatory to Fitzgerald and the answer to it overruled by the Court and Defendants excepted at the time

3 Defendants objected to 14th interrogatory to Fitzgerald, and the answer thereto overruled, and exception at the time.

1st Defendants objected to 15th interrogatory put to Henry M. Williams and the answer thereto overruled by the Court, and Defendant excepted at the time

2^d Exhibit marked "A" and referred to interrogatory 9th put to said Williams was offered to be read by Plaintiffs Counsel, with the answer of witness to the said interrogatory — Defendants objected because it was not appended to the Deposition — to which objection Plaintiffs Counsel replied to the Court that said exhibit had been attached by a wafer to the deposition, but had been detached

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Since Deposition was opened, and asked the Court to examine the wafer on the back of the Deposition and the mark of the same on the exhibit; upon examination of which the Court allowed the paper to be read to the jury. To which ruling of the Court in admitting said exhibit "A" to be read in evidence the Defendants excepted at the time

3 Defendant excepted to the 11th Interrogatory to Williams, and the answer to the same, which was overruled - and the Defendant then and there excepted -

4 Defendants objected to answer of Williams to interrogatory 11th which was overruled and the Defendant excepted at the time -

5 Defendant objected to 15th & 16th interrogatories put to Williams and the answers to the same which objections were sustained by the Court as to 15 - overruled as to 16 Deft excepted at the time

The Plaintiffs then introduced C. Nichols as a witness at the Bar of the Court who testified as follows:

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"I remember when Plaintiff came to the Station in Salem in 1856 with three or four hundred head of hogs - don't know the exact number of Hogs - Witness came by the Station when hogs were there - it was in 1856. I saw the hogs after they were put into the cars. I don't know who put them into the cars, nor do I know how long the hogs remained at the Station - I went down on the same train with them. I think I saw a train at Sandover as we went down but do not remember whether it was a freight train or passenger train. Mr Blair was agent for the Ohio & Mississippi R.R. Co. at Salem at the time. The weather was very cold and there was some snow on the ground at the time, but I don't remember anything about a contract - We started from Salem on Friday for Minnietown and arrived there some time that night - I know the hogs were put on the cars on Tuesday - There were some four or five persons along with the hogs - I heard some talk between some person and Mr Blair about the hogs but was not paying attention, and don't know what was said

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The Plaintiff then introduced Israel Jennings

who testified that last winter was a year
 ago in January or February 1856 he came
 to the Station of the O. & M. R. R. at Salem
 It was in January or February A.D. 1856. I
 think. It was on Monday Plaintiffs hogs
 were there at the time - I had been there 4 or
 5 days before and spoke for three cars there
 were five cars there at the time I think -
 They told me the cars were for Decatur - The
 agent told me so - Another car was afterwards
 boxed up which made six - I got two
 cars, and there were four left, into which
 Plaintiffs hogs were put, but I cant say how
 many hogs were put in each car - On Monday
 evening a train came from St. Louis and the
 agent ordered Plaintiffs and myself to put our hogs
 on the cars - expecting the train would be along -
 I helped Plaintiffs to put their hogs on the
 cars and they helped me - I tried to count
 their hogs as they drove them into the cars
 but dont know that I counted them right -
 I dont know how many hogs Plaintiffs had
 but suppose there was about 240 or thereabouts
 There was not less than from 50 to 60 in a
 car - Plaintiffs hogs were very large fat
 hogs - We put them in on Monday or
 Tuesday - Did not get off that day

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We started on Friday about 12 o'clock for
Illinoistown Plaintiffs watched their hogs
every night while on the cars. the weather was
very cold and there was some snow on the ground
but the weather was not so cold nor the snow
as deep then as it was a few days after-
wards. Plaintiffs hogs were crowded very
much, and several were killed by crowding
on each other - My hogs were not as
large or as fat as Plaintiffs - and I think
48 head of hogs would be about right for
a car. the size of Plaintiffs hogs and
about five cars would have been right. -
We got to Illinoistown in the night. and
all our hogs were turned out together -
I thought at first we never would get
them separated, but when we got the hogs
all out of the cars, it was very easy to tell
Dunbars hogs from mine - on account of
their being greasy from hogs killed
in the cars - Mr Harmon was at Salem
I think and helped us to put the hogs
in the cars & the Companys Agent insisted
on the hogs being put on the cars. I cant
say how many cars Dunbar was to leave.
I had 108 hogs there were 54 feet in
each car I have drove hogs on foot

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frequently from Salem to St Louis, and I never saw hogs lose as fast before I cant tell exactly how much Plaintiffs hogs lost in weight. Witness was then asked by Plffs Counsel what in his judgment would be the loss on Plffs hogs by shrewing from the time they were put on the car till they arrived at Illinois town. Defendant objected, and Court overruled the objection to which Defendant excepted at the time. Witness then stated that they would lose in his opinion 30 to 35 pounds each hog. Plaintiffs lost 5 hogs when I lost 1. We started on Friday and got Illinois town that night near midnight. I dont know how many died first night on the cars. Second night they they lost several hogs. Plaintiff Wumbar seemed to be more concerned than the other Plffs Hull and Wilbanks, and had the largest interest in the hogs, as I gathered from Plaintiff Wumbar I did not hear him say he owned a part of the hogs, Wilbanks a part and the other man a part, but I understood from what he said that he was more largely interested in the hogs than the other two.

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I think it was the cold & being crowded so much that made the hogs lose so fast. At the time we went down there were freight trains running to Sandoral from St Louis and one freight train came up to Sandoral and switched off as we passed - Passenger trains were passing Salem for the most while the hogs were on the cars waiting, and also one lumber train passed.

Bring Crop examined by Defendants Counsel. Testified - I understood that the hogs were owned by Dunbar Wilbanks and another man. I did not hear Dunbar say Wilbanks owned any particular part of the hogs - but I understood that he was more largely interested in the hogs than the others and from what Dunbar said, I supposed they were in partnership in the hogs but I know nothing about it myself. - The other Plaintiffs Hull and Wilbanks went along with us with the hogs to Illinois town - That all of the above statements in reference to the ownership of the hogs I gathered from Dunbar himself, and neither of the other Pffs were present.

