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NEW JERSEY

Court of Errors and Appeals

NOTICE OF APPEAL

10

(Filed, June 22, 1926)

HUDSON COUNTY CIRCUIT COURT

IRWIN K. GIRDEN,	} Plaintiff,	} Action at Law.	} 20
vs.			
ANDREW THOMPSON and ERIE RAILROAD COMPANY,			
Defendant.			

To John N. Platoff, Attorney for Plaintiff:

Sir:

TAKE NOTICE that the defendants, Andrew Thompson and Erie Railroad Company appeal to the New Jersey Supreme Court from the whole of the judgment entered in this cause. 30

Dated, June 17th, 1926.

COLLINS & CORBIN,
Attorneys for Defendants.

Service acknowledged,

June 18, 1926,

John N. Platoff,

Attorney of Plaintiff.

40

GROUNDS OF APPEAL

(Filed, July 9th, 1926)

The Appellants state the following grounds of appeal:

10 1. The Trial Court erroneously refused to non-suit the plaintiff and to direct a verdict in favor of the defendants when thereunto moved, whereas said motions should have been granted on one or more of the following grounds urged in support of each of said motions:

(a) There was no evidence of any negligence on the part of the defendants which was the proximate cause of the plaintiff's loss.

20

(b) The evidence showed that the plaintiff was guilty of contributory neglect as a matter of law.

Dated, July 6, 1926.

COLLINS & CORBIN,

Attorneys of Defendants-Appellants.

Service acknowledged,

July 8th, 1926,

30 John N. Platoff,

Attorney of Plaintiff-Respondent.

40

COMPLAINT

(Filed, June 22, 1925)

Plaintiff, residing in the City, County and State of New York, says that:

1. At all times hereinafter mentioned defendant, Erie Railroad Company was and still is a domestic railroad corporation organized and existing under the laws of the State of New Jersey and operating lines of railroad between Port Jervis, in the State of New York and Jersey City, in the State of New Jersey, and was and is engaged as a common carrier in the transportation of passengers and baggage.

10

2. That at all times hereinafter mentioned the defendant The Pullman Company, was and still is a foreign corporation organized under the laws of the State of Illinois, licensed to transact business in the State of New Jersey, and at all said times was and still is operating Pullman Cars for the transportation of passengers and luggage between Port Jervis of the State of New York, and Jersey City of the State of New Jersey over the lines of the Erie Railroad Company.

20

3. On the 28th day of December, 1924, plaintiff purchased of defendant, Erie Railroad Company, a regular passenger ticket for transportation between Port Jervis and Jersey City and became a passenger upon defendant's train known as Special Relief Train No. 1000.

30

4. On the said date, plaintiff purchased of defendant the Pullman Company, a regular pullman ticket for transportation between Port Jervis and Jersey City and was assigned by the said defendant to a seat in Club Car No. 902.

40

Complaint

5. The said Andrew Thompson was employed by the defendant Erie Railroad Company and the defendant, The Pullman Company, or either of them as train porter, and among the duties of the said Andrew Thompson for and on behalf of his said
 10 employers, or either of them, was the transportation of valises from the pullman car to the station platform.

6. When the said train arrived at Jersey City plaintiff was requested by the defendant Andrew Thompson, to deliver to the said defendant Andrew Thompson, the valise of plaintiff for the purpose of transporting the same from the said pullman car to the station platform; and pursuant to said re-
 20 quest, plaintiff delivered his said baggage to the said defendant Andrew Thompson.

7. That defendants, failed to use due care and precaution for the safe delivery to the plaintiff of his said valise so that the same was wholly lost and defendants failed and neglected to deliver the same to plaintiff upon demand therefor having been duly made by plaintiff.

8. The said baggage and its contents were of the
 30 value of Six Hundred and Seventy-two Dollars and Seventy-nine Cents (\$672.79) and plaintiff by reason aforesaid has suffered damages in the sum of Six Hundred and Seventy-two Dollars and Seventy-nine Cents (\$672.79).

Plaintiff demands as damages the sum of Six Hundred and Seventy-two Dollars and Seventy-nine Cents (\$672.79) together with costs of suit.

JOHN N. PLATOFF,
 Attorney for Plaintiff.

40

ANSWER OF ANDREW THOMPSON

(Filed, Nov. 20, 1925)

Defendant, Andrew Thompson, answering the complaint of the plaintiff, says that:

10

FIRST DEFENSE.

1. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

2. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph 2.

3. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph 3.

4. He has no knowledge or information sufficient
 to form a belief as to the allegations of paragraph 4. 20

5. He denies the allegations of paragraph 5.

6. He denies the allegations of paragraph 6.

7. He denies the allegations of paragraph 7.

8. He denies the allegations of paragraph 8.

SECOND DEFENSE.

The plaintiff was guilty of contributory negligence in that he failed to exercise due care for the protection and care of his said valise and the contents therein. 30

THIRD DEFENSE.

Plaintiff was guilty of contributory negligence in that he failed to exercise due care for the protection and care of the said valise and the contents therein while said valise was on the station platform.

40

COLLINS & CORBIN,
 Attorneys for Defendant,
 Andrew Thompson.

ANSWER OF ERIE RAILROAD CO.*(Filed, Nov. 20, 1925)*

The defendant, Erie Railroad Company, a corporation, answering the complaint of the plaintiff,
10 says that:

FIRST DEFENSE

1. It denies the allegations of paragraph 1.
2. It has no knowledge or information sufficient to form a belief as to the allegations in paragraph 2.
3. It denies the allegations of paragraph 3.
- 20 4. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 4.
5. It denies the allegations of paragraph 5.
6. It denies the allegations of paragraph 6.
7. It denies the allegations of paragraph 7.
8. It denies the allegations of paragraph 8.

SECOND DEFENSE

30 No employee, servant or agent of the defendant, Erie Railroad Company, had any authority to carry any valise or goods of the plaintiff from the Pullman car to the station platform, and if any employee, servant or agent of the defendant, Erie Railroad Company, carried any valise or goods of the plaintiff from the Pullman car to the station platform, said employee, servant or agent was acting outside the scope of his authority and solely as
40 the agent and servant of the plaintiff.

*Answer of Erie Railroad Co.***THIRD DEFENSE**

The valise of the plaintiff and the goods contained therein were in the sole custody, protection and care of the plaintiff and were never delivered to the defendant, Erie Railroad Company, and the said 10 Erie Railroad Company owed no duty towards the plaintiff regarding said valise and the contents therein.

FOURTH DEFENSE

If any employee, servant or agent of the defendant, Erie Railroad Company, carried the aforesaid valise from the Pullman car to the station platform, said employee, servant or agent acted as a 20 gratuitous bailee and solely for the benefit of the plaintiff and the defendant, Erie Railroad Company is not liable if the same has been lost.

FIFTH DEFENSE

The plaintiff was guilty of contributory negligence in that he failed to exercise due care for the protection and care of his said valise and the contents therein. 30

SIXTH DEFENSE

There was no agreement or contract between the plaintiff and the defendant, Erie Railroad Company, for the carriage and transportation of the aforesaid valise and the contents therein.

Answer of Erie Railroad Co.

SEVENTH DEFENSE

The aforesaid valise and the contents therein did not constitute baggage and said articles were not necessary and appropriate for the wear, use, com-
 10 fort and convenience of the plaintiff on his said journey, and the defendant, Erie Railroad Company, is not liable if the same has been lost.

EIGHTH DEFENSE

The liability, if any, of the defendant, Erie Railroad Company, as a carrier of the plaintiff's valise and the contents therein, is limited to \$25, under
 20 the rules of baggage tariff of the Interstate Commerce Commission, effective at the time of the alleged loss.

NINTH DEFENSE

If the aforesaid valise and the contents therein were delivered to the said Erie Railroad Company, its servant or agent, any act of said defendant's agent or servant in carrying said valise from the
 30 Pullman car to the station platform was merely gratuitous and solely for the benefit of the plaintiff and said defendant is liable only for gross negligence.

COLLINS & CORBIN,
 Attorneys for Defendant,
 Erie Railroad Company.

REPLY

(Filed, Nov. 21, 1925)

Plaintiff, by way of reply to the answer filed by defendant, Andrew Thompson, says that:

1. He denies each and every allegation contained
 10 in the First, Second and Third Defenses, and joins issue thereon.

JOHN N. PLATOFF,
 Attorney for Plaintiff.

REPLY

(Filed, Nov. 21, 1925)

20

Plaintiff, by way of reply to the answer filed by the defendant, Erie Railroad Company, says that:

1. He denies each and every allegation contained in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses, and joins issue thereon.

JOHN N. PLATOFF,
 Attorney for Plaintiff. 30

RULE FOR JUDGMENT*(Filed, June 9, 1926)*

The issue in the above entitled action having come on regularly to be tried before Judge Henry E. Ackerson, Jr., and a jury having returned its verdict on the 8th day of June, 1926, in favor of the plaintiff and against the defendants, Andrew Thompson and Erie Railroad Company, in the sum of Five Hundred and Eighty Dollars (\$580.), and costs to be taxed;

Now, on motion of John N. Platoff, attorney for the plaintiff, it is hereby

ORDERED AND ADJUDGED that the plaintiff have and recover the sum of Five Hundred and Eighty Dollars (\$580.), together with costs to be taxed.

Let judgment be entered accordingly, this 9th day of June, 1926.

HENRY E. ACKERSON, JR.,
Judge.

30

40

FINAL JUDGMENT

Judgment entered June 9th, 1926.

Judgment on verdict in the above entitled cause was entered in this Court on the Ninth day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six, in favor of the plaintiff Irwin K. Girden, and against the defendants Andrew Thompson and Erie Railroad Company, in a plea of Action-at-Law for the sum of Five Hundred and Eighty Dollars and cents damages and Fifty-seven Dollars and Fifty cents cost of suit.

Judgment entered and signed this 9th day of June, 1926.

HENRY E. ACKERSON, JR.,
Judge.

Min. 72, page 299.

ANDREW THOMPSON, ERIE RAIL-
ROAD COMPANY and THE PULL-
MAN COMPANY.

30

40

TESTIMONY

Before HON. HENRY E. ACKERSON, JR., J., and a jury.

Jersey City, N. J., June 7, 1926.

10

Appearances:

John N. Platoff, Esq., for the plaintiff, by David Saperstein, Esq.

Collins & Corbin, Esqrs., for the defendants.

A jury was duly empaneled, found satisfactory and sworn.

By stipulation and agreement between counsel,
20 a discontinuance is consented to as to The Pullman Company, one of the defendants.

Mr. Saperstein: I move to amend the complaint as to the fourth paragraph, to read that the said plaintiff purchased of the said defendant, Erie Railroad Company, a regular Pullman ticket, instead of the Pullman Company, as alleged in paragraph four.

Also, I move to amend paragraph 8, to read that
30 the plaintiff has suffered damages in the sum of \$850, instead of \$672.79 as alleged, and then to amend my prayer to read \$850.

The Court: I will allow the amendment.

Counsel opened to the jury.

40

Plaintiff's: Irwin K. Girden—Direct

IRWIN K. GIRDEN, sworn:

Direct-examination by Mr. Saperstein:

Q. What is your occupation? A. Dentist.

Q. Where is your office? A. Steinway Hall, 113 10
West 57th Street, New York City.

Q. In the winter of 1924, did you make a trip to Pennsylvania? A. I did.

Q. Where were you going? A. I was going to Sauk Hill Pines Lodge, Milford, Pennsylvania.

Q. What kind of place is Sauk Hill Pines Lodge?
A. It is one of the winter camps. It is one of the camps that caters to the holiday crowd during the holiday season.

Q. Were you going up there for a holiday? A. 20
Going up there to visit about fourteen days.

Q. When was your vacation to begin? A. I got there before Christmas, I was supposed to be back after New Years.

Q. Do you remember what day you got there? A. The 23rd of December.

By the Court: Q. Where was it you went?

The Witness: Sauk Hill Pines Lodge, Milford, Pennsylvania.

Q. How long did you remain at Sauk Hill Pines? 30
A. About five days.

Q. Who accompanied you upon this trip? A. Mrs. Otto Kahn.

Q. Who is she? A. Now my wife.

Q. She was then your fiancée? A. Yes, sir.

Q. After five days you left Sauk Hill Pines? A. I left the 28th of December. I took the train from Port Jervis to New York, took the Erie to New York.

Q. The Erie Railroad, did you buy a ticket at 40
Port Jervis? A. I did.

Plaintiff's: Irwin K. Girden—Direct

Q. Do you recall how much you paid for the ticket? A. No, I don't recall.

Q. How did you travel? What sort of a car did you travel in? A. I bought a Pullman chair there. We both rode the Pullman from Port Jervis to Jersey City.

Q. Did you buy one or two tickets? A. We had two tickets.

Q. You mean you bought ticket transportation and a ticket for the Pullman chair? A. We had four tickets.

Q. Well, four tickets altogether for the two of you? A. Yes, sir.

Q. Did they assign you seats in the Pullman car? A. They did.

20 Q. What was the destination of the train? A. Well, the trip was to New York; the train only went as far as Jersey City, to the ferry.

Q. Did you have any baggage with you at the time? A. We each had a bag.

Q. A bag; what kind of bag did you have? A. One of the English bags, a large black collapsible bag.

Q. Was it a very large bag? A. Very large, yes, sir.

30 Q. What did you do with your bag when you got aboard the train? A. Put it alongside of me.

Q. In the parlor cars, you mean? A. Yes, sir.

Q. Did you keep it alongside of you during the trip, until you reached Jersey City? A. Yes, sir.

Q. And did you see the defendant, Andrew Thompson, on the train? A. I saw him many times on the train.

Q. Did he have a uniform? A. Yes, sir.

40 Q. What sort of a uniform did he have? A. I don't know, one of the regular Pullman porter's uniforms.

Plaintiff's: Irwin K. Girden—Direct

Q. Was he on the train during the course of the trip? A. Oh, yes; served us some lemonade and other things he brought to me.