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The Defendants then introduced H. W. Blair as a witness on their behalf who testified as follows -

I was Station Agent on the Ohio & Mississippi R.R. at Salem in the year 1856 I remember the Plaintiffs coming there with a drove of hogs to said Station - at that time it was extremely cold weather. I was the only person authorized to make Contracts of shipment for freight - I never made any Contract of shipment with Defendant, as agent for said Company I refused to do so. It was very difficult to get water along the Road. and freight trains were running very irregularly, so much so, that I would not contract to ship said Hogs - At the time Plaintiffs hogs were there, no freight train passed there going west till the train that took them off. I wrote, sent word, and did every thing within my power to get them off before, but could not do so. There was no particular number of cars agreed on - The Company charged so much a car for freight cars - \$18.50 per car from Salem to Illinois town. We had notices printed and put up that the shipper had to run his own risk - I don't know that

65- Plaintiffs ever saw any of the notices, and I don't remember telling them of their contents (Plaintiffs objected to parol evidence with reference to the contents of the notices which objection the Court sustained - but the Counsel for the Defendant still persisted in asking the question, and got it out before the Jury. Plaintiffs all the time objection) I have seen Cars as closely loaded as the cars on which Plaintiffs hogs were shipped. I do not consider hogs in the care of the Company till on the cars - It was impossible for us to have got the hogs away before we did. It was extremely cold everything was froze - and we had to keep men to bail water for the passenger trains. The pumps were froze up, and we could not raise it) -

Crop examined - Passenger Trains were running past Salem to the West, and a freight train passed to the West on Friday night after the hogs were in the pens, and a lumber train also passed going West after the hogs were put on the cars. Freight trains are running between St Louis and Sandoval during the time the hogs were waiting at Salem

66

Andrew Harmon was next called as a witness on behalf of the Defs. I was in the employ of the Ohio & Miss R.R. Co at the time Dunbar and Company to the Station House at Salem Mo in January 1856 I never made any contract with them whatever in reference to freighting their hogs - Freight Trains were running very irregularly then - It was very cold and the water froze in the Tanks and pumps Mr Blair and myself did all we could to get Plaintiffs hogs off and did get them off at the first moment we could. It was impossible for us to get them off before we did I helped the Plaintiffs to load the hogs in the 4 cars - Dunbar himself was not present when the hogs were put in the cars but they were put on the cars by the consent of Plaintiffs - A man named Williams was then representing Dunbar I did not compel or force them to put the hogs on the cars - I told them at the time the hogs were shipped at the owners risk and that the Company would not be responsible for loss by crowding, but that the owners

Must run that risk themselves. That they
hired the cars at so much per car - and
then loaded to suit themselves - I have seen
67 more hogs in these same cars than the
Plaintiffs put in them - I had not long
before shipped in the same cars a lot of hogs
and put more in them and they went down
well enough. There was no freight train went
West from the time the Plaintiffs came on
to the time they went down, except one on
the Saturday morning after the hogs divided.
The hogs got in on Friday evening, and the
train passed on Saturday morning and the
next train that came took off the hogs -

The number of hogs shipped on the cars
I think was 238, or 239. Several had died
before shipping & several had been lost by
the Plaintiffs or died before they got to
the station. The reason the trains did not
come further East than Sandoval, was
the last watering place was at Carlyle
and they could only take water enough
to run Sandoval and back to Carlyle
and if they came on here they would
get out of water - It was froze up this
side of Quaw River
Crops Examined -

Says There were passenger trains running by Salem on the Chic & Miss R.R. west, and also some lumber trains were passing west.

Which was all the evidence adduced on the part of the Pliffs and the Defendants in the Cause.

Whereupon the Court instructed the jury for the Plaintiffs " That if the Jury believe from the evidence that the Defendants are Common Carriers, and are engaged in the conveyance of freight &c from Salem to Illinois town and the Plaintiffs delivered 241 hogs to them in their pens at the Station at Salem to be conveyed to Illinois town the Defendants were bound by Law to ship or carry the said Hogs in a reasonable time, and in a safe and secure manner from Salem to Illinois town; and if they fail so to do, the Company is liable for all the loss and damage that ensued to the Plaintiffs on the 3rd Count in the Declaration, and the Defendants cannot limit their own liability for any wrongful or injurious conduct on their part.

2) That if the Jury believe from the evidence

69 That the Plaintiffs for want of a sufficient number of Cars, was compelled by necessity to ship in 4 Cars, which were insufficient. The fact of the Agents telling them that they shipped at their own risk does not relieve the Defendants from liability for failing to supply the proper number of Cars —

not said as
Am. Com. 13
3 That if the Jury believe from the evidence that the Defendants were common carriers and could have by reasonable diligence taken the Plaintiffs hogs from Salem to Allinistown, on Friday night, or next morning and failed so to do, they are liable for all the loss and damage that ensued to the Plaintiffs —

4 That the Plaintiffs hogs were in point of Law delivered to the Defendants as soon as they were put into the pens of the Defendants at the Station House for shipment —

5 That if the Jury believe from the evidence that the Plaintiffs drove the hogs in dispute to the Station in Company exercised ownership over them

70

And jointly paid the freight for their shipment, it is *prima facie* evidence of their ownership and is conclusive till the contrary is made to appear —

6" The Court is asked to instruct the Jury that if they believe from the evidence that Defendants ordered the Plaintiffs to put their property in their cars for transportation from Salem to Illinois town, then the Defendants are liable as common carriers for all Damages done to the property of Plaintiffs while in their care and possession. And if the Jury believe from the evidence that by the delays carelessness or negligence of the Defendants, the Plaintiffs without their fault have sustained damages they should find for the Plffs and fix the damages according to the evidence in the case —

7" That it makes no difference for the purposes of this suit which of the Plaintiffs had the largest interest in the hogs, if they were jointly interested — and the statements of Dunbar in the absence of Hull and

Millbams are not evidence against them, as to the ownership of the hogs, unless called out by the Plaintiffs

71 To all of which instructions given by the Court on behalf of Plaintiffs the Defendant excepted at the time.

The Defendant then asked the Court to instruct the Jury as follows

1st And as to the 3rd Count the Court instructs that the Jury are to judge by all the circumstances proven, as to what kind of diligence was used by the Defendants in shipping said hogs. And if Company have used ordinary diligence to ship them, then the Jury must find for the Defendants on the 3rd Count)

2nd That if the Jury believe from the Evidence and Testimony that Plaintiffs of their own accord preferred to ship their hogs on 4 Cars, rather wait for more cars, and that they had notice that the shipment in the cars would be at their risk as to being crowded

Then Defendants are not liable for loss occasioned by being crowded.

3rd If The Jury believe that Plaintiffs were told, when loading hogs, that Defendants would not hold themselves liable for loss by being crowded, and defendants consented to the loading, after that the Defendants are not liable for the loss occasioned by crowding -

All of which instructions asked by the Defendant the Court refused to give. To which refusal the Defts then and at the time excepted -

Whereupon the Jury after retiring to consider the testimony afterwards trot into Court the following verdict viz -

"We the Jury find for the Plaintiffs and assess their damages at \$371.72 Three hundred and seventy one Dollars and seventy two Cents -"

Defendants then moved the Court for a new trial for the following causes to wit -

1st The Verdict of the Jury is against the Evidence

2nd The Verdict is against Law -

3rd The Verdict is against Law & Evidence,

4th The Court improperly instructed the Jury on points of Law for Plffs

5th The Court refused proper instructions for Defts -

6th The Court admitted improper evidence for Plffs on the trial

7th The Court excluded proper evidence offered by Defts -

Whereupon the Court overruled the Defts motion for New Trial, and entered judgment for Plaintiffs on the Verdict of the Jury -

To the overruling of which motion, and the entering of judgment the Defendants at the time excepted and now pray that their Bill of exceptions be allowed. Signed & sealed which is done.

xc

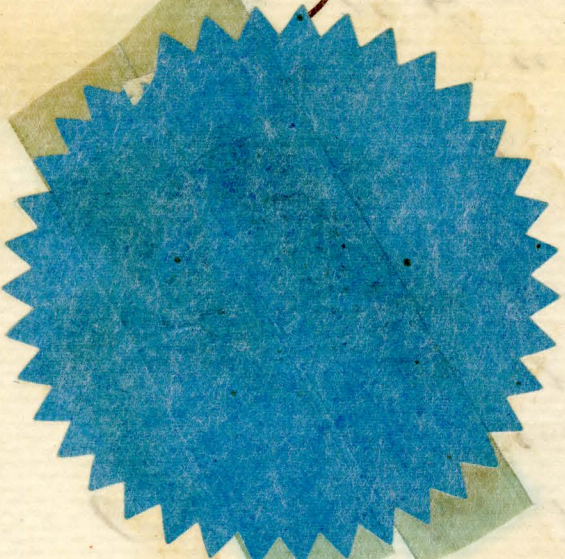
Sidney Press Seal

State of Illinois
 Marion County — ss

I, H. W. Cagan Clerk of
 the Circuit Court within and
 for said County do hereby certify the foregoing
 to be a full complete and correct
 Transcript of the Records and proceedings
 in the above entitled Cause as appears
 by the Records and proceedings in the same
 on file in my office

In Testimony whereof I
 have hereunto set my hand
 and affixed the Seal of said
 Court at my office in Salem
 this 12th day of November
 A.D. 1857

H. W. Cagan Clerk



And now comes the Said Petitioner by their atty and
says there is manifest error appearing in the record of the
foregoing Cause, and for assigning the Same Said Petitioner
in errors sets down and shows the following errors to wit

- 1st The Court erred by proceeding to try the foregoing Cause
without an issue found
- 2nd The Court erred by proceeding to try issues found
upon the plea of not guilty in Case, & non assumpsit —
Plea in this Cause
- 3rd The Court erred in Sustaining Pleas (below) Demurrer
to Defs third Plea
- 4 The Court erred in refusing to Carry Demurrer
back to Pleas Declaration ^{Sustain} and it to the Same
- 5th The Court erred in admitting testimony to go to the
Jury for Pleas (below) which was objected to by Defs
- 6 The Court erred in refusing to allow testimony
offered by Defs to go to the Jury
- 7 The Court erred in giving improper instructions
to the Jury for Pleas below
- 8 The Court erred in refusing proper instructions
asked by Defs below
- 9 The Court erred in overruling Defs (below)
Motion for new trial - & entering Judgment
for Pleas below on answer, and against
the Defs below.

Wherefore Defs pray that Said Judgment be reversed Set
aside, Annulled made void and a new trial
granted be

J. H. Maynard
for Petitioner in Error

4053
9

Ohio & Mississippi

Rail R. Company

my

Sidney B. Scrubner

Charles H. Hall &

Joseph Williamson

Ernest. Murrin

Jan 23: 1857.

A. L. Scrubner Clk

Prepared by Lucy Stearns
P.S. or. Nov. 23. 1857.

It is agreed that the receipt copy of
Exhibit marked A referred to
in testimony of H. Williams, a
witness on behalf of Defendant

Freight Bills Payable on Delivery of the Goods.

Dumbar & Co Illinoisdown, Feb 1st 1886
To Ohio and Mississippi Rail Road Company Dr

	Rate	Dollars	Cts.
For transportation from Salem			
4 Car loads Hogs	1850	\$74.	00
11 Dead Hogs			4 75
		\$78.	75
Car No 87-56-46-57-Flat			
Box 15			
Charges.....			
Received payment of			
Notes			

¶ You are hereby notified that the above goods have arrived
at this Depot, consigned to you, and are now ready to be deliv-
ered on the ^{payment of the} above freight and charges. ¶ If not removed
on the day of notice, they will be sent to Storage at expense
of Consignee. ¶

The Company will not be responsible
for damage from ordinary Leakage, Breakage, or insuff-
icient Cooperage; and no damage will be allowed
after the Goods leave the Depot, unless by consent.
No package carried for less than 25 cents

State of Illinois I, H. W. Eagan Clerk of the Circuit Court of said County do
Marion County certify this to be a true & perfect copy of a freight
Bill or receipt from the Ohio & Mississippi Rail Road Co. to
Dumbar & Co. Given under my hand & official seal at Salem Ills this
10th day of May A.D. 1888
H. W. Eagan Clerk
J. C. Eagan Secy

9
Ohio & Mississippi

Rail road Co

my

Saturday December 2nd

Annand & Brown & Co

Receipt -

Received and given

May 10. 1885 -

N. Johnston cl^k

Ohio & Mississ. RR Co

vs

Sidney Dumbor et al

error to monon

Low Rep vol
3-416.