Q. Now as you approached the city did you see the defendant, Andrew Thompson, in your car? A. Why yes, you know how they are; they always cater to passengers all the time, wipe their shoes and do everything for them. That is the way they make their living.

Q. What did he do as the train approached Jersey City? A. Just took the bags and put them on the front platform of the train.

Q. Took many bags? A. Took many bags; there was only a few people, six or seven people on the train, because the Erie only have, I think, a small Pullman coach.

20 Q. Did he take the baggage of all the six or seven people? A. I don't know. I mean he collected the baggage and put it on the front platform.

Q. Was this while the train stopped or had stopped? A. While it was slowing down.

Q. In the Jersey City tunnel? A. Yes, sir.

Q. What did you do? A. I had to form a line with the passengers because they always put the baggage on the front platform, and before anybody can get off they took all the baggage and put it on the platform, the porter did.

The Court: Never mind what they always do; what did they do this time?

Q. Tell us what he did in this particular case? A. Put the baggage on the front platform and then moved it to the station platform.

Q. Did he wait until the train stopped before removing the baggage? A. From where?

Q. From the train platform to the station platform? A. He had to do that to take the baggage off.

20

30

40

Plaintiff's: Irwin K. Girden—Direct

Q. Who was the first one off the train? A. The Pullman porter.

Q. With the baggage? A. You cannot get off until he takes the baggage off first.

Q. You mean that you could not get off of this
10 train until the baggage was cleared off to the station platform? A. Nobody can get off.

Q. Do you recall when you got off, were you the first passenger off or were you not? A. No, at least four or five people in front of us.

Q. At least four or five? A. Or more than that.

Q. Where did you go when you got off? A. I went down to get my bag.

Q. Where do you mean you went down? A. Off the train.

20 Q. Did you see the defendant, Andrew Thompson, standing there? A. He was standing in front of six or seven bags.

Q. Tell us what happened? A. I had the biggest bag on the train. It was a very heavy bag, in fact the porter made some remark about it. It wasn't there when I got there. I talked with the lady, she had a bag, and I asked for my bag, and he said he could not find it, "Maybe some one took it by mistake, and see if one bag is left over." After a while
30 no bag was left over. Then we went to the station master, or whoever it was, the lost and found, where we made some record.

Q. Did he go with you? A. He went with me.

Q. What happened? A. He told the master somebody stole my bag. Then the station master called up some man, I don't know who the man was, on the phone, and they asked me to speak to him. I spoke to the man; I don't remember his name.
40 They asked me to set it up in writing, make a complaint. The porter told the station master the bag

Plaintiff's: Irwin K. Girden—Cross

was stolen. He remembered the bag at the time, it was a very large bag; in fact it was the largest on the train at the time.

Q. Thereafter did you make complaint to the company? A. Yes, sir.

Q. In writing? A. I spoke to some man in the
10 office that day he called up, three or four times I spoke to him about it. He asked me to keep in touch with him, and if they have any report they will let me know.

Q. Did they ever make any report? A. No, sir, they never did.

Q. Now do you recall what articles you had in this bag? A. Practically.

Q. Did you make a list of these articles after the
loss of the bag? A. I did. 20

Q. Have you got the list with you? A. Yes, sir, I have the list.

Q. Was that list made at the time of the occurrence, when the occurrence was fresh in your memory? A. Yes, sir.

Q. In your own handwriting? A. Yes, sir.

Q. Will you refer to that list. You described this handbag, as a large sized leather handbag. Where did you get the bag? A. A present from a
friend of mine. 30

Mr. McIntyre: If your Honor please, I object. I would like to examine the paper which the witness says he made in his own handwriting.

CROSS-EXAMINATION by Mr. McIntyre:

Q. You say this was made at the time the loss occurred to you? A. No, sir, that was not the question asked. The question was, when it was fresh
in my memory. 40

Plaintiff's: Irwin K. Girden—Re-direct

Mr. McIntyre: Then I object to the witness refreshing his memory from this paper, on the ground that it does not appear that the paper was made at the time the loss occurred; he simply says it was made when the loss was fresh in his mind.

10

By the Court: Q. When did you make the list?

A. I received a letter—this was made February 17th, about a month and a half later.

By the Court: Q. At the time you made it could you recall the articles? A. I could, because I needed them all.

By the Court: Q. You made that up with reference to your recollection of what was in the bag at the time?

20 The Witness: Yes, because I borrowed some of the articles, they were not mine, and I needed a lot of things in the bag.

Q. You sat down and checked up from your memory at that time what was in the bag? A. I did.

RE-DIRECT-EXAMINATION by Mr. Saperstein:

Q. Now, where did you get the bag? A. A friend of mine by the name of Sterling Reynolds.

30 Q. When did you get the handbag? A. About five or six months before that.

Q. Was that a gift from Mr. Reynolds? A. A gift.

Q. Since that time did you have occasion to price the handbag, a handbag of this particular kind? A. I did.

Q. Where did you price them? A. In fact I purchased one.

40 Q. Where did you buy it? A. Abercrombie & Fitch.

Plaintiff's: Irwin K. Girden—Re-direct

Q. Did you price bags of this kind, similar kind? A. I did.

Q. Where did you get the prices? A. I went to many stores; Abercrombie & Fitch and other stores.

Q. Did you find out what the exact type of handbag that Mr. Reynolds had given you costs? A. I 10 did.

Q. How much does it cost?

Mr. McIntyre: I object to that.

The Court: Sustained. You cannot show the value that way. You can show what he paid for it.

Q. How much was it you paid for this bag? A. Sixty dollars.

Q. Sixty dollars was what was paid for that particular bag? A. Yes, sir. 20

By the Court: Q. How do you know that?

The Witness: Mr. Reynolds told me.

Mr. McIntyre: I object to that as hearsay.

The Court: Strike it out.

Q. Did you ever have occasion to go and get the price of this bag at the time Mr. Reynolds gave it to you?

Mr. McIntyre: I object to that. That is no proof of the value of this particular bag. That is immaterial, this question. 30

The Court: Sustained.

Q. Did you about this time have occasion to purchase a bag? A. I did.

Q. Of the same type? A. I purchased five bags of the same type.

Q. You purchased five bags when? A. A little after that.

Q. You bought all of them of the same type as you had last? A. Yes, sir.

Q. And that was some time after, a little time 40 after? A. I bought them in April.

Plaintiff's: Irwin K. Girden—Re-direct

Q. In April 1925? A. Yes, sir.

Q. When you say that they were like that bag, were they exactly similar to this one? A. Exactly similar except as to color.

Mr. McIntyre: I object.

10 Q. Where did you get them? A. I had them made at Gimbel's.

Q. How much did you pay for them?

Mr. McIntyre: I object.

The Court: Sustained.

Mr. Saperstein: Exception.

Q. These bags that you testified you bought, what was the purpose of them? A. I went to California.

Q. You bought them for yourself, did you? A. I did.

20 Q. Now, referring to that list, will you tell us the first article that you have on that list that you had in the bag that was lost? A. A golf suit.

Q. Where did you purchase the golf suit? A. Kahn, Gould & Company.

Q. When? A. I bought them for Labor Day of that year.

Q. Had you worn it very frequently? A. Three or four times.

Q. What condition was it in at the time that you 30 started your vacation in Sauk Hill Pines? A. Practically new.

Q. How much did you pay for it? A. Sixty dollars.

Q. What is the next article you have in there? A. Two pair of shoes.

Q. Where did you purchase them? A. Whitehouse & Hardy.

Q. How long before this trip did you purchase those? A. Probably a month.

40 Q. How much did you pay for these? A. I got

Plaintiff's: Irwin K. Girden—Re-direct

them marked twenty-five dollars here, I think I paid twenty-eight dollars.

Q. What condition were they in when you left from Sauk Hill Pines? A. Very good.

Q. Had you worn them very frequently? A. No.

Q. What is the next item you have? A. A pair 10 of knickers.

Q. Where did you buy those? A. Lou Freedman.

Q. What condition were they in? A. Good.

Q. When did you buy them? A. Just before that.

Q. Just before what? A. Just before the trip. I bought them for the trip.

Q. Were they in good condition when you left Sauk Hill Pines? A. I only wore them once up 20 there.

Q. How much did you pay for them? A. Ten dollars.

Q. What is the next? A. I have six ties at five dollars each, Sulka Brothers; that six ought to be six dollars each. I have six at five dollars each; it should be six, because all their ties are six dollars.

Q. How long before had you bought these? A. Within two months.

Q. What condition were they in? A. Very good. 30

Q. What is the next item? A. Two ties.

Q. Where did you buy those? A. Kaskel & Company.

Q. How long before the trip? A. Probably a couple of months, about the same time.

Mr. McIntyre: Two more ties.

The Witness: Eight ties altogether.

Q. What condition were they in? A. Very good.

Q. Had you worn them frequently? A. No.

Q. How much did they cost you? A. Six dollars 40 apiece.

Plaintiff's: Irwin K. Girden—Re-direct

Q. What is the next item? A. One flannel shirt.

Q. Whom did that belong to? A. That belonged to Irving Squires.

Q. Do you know how much that shirt cost? A. Ten dollars; I had to pay him ten dollars.

10 Q. Do you know how much the shirt cost? A. Yes, sir.

Q. How do you know? A. Because I paid what he asked me for it, ten dollars.

Q. You paid Irving Squires what he asked you? A. Yes. It was a lumberjack, black and white.

Q. What is the next item you have? A. Sweater.

Q. Whom did that sweater belong to? A. My brother.

20 Q. Do you know how much your brother paid for that sweater? A. Yes, it was charged to him by Spaulding, at fifteen dollars.

Mr. McIntyre: I object to that, that is hearsay.

By the Court: Q. How do you know what was paid for it?

The Witness: He had a charge account and I paid him what he paid for it.

By the Court: Q. It had not been paid for yet?

30 The Witness: He paid for it. He is interested in a camp.

By the Court: Q. All you know is what he told you?

The Witness: That's all.

The Court: Strike that out.

Q. What is the next item? A. One of these heavy winter sweaters "V" neck.

Q. Have you bought the sweaters yourself? A. I bought hundreds of them probably.

40 Q. What are they worth? A. Probably ten, twenty or thirty dollars.

Plaintiff's: Irwin K. Girden—Re-direct

Q. I mean for this particular kind of sweater?

A. They all have a standard value.

Q. How does it happen that you have bought hundreds of them? A. Well, I have been on the "All-American" Football team and played football and baseball, basketball, and used sweaters all my 10 life.

Q. Are you connected with any camp business?

A. I am interested in a camp in Connecticut, a very large camp.

Q. Who owns the camp? A. My brother.

Q. You have occasion in connection with your interest in the camp to purchase athletic materials?

A. Yes, I do the administrative work there.

Q. Will you tell us what the cost of this sweater was? A. Fifteen dollars. 20

Q. At Spauldings? A. Yes.

Q. What is the next item? A. A suit, Sulka Brothers, under my name, eighty-five dollars.

Q. When did you buy that? A. In the summer preceding that, about August.

Q. How frequently have you worn that since then? A. Once a week, or once in two weeks.

Q. You had worn it about six months? A. Less than that; it was practically a new suit.

Q. What condition was it in when you left Sauk 30 Hill Pines? A. Good.

Q. And the suit cost, you say, eighty-five dollars new? A. New.

Q. What is the next item? A. Two pairs of pajamas.

Q. Where did you purchase those? A. Lou Freedman's, Broadway and 49th Street.

Q. When did you buy those? A. Within a month of the time.

Q. How much did they cost? A. I have got them 40

Plaintiff's: Irwin K. Girden—Re-direct

marked here thirty dollars; one twenty and one ten, I have them; the prices were one twenty-two dollars and one ten dollars.

Q. What condition were they in? A. Brand new.

10 Q. What is the next item? A. One hat and one cap.

Q. Where did you buy those? A. Dobbs.

Q. Dobbs, New York? A. I have an account there.

Q. When did you buy them? A. The cap I bought for the trip and the hat I bought about a month before.

Q. How much did you pay for the cap? A. Three dollars and fifty cents.

20 Q. What condition was it in when you left Sauk Hill Pines? A. Good condition.

By the Court: Q. What was that cap; how much was it?

The Witness: Three and a half dollars.

Q. How much did you pay for the hat? A. Ten dollars.

Q. What condition was that in when you left Sauk Hill Pines? A. Pretty new; very good condition.

30 Q. What is the next item? A. Six shirts.

Q. Where did you buy those? A. Lou Freedman's.

Q. Where is that? A. Broadway, between 49th and 48th Street.

Q. When did you buy them; did you buy them all together? A. I bought them all together.

Q. When did you buy them? A. A couple of weeks before this trip.

40 Q. What condition were they in when you left Sauk Hill Pines? A. Very good.

Plaintiff's: Irwin K. Girden—Re-direct

Q. How much did you pay for these? A. I have thirty-six dollars; I think they charged me six and a half dollars apiece; I have thirty-six dollars marked here.

Q. By the Court: Q. What is that item?

The Witness: I wrote on this list that I paid six 10 and a half dollars for them.

Q. What is the next item? A. A pair of skates.

Q. You say the list calls for six dollars for those shirts? A. The reason I went over this, the Company sent a man, and they have a list, of whatever I have bought, and they could have gone over to the store and had all these verified.