The Court is in assumpsit upon the Contract of
defts below - not in case for breach of duty -
they are not sued in their Character of Common Carriers
but only for failing to safely & securely carry
& deliver the hogs within a reasonable time.
The Hogs having been delivered at ~~St Louis~~ ^{St Louis} to
puffs the only question in the case is as to the
right of Puffs below to recover damages which
they, alleged they suffered by a failure or delay as
they claim

1st Damages for shrinkage

2nd Loss of dead Hogs

3 Expense of feeding & tending hogs one month

4 Expense of trips to St Louis -

The verdict below was \$371.⁷² & for the purpose of
this case I propose first to show that this
verdict is ^{too much} wrong - aside from other errors

By examining the Count - The Court will
see that the 2nd Count (1st was Ad Pro), Count is
on a special Contract "that defts would start with
the hogs on the next morning, after delivery to
them -

There is no pretence of this being proven, and I decline that the 2nd Court has ~~that~~ insisted upon, as being proven - Over the rights of recovery I think was abandoned there

Then the 3rd Court is for failing to carry in a reasonable time after Delivery to Depts - It is not for refusing to receive the bags for transportation - When the breach of the Contract is the failure to carry in a reasonable time - Ours is on the proof - to prove the Contract + Breach

The Reasonable time Commences - at the instant of Delivery to Depts for Carriage not before -

Delivery is the transfer of the possession of property from one ~~man~~ to another - a handing over and receiving - a change of Custody -

1st Domest. civil law 200 Sec 270

1st Person. Cont. 650. note

There must be notice of transfer to carrier to Constitute Delivery - the responsibility does not attach 1st Person 654

Then the testimony (vide Record P 33 - Aug. to int'ly 2nd + Pag 43 - Aug. to int'ly 2nd) Shows that Delivery to Depts only occurred on Tuesday by being put upon the Cars on that day - The placing them in the pens before was no Delivery - The Depts below not

their agent, had not anything to do in that transaction - It was by summons orders (vide record P. 35 - Ans to int'ly 4 + Page 36 ans to Int'ly B) they were put in the pens - not deft and affirmas Pliffs below kept their custody until Tuesday - Defts then had a reasonable time after that day to deliver or carry them to Illinois town - this would be one day at all events, up to this time Defts below are not chargeable - the unreasonable delay in carrying them could only be Thursday + Friday - for they were delivered on Friday night - If therefore the Defts be liable for damages at all their liability would be only for Shrinkage - Expenses be for two days -

14" Ills 158.

One witness in his testimony (Vague conjectural + uncertain as it is) estimates the gross weight of the hogs "when in Starks" at 250 or 60 lbs - and at St Louis 210 lbs (Page 37 Record) Another witness estimates loss at 18 to 20 lbs by shrinkage per 100 lbs - another at 40 lbs per hog - Take then an estimate of loss at 45 lbs per hog from the start to St Louis - they left home (Starks) on Sunday 20th Jan'y 56, arrived at Salem on Friday 25 Jan'y - (Six days) - Saturday - Sunday + Monday hogs were in the pens or fields - (3 days) Tuesday put on the Cars - Friday delivered at Illinois town one day to St Louis + there weighed out at 210^{lbs} each - 14 days in all

Sol for Acad bags cannot be charged on
 Accts below unless the unnecessary delay
 caused their Sol

If then the Sol of each bag in 14 days was 45 lbs, the
 Sol of 240 bags 10,800 lbs. One Seventh of
 which (Sol for 2 days) is 1543 lbs this at
 5 cts per lb (per firma) Amounts to \$ 77.15-
 Wages of 5 hands 3 days each @ 75^{cts} per day 7.50
 Board of 5 " 2 " " @ 10 10.00
 Corn for hogs 2 " 20 bush. per day 30. per bushel, 12.00
 Acad bags 5 @ 10\$ (allowing for all) 50.00
 Total \$ 156.65

The trips to St Louis & back and repairs I
 allow entirely - leaving as the ultimate
 and highest amt of expenses \$156.65 - instead
 of \$371.72

I object to the sum including the expenses
 of Dumbor & Williams his agent, to St Louis & back
 on this ground - If A contract to pay B. 1000\$ on
 New year day & fail B's property may be sacrificed
 for his debts by reason of A's failure. Yet A is
not liable for such damages as is occasioned by the
sacrifice, they are occasioned by reason of B's
 engagements with others - not with A - So in
 this case the expenses to St Louis & back is Occa-
 sioned by Attempts to extend or renew Dumbor's
contracts, in St Louis - not from Acft's promise
 what have Acft's below to do with Dumbor's
contract in St Louis - or with going to St Louis? Our
 agreement only extends to Illinois town, - and his
 having a contract in St Louis hath nothing to do with us

Record P 48
 49

I therefore insist that this was a loss improperly allowed to be proven below, and improperly included in the instructions given for Juries below.

But I maintain further, that the Defect and below were not taken for Shrinkage at all For the reason that Shrinkage is the result not of any act, neglect or breach of Contract of Agents It was almost exclusively attributable to the extreme cold weather and want of Subsistence (the Juries themselves prove (Recd P. 38) that the hogs were fed but once after being put on the cars - and then only 4 bushels of corn fed to 240 hogs in 4 days, from Tuesday until Friday night - this is their negligence not Agents below - Now unless the supply of animal heat, required to resist the extreme cold is kept up by an abundance of food their substance is naturally consumed in sustaining vitality, thus producing loss in weight or shrinkage - this always occurs most rapidly in extreme cold weather, and we have shown this to be such at the time.

I therefore insist that Shrinkage (being produced by Natural causes & the Negligence of the Juries below whose duty it was to feed his hogs well) is not a loss for which Agents below were chargeable at all

6

I maintain that Defts below were not liable
for loss by crowding at all Because
the liability of Defendants was expressly
limited by that exception (loss by crowding)
(see Record P 66) and the Contract was
for the Cows at \$18.50 per cow, they loading
them as they pleased

As to right to limit liability by notice and
Special Contract See Edmund Bail 477-576

31 Maine R 228 — 13 Wend 611-

19 Wend 534 8 West Nelsby 443

4 West Low Journal P 494 + authorities cited

But I maintain further that we are not liable
for any loss of Defts here (Pliffs below)

This action being for a failure to deliver in a
reasonable time, in form Ex contractu before
the Pliffs below can recover they must show
the Contract + Breach - And when this

14 Wend 217 is done Defts below may discharge all
1 Term R 27 Liability by showing due Allegiance
Strong Bail Sec 545

13 Port Cent 619. This we have done vide Record P. 64, 65, 66

Reasonable time to do an act is a question
made up or arrived at by reference to
Circumstances in Connection with the ordinary
affairs of men - Reasonable time to
deliver the bags at Almar Towns can
only be shown by reference to what time

is Ordinary Negligence under similar Cir-
cumstances for Men to do similar acts
about their own property - using ordinary
Diligence - Common Carriers of Land as
Ships are bound to deliver goods entrusted
to them at all times - (unless lost by act of
God &c) or pay the value. But where they
are only charged with Delay or Complaint
of an account of the time of Delivery - they
are only bound to Ordinary Diligence