Q. You mean—A. An insurance man, said he was from them; everything was gone over there.

Q. What is the next item? A. One pair of 20 skates.

Q. Where did you buy those? A. Spauldings.

Q. When? A. About three days before the trip.

Q. You bought them for the trip? A. Yes, sir.

Q. How much did you pay for these? A. Twelve dollars.

Q. What condition were they in? A. Brand new, the first time used.

Q. What is the next item? A. Three suits of un- 30 derwear.

Q. Where did you buy them? A. I think I bought them at Tripler's. I bought seven or eight suits of underwear at Tripler's, and at Lou Freedman's, and I don't know which were which.

Q. Do you know how much you paid for them? A. I paid four dollars for each pair.

Q. Four dollars for each pair? A. That is including the drawers and shirts.

Q. And you lost how many suits? A. Three 40 suits.

Plaintiff's: Irwin K. Girden—Re-direct

Q. What condition were these suits in? A. Very good.

Q. How long before had you bought these, do you recall? A. I don't remember, within two or three months.

10 Q. You had bought them that month; it was winter underwear? A. No; I don't wear winter underwear.

Q. You wear the same kind all the year round? A. Yes, sir.

Q. What else? A. A set of links.

Q. What kind of links were they? A. For dress shirts.

Q. What kind, cuff links? A. A set for a dress shirt, cuff links and a stud for the fronts.

20 Q. A set of studs and cuff links? A. Yes, sir.

Q. Where did you get them from? A. They were a present from Mrs. Otto Kahn.

Q. That is the lady that you testified is now your wife? A. I did.

Q. Were you with her when she bought these cuff links and studs? A. Yes, I selected them.

Q. Were they a gift to you? A. Yes, my birthday comes ten days before, the 15th of December.

30 Q. She bought you these links for your birthday? A. Yes, sir.

Q. How much did she pay for them? A. Seventy-five dollars.

Q. What is the next item? A. Pardon me, you want to know where they were bought? Lebolt's; it is on Fifth Avenue.

Q. How many times did you wear these cuff links? A. Twice a week; they are a full set; they are more than links.

40 Q. What is your next item? A. Dinner jacket.

Q. Where did you buy that? A. B. Lettler.

Plaintiff's: Irwin K. Girden—Re-direct

By the Court: Q. Suit or jacket?

The Witness: Jacket and trousers and vest.

Q. Where are they located? A. Fifth Avenue, opposite the Cathedral, 50th and 51st Street.

Q. When did you buy these? A. I bought them all in October of that year. 10

Q. How much did the dinner jacket and trousers cost you? A. The dinner jacket was a hundred and eighty-five dollars, and two vests were forty dollars more, black and white vests.

Q. Did you have both vests with you? A. I did.

Q. That makes two-hundred and twenty-five dollars? A. Yes, sir.

Q. How often had you worn your dinner jacket and vests prior to the trip? A. I wore them about 20 once a week or once in two weeks.

Q. And you say you bought them when, in October? A. I did.

Q. What condition were they in when you left Sauk Hill Pines? A. Very good; didn't use them up there.

Q. When you left did you expect you would have to use them? A. Yes, they have a New Year's party and a Christmas party.

Q. Did you stay for the New Year's party? A. 30 I did not.

Q. You left before the New Year's party? A. Yes, sir.

Q. What is the next item? A. Two bow ties.

Q. Where did you buy these? A. Tripler Brothers.

Q. When? A. Within a month of that.

Q. How much did they cost you? A. Both were five dollars.

Q. Five dollars for both? A. Yes, sir. 40

Plaintiff's: Irwin K. Girden—Re-direct

Q. What condition were they in? A. Good.

Q. What else? A. Next I have a razor.

Q. What kind? A. Gillette, ten dollar razor.

Q. Cost you ten dollars? A. It did.

Q. How long before had you bought it—

10 By the Court: Q. How much for the ties?

The Witness: Two dollars and a half apiece.

By the Court: Q. What is the next item?

The Witness: One razor.

Q. When did you buy the razor? A. I don't remember, a month or a couple of months before.

Q. What is the next item? A. Two hair brushes.

By the Court: Q. How much was the razor?

The Witness: Ten dollars.

20 Q. Two hair brushes; when did you buy those, if you remember? A. I don't, within a little while, three or four or five months before that.

Q. How much did they cost? A. Ten dollars for the set.

Q. Where did you buy those? A. Mark Cross.

Q. What is the next? A. The next item for a comb, a dollar; shaving brush a dollar fifty; clothing brush, two dollars, nail brush for a dollar. Then I had some socks and handkerchiefs that I made no mention of.

30 Q. Do you recall what price you paid? A. I had six handkerchiefs at Mosse's made with my initials, for thirty-eight dollars. I made no notation; some of them were in there.

Q. How many? A. I believe three, made by Mosse, at 57th Street, the six cost thirty-eight dollars.

Q. You lost three? A. I have some socks which I didn't enumerate at all.

40 Q. Is there anything else on that list? A. That's all the list.

Plaintiff's: Irwin K. Girden—Re-direct

Q. Did you have any golf stockings? A. I think I gave you the golf stockings. My item here is two golf stockings, four dollars.

Q. Two pairs of golf stockings at four dollars apiece? A. Yes, sir; they were much more than that. I just marked four dollars. I paid seven and 10 a half for one of them. I remember that now, but I only marked four dollars here.

Q. And about how large was this bag? A. One of those English large collapsible bags. Must be as large as that (indicating), and very wide, with a collapsible top.

Q. And you say that all of these items were in this bag? A. There was much more than that.

Q. And you had all this baggage in this one bag? 20 A. Yes, sir.

Q. Where do you live? A. Now?

Q. Yes. A. Waverly Place, down in the Village.

Q. What is that? A. I just moved there. I just gave up a house I lived in before my wife went to California; I had an eleven room house.

Mr. McIntyre: I don't see the materiality of this.

Mr. Saperstein: Merely on the question of his standard of living, to indicate that all these items were necessary to a man of his 30 condition.

The Witness: I had an eleven room house down there on Manhasset Bay.

Q. Did you own the house? A. No, I did not.

Q. Did you rent it? A. I did.

Mr. McIntyre: I desire to have my objection noted to the testimony that is now being given on the ground that it is immaterial and irrelevant.

The Court: Now, that question is leading. 40

Plaintiff's: Irwin K. Girden—Re-Cross

You state these things and they are all proper items; I have not suggested otherwise.

Mr. Saperstein: I withdraw the question.

Q. Is your wife in court? A. She is in California.

10 Q. Was anybody else with you on this trip? A. No.

Q. Just you and she came down together? A. Yes, sir.

Q. This gentleman sitting at that table, is that the porter? A. I think so; he seems like him.

Q. How did you get the porter's name? A. I took a record; I asked him his name.

Q. And he told you his name was what? A. I don't remember; I think his name was Thompson.
20 I took his name in the station master's office; the record was made at that time.

CROSS-EXAMINATION by Mr. McIntyre:

Q. Where did you board the train, at Port Jervis? A. Port Jervis.

Q. Where did you come from? A. Sauk Hill Pines Lodge, Milford, Pennsylvania.

Q. How far away is that? A. About fourteen miles.
30

Q. How did you come? A. By automobile.

Q. Just you and your fiancée came together? A. Yes, sir.

Q. In your car? A. No.

Q. Public hack or taxicab? A. A car of Sauk Hill Pines, a large bus.

Q. Anybody else with you? A. There was quite a few people on the train.

Q. I mean from Sauk Hill Pines? A. Five or six
40 people.

Q. You say you carried your baggage from Sauk

Plaintiff's: Irwin K. Girden—Re-Cross

Hill Pines or the taxi or whatever it was? Some conveyance, and you took it to the train yourself?

A. Yes, sir.

Q. It was very heavy? A. Very heavy, it was quite a heavy load for me to carry.

Q. How many valets do you employ? A. I used 10 to have one, but I haven't any now.

Q. You didn't have your personal valet on the trip? A. I didn't.

Q. Just one you employ? A. Now?

Q. I mean yet? A. I employ none now.

Q. At that time how many did you employ? A. None at the time.

Q. You went on this trip for the purpose of a winter vacation, is that the idea? A. I went for a good time. 20

Q. It was a winter resort, you testified before? A. Yes. I said it was; they have a camp in the summer, and they open up a place again for the Christmas season.

Q. You went there for the winter sports? A. Yes, sir.

Q. You brought a golf suit up there for the winter sports? A. Yes, sir.

Q. What do you do, play winter golf? A. I didn't say why I bought it. 30

Q. You claim here for one golf suit I think, eighty-five dollars? A. No, sixty dollars.

Q. Did you go up there to play golf? A. No, I didn't.

Q. You had a golf suit with you? A. Yes, sir.

Q. How long is the trip from Port Jervis to New York? A. I don't know.

Q. Well about? A. I imagine about two and a half or three hours.

Q. We want to know what it is, if you know? A. I don't know. 40

Plaintiff's: Irwin K. Girden—Re-Cross

Q. You have made the trip there how many times? A. I have been there quite a few times, five or six.

Q. You were asked whether you recognized this gentleman here? A. I said I thought I did.

10 Q. Don't you know how long it would take you to go that trip from Port Jervis to Jersey City? A. I think about two and a half or three hours.

Q. You went away there for a two weeks' vacation? A. About twelve or thirteen days.

Q. And you had been away five days? A. Yes, sir.

Q. You got there and you had to go back to your office? A. I didn't say why I came back.

Q. You apparently left? A. I left, yes, sir.

20 Q. Took all your baggage with you going home? A. Why, yes, sir.

Q. Did you ship any trunk up? A. No.

Q. Just took a handbag? A. Yes, sir.

Q. Just that one valise had to last you for two weeks? A. Yes, sir.

Q. That's all you had with you? A. Yes, sir.

Q. You had no trunks or any other baggage? A. I never use trunks.

30 Q. No other valise? A. There was two valises; one was mine.

Q. I mean your own personal apparel? A. Just one.

Q. Just that one grip? A. Yes, sir.

Q. That was supposed to last you for two weeks? A. Twelve or thirteen days.

Q. You had intended to go for twelve or thirteen days? A. Yes, sir.

40 Q. You had in this one grip all of the items you mentioned here? A. Yes, sir.

Q. You went to evening affairs you say once or twice a week? A. In New York.

Plaintiff's: Irwin K. Girden—Re-Cross

Q. I mean at the Pines Lodge? A. I didn't use it at all.

Q. You had little use there for this two hundred and twenty-five dollar dress suit or dinner jacket?

A. Yes, well.

Q. And all you have there is a dinner jacket; is 10 that for evening wear? A. I have my shirt, dinner jacket, vest, and pants.

Q. Was that dress shirt there? A. Six shirts were there.

Q. The six shirts were dress shirts? A. I didn't say anything of the kind. You didn't ask me that way.

Q. You claim here for six shirts? A. I do.

Q. They were six dress shirts? A. I didn't say that at all. I said six shirts, I don't remember what 20 they were.

Q. How many of these six were dress shirts? A. Two.

Q. And you had brought along a couple of pairs of golf stockings? A. Yes, sir.

Q. For the golf up there? A. No.

Q. I see, going skiing? A. No, sir.

Q. You never went abroad? A. I have been abroad, but I never skiid, there is other things be- 30 sides winter sports.

Q. You went there for a winter vacation? A. I went for a good time.

Q. In the beginning you went up there for a two weeks' holiday? A. I went there for a holiday.

Q. I don't dispute you. You said you went up there for a winter holiday of two weeks? A. Twelve or thirteen days. Before Christmas until the day after New Year's.

Q. Did you have any evening collars with you? 40 A. Oh, yes, sir.

Plaintiff's: Irwin K. Girden—Re-Cross

Q. You haven't mentioned those? A. There are many things. I had more than that.

Q. You say much more in that grip? A. There was much more—collars and things like that, items too small to bother with. A collar only costs twenty cents.

Q. You are claiming for handkerchiefs and a fifty cent tooth brush? A. My handkerchiefs cost me sometimes four and three and a half dollars; that's not a small item.

Q. You are claiming for one tooth brush? A. I was asked to put down what I remembered at the time.

Q. You don't remember having any evening, I mean, any formal collars? A. I didn't use a formal collar, I used a low collar.

Q. For formal evening wear? A. I use a low collar; I had only a dinner jacket, I have formal evening clothes.

Q. You did not contemplate going in formal evening clothes at all? A. No, I never had a formal dress; this is not formal.

Q. You just bought your dinner jacket? A. And dinner clothes; that is not formal.

Q. I don't want to qualify on formality and informality. You say you were up a number of times at the lodge, weren't you? A. Yes, sir.

Q. And they were not formal there, were they? A. No; I mean by that a Tuxedo is not formal.

Q. Quasi-formal, if you will? A. As you say.

Q. I am asking you? A. Yes.

By the Court: Q. This was an Erie Railroad train you came from Port Jervis down to New York on? A. Yes, it was a special train.

By the Court: Q. It was assigned by the Erie Railroad?

Plaintiff's: Irwin K. Girden—Re-Cross

The Witness: Yes, sir.

Q. How much of a tip did you give Mr. Thompson there when he assisted you with your baggage?

A. Even though I lost the bag, I tipped him anyway.

Q. You tipped him anyway? A. Gave him thirty-five cents before; I tipped him before on the train. I tip very liberally; that is why I get the attention from him; that is why he remembers my bag very distinctly.

Q. You didn't tip him in the train before you got off and found the bag was gone? A. I tipped him in front of the station master; I gave him thirty-five cents.

Q. You remember that very distinctly? A. Very distinctly.

Q. And also gave him a tip when he brought you some ginger ale? A. I didn't give him anything when he brought the ginger ale, I tipped him for it on the train.

Q. You carried your own grip into the train, didn't you? A. Yes, sir.

Q. Also the grip of your fiancée? A. I did.

Q. How many passengers were in that car, do you remember? A. I don't remember. It was a special train, I think it was filled.

Q. Were there all types of grips? A. My grip was too heavy to be put on top of the rack.

Q. On the ground the entire time, on the floor of the car? A. Yes.

Q. You say you saw Thompson take the grip and bring it to the vestibule of the train as it neared Jersey City, or he brought the grip from your chair and left it in the vestibule of the train? A. Yes, sir.

Q. Do you recall how many other grips were also in that vestibule? A. About eight or ten.

Plaintiff's: Irwin K. Girden—Re-Cross

Q. Including yours? A. Yes, sir.

Q. And that would be about twelve grips or ten grips altogether? A. About that.

Q. About ten or twelve grips? A. Yes, sir.

Q. Had you ever made that trip before with your fiancée? A. On the train, you mean?

Q. I mean when Mr. Thompson was your porter? A. Never.

Q. You personally had made the trip many times. You knew the trip, and he knew your bag? A. I didn't say that at all.

Q. He was familiar with it, I think you testified; Mr. Thompson knew your grip quite well? A. Yes, because it was so heavy. I wanted to have him put it up on top, but he advised me to keep it down.

20 Q. When you got out of the train, did you get out before Thompson, or did Thompson get out before you? A. The porter always gets out first of all.

Q. You see what I want to know is not what they always do, but what he did on this particular time? A. All the bags were in front of the door in the passageway. You could not get through the narrow alley unless he goes out first.

30 Q. I assume he carried all the baggage out and put them on the platform? A. I don't say he did. He assisted the people with their baggage.

Q. Were there two porters? A. No, one.

Q. None of the passengers carried their baggage out? A. Of course some passengers always carry their own baggage.

Q. Did you notice whether Thompson carried your grip out and laid it on the station platform? A. You asked if I saw him leave the train?

40 Q. I asked you whether you knew that Thompson took your grip from the vestibule of the train?

Plaintiff's: Irwin K. Girden—Re-Cross

A. I noticed Thompson take the grip and bring it to the front of the platform, and that is the last I saw of the grip.

Q. You saw him pile it with the other grips in the vestibule of the train as the train was slowing down? A. I didn't. 10

Q. When did you first know that your grip was missing? A. When I came down to get it.

Q. And the train stopped and he got off first and you assisted your fiancée? A. I did, helped her down.

Q. Any other passengers get off before you? A. Yes, sir.

Q. How many? A. I don't know, a few.

Q. How many, about? A. Four or five.

Q. Did you notice your grips on the station platform when you got off? A. I noticed the lady's grip. 20

Q. What lady's grip? A. The lady I was with.

Q. What kind of a bag was that? A. A bag.

Q. What kind of a bag, a small one? A. A kit bag.

Q. A dark bag like yours, or a tan bag? A. She had a tan one.

Q. You saw that there in the heap? A. Not a heap. The bags are not in a heap. They never are 30 in a heap on the platform.

Q. I don't mean what they never are? A. I am afraid you might catch me in a question. I am trying to be very truthful.

Q. That is what I want you to do? A. To be very explicit, I don't want to be tripped up in any little question.

Q. You say you saw the yellow grip belonging to your fiancée on the station platform? A. I did. 40

Q. How long had the train stopped, if you know,

Plaintiff's: Irwin K. Girden—Re-cross

when you got off the train? A. A matter of three or four minutes, the time to take a walk through the three or four people in front of me.

Q. The train came to a dead stop? A. Then the bags were taken off.

10 Q. You got up and a few people went ahead of you? A. Yes, sir.

Q. Did you see Thompson when you got off the train? A. I did.

Q. Where was he? A. In front of the bags. He was standing at the bags, and they were lined up in front of him.

Q. Did he say anything to you? A. I asked him where my bag was.

20 Q. What did he say? A. Looked around, and he said, "Well, he doesn't see it" he said.

Q. Did he say anything further or did you say anything further? A. I asked where it was.

By the Court: Q. Were there many people on the platform at the time?

The Witness: Which platform?

By the Court: Q. The station platform?

The Witness: People coming out of the train at the time.

By the Court: Q. People passing by?

30 The Witness: Yes, sir.

By the Court: Q. Amongst the bags.

The Witness: Not around the porter. All the baggage was here, and the porter was here (indicating). I asked him, and he said, "Well, perhaps somebody may have taken it by mistake." We should wait and see whether or not there is one bag left, and then we will see if it is taken by mistake.

By the Court: Q. Did you see him down by the bags before you left the platform of the car?

40 The Witness: Why yes.

Plaintiff's: Irwin K. Girden—Re-Cross

By the Court: Q. What was he doing?

The Witness: Why, standing there, getting tips, brushing people's clothing.

By the Court: Q. Looking at the bags?

The Witness: He was standing in front of them.

By the Court: Q. Were they along of him? 10

The Witness: The bags were between the train and the porter; he was facing the train.

By the Court: Q. And the bags were in front of him?

The Witness: Yes, sir; I didn't watch him all the time. The minute I got there I saw him, and I went and spoke to him.

By the Court: Q. That's what I mean, when you left the train.

The Witness: Yes, sir. 20

By the Court: Q. Did you see him before you reached the platform of the station itself?

The Witness: I did. He was catering for tips at the time.

By the Court: Q. What did you see him do?

The Witness: I saw him hand bags to different people.

By the Court: Q. How many bags do you estimate there were there?

The Witness: About ten or twelve. He asked 30 me to wait, and if somebody took my bag by mistake there must be a bag left over, and since there was not any bag left over, he said, "Well, I think it must be stolen." I asked what to do and he said to report to the station master. He went with me and he said the bag was stolen. He said that at the time. He asked him why, and he said, "Well, I don't know."

Q. From the time the train stopped and when you 40 got off, Thompson was facing you all the time? A.

Plaintiff's: Irwin K. Girden—Re-direct

From the time I got off, I was with him all the time from the time I missed my bag.

Q: Did you buy a round trip ticket or a one way ticket? A. One way.

Q. You bought that from Milford to Port Jervis?

10 A. There is no station at Milford?

Q. You bought that at Port Jervis? A. I did.

Q. I show you this ticket and I ask you if that is the type of ticket you bought? A. I bought an Erie Railroad ticket. I don't know if it is the same color, I don't remember that. I don't know whether it was Jersey City or New York, because my transportation entitled me to the ferry; I know that.

20 Q. Entitled you to what? A. To going across on the ferry, but I don't know whether it was the same as the sample ticket or not. It is a long time ago.

Q. Did you check your baggage? A. No, I didn't.

Q. Do you ever check your baggage on any trip from Port Jervis to New York? A. Never. I have never checked baggage, and I have made a great many trips.

30 Q. Did you declare the value to the railroad company, or to anybody what the value of your bag was before your trip started? A. No, I never did. I never checked that baggage, or any baggage as long as I ever made trips.

RE-DIRECT-EXAMINATION by Mr. Saperstein:

40 Q. Did you ever use a golf suit for any other purpose except playing golf? A. Why, yes, I have used a golf suit—whenever I ride a horse I may wear a golf suit. If I go any time to the country I use one.

Plaintiff's: Irwin K. Girden—Re-direct

Q. Whenever you go to the country in the winter time do you take a golf suit along? A. I take one; it is the only thing to use. You can use it right along. I might not use the full suit.

Q. You use a golf suit and it is not limited for use in playing golf? A. A golf suit is used for 10 many things—hikes, for instance. I go horseback riding.

Q. Before you left what caused you to bring your full dress suit along? A. To this place, they have quite a formal affair on New Year's Eve. They have quite a formal Christmas affair Christmas night.

Q. Have you been to this camp before? A. I have.

Q. Did you know that they had a formal New Year's affair when you left? A. Yes, sir. 20

Q. Did you get their program before you left? A. No, but I knew what the camp was like.

Q. When you left you expected to use that full dress suit? A. Sure. I expected to use it and I had the suit there.

Q. Where did the porter pick your bag up from? A. Right in front of where I was sitting.

Q. Was anything said at the time he picked it up? A. Just picked up; wiped my shoes and picked the bag up while I was sitting down. 30

Q. When you came outside on the station platform, and you said, "Where is my bag?" did Thompson say anything to you to indicate that he didn't know which bag was yours? A. He knew my bag so well.

By the Court: Q. He asked you if he said anything?

The Witness: The minute I asked him he knew my bag was missing. He said, "Somebody must have taken it by mistake," he said. 40

Plaintiff's: Irwin K. Girden—Re-direct

Q. Did he ask you which bag was yours? A. He knew my bag. I had a very large bag.

Mr. McIntyre: I ask that that be stricken out on the ground that it is a conclusion, that Thompson knew his bag. There is no testimony here to show that this witness qualified to testify as to what Thompson knew.

The Court: He has answered the question before the objection is in.

Q. This station that you speak of, was that the last station on the road? A. Which station do you mean?

Q. Jersey City? A. Yes, sir.

Q. That is the last station? A. Then there is the river.

20 Q. So that when you got out everybody was getting off the train? A. Everybody was off the train at the time.

Q. And how long do you estimate, if you remember, it took from the time you left your seat in the parlor car after the train stopped to get to the station platform?

Mr. McIntyre: He said four or five minutes.

The Witness: I don't remember; it might have
30 been eight minutes for all I know. He had to take out eight or nine bags, and there was this girl I was with, I was helping her, I was going to marry her and I was not worrying about time.

By the Court: Were the people coming from the day coach, would they pass this place where your baggage was while it was there?

The Witness: I don't know where the coaches were, whether they were in front or back of us. I don't remember.

40 Q. Do you remember whether there was a great

Plaintiff's: Irwin K. Girden—Re-cross

many people on the platform, or all about you? A. There was not so very many.

Q. Were there any about you? A. There was people there.

Q. Were there people getting off the other coaches as well? A. I suppose so. It was the last stop and they have to get off. 10

Q. Did you see them get off? A. I believe they were passing all the time.

RE-CROSS-EXAMINATION by Mr. McIntyre:

Q. You say you were with your fiancée on that trip? A. Yes, sir.

Q. You were pretty well taken up with her? A. Yes, sir.

Q. Giving her a lot of your attention? A. Yes, 20 sir.

Q. Assisting her off the train? A. I was.

Q. You weren't concerned much about your baggage? A. I was very much concerned about the bag.

Q. But you were more concerned about your fiancée? A. Naturally.

Q. How long after that were you married? A. After that. I got married last June in California.

Q. This happened December 1924? A. Well, about six months later. 30

Q. How long had you known your fiancée?

Mr. Saperstein: I don't see the materiality of this.

The Court: Sustained.

Plaintiff's: Irwin K. Girden—Re-direct
Plaintiff's: Andrew Thompson—Direct

RE-DIRECT-EXAMINATION by Mr. Saperstein:

Q. From the time the train stopped did you get
 10 off the train without wasting any time, or did you
 spend any time in the train?

Mr. McIntyre: I object to the form of the question.

The Court: Yes, the question is a little bit involved.

Mr. Saperstein: I withdraw it.

Mr. Saperstein: That is the plaintiff's case.

20 Mr. McIntyre: I now move, if your Honor please, for a nonsuit on the ground that the plaintiff has shown no negligence on the part of either the defendant the Erie Railroad or the defendant Thompson. That he has not shown that there was a violation of any duty by the Erie Railroad Company to the plaintiff and therefore has not made out a prima facie case.

Argued.

30 The Court: The plaintiff has asked leave to reopen the case, and he may do so.

ANDREW THOMPSON, sworn:

Direct-examination by Mr. Saperstein:

Q. Mr. Thompson, are you employed by the Erie Railroad Company? A. Not now, no.

40 Q. You were formerly employed by the Erie Railroad Company? A. Yes, sir.

Plaintiff's: Andrew Thompson—Cross

By the Court: Q. On December 28, 1924, were you employed by the Erie Railroad Company?

The Witness: December 28th? Yes, sir.

Q. For how long before that period were you employed by the company? A. Three years.

Q. What was the nature of your employment? 10
 A. As porter.

Q. You were a porter in the parlor car? A. In the parlor car.

Q. And as a porter in the parlor car for the Erie Railroad Company what was the nature of your duties? A. To assist passengers with their bags, assist them on and off.

Q. Throughout the entire period that you worked for the Erie Railroad Company as porter, was that one of your duties, to assist passengers on and off
 20 with their baggage? A. Yes, sir.

Q. When you passed through the parlor car on this particular occasion did you pick up all the baggage and take it down to the station? A. I asked permission before I took any bag.

Q. You took the baggage off? A. Not all of them, just what the people let me take.

Q. You took several bags off? A. Yes, sir.

Q. Was that a customary portion of your duties with the company to take the bags off? A. To assist
 30 the passengers with bags.

Q. That was part of your customary duties to take baggage off? A. Yes, sir.

Q. Always had been since you began to work for the company? A. Yes, sir.

CROSS-EXAMINATION by Mr. McIntyre:

Q. That is, with the passengers' permission? A. Oh, yes, with the passengers' permission.

Q. You never took a bag unless the passenger requested you? A. No, I didn't touch them. 40

Motion for Nonsuit

Q. It would not be under his control—

By the Court: Q. What I want to know whether it was part of your duties if they required assistance—did you help them off?

The Witness: Helped them off, yes, sir.

10

Jersey City, N. J., Tuesday, June 8, 1926,
2 p. m., trial of the case resumed.

20

Mr. McIntyre: I further renew my motion for a nonsuit on behalf of the defendants, the Erie Railroad Company and Andrew Thompson, on the ground previously stated and also that the complaint discloses no cause of action. If the plaintiff has any cause of action it is set out in paragraphs 6 and 7 of the complaint, or especially paragraph 7; "that the defendant failed to use due care and caution for the safe delivery to the plaintiff of the said valise, so same was wholly lost and the defendant failed and neglected to deliver same to the plaintiff upon demand having been made therefor by the plaintiff."

30

That assumes that the defendant railroad company was an insurer, and that unless the grip in question was delivered back to the plaintiff by the company that it is responsible.