Edwards Bail 371 Jones Bail 119 - 2nd Kent 587
19 Barb 44-8 14 Wend 217

It is the time of Delivery that is complained
of in this suit - Nothing but Delay objected to

But again the Contract in this case is
different from the Contracts which at
Common Law fixed the Liability of
insurers upon Carriers - the undertaking
of Defts below was not to Carry Merch -
Analyze - Goods - mere chattels - but
for transportation of live Stock (hogs)
The reasons given for the origin of the Liability
of Common Carriers making them insurers cannot
apply to freight of this kind - the entire
Exclusive - corporeal - Manual Custody of live
Stock cannot be had by the carrier as
of merchandise - the owner of
Stock go with it - The temptation

to Embezzle - or Caruline to Rob or be
Robbed Cannot exist in these cases
It is therefore a branch of the Carrying Trade
Which Calls for the Softening of the old
Rule of Law with respect to it

Was Note to Coeys by Benard -

5th Edition Smiths Leading Cases - 331, 32

The old rule therefore Can now apply to
Either

- 1st This Kind of Freight or
- 2nd The Character of Contract (to what time
is the only question -

Then

If there be not an absolute liability
at all events - Depts Stand upon The
Same footing with all other Bailies
for hire - Whichever party is Benefitted
by the Bailment - And are only
bound to Ordinary Diligence
Therefore it is clear that the first in-
struction asked by Dept below - Asking
their Liability to be tested by the Exercise
or Non Exercise of Ordinary Diligence
Should have been given - and
Had it been given the Depts would then
have been clearly entitled to a verdict
For Depts below Show the utmost exertions
to do all in their power

They write for motive power - Send for it - Box
up all the Cars they can get - Try in every way
to Send them away - And actually do
Ship them by the first train that could
take them - the first freight Train which
moves west After the hogs were on
the Cars, We show the extreme cold
weather - No water to be had - pumps
& pipes froze up - Necessity to build water
for even passenger Trains - the impossibility
to get water at Colgate & go to Salina
& return. And yet are held liable
below for the Delay - Were the
Agents Compelled to stop the passenger
trains in order to run a hog train - Surely
until hogs are more valuable than men -
this would be extraordinary allegiance

But the Delay was caused by the
extreme cold - freezing up of water
& this was actus dei and would
have anchored common carriers for
even top of Goods toiletty -
via

So that I maintain we are in no cash
Liable in this action -

Again

The Measure of Damages adopted by the Court below was improper. The jury were instructed them on Failure to deliver the hogs in a reasonable time after their delivery "for all the loss and damages that ensued"

Reed P
68-69

this would include remote consequential damages - and would not confine or limit the jury to the Natural & proximate, or legal & proximate damages sustained by the Delay

What the Natural proximate damages are I need not define for it is certain the rule laid down by the Court below will include remote consequential loss. Even a loss of profits - or a loss by going to try to renew contracts previously made for sale of hogs, (or subsequently made)

Reed P
48-49

And no bona fide purchaser was permitted to prove two trips to St Louis & back & charge the same to defect below

These damages are not the Natural & proximate consequences of the Delay

See 2d Grif v. See 253-52-56

5 Wind 538, 39

6 Hill 648

Scapner Damages Chap 3-15-84

The Rule of Damages laid down in 14 Ills P 156 is more narrow than this yet we see there a Contract to deliver by a certain time the agreement being that the bags "Should be taken to Stops on that day" Now if a party agree to do an act & fail. he cannot discharge himself from Damages by showing a beligust attempt to do it. or reasonable diligence if he agree to do it he must or pay for his failure — But where he is to do so in a reasonable time, a delay before due diligence used discharges the party for it & fulfills his undertaking.

But the rule in 14 Ills P 156 is restricted to injury done to the bags, or expenses incurred on them, whilst en route or after their arrival at Stops "And which" (injury or expense) "was occasioned by the delay" The rule of the court below goes certainly further than this, and does charge defendant for expenses going to & returning from St Louis, twice on his own business. & would charge him in the same manner for like trips to N York or Boston if it had so happened that he had made them in Boston or N Y instead of St Louis — We have thought to do with St Louis more than N Y — We agree to deliver at Illinois Town they charge us for expenses to St Louis — why not to Chicago —

The cause was to interrogatory 15 on Page 52
of Renda is bearing & no intentional act

Again the 6th instruction for Puffs below would
make airtight for damages occasioned
by inevitable accident if thereby delay
was caused for the firm was instructed
that if Puffs were "damaged by the delay
carelessness or negligence" of airtight "they must
pursue for puffs. This instruction precludes
airtight from protecting themselves by the
greatest diligence if there should be
any "delay"

I therefore insist that, from the authorities &
reasons above given that the Enamels
objection to by airtight & admission was wrong
the Puffs instructions were wrong —
the various polypody wrong — and
that the first instructions asked by airtight
as to using ordinary diligence to ship
sea bags should have been given — it is
right — So also the 2nd & 3rd asked
by airtight — & a new deal should be
granted to airtight. Any will
for Puffs in error

Imp & Arguments

Ember Co

in

Leamy & Underwood

St Margie
for full in Enos

STATE OF ILLINOIS, }
SUPREME COURT, } ss. *1st Grand Division.*

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Sheriff of *Marion* County,

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of *Marion* County, before the judge thereof, between *William E. Middleton and L. L. Morgan*, Plaintiffs - and *The Ohio and Mississippi Railroad Company*

defendant, it is said that manifest error hath intervened to the injury of said *Ohio and Mississippi Railroad Company* - as we are informed by *this* complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mt. Vernon, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said *William E. Middleton and L. L. Morgan*

that *They* be and appear before the Justices of our said Supreme Court, on the first day of the next term of said Court, to be holden at Mount Vernon, in said State, on the *first Tuesday after the* Second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if *They* shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said *William E. Middleton & L. L. Morgan* notice, together with this writ.

John D. Caton

Witness, the Hon. ~~Samuel H. Treat~~, Chief Justice of our said Court, and the seal thereof, at Mount Vernon, this *21st* day of *October* in the year of our Lord, one thousand eight hundred and fifty-*seven*.

Stark Johnston
Clerk of Supreme Court.

35
Chris L. Mississippi

Paul Brad Thompson

for } Dec 31

William E. Madison

L. L. Morgan

not sent out - sent

attorney from by

order of Judge Rogers

W. L. Johnston

In the Supreme Court, State of Illinois.