The care of an insurer is not the care required of the defendant in this case. I respectfully submit that the complaint does not disclose and the plaintiff had not proven a cause of action.

40

The plaintiff has failed to prove any negligence. The defendants did all that was required of them. There was no specific allegation of negligence that

Defendants': Andrew Thompson—Direct

the plaintiff has sustained. The baggage was never checked nor its value declared by the plaintiff.

(Motion argued.)

The Court: I deny the motion and give you an exception.

Mr. McIntyre: Note my exception as to 10 each defendant.

ANDREW THOMPSON called by the defense:

Direct-examination by Mr. McIntyre:

Q. Where do you live? A. 247 Van Horn Street, Jersey City.

Q. Do you recall the day upon which the baggage was lost which the plaintiff is now calling for? A. December 28th, 1924.

Q. Just tell the Court and jury in your own words just what you know about this case. A. When we arrived in Jersey City I placed the baggage on the platform.

Q. I don't think the jury can hear you.

The Court: Speak right out; don't be afraid.

30

The Witness: I placed the bags on the platform and assisted the passengers off the car. I was turning around to assist a lady off the car and turned around again and the gentleman told me his baggage was lost.

Q. What did he tell you? A. Told me his bag was lost.

Q. You saw these people in the train, didn't you? A. Yes, sir.

Q. That was Mr. Girden and the lady who was with him? A. Yes, sir.

40

Defendants': Andrew Thompson—Direct

Q. Did they have bags with them? A. One hand bag and a suit case, I call it a large black suit case.

Q. What else? A. A handbag.

Q. What kind of handbag? A. Tan handbag.

Q. Do you know who owned the tan handbag?

10 Mr. Saperstein: I object to that question. He cannot possibly tell who owned it.

Q. Who was in possession of the tan handbag? Did you notice? A. No, I didn't, the two were together.

Q. When you got these handbags did you ask Mr. Girden if you should take them out? A. I did.

Q. What did he say to you? A. He said, "Yes, carry them out."

Q. What did you do then? A. Carried them to 20 the platform.

Q. To the vestibule platform? A. Of the train

Q. And then when the train stopped what happened? A. Placed them on the platform of the station.

Q. Did you have any other grips there? A. About ten or twelve.

Q. You placed them all on the platform of the station? A. The platform of the station.

Q. That is what you ordinarily do, is it? A. Oh, 30 yes, sir.

Q. Now, you said something about the lady getting off the train at the time? A. A lady was getting off, and she got hooked into the door and I turned around to unfasten her. I turned around again and he said the bag was lost.

Q. Who said whose bag was lost? A. The lady's bag.

Q. Did he say the black bag, the large bag described as you have heard? A. No, sir.

40 Q. Did you see the large black bag? A. Yes, sir.

Defendants': Andrew Thompson—Direct

Q. That was there? A. It was there.

Q. Was the lady there too? A. The lady was there too.

Q. And then what happened? A. I carried the black bag to the lost and found bureau and explained the case there. 10

Q. Did Mr. Girden tell you that the lady's bag was gone? A. The lady's bag was lost.

Q. Did you carry the bigger bag? A. I carried his bag to the lost and found.

Q. The lady told you that her bag was gone? A. Yes, sir.

Q. This lady who was with Mr. Girden? A. Yes, sir.

Q. And was that the large black bag that Mr. Girden is now complaining of having been lost; so 20 it was not lost at all? A. Not lost at all, no, sir.

Q. But the bag which the lady had? A. Was lost.

Q. The lady who accompanied him, that is the bag that was lost? A. Yes, sir.

Q. How long time transpired from the time that the train stopped until the time that Mr. Girden told you that the bag was gone? A. About three or four minutes.

Q. Did you watch the bags to see that the proper owners took them away? A. I always say to the 30 people back there, I stay right by the baggage, I cannot watch the baggage, I have to turn around and assist people.

Q. Mr. Girden was present during the entire time? A. He was; he was standing right over the bags.

Q. When you were removing the bags from the platform of the train, Mr. Thompson, to the platform of the station, do you remember where Mr. Girden was standing? A. Yes, he was standing be- 40 hind the bags.

Defendants': Andrew Thompson—Cross

Q. And when they were all located on the platform, on the railroad platform, where was Mr. Girden then, did you notice? A. Standing right behind the baggage.

Q. And the young lady was with him too all that
10 time? A. Yes, sir.

CROSS-EXAMINATION by Mr. Saperstein:

Q. Now, Mr. Thompson, you had made this trip all the way from Port Jervis to Jersey City, had you not? A. Yes, sir.

Q. You testified a moment ago that you knew the large bag was in Mr. Girden's possession, or in the possession of himself and the lady that was with him? A. I did.

20 Q. You saw both those bags before the train reached Jersey City, did you not? A. Yes, sir.

Q. You say there was a large black bag and a smaller handbag? A. Yes, sir.

Q. They are both handbags, aren't they? A. One is a suit case, that's what I would call it.

Q. Do you mean by the suit case, one of these bags that opens all the way and that closes—a grip is that what you mean? A. The long one that opens up one side.

30 Q. What color was the suit case? A. It was black.

Q. How large was the tan handbag? A. I could not say, regular handbag size.

Q. Can you indicate with your hands? A. About that size (indicating).

Q. It was a smaller one? A. Yes, sir.

Q. The sort that ladies carry; and these two bags were in the parlor car and appeared to be in the possession of Mr. Girden from the beginning to the end of the trip? A. That is right.

40 Q. When the train stopped at Jersey City you

Defendants': Andrew Thompson—Cross

picked up these two bags after having asked permission to do so, and brought them to the station platform? A. I did.

Q. Then you brought them from the train platform to the station platform as soon as the train stopped? A. That is right. 10

Q. You were the first one off the train? A. Yes, I was.

Q. You usually are? A. Yes, sir.

Q. Before you took the bags off the train platform because of the passengers getting off? A. Not at all.

Q. Then you took the bags from the train platform down to the station platform? A. Yes, sir.

Q. Do you know where you placed Mr. Girden's bag? A. On the platform. 20

Q. You said you had about ten bags on the station platform? A. Eight or ten bags.

Q. Did you place both of the bags that belonged to Mr. Girden and his fiancée together? A. Together.

Q. You placed them together? A. I did.

Q. Do you remember in what relative position you placed them? A. Opposite each other.

Q. Did you place them at the end of the line of bags that you say you lined up? A. At the end of
the line. 30

Q. On the end? A. On the end.

Q. So that the bags belonging to Mr. Girden and his fiancée were at the end of the bags? A. On the end.

Q. You knew all the time which bag belonged to him? A. Yes, sir.

Q. If that bag were in court today you would be able to identify it? A. Yes, sir.

Q. You could tell which bag was which? A. I
can tell what it looked like. 40

Defendants': Andrew Thompson—Cross

Q. If you saw it in front, if you saw them in front of you today, would you be able to tell they were the two bags? A. No, I could not say that.

Q. Now, afterwards, you say after you left the bags on the station platform you turned around to assist a lady off the train? A. I did.

Q. And then you turned around again and then this gentleman, Mr. Girden, asked you where his bag was, is that right? A. Yes, sir.

Mr. McIntyre: I object to that. That is not the testimony. The testimony was that Mr. Girden told him that the lady's bag was gone, he didn't say "My bag is missing," I merely want to get that cleared up.

The Court: Yes, he did say that.

20 Q. You said a moment ago, did you not, that when the lady's bag was on the station platform you turned around to help a lady off the train and then you turned around again and Mr. Girden then, the gentleman sitting here, said to you, "Where is that"—whose bag? A. The lady's bag.

Q. And he said "Where is that lady's bag"? A. Yes, sir.

30 Q. From the time you delivered the bag to the station platform until he asked you that question only three or four minutes elapsed, is that right? A. That's right.

Q. He didn't waste any time getting off the train, did he? A. No, sir.

Q. He asked you where the lady's bag was? A. Yes, sir.

Q. What did you say? A. I said it was placed on the platform there.

Q. Did you look for it? A. Sure.

40 Q. Did you find one of his bags? A. The one I call a trunk; that big black bag.

Defendants': Andrew Thompson—Cross

Q. The big black bag was found? A. Yes, sir.

Q. What did you do with that? A. Went to the lost and found bureau with it, thinking some one carried the other bag by mistake.

Q. Who carried that bag to the lost and found? A. I carried it.

10

Q. Was it a heavy bag? A. It was.

Q. How heavy would you say it was or don't you know? A. I don't know.

Q. Did he open the bag at the lost and found bureau, or at any time in your presence? A. No, sir.

Q. Who reported the loss? A. I did.

Q. Was Mr. Girden there when you reported the loss? A. Yes, sir.

Q. What did you report to the station master? 20 A. I told him probably some one picked the bag up in mistake, and probably they would bring it back.

Q. Whose bag did you say it was? A. The lady's bag.

Q. Did you hear the station master ask Mr. Girden what was in the bag? A. No, I did not.

Q. Was the lady with him at the time? A. She was.

Q. Did you hear the station master ask her what was in the bag? A. No, I didn't hear; I left them 30 there, that's all I know.

Q. You didn't hear Mr. Girden describe in detail what articles were in the bag? A. No, I didn't.

Q. You didn't hear him state to the station master that he had his golf suit and all these other articles in there? A. I left them there; I didn't hear anything at all.

Q. How much time did you spend in the station master's office? A. About five minutes, I guess. 40

Defendants': Andrew Thompson—Cross

Q. Do you know where they went from the station master's office? A. No, I don't.

Q. Didn't you help them to a taxicab or a cab after leaving the station master's office? A. No, I didn't; I went back to the train.

10 Q. Did Mr. Girden tip you? A. Oh, yes, sir.

Q. Where? A. In the car.

Q. You mean before you took the bag out on the platform? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. You are sure he didn't tip you in the station master's office? A. No, he didn't tip me there.

Q. Did you see him while you were still in the station master's office write out a report as to what was in the bag? A. No, I didn't.

20 Q. You didn't see him write any thing? A. No, I didn't see him write anything.

Q. How much time would you say you spent in the station master's office? A. About five minutes.

Q. Will you tell us what happened in those five minutes in the station master's office, as much as you can remember? A. Just asked to describe the bag, what kind of bag it was; that's all I know.

Q. That's all? A. That's all.

30 Q. And all that took you five minutes? A. I could not say; maybe it took less time than that.

Q. Cannot you give us any more exact idea as to how much time it took you? A. No.

Q. Your best idea is that it took you five minutes, that you were in the station master's office five minutes, and all that you can remember doing was your simply telling the station master a description of the bag, is that all? A. That's all.

40 Q. Will you tell us as nearly as you can remember how you described the bag to the station master? A. I told him it was a tan handbag; that's all I said.

Defendants': Andrew Thompson—Cross

Q. That's all you said and that took you five minutes? A. Yes, sir.

Q. You say you live in Jersey City? A. Jersey City, 246 Van Horne Street.

Q. You are working for the Erie Railroad? A. No.

10 Q. You were not here in court early yesterday morning, and you didn't get into court until about half past eleven? A. Half past eleven.

Q. You came from Easton, Pennsylvania, yesterday morning? A. I did.

Q. Did the Erie Railroad Company give you anything for testifying here today? A. No.

Q. Nothing at all? A. No.

Q. You came all the way in from Easton, Pennsylvania, to be present? A. I did.

20 Q. Without any compensation whatever? A. I did.

Q. The railroad company didn't subpoena you did it? A. No.

Mr. McIntyre: If the Court please, this gentleman is a defendant to the action, and is a party to the suit. I object to this.

The Court: Yes, you have not discontinued as to this man.

30 Q. Has the railroad promised to pay you anything for your testimony here? A. No, they have not.

Q. Nothing at all? A. No.

Q. Did they pay your fare in from Easton, Pennsylvania? A. No.

Q. You paid your own fare? A. Yes, sir.

Q. Isn't it a fact that the railroad sent a special train despatcher for you and sent a special train for you yesterday morning? A. I didn't come in by special train.

Defendants': Andrew Thompson—Cross

Q. Have you from that time to this ever seen Mr. Girden? A. No.

Q. Has the railroad investigator spoken to you about this case?

10 Mr. McIntyre: I object to this. The witness is not qualified to state whether the railroad investigated the case.

The Court: Spoken to him about the case.

Mr. McIntyre: I withdraw the objection, I beg pardon.

(Question repeated as follows: "Q. Has the railroad investigator spoken to you about this case?")

A. Yes, sir.

Q. You made a statement to him, did you not?

20 A. I did.

Q. In that statement didn't you tell him that it was Mr. Girden's bag that was lost? A. No, I didn't.

Q. You didn't? A. No.

Q. Do you know who Mr. Waldron is? A. Yes, I know him.

Q. What is his position with the railroad? A. He is the chief dispatcher agent for that section.

Q. You spoke to Mr. Waldron about this case, 30 didn't you? A. I did.

Q. And Mr. Waldron asked you for a complete statement, did he not? A. He did.

Q. At any rate Mr. Girden and yourself both agreed that a bag had been lost? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. You reported to the station master that a bag had been lost? A. Yes, sir.

Q. You have no idea what was in the bag? A. No, indeed.

40 Q. You didn't wait to hear what was in the bag at all? A. No.

Defendants': Andrew Thompson—Re-direct

RE-DIRECT-EXAMINATION by Mr. McIntyre:

Q. Who are you employed by? A. The Lehigh Valley.

Q. Did you lose any pay on account of this case? 10 A. Yes, sir.

Q. How many days did you lose this week on account of this case? A. Yesterday until Friday now.

Q. Monday, Tuesday, Wednesday, Thursday and Friday.

By the Court: Q. Do I understand you to say, there is no doubt about it, that at the time of this accident which was December 28, 1924, you were employed by the Erie Railroad Company? A. Yes, 20 sir.

By the Court: Q. In what capacity?

The Witness: Dining car and parlor car combined.

By the Court: Q. Of the Erie Railroad?

The Witness: The Erie Railroad.

By the Court: Q. Your duty was to assist passengers with their baggage in getting on and off the train?

The Witness: Yes, sir.

By the Court: Q. But when a passenger asks you; 30 you never touch them unless he does?

The Witness: Never touch the bags unless I ask.

Q. You always get a passenger's permission to get his baggage? A. Yes, sir.

Q. This incident of the lost and found bureau, you went you say from the station, from the train, to the lost and found bureau, in company with Mr. Girden and his fiancée, is that right? A. Yes, sir.

Q. You carried the grip? A. I carried the grip.

Q. You say five minutes; do you mean actually 40

Defendants': Andrew Thompson—Re-cross
Defendants': Andrew Thompson—Re-direct

five minutes or just a few moments? A. Just a few moments, I said five minutes at most, but it may be just a few moments.

By the Court: Q. Five minutes to do what?

10 The Witness: To go to the station.

By the Court: Q. Did you carry both of these grips?

The Witness: Just carried one.

By the Court: Q. Which one did you have?

The Witness: The black one.

By the Court: Q. You didn't have the other?

The Witness: Didn't have the other one, no, sir.

By the Court: Q. And the black one you say was not missing?

20 The Witness: Was not missing.

RE-CROSS-EXAMINATION by Mr. Saperstein:

Q. Didn't you say a moment ago that you took both bags and laid them on the platform from the train?

By the Court: Q. That is what I am asking you. You took both bags from the inside of the car out to the station platform and put them down?

30 The Witness: Yes, sir.

RE-DIRECT-EXAMINATION by Mr. McIntyre:

Q. And immediately Mr. Girden followed you?

A. One of the first ones.

Q. And stood over the bags? A. Yes, sir.

Q. Over his own bag? A. Yes, sir.

Q. And then you assisted some lady off the train, and then he told you the bag was gone? A. Yes,

40 sir.

Q. The lady's bag? A. Yes, sir.

Defendants': Andrew Thompson—Re-cross
Defendants': Andrew Thompson—Re-direct

RE-CROSS-EXAMINATION by Mr. Saperstein:

Q. In the meantime, Mr. Girden, before he got off, did you do anything besides assist this lady off the train? A. Other people coming off the train 10 too.

Q. You were assisting those? A. Yes, sir.

Q. While you were assisting them you didn't pay any attention to the bags, did you? A. No.

Q. What did you do when a passenger came out and asked you for their bags? A. I would just say, "Get your right bags"; I didn't do no more than that.

Q. When a passenger came out you let them take any bag that was lying there and walk away with 20 it, is that right? A. Not take any; supposed to take their own bag.

Q. Supposed to take their own bags? A. Yes, sir.

Q. But they could pick up a wrong bag and walk away with it and you would have nothing to say about that? A. What could I say?

Q. And you knew Mr. Girden had two bags, didn't you? A. When the bags were placed together naturally I would know those.

Q. You knew that these two bags which laid at 30 the end of the line belonged to him? A. Yes, sir.

Q. You knew that if any one took those bags some one was doing a wrongful act, isn't that right? A. Yes, sure.

RE-DIRECT-EXAMINATION by Mr. McIntyre:

Q. Suppose one of Mr. Girden's friends came over there and picked up the bag, would you say, "Leave 40 that bag, it belongs to Mr. Girden"?

Motion for Direction of Verdict
Plaintiff's: Irwin K. Girden—Direct

Mr. Saperstein: I object to the question as entirely immaterial.

The Court: Sustained.

10 Mr. McIntyre: Defendants rest.

Mr. McIntyre: I would like to make a motion for a direction of verdict on the ground that the plaintiff, first, has not borne the burden of proving his case beyond a fair preponderance of the evidence.

Mr. Saperstein: I have rebuttal, if your Honor please.

20

IRWIN K. GIRDEN, the plaintiff, re-called in rebuttal:

By Mr. Saperstein: Q. When you discovered the loss of your bag and you went to the station master to report the loss, did you or the porter report the loss? A. We were both there together when he said the bag was lost, and the station master said, "Well,

30 if you identify it I might possibly find it for you. Somebody might have taken it by mistake."

Q. Did he ask what was in the bag that was lost? A. Yes, sir. Asked what was in the bag, and to describe the bag.

Q. To the porter? A. No, the porter knew it was my bag.

Q. Which bag did the porter describe to the station master; your bag? A. Right.

Q. What did he say; what was his description?

40 A. He said it was a very heavy, large bag, black bag.

Plaintiff's: Irwin K. Girden—Direct

Q. While you were standing there did the station master ask you to describe its contents? A. Asked me what was in it.

Q. Did you tell him? A. I told him the golf suit and a couple of suits and a lot of things and he said better make it in writing. 10

Q. Did you ever on that occasion or at any time say that the bag that was lost was not your bag? A. No, I never said so.

Q. Did you ever on that occasion or at any time say that the bag that was lost was not your bag? A. No, I never said so.

Q. Did you ever on that occasion or at any time say that the bag that was lost was a tan bag? A. Never did.

Q. Have you got the black bag that Mr. Reynolds 20 gave you now? A. No, I have not.

Q. Did you buy a new bag? A. I did.

Q. What kind did you buy? A. I bought a tan bag.

Q. Similar to this one? A. Yes, sir.

Q. What was the purpose in buying that bag you did? A. To carry clothes.

Q. You didn't have a grip at the time?

Mr. McIntyre: I object.

Mr. Saperstein: I withdraw it. 30

Q. Did you have a grip at the time? A. I didn't have.

Mr. McIntyre: I object to this entire line of question and I ask that it be stricken out. It has no material bearing on the issue, which we are here upon, and it is not rebuttal. None of this testimony which is supposed to be rebutted was brought out about a tan bag or a black bag.

The Court: The only thing is you didn't 40 object to it at the time. The question is im-

Plaintiff's: Irwin K. Girden—Direct

proper and it should be objected to at the time it is asked.

Juror No. 7: Didn't the witness testify he bought two bags; I didn't know they were the same thing.

10 The Witness: I said I bought five bags and all were like that. I went to California on a trip, and I bought two something like it. I have a receipt for those bags.

Q. This tan bag you just described to us was one of the five, was it? A. Yes, sir.

Q. Now while Mr. Thompson was standing in the station master's office, did the station master give you any directions with regard to reporting your loss? A. Yes, told me to call some man up at the
20 office, to get in touch with him, at the Erie office. It was a Jersey number—I don't remember the number now. It was Montgomery something, I am not sure.

Q. Was this discussion in the office at the time? A. We were in the office, we were outside of the office; I never would let him get away until the whole thing was finished.

Q. You held him there? A. I would not let him get away until he completed the report.

30 Q. And from the station master's office you went where? A. To a taxi.

Q. Did Thompson go with you? A. Yes, and he was very profuse in his apologies at the time, and everything else.

Q. Did he put you in the taxicab? A. He put us in. I tipped him again in the taxi. I was in the taxi. It was a heavy bag too—it was a heavy bag to carry. He seemed to be very nice to me, and he
40 tried to do the best he could for me all the time. I kept him from his duty at least for half an hour while the thing was going on.

Plaintiff's: Irwin K. Girden—Direct

Q. He was with you half an hour? A. All the time, station master's office and fussing around.

Q. From the station master's office where did you go? Did you go home? A. I went home after that.

Q. Did you have any bag at all when you went home? A. One bag. 10

Q. Whose bag was that? A. My wife's now.

Q. And that was a tan bag? A. Yes, sir.

Q. After that did you make a report to the railroad company in writing? A. I spoke to a man three times at the office, and I sent him a list in writing.

Q. What man did you speak to? A. I don't remember, I think his name was Wingle.

Q. Did you give him a list in writing? A. I gave him a list in writing. 20

Q. Were the articles enumerated on that list the same as the articles you testified to here yesterday? A. They were. I gave him no amount. I told him to take the list, and he said he would send around a man. He said he didn't want to take the case to court, because the porter said the bag was stolen and he wanted to keep it out of court, to keep it from going to court. He wanted me to keep in touch with him before I did anything. I don't know how long it was. He promised to have a man next
30 week, and a man came and asked me to give him a list of all the articles, and I gave it to him, went over every one.

Q. Prior to the commencement of this suit did any officer or agent of the railroad company, the Erie Railroad Company, deny that it was a black bag that was lost, and that it was your bag?

Mr. McIntyre: I object.

The Court: What is the difference?

Mr. McIntyre: I object on the ground that 40

Plaintiff's: Irwin K. Girden—Direct

there is no proof that it was an officer or agent, or any one representing the railroad company, spoke to him. The mere assertion that it was an officer or connected with the Erie Railroad would not establish that.

10 The Court: I don't think that whether it was or was not, and whether anybody ever spoke to him about it would make any difference.

Mr. McIntyre: Furthermore the witness is here in rebuttal. I understand that they are putting him on the stand to rebut testimony offered by our witnesses.

20 The Court: It has not been shown that a duly authorized agent knew it was a particular kind of bag.

Mr. Saperstein: I will reframe the question.

Q. You say you spoke to an agent of the Erie Railroad Company? A. I spoke to a man on the phone at least three times.

Q. Did he tell you who he was? A. Well, I asked the station master, and he gave me a number to call up.

30 Q. And you called up that number? A. I called up that man and he sent a man to my office and I gave him a list of where I bought all this stuff.

Q. And he said nothing about the ownership of the bag? A. Not at that time or at any other time.

Mr. McIntyre: I don't think that question is proper. I will stipulate, if you want me to, that Mr. Girden said it was a black bag. There is no difference.

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Plaintiff's: Irwin K. Girden—Cross

CROSS-EXAMINATION by Mr. McIntyre:

Q. You say you tipped Mr. Thompson, did you?

A. Yes, sir.

Q. At the taxicab, and you went directly home, did you? A. I took the lady home.

Q. You and your now wife? Where did you live?

A. I lived home.

Q. And where was that location? A. Waverly 10 Place.

Q. New York City? A. Yes, sir.

Q. Downtown or up? A. Around Eighth Street, Fourth and Eighth Street, between that section.

Q. Did you go over in a taxi? A. Took the ferry across.

Q. In a taxicab? A. Yes, sir.

Q. You say you tipped Mr. Thompson first in the train, in the office, and then again in the taxicab? You tipped him three times, as I understand it. A. 20 I didn't say anything of the kind.

Q. I am only asking if you did; I am only asking you what you did say? A. I tipped him after I bought the ginger ale on the train, and then at the taxicab.

Q. The tipping is the only part we are interested in. A. I tipped him then, and then at the taxicab at the side of the ferry that we got into, because Mrs. Girden was not feeling well, all the excitement there, and we took a taxicab at the ferry across. 30

Q. You say that Mr. Thompson made a report, did you? A. I made the report and the man asked me to describe it.

Q. Describe it? A. What Mr. Thompson said, he said the bag was stolen.

Q. Now, you say that Mr. Thompson said the bag was stolen? A. He said it was. He said a large black bag was stolen. That is what he said; he described it as a large black bag.

40

Plaintiff's: Irwin K. Girden—Cross

Q. And he said nothing more about the bag, Thompson didn't say anything more? A. I think perhaps somebody else—the reason he asked me to describe what was in the bag was because Thompson said that perhaps somebody made a mistake.

10 Q. That is what he said? A. He said the bag was stolen. He said perchance somebody took it by mistake. That is what he told the man.

Q. Did he say anything else? A. Yes, sir.

Q. What else did he say? A. He told me to report the thing to the office and give my full number.

Q. Mr. Thompson did that? A. No, he did not.

Q. I am asking you what Mr. Thompson said? A. Yes, he did, he said he was very sorry about the whole thing, he said he hopes I find my bag.

20 Q. He said that it was a black bag that was stolen? A. He told the station master it was a black bag, a large black bag.

Q. Then he corrected what he said, that somebody took it away by mistake? A. No, he didn't correct it, he just added to that.

Q. What was the addition? A. He said somebody took it by mistake.

Q. Wasn't that a correction? A. I don't think so.

30 Q. We will not quarrel on that? A. He supplemented it.

Both sides rest.

Motion for Direction of Verdict

Mr. McIntyre: I now move for a direction of verdict in favor of each defendant on the grounds I mentioned yesterday in my motion for nonsuit.

(1) That the plaintiff has not shown any negligence on the part of the defendant company, or its agent, Thompson, as alleged in the complaint which was the proximate cause of the loss. 10

(2) On the ground that the rule requires that the plaintiff shall show by a fair preponderance of the evidence in the case, any such negligence before he is entitled to a verdict, and that the plaintiff has not borne that burden. 20

(3) On the further ground that we owed the plaintiff no duty other than that of reasonable care and the plaintiff has not shown that we did not use such care and precaution. It is not our duty to take the baggage of an individual and deliver it back again; our duty is simply to use reasonable care to take the baggage off the train and place it on the station platform. 30

(4) We further contend that this defendant was a gratuitous bailee of the plaintiff, in that he engaged the defendant Thompson for his own convenience to take the grip from the train to the platform.

(5) On the ground that there is contributory negligence on the part of the plaintiff in that the plaintiff or passenger as in this particular case, engaged his fiancée in con- 40

Defendants': Andrew Thompson—Direct

versation and did not give attention to the disposition of the baggage; the defendant certainly is not liable if there is contributory negligence.

10 The Court: I think there is enough to go to the jury; I will deny your motion and give you an exception.

Mr. McIntyre: Note my exception.

Thereupon counsel summed up to the jury.

20 (At the request of the foreman of the jury the Court reopened the case to call Andrew Thompson.)

ANDREW THOMPSON, re-called:

Examination by the Court:

Q. The foreman wants to know whether or not you accompanied this gentleman to a cab after you had gone to the baggage room?