November Term 1857

Ohio & Miss. R. R. Co. }

vs

Sidney Dunbar, }

Charles Kelle, & }

Joseph Milbanks }

Enort Monon.

This official

Richard S. Nelson, being first duly sworn according to law deposes and says that he was the attorney for the defendants in error in the court below, and that the second count in the declaration of plaintiffs below against defendants in error, was abandoned in the trial of said cause in the Major Circuit Court -

Appellant further states that a certain receipt for freight on the hops of plaintiffs, in the court below, given by the agent of the Ohio & Miss. R. R. Co. to "Dunbar & Co.," for \$79, or thereabouts, ~~does not~~ which was offered in evidence on said trial, and was

filed among the papers in the
cause in said Circuit Court,
does not appear in the record
in this Court.

Affiant therefore prays
that a writ of certiorari may
issue from this Court to the Clerk
of the Minor Circuit Court,
to send up a true and com-
plete record in this cause.

Subscribed and sworn
to before me, this 2nd
November, AD 1857—

Thos. Sullivan

Subscribed and sworn to and
~~Subscribed~~ before me
Dec. 2^o. 1857.

J. Johnston Ck

164-00243

9

Ohio & Michigan RR

Per-

J. Dumble & Co

Agidorik

John Dec. 2, 1857.
A. Schuster Ck

Ohio & Mississippi
Rail Road Co plffs
in error

defendants in
Error

Sidney Dunbar

Contract

- 1st as to proof of implied Contract
see 2 Greenleaf page 199 see
210 Law makes the Contract

Common Carrier this need not be averred 2 Chit 355^{in notice}

Ohio &
M & P
Charles
makes
them
Common
Carriers

- 2nd as to proof of defendants in the
Court below being Common Carriers
it page 201, & 211 need not be averred
see Bailon at Title Carrier (A) ^{as to} Declaration.

- 3rd That Contract was made with the
plff & by Defendants 201 see 212
it - proof by delivery of freight - 3 witnesses.

- 4th as to limiting liability it page 203
see 215 - 2nd C & M 353

Gross Negligence The Carrier Cannot limit
qualification ~~Law~~ ^{avoided} of 2nd by
Notice 215, 216, 217, 218.

Notice

- 5 avoided how? 218 by proof of neglect
on part of Carrier or his agents?

- 6 as to accident see 219 how far
that shall excuse Carrier page 207
& note C. & authorities there cited.

7 Negligence of Carrier See 220 is
a question for the jury - See Note 3
Ratton vs Donovon 4 B & Ald 21
3^d Barn & Carr 601. 6 C & P 550 & C
Clay vs Willan 1 H. Bl 298, Lych
B Mountain 4 East 370 - & relied
upon as a defence - proof on deft
in Court below & deft must show
plff in Court below could have
avoided the consequences

8 as to the neglect to Carry in a
reasonable time - question for jury
See Star Pie vol 2^d part 2^d Note (13)
question for jury under the circumstances
of Case -

9 The declaration is in assumpsit
& No part in Case for tort
See 1 Greenleaf Sec 210 + note to page
200 where are the forms -

Instruction for deft
in error

of Ohio & Pa }
 R. R. Co }
 4 }
 Dunbar }
 brief of }
 points of }
 reference of }
 depth in errors

SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.

NOVEMBER TERM A. D., 1857.

Record Page.

ABSTRACT.

Ohio & Mississippi Railroad Co., Plaintiffs in Error.

vs.

Sidney Dunbar, et al. Defendant in Error.

Error to Marion.

On 3d day of April, 1856, Plaintiffs below (Defendants here) filed their declaration &c. entitled in an action of "Trespass on the case" 3 counts therein.

1st count demurred to, demurrer sustained, and *nol. pros.*

2d count, that Plaintiffs below, on &c at &c, delivered to defendants, a certain lot viz of 242 hogs, of value \$2000, at Salem, to be carried thence to Illinoistown, to be there safely and securely delivered for plaintiffs, and in consideration of certain rewards &c, defendants undertook and then &c. promised they would carry and convey said hogs from &c. to &c., and there safely and securely deliver said hogs for said plaintiffs, and that they would furnish a suitable No. of cars (to-wit 5) and that they would start from the station house on the next morning (to-wit 26 January)—avers that defendants received said hogs &c., and did not furnish said cars, nor did they start on the next morning, nor safely and securely deliver same at Illinoistown &c., refused to furnish cars, did not start for seven days, and so carelessly and negligently did defendants conduct themselves, that 30 head of hogs being crowded &c., in pens and on cars died and were lost in consequence of the failure afore-said. Plaintiffs lost a large amount of money &c. by shrinkage and hire of hands from the time of delivery to defendants, to delivery to plaintiffs. Expenses in renewing engagements, &c., (a part of the injury sued for in this count is remediable only in assumption and a part in case.)

3d Count. That in consideration that plaintiffs had then &c. delivered to defendants certain, to-wit 242 pork hogs, to be carried &c (as in Second Count) and delivered to plaintiffs for certain rewards, &c., the defts undertook and promised to carry said hogs from &c. to &c. and there deliver the same "for plaintiffs in a reasonable time then following. Averment that defendants received the hogs &c., but did not in a reasonable time (*sect sepium requisitus*) carry and convey said hogs from &c., to &c. and there deliver the same &c. within said reasonable time, but neglected and refused so to do. In consequence whereof plaintiffs lost 30 head of hogs and a large sum, to-wit \$600 in loss of weight and trouble and expense after the lapse of said reasonable time in watching hogs in pen, was forced to lay out money, \$100, to renew engagements &c. Conclusion in case *ad damnum* \$1,500.

Defendant Plead, 1st general issue in case; 2nd general issue in assumpsit; 3d (a special) plea. Action now because before the 25th January, 1856 or the accruing of the causes of action in pl'tfs declaration, defts had hired and let, their road with fixtures, engines, cars, machinery, &c, to one G. W. Jenks, who at the time when &c. had entire control over the whole, and by his agents &c., completely managed the same, free from control of defendants and that the contract, &c., if any such was made, was with Jenks and his agents, then lawfully in possession and control of said road. Verification &c.

Demurrer to third plea sustained; defendant stands by third plea; issue joined, (on which plea, query?) jury and trial, verdict for plaintiffs \$371.72. Motion for new trial overruled, and judgment on verdict excepted to and bill of exceptions signed.