30 The Witness: No, I didn't.

By the Court: Q. He did not tip you for carrying this bag to the cab? A. No, sir, didn't go to the cab.

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CHARGE

The Court then charged the jury as follows:

The Court: Gentlemen of the Jury:

On December 28, 1924, Irwin K. Girden became 10 a passenger of the Erie Railroad Company at Port Jervis in the State of New York, having bought his ticket, and I understand that it is not disputed that he was a passenger to New York City over the lines of this company.

He claims that at that time he had with him two bags, which he describes as a large black bag, and another bag of a tan or lighter color which he describes as belonging to the lady who subsequently became his wife.

They travelled together on this train and in what might be called a Pullman car, at least a car other than that ordinarily devoted to the carrying of passengers on a regular ticket, to Jersey City. When they reached their destination on the New Jersey side of the river, the plaintiff here claims that he turned over the two bags to Mr. Thompson, Andrew Thompson, who it is conceded, as I understand it, was an employe of the Erie Railroad Company; that he did that for the purpose of having these bags 20 taken from the car to the platform outside.

He says that he followed in a few minutes after the bags had been taken out and put on the platform, and when he got out there, he asked for the bags and one of them was missing and he says it was the large black bag which belonged to himself. It was not delivered to him; it could not be found.

He made a complaint regarding its alleged loss and not having been returned to him and he not having been compensated for the value of the articles therein contained, he has brought this suit 30 40

Charge

as plaintiff against Andrew Thompson and the Erie Railroad Company, to recover the reasonable value of the bag and its contents, and the plaintiff's claim is based upon a charge of negligence. It is insisted that Andrew Thompson was negligent and that
 10 his negligence was the proximate cause of the disappearance of this bag, and that he was an employe of the Erie Railroad Company, acting within the scope of his authority at the time, and that therefore the Erie Railroad Company, as well as Thompson, is responsible for this loss inasmuch as it is claimed that the articles contained in this bag constituted personal baggage.

Well, now, these defendants, both of them, Andrew Thompson and the Erie Railroad Company,
 20 both charge this plaintiff with contributory negligence. They both deny that they were negligent.

The Erie Railroad Company claims that Thompson was not its agent for the purpose of removing these bags from the compartment in the car to the platform; that the articles were not what are termed personal baggage, concerning which I will speak to you in a moment, and they insist, that is, the Erie Railroad Company, that if there is any responsibility, the responsibility is only and solely that of
 30 Thompson, because they say that it was an act of courtesy on his part, not connected with and within the scope of his employment by the Erie Railroad Company.

Now, there briefly you have the issues presented. You see, the suit is based upon a charge of the negligent handling of the plaintiff's personal baggage, while a passenger on the train of the Erie Railroad Company by the defendant Thompson as agent of the Erie Railroad Company, as the proximate cause of which it is claimed that the bag was
 40 lost or stolen or disappeared.

Charge

Now, the burden rests upon the plaintiff here to prove his case to your satisfaction by a fair preponderance of the evidence. Now, that does not necessarily mean the greater number of witnesses on the one side, nor on the other. It has reference
 10 more particularly to the greater weight of the evidence. It refers to the quality rather than to the quantity of the proof on the one side or on the other.

Now, in the first place, gentlemen, with respect to this case, which the plaintiff has the burden of proving to your satisfaction by a fair preponderance of the evidence, it must be apparent that the first question to be solved is whether or not the bag which was lost, and apparently it is conceded that one bag was lost, belonged to this plaintiff. Was it
 20 his bag? If it was not, that ends the case, of course, because he could not have a recovery for the loss of a bag and the contents of a bag which didn't belong to him.

Now, the next point which seems, I think, to be conceded, is whether or not this bag, this particular bag for which this claim was made, was delivered to Mr. Thompson for the purpose of being carried from the car to the platform. I understood him to say it was; therefore your duties with regard to that point are solved.
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Then the next question which will present itself is whether or not the defendant Thompson, as far as the Erie Railroad Company is concerned, in doing what he did at the time, was the servant of the Erie Railroad Company, acting within the scope of his employment, because if he was not so acting, then any negligence, if you should find that there was any negligence on the part of Thompson, could not be chargeable to the Erie Railroad Company.

Now, it is not denied by the witnesses produced
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Charge

here that Thompson was employed by the Erie Railroad Company and he says that it was for the purpose of assisting passengers with their baggage on and off the train. Now, any negligence which could in any way be chargeable as against Thompson must
 10 have occurred between the time when he took over the bags and the time when the loss was discovered upon the station platform. Now, in doing what he did in that period of time, was he the agent of the company, acting within the scope of his employment.

Our Supreme Court has said, that for all acts done by the servant in obedience to the express order or directions of the master, or in the execution of his master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given and circumstances under which the act is done, the master is responsible. For
 20 acts which are not within these conditions, the servant alone is responsible.

Well, now, gentlemen, a servant may derive authority other than by express direction. If a line of conduct is pursued by a servant or agent for a period of time sufficient for it to have become known to his employer and the employer permits that person to continue on in the doing of that thing without objection, so that a custom grows up of permitting the agent to do the thing which later is complained of, then the master could not successfully say that the agent had no authority to do that thing. and so, whether or not an act is within the scope of the agent's authority, may depend upon something more than the exact language of the instructions
 30 given to the agent himself. It is not only what he

Charge

is directed to do, but what he is held out by implication on the part of his master as having the authority to do.

So, gentlemen, if you reach the conclusion that Thompson, in doing what he did on this occasion was not acting within the scope of his employment
 10 for this company, that would end the case so far as the Erie Railroad Company is concerned and you would be required to bring in a verdict in favor of that company and against this plaintiff.

But of course that would not relieve the defendant Thompson if he were found to be negligent and his negligence was the proximate cause of the loss of this bag.

Now, if Thompson was acting within the scope of his authority at the time, then what duty was owing from the company to this plaintiff? If the porter was acting within the scope of his employment when he took the bag, in legal effect it was the same as if the defendant personified had taken it, and therefore the plaintiff's property was lawfully in the possession of the defendant, then the question arises, what was the duty of the defendant in reference thereto. Its position was not that of a carrier, because the bag had not been checked as baggage, nor entrusted to the company for the extent of the journey, but had been retained in the custody of the passenger throughout this trip until arrival almost at the destination. But it was delivered at this particular time, delivered to this defendant, Thompson, only for the special purpose of aiding the plaintiff as a passenger in getting off the train, as he says, in accordance with his usual custom, if that is the case, if that is a fact. Hence the Railroad Company was not liable as an insurer in this case. Its position was that of bailee and the law of bail-
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Charge

ment measures its obligation to the plaintiff in regard to his property.

In the absence of special agreement, it has been held a carrier, such as a railroad company, does not assume control of such money or other personal effects as passengers may bring into its cars, and its duty with reference to such effects is merely to exercise reasonable care to protect them from loss or injury. It does not assume to exercise the liability of an insurer, but becomes liable only for failing to exercise such reasonable care to protect such effects; and that liability extends to their employes while acting within the scope of their employment in carrying passengers' baggage to and from the trains.

20 So you see, at the bottom and fundamentally, there could be no liability here even though Thompson was acting at the time within the scope of his employment, unless Thompson was negligent and unless he did something which a reasonably prudent person would not have done, or he failed to do something which a reasonably prudent person would have done under the same circumstances. And further, unless any negligence on his part was the proximate cause of the disappearance of this baggage.

30 Now, by proximate cause, we mean that cause which naturally and probably led up to and which might have been expected to produce the very result complained of. It is the moving cause, the cause which leads up to the result complained of.

Now, gentlemen, even though you should find that this bag which disappeared, was the plaintiff's bag, that in taking it and doing with it what he claims to have done with it, Mr. Thompson was acting within the scope of his employment, and that

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Charge

he was negligent and that his negligence was the approximate cause of the disappearance of this bag, nevertheless, gentlemen, so far as the Erie Railroad Company is concerned, it would, under such circumstances, only be responsible for such articles contained in this bag, as well as the bag, itself, as constituted personal baggage. 10

Now, I think when I have given you a definition of personal baggage, it will be readily seen that most of these articles would fall within the definition of personal baggage. But for the purpose of complete understanding of this case, it has been said that the term baggage, or the term luggage which means the same thing, within the rules determining a carrier's duty to transport baggage and its liability for the delay, loss, or injury thereof, is generally so defined as to include whatever articles a passenger usually takes with him for his own personal use, comfort, and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to his immediate necessities or the ultimate purpose of his journey. 20

Our courts have said that he is entitled to take with him for use his personal baggage proper to the journey and its object, that is, not only wearing apparel for use and ornament, but also other articles, within reasonable limit, the use of which was personal to him during the journey and in accomplishing its purposes. 30

Now, as to all other articles, which, though you find that they were in such bag, did not constitute personal baggage, even though you should find there was liability so far as these other elements of liability are concerned, the railroad company would only be responsible for those things which consti-

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Charge

tuted personal baggage within this rule, and you will remember what the items were as have been detailed here by the plaintiff himself.

But, gentlemen, even though you should find that Thompson took over the custody of the plaintiff's
10 bag and that it was his bag which disappeared and that it disappeared and was not found because of any negligence on the part of Thompson as the proximate cause of its non-delivery to the plaintiff in this case, under the evidence here, and if you find that it constituted personal baggage, and that Thompson was the agent or servant of the company, acting within the scope of his authority, still you have another question to determine before you could render a verdict in favor of this plaintiff and against
20 these defendants or either of them.

And that is, whether or not the plaintiff was himself guilty of any contributory negligence. That is set up as a defense here by these defendants, and that being the case, the burden now rests upon them to prove that to you by a fair preponderance of the evidence in this case. Now, the evidence bearing upon the plaintiff's contributory negligence is rather meager, but of course, he was required to exercise reasonable care with respect to this bag-
30 gage. If he did not exercise such reasonable care and thereby contributed in any measure or degree to the eventual loss as it is claimed, then he could not have a recovery and your verdict would have to be for the defendants and against the plaintiff in this case.

Now, as I intimated a moment ago, if you find that Thompson was liable in this case, it would not necessarily follow that the Erie Railroad Company would be liable also, because that would depend up-
40 on whether or not Thompson was acting within the

Charge

scope of his authority in doing what he did upon this occasion. That is the only way that you can tie up any negligence, if found on his part, with the defendant Erie Railroad Company. So, if it should appear that Thompson was negligent and that his negligence was the proximate cause of the losing of
10 this bag, and this plaintiff was free from any contributory negligence, and it was his bag that was lost, you might find that Thompson was liable; at the same time, you might find that he was not acting within the scope of his employment and find that the Erie Railroad Company was not responsible, and in such event, it would be entitled to a verdict as against the plaintiff of no cause of action.

Now, gentlemen, I think I have covered the rules of law applicable to this case, as far as it is neces-
20 sary, and it is for you to apply them to the evidence, having these rules to guide you. You must remember that you have to decide this case upon the evidence that has been presented here. You have taken your oath to that effect. You are not to be swayed by passion or prejudice, or what you may think may have occurred on this occasion; if there is no evidence to back it up, or no inference that can be reasonably drawn from the evidence that has been presented here. You are to decide the issue upon
30 the evidence presented, together with the reasonable inferences that may be drawn from that evidence, applying the rules of law that I have given you.

If you do that conscientiously, you will then render a right verdict, no matter whether you find for the plaintiff or the defendants.

But, gentlemen, if you find for the plaintiff, you should have in mind the rule as to the admeasurement of damages, remembering what I have already told you, that in any event, the plaintiff could only
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Charge

recover as against the Erie Railroad Company for such items as were lost as constituted personal baggage within the rule that I have read to you. For such articles, if he is entitled to your verdict at all, he is entitled to recover the market value of such
 10 articles at the time of their disappearance, which was December 28th, 1924, according to the plaintiff's own testimony.

Now, there has been no direct testimony as to the actual market value of these articles at that specific time. The plaintiff has been permitted to testify to the cost of most of these articles, and that was done because market value is not easily ascertained. It is an element to be taken into consideration, but the sole measure of damages is not the
 20 original cost price of these articles, but it is the market price of these articles; yet the original cost is an element to be considered in ascertaining the market value at the time of the loss. You must remember what has been said upon the subject; the length of time the various articles have been in use; the circumstances under which they were purchased; the condition they were in according to the testimony, at the time they disappeared. It would not do to say now that the market value of these
 30 articles would be the price that was paid for them; what the plaintiff is entitled to recover you would ascertain by ascertaining the value of them at the time of the incident.

You may now retire.

(The jury retired.)

Mr. Saperstein: I except to that part of your Honor's charge wherein your Honor states that if
 40 it was not the plaintiff's bag, he could not of course

Charge

recover. There is no proof in the case that it was not the plaintiff's and that the contents of the bag did not belong to the plaintiff is not disputed. Also to so much of the charge as fixed the duty of the railroad company as regards the plaintiff as that of bailee.
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The Court: That that did not allow them to say that he was an insurer?

Mr. McIntyre: I except to that part of the Court's charge where the Court charged that where the master permits something to be done or a course of action to continue with the master's knowledge, then the jury may find for the plaintiff as against the railroad company as being prejudicial to the defendant railroad company.
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(The Jury was summoned to the court room by the Court.)

The Court: Gentlemen: I have called you back because in an extemporaneous charge, there may be certain items that are not clearly developed.