Depositions, Testimony in Bill of ex—Defendant objected to 6th interrogatory and answer (Page 22 of record) objections overruled and exceptions taken, defendant objected to 13th int. and answer, Page 25, overruled &c., defendant objected to 16th int. and answer Page 26, overruled &c., defendant objected to 22 int. and answer, Page 28, overruled &c., defendant objected to 23 int. and answer, Page 28, overruled &c., defendant objected to 1st int. and answer on re-examination of Knowles, pages 31 & 32, overruled and excepted to, defendant objected to 9th int. and answer, pages 36, 37, overruled &c., defendant objected to 11th int. and answer, page 38, overruled &c., defendant objected to 14th int. and answer, page 39, overruled &c., defendant objected to 15th int. and answer, page 53, overruled &c., defendant excepted to 10th int., on page 50, overruled &c., defendant objected to answer to 11th int., page 51, overruled; def't objected to 16th int., page 53, and answer overruled; page 62, plaintiff asked Jennings "what, in his judgment, would be the loss in "plaintiffs' hogs by shrinkage from the time they were put on the cars till they arrived at "Illinoistown." Defendant objected, court overruled objection and defendant excepted. Witness answered that "they would lose in his opinion 30 to 35 lbs. each hog."

F. A. Blair, defendant's witness, was station agent at time plaintiffs came to the Salem station, that he was the only person who was authorized to make contracts for shipment of freight; never made any contract to ship hogs, would not do it. The company charged so much (\$18.50) per car, have seen cars as closely loaded as these were; do not consider hogs in care of company till on cars; we could not have got the hogs away sooner

Hayman *ply*

14 Men 273 Time of delivery

1 Chut P135 3 Count is assumed

Nelson for 647

Slay Bail P517 & 509. all risks - insured

Hayman

1 Smith L C 332 Live stock

Parsons 659 Delay by accident

140
300
41 2 000
16 5 00

NOVEMBER 1871

FIRST GRAND DIVISION

RENEWED CORNER OF ILLINOIS

than we did. It was extremely cold; had to keep men to bail water for passenger trains.

66 Andy Harmon was at station working for defendants when plaintiffs came with hogs, never made any contract with them, freight trains run very irregularly, very cold, water froze in tanks and pumps, impossible for us to get them off before we did hogs put in cars by plaintiffs' consent. I stated at the time the hogs were shipped at owner's risk, and the company would not be responsible for loss by crowding but the owners must run that risk themselves; that they had the cars at so much and loaded it as they pleased. I have seen more hogs in same cars than pl't'ffs put in; they went well enough freight trains ran no further than to Sandoval; the reason was, there was no water except at Carlyle, and they could only take water enough to run to Sandoval and back to Carlyle, and if they came to Salem they got out of water.

67 Instructions for plaintiffs—1st, that if the jury believe from the evidence that the defendants are common carriers, and are engaged in the conveyance of freight &c. from Salem to Illinoistown, and the plaintiffs delivered 241 hogs to them in their pens at the station at Salem to be conveyed to Illinoistown, the defendants were bound by law to ship or carry said hogs in a reasonable time and in a safe and secure manner from Salem to Illinoistown; and if they fail so to do the company is liable for all loss and damage that ensued to plaintiffs on the third count in the declaration, and the defendants cannot deny their own liability for any wrongful or infamous conduct on their part.

68 2nd, that if the jury believe from the evidence that the plaintiffs for want of a sufficient No. of cars was compelled by necessity to ship in 4 cars which were insufficient the fact of the agent telling them that they shipped at their own risk does not relieve defendants from liability for failing to supply the proper number of cars.

69 3d, that if the jury believe from the evidence that the defendants were common carriers and could have by reasonable diligence taken the plaintiffs' hogs from Salem to Illinoistown on Friday night, or next morning, and failed so to do they are liable for all the loss and damage that ensued to the plaintiffs.

4th, that the plaintiffs' hogs were in point of law delivered to the defendants as soon as they were put in the pens of defendants at the station house for shipment.

70 5th, If the jury believe from the evidence that the plaintiffs drove the hogs in dispute to the station in company, exercised ownership over them and jointly paid the freight for their shipment, it is prima facie evidence of their ownership and is conclusive till the contrary is made to appear.

6th, the court is asked to instruct the jury that if they believe from the evidence that defendants ordered the plaintiffs to put their property in the cars for transportation from Salem to Illinoistown then the defendants are liable as common carriers for all damages done to the property of plaintiffs while in their care and possession and if the jury believe from the evidence that by the delays, carelessness or negligence of defendants the plaintiffs without their fault have sustained damages they should find for the pl't'ffs and fix the damages according to the evidence of the case.

71 7th, that it makes no difference for the purposes of this suit which of the pl't'ffs had the largest interest in the hogs if they were jointly interested, and the statements of Dunbar in the absence of Hall and Wilbanks are not evidence against them as to the ownership of the hogs unless called out by the plaintiffs.

Defendant excepted to all of above instructions &c., at the time.

Defendants' instructions—1st that as to the third count, the court instructs the jury that they are to judge by all the circumstances proven as to what kind of diligence was used in shipping said hogs and if the company have used ordinary diligence to ship them then the jury must find for the defendants on the third count.

2nd, that if the jury believe from the testimony that pl't'ffs of their own accord preferred to ship the hogs on 4 cars rather than wait for more cars and that they had notice that the shipment in the cars would be at their risk as to being crowded, then defendants are not liable for loss occasioned by being crowded.

72 3d, if the jury believe that defendants were told when loading hogs that defendants would not hold themselves liable for loss by being crowded, and defendants consented to the loading after that, the defendants are not liable for the loss occasioned by crowding.

All of instructions refused and excepted to &c. Verdict \$371.72. Motion for new trial, overruled and excepted to.

ERRORS ASSIGNED.—And now comes the said plaintiffs in error in this cause and says there is manifest error appearing in the record of the foregoing cause, and for assigning the same sets down and shows the following errors to-wit:

1st, the court erred by proceeding to try the foregoing cause without an issue joined.

2nd, the court erred by proceeding to try issue joined upon the plea of *not guilty* in case and *non assumpsit* filed in this cause.

3d, the court erred in sustaining plaintiffs demurrer to defendants' 3d plea.

4th, the court erred in refusing to carry demurrer back to plaintiffs' declaration and sustain it to said declaration.

5th, the court erred in admitting testimony for plaintiffs, which defendants objected to, to go to the jury.

6th, the court erred in refusing to allow testimony offered by defendants to go to the jury.

7th, the court erred in giving improper instructions to jury for plaintiffs.

8th, the court erred in refusing proper instructions asked by defendants.

9th, the court erred in overruling defendants' motion for new trial and entering judgment for plaintiffs on verdict of jury and against defendants, wherefore defendants pray that said judgment be reversed, set aside, annulled, made void, and a new trial granted &c.

L. N. HAYNIE, for pl't'ffs in Error.

State of Illinois S. S.

Supreme Court of said State. 1st Grand Division. at Mount Vernon.

The People of the State of Illinois, To the Clerk of the Circuit Court of Marion County - Greeting.

Whereas, in a certain plea between Sidney Dunbar, Charles Hall and Joseph Milburns, plaintiffs, and The Ohio and Mississippi Rail road Company Defendants, lately pending in the Circuit Court of said County, wherein Judgment was rendered for the said plaintiffs and against the said Defendants, and the said Defendants having since obtained their Writ of error upon the said Judgment, rendered against them as aforesaid, to the Supreme Court, here at Mount Vernon, On the 1st Tuesday after the 2^d Monday of November last; and in pursuance of said Writ of error a transcript of the record and the proceedings in the plea aforesaid was transmitted.

And also, Whereas it hath been suggested, on the part of the said Defendants in error - who were Plaintiffs in the Circuit Court - that the said record has been diminished, in as much as a full and complete transcript of the record and proceedings, and of the papers offered and used in evidence in the trial of said cause - and now on file in said Circuit Court hath not been sent up; and for as much as the said Supreme Court are not satisfied that

then is a sufficient record sent in the plea aforesaid,
but in the record there is a diminution: You
are therefore hereby commanded, that, without
delay, the said record therein, you cause to be
transmitted to the Supreme Court, to be held at
Mount Vernon on the first Tuesday after the
second Monday of November next, without
any diminution or addition whatever, to
the end that speedy Justice may be done in
the premises: according to law, Whence you
are in no wise to fail, and send you there
there, this writ.

Witness, the Hon John D. Coston,
Chief Justice of our said Court,
and the Seal thereof, at Mount-
Vernon, this twenty eighth day of
January in the year of our Lord
One thousand eight hundred
and fifty eight.

Noah Johnston Ck

Del'd All
May 10th A.D. 1858.

By J. O. Adams
Esq.

By virtue of the writ to me directed & do hereby
certify to the holders of the said Supreme Court that
having examined the record and proceedings in the suit
of which mention is within made of find a certain Joseph
Hall or Hecup, a transcriber of which as fully and truly
as the same himself in my capacity of clerk & do hereby
certify and warrant to the said holder, as the day and
place within mentioned, as within of and command.

Ohio Mississippi
Rail Road Company
Platts in error

by

Henry Sturges - Charles
Hall & Joseph William
Esqts in error

Continued
Returned and filed
May 10. 1858.
H. Sturges

SUPREME COURT OF ILLINOIS.

FIRST GRAND DIVISION.

NOVEMBER TERM A. D., 1857.

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ABSTRACT.

Ohio & Mississippi Railroad Co., Plaintiffs in Error.

vs.

Sidney Dunbar, et al. Defendant in Error.

Error to Marion.

On 3d day of April, 1856, Plaintiffs below (Defendants here) filed their declaration &c. entitled in an action of "Trespass on the case" 3 counts therein.

1st count demurred to, demurrer sustained, and *nol. pros.*

2d count, that Plaintiffs below, on &c at &c, delivered to defendants, a certain lot viz of 242 hogs, of value \$2000, at Salem, to be carried thence to Illinoistown, to be there safely and securely delivered for plaintiffs, and in consideration of certain rewards &c, defendants undertook and then &c. promised they would carry and convey said hogs from &c. to &c., and there safely and securely deliver said hogs for said plaintiffs, and that they would furnish a suitable No. of cars (to-wit 5) and that they would start from the station house on the next morning (to-wit 26 January)—avers that defendants received said hogs &c., and did not furnish said cars, nor did they start on the next morning, nor safely and securely deliver same at Illinoistown &c., refused to furnish cars, did not start for seven days, and so carelessly and negligently did defendants conduct themselves, that 30 head of hogs being crowded &c., in pens and on cars died and were lost in consequence of the failure afore-said. Plaintiffs lost a large amount of money &c., by shrinkage and hire of hands from the time of delivery to defendants, to delivery to plaintiffs. Expenses in renewing engagements, &c., (a part of the injury sued for in this count is remediable only in assumpsit and a part in case.)

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Defendant Plead, 1st general issue in case; 2nd general issue in assumpsit; 3d (a special) plea. Action now because before the 25th January, 1856 or the accruing of the causes of action in pltf's declaration, defts had hired and let, their road with fixtures, engines, cars, machinery, &c, to one G. W. Jenks, who at the time when &c.. had entire control over the whole, and by his agents &c., completely managed the same, free from control of defendants and that the contract, &c., if any such was made, was with Jenks and his agents, then lawfully in possession and control of said road. Verification &c.

Demurrer to third plea sustained; defendant stands by third plea; issue joined, (on which plea, query?) jury and trial, verdict for plaintiffs \$371.72. Motion for new trial overruled, and judgment on verdict excepted to and bill of exceptions signed.

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68 2nd, that if the jury believe from the evidence that the plaintiffs for want of a sufficient No. of cars was compelled by necessity to ship in 4 cars which were insufficient the fact of the agent telling them that they shipped at their own risk does not relieve defendants from liability for failing to supply the proper number of cars.

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6th, the court is asked to instruct the jury that if they believe from the evidence that defendants ordered the plaintiffs to put their property in the cars for transportation from Salem to Illinoistown then the defendants are liable as common carriers for all damages done to the property of plaintiffs while in their care and possession and if the jury believe from the evidence that by the delays, carelessness or negligence of defendants the plaintiffs without their fault have sustained damages they should find for the pl't'fs and fix the damages according to the evidence of the case.

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Defendant excepted to all of above instructions &c., at the time.

Defendants' instructions—1st the court to the third count, the court instructs the jury that they are to judge by all the circumstances proven as to what kind of diligence was used in shipping said hogs and if the company have used ordinary diligence to ship them then the jury must find for the defendants on the third count.

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All of instructions refused and excepted to &c. Verdict \$371,72. Motion for new trial, overruled and excepted to.

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9th, the court erred in overruling defendants' motion for new trial and entering judgment for plaintiffs on verdict of jury and against defendants, wherefore defendants pray that said judgment be reversed, set aside, annulled, made void, and a new trial granted &c.

I. N. HAYNIE, for pl't'fs in Error.

O & M R R Co
res
Sedney Dunbar
St. A. C.

8730

Place Dec. 6. 1857.
A. Johnston M^r