In taking up the question of damages just now, if you find for the plaintiff, that the plaintiff was entitled to your verdict, I may have stressed the Erie Railroad Company as a defendant, stating that
 30 for such of these articles as would constitute personal baggage, that the plaintiff would be entitled to recover the market value thereof. I did not mention Thompson. Of course, the same measure of damages would apply to him, if he exceeded or went beyond the scope of his authority, not acting within the scope of his authority as a servant or agent of the railroad company, so that if you find that he took over these things as bailee himself, then of course the plaintiff would be entitled to a verdict as
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Charge

against him, if otherwise liable, that is that his negligence was the proximate cause of this loss, and this plaintiff was not in any way contributorily negligent; why, then, the plaintiff might recover the market value of the articles that were in that
 10 bag at the time. But, on the other hand, if he was acting within the scope of his employment—now, get this clearly, if he was acting within the scope of his employment, then of course the plaintiff could recover as against the railroad company for such articles as constituted personal baggage and the market value thereof at the time of the loss.

Now, I may have said there could be no recovery if this bag didn't belong to this plaintiff. I should qualify that, if I did say that: I say that there
 20 could be no recovery if these articles were in a bag belonging to somebody else and they were not the property of this plaintiff. In other words, if this was the bag of the lady who was accompanying him at the time, and the contents belonged to that lady, then of course there could be no recovery here, but if on the other hand, the contents of the bag did belong to this plaintiff and you find that the defendants were otherwise liable, remember this, that whether these articles in that bag were actually
 30 bought by him, or only loaned to him, he could recover for their loss, and he would be compensated for their market value; he would be entitled to recover the market value from these defendants if you find that he is entitled to recover anything at all.

Now, exception has been made to another portion of the charge which counsel has got confused. It is claimed that I said that if you should find there was a course of conduct on the part of this defendant Thompson in taking the bags of passengers from in-
 40 side and out to the station platform, and that this

Charge

was known to the defendant company, that therefore they would be liable to the plaintiff. I don't think I put it as broad as that: What I meant was, and I repeat it now so that there will be no doubt about it. You could not find the Erie Railroad Company responsible, even though all the
 10 other elements were present that I have mentioned constituting liability, unless you further find that what this man Thompson did which accounted for or brought about or was the proximate reason or cause for the loss of the bag, was done within the scope of his authority, and also such conduct might be expressed by word of mouth, or it might arise by implication or it might have grown out of acts done by the agent as a result of his being held out by this company as having certain authority, al-
 20 though it was not expressly and directly given to him.

Now, gentlemen, you may retire.

(The jury retired.)

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OPINION OF SUPREME COURT

(Filed, March 3, 1927)

NEW JERSEY SUPREME COURT

10 No. 36, Oct. T. 1926.

IRWIN K. GIRDEN,

vs.

ANDREW THOMPSON and ERIE
RAILROAD COMPANY.

Appeal from Hudson County Circuit Court.

20 Argued before Gummere, Chief Justice, and Justices Trenchard and Minturn.

For the appellants, Edward A. Markley and Charles W. Broadhurst.

For the respondent, John N. Platoff.

PER CURIAM.

30 The plaintiff was a passenger traveling on a train of the Erie Railroad Company from Port Jervis to Jersey City, riding in a parlor car attached to that train. When he reached his destination he surrendered possession of his suit-case to the defendant Thompson, who was a porter on the parlor car. The latter carried it out to the platform, together with baggage belonging to other passengers. When the plaintiff alighted he discovered that his suitcase had disappeared, and a search made for it by the porter was unavailing. The present suit was instituted to
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Opinion of Supreme Court

recover the value of the suit-case and its contents. The plaintiff had a verdict against both the railroad company and the porter, and the defendants have appealed from the judgment entered upon it.

The only ground upon which we are asked to reverse this judgment is that there was no evidence of negligence on the part of the defendant Thompson which was the proximate cause of the plaintiff's loss, and that consequently, a verdict should have been directed both in his favor and in favor of his employer, the railroad company as requested by their counsel. We think the motion was properly denied. The company was a bailee, performing a service incidental to the carriage of the plaintiff as a passenger. The law required it, as such bailee, to exercise some degree of care for the protection of the plaintiff's suit-case while in the possession of its agent to prevent it from becoming lost or stolen. Whether it discharged this duty or not depended upon the proofs submitted, and presented a question of fact for the determination of a jury, rather than one of law, to be settled by the court.

The judgment under review will be affirmed.

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JUDGMENT OF AFFIRMANCE*(Filed, March 22, 1927)***NEW JERSEY SUPREME COURT**

10 On Appeal from Hudson County Circuit Court

IRWIN K. GIRDEN,	}
Plaintiff-Respondent,	
vs.	

ANDREW THOMPSON and ERIE	}
RAILROAD COMPANY,	
Defendants-Appellants.	

20 This cause having been duly brought to a hearing on an appeal from the Hudson County Circuit Court at the October Term, 1926 of this Court, and the Court having heard Edward A. Markley and Charles W. Broadhurst, of counsel with the defendants-appellants, and John N. Platoff, of counsel with the plaintiff-respondent, and having duly considered the questions brought up by this appeal and finding no error in the records or proceedings in the Hudson County Circuit Court;

30 IT IS THEREUPON ORDERED AND ADJUDGED that the judgment of the Hudson County Circuit Court from which this appeal was taken, be and the same hereby is in all things affirmed with costs; and that the record in this case be remitted to the Hudson County Circuit Court for further proceedings thereon according to law and the practice of that court.

Entered March 22nd, 1927.

On motion of

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JOHN N. PLATOFF,
Attorney of Plaintiff-Respondent.

Notice of Appeal

A true copy.
Edward J. Kelleher,
Clerk.

NOTICE OF APPEAL

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*(Filed, March 26, 1927)***NEW JERSEY SUPREME COURT**

Action at Law.

IRWIN K. GIRDEN,	}
Plaintiff-Respondent,	
vs.	

ANDREW THOMPSON and ERIE	}
RAILROAD COMPANY,	
Defendants-Appellants.	

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To John N. Platoff, Esq., Attorney for Plaintiff-Respondent:

Sir:

TAKE NOTICE that the defendants-appellants appeal to the Court of Errors and Appeals from the whole of the judgment entered in this case.

Respectfully,

Dated, March 24th, 1927.

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

Service acknowledged March 24th, 1927.

John N. Platoff,
Atty. of Plaintiff-Respondent.

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GROUND OF APPEAL*(Filed, March , 1927)***NEW JERSEY COURT OF ERRORS AND APPEALS**

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Action at Law.

On Appeal from New Jersey Supreme Court

IRWIN K. GIRDEN,
Plaintiff-Respondent,
vs.

20 ANDREW THOMPSON and ERIE
RAILROAD COMPANY,
Defendants-Appellants.

The appellants state the following Grounds of Appeal:

1. The Supreme Court of New Jersey erred in giving judgment for the plaintiff-respondent, instead of for the defendants-appellants for some one or more of the grounds of appeal urged in said Supreme Court.

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Dated, March 26th, 1927.

Respectfully,

COLLINS & CORBIN,

Attorneys of Defendants-Appellants.

Service acknowledged March , 1927.

John N. Platoff,

Attorney of Plaintiff-Respondent.

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NEW JERSEY

Court of Errors and Appeals

ON APPEAL FROM NEW JERSEY SUPREME COURT

10

IRWIN K. GIRDEN,
Plaintiff-Respondent,

vs.

ANDREW THOMPSON and ERIE
RAILROAD COMPANY,
Defendants-Appellants.

Action at Law.

**BRIEF OF COLLINS & CORBIN IN BEHALF
OF DEFENDANTS-APPELLANTS**

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(1)**Statement of the Case**

This appeal brings before this Court for review a judgment of the Supreme Court in favor of the plaintiff-respondent (hereinafter referred to as the plaintiff), and against the defendants-appellants (hereinafter referred to as the defendants). The action was brought to recover damages for the loss of personal property, consisting of a handbag and its contents, sustained by the plaintiff on December 28, 1924, while a passenger on the train of the defendant, Erie Railroad Company. The loss occurred at Jersey City, while the plaintiff, together with other passengers in a parlor car, were alighting with their baggage. The defendant, Thompson, who

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was a porter on the car, assisted them to alight in the customary manner. Originally, there was a third party defendant, namely, the Pullman Company, but at the opening of the case, a discontinuance was consented to by the plaintiff as against that defendant (p. 12). The complaint charges that the defendants were negligent in the care of the plaintiff's grip, and that its loss was due to such negligence (p. 4, ll. 20-30). At the close of the plaintiff's case, counsel for the defendants moved for a non-suit, and at the close of the entire case, for a direction of verdict in favor of the defendants, both of which motions were denied by the Trial Judge and exceptions noted (pp. 46-47; pp. 67-68). The case was submitted to the jury who returned a verdict in favor of the plaintiff and against the defendants, for \$580 (p. 11). The case was originally tried in the Hudson County Circuit Court and from the judgment therein entered, an appeal was taken to the Supreme Court (p. 1). The Supreme Court affirmed the judgment below (p. 84), and it is from the judgment of the Supreme Court that the present appeal is taken to this Court (p. 85).

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Grounds of Appeal

The grounds of appeal are as follows:

"The Supreme Court of New Jersey erred in giving judgment for the plaintiff-respondent, instead of for the defendants-Appellants, for some one or more of the grounds of appeal urged in the Supreme Court."

Only one ground of appeal was argued in the Supreme Court, namely, that there was no evidence of any negligence on the part of the defendants which was the proximate cause of the plaintiff's loss. The other grounds of appeal are, therefore, considered waived.

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Brief of the Argument

I

10 THERE WAS NO EVIDENCE OF ANY NEGLIGENCE ON THE PART OF THE DEFENDANTS WHICH WAS THE PROXIMATE CAUSE OF THE PLAINTIFF'S LOSS.

There were only two witnesses who testified in the case, namely, the plaintiff, Girden, and the defendant, Thompson. There was no dispute between them. The material facts are not contradicted or controverted. Girden testified that after purchasing tickets at Port Jervis, New York, he boarded 20 a train of the defendant, Erie Railroad Company, and occupied a seat in the parlor car on the trip from that place to the terminal at Jersey City, New Jersey. He had a black collapsible bag containing wearing apparel that had been used on a vacation from which he was returning. He placed the bag alongside of his seat in the parlor car (p. 13, l. 30 to p. 14, l. 40). The defendant, Thompson, was a porter in the parlor car and during the course of the trip served the plaintiff with lemonade and 30 "other things" (p. 15, ll. 1-10). As the train approached the station at Jersey City, Thompson took the bags of a number of passengers in the car and placed them on the front platform of the car. Among other bags he took that of the plaintiff. At that time the train was slowing down for the station (p. 15, ll. 20-30). The plaintiff waited in line with the other passengers to alight facing the platform on which Thompson had placed the bags. When the 40 train stopped he saw Thompson take all the bags from the car platform to the station platform (p.

15, ll. 30-40). The plaintiff was the fifth or sixth passenger to alight from the car to the station platform (p. 16, ll. 1-10). Upon alighting he observed Thompson standing near six or seven bags in a pile (p. 16, ll. 10-20). The plaintiff looked for his bag and not finding it asked Thompson where it was. Thompson replied that perhaps someone had taken it by mistake and requested the plaintiff to wait 10 until the other bags were taken to see if one was left over (p. 16, ll. 25-35). There were originally about ten or twelve grips in all that Thompson had taken from the car. Some of the passengers carried their own grips off the car (p. 36, ll. 1-40). Passengers alighted from other cars of the train and were walking on the platform where the grips were placed (p. 38, ll. 20-30). After all the grips were taken, Thompson informed the plaintiff that his bag must have been stolen and they reported the loss to the station 20 master (p. 39, ll. 30-40).

Thompson testified that he was a parlor car porter and among other duties assisted the passengers in the parlor car to board and alight, carrying their baggage when permitted or requested to do so (p. 45, ll. 10-30). On the day in question when the train was nearing the Jersey City station the plaintiff told him to carry his bag from the car. Thompson collected ten or twelve other grips and placed 30 them on the platform of the car as the train was stopping at the station. When the train stopped he carried the bags from the car platform and placed them on the station platform. This was the customary and ordinary way of doing the work. While a lady passenger was alighting from the car some part of her clothing caught on the car door and he momentarily stepped away from the pile of grips to assist her in alighting (p. 48, ll. 30-40). After completing that task the plaintiff who was 40 then on the station platform asked Thompson where

his grip was and claimed that it had disappeared. It was impossible for the porter to know and identify the grips or the passengers to whom they belonged as he was required to remove ten or twelve and after placing them on the station platform the various passengers upon alighting pick out their own grips. The plaintiff was present during the entire
10 time (p. 49, ll. 20-40).

The above resume' of the testimony discloses that the only facts proven by the plaintiff were the delivery of the grip to the defendant, Thompson, for the purpose of removing it from the car to the station platform and the disappearance of the grip due either to the mistake of a fellow passenger carrying it off or the wilful intent to convert it by a fellow passenger. The duty of a railroad company in cases of this kind is thus stated in 10 Corpus Juris,
20 1203:

30 "The passenger has the right to retain in his possession and under his control, and to have carried as a part of the transaction a reasonable quantity of personal baggage appropriate to the journey. This right, however, to take personal belongings and other articles with him into the cars or other vehicles of conveyance is subject to reasonable regulation, not only as to what may be thus taken, but also as to how far the carrier will be liable for articles retained by the passenger under his control. In the absence of a special agreement, a carrier does not assume control of such money or other personal effects as its passengers may bring into its cars, and its duty with reference to such effects is merely to exercise reasonable care to protect them from loss or injury; it does
40 not assume the carrier's liability of an insurer, but becomes liable only for failing to

exercise such reasonable care to protect such effects from loss or injury, and this liability extends to loss occurring through an employee while acting within the scope of his employment in carrying a passenger's baggage to or from the train, but does not extend to large sums of money or other property of exceptional value retained by the passenger
10 in his control, without the knowledge of the carrier. *The mere fact of a loss, without any circumstance connecting it with a failure on the part of the carrier's employees to exercise due care, is not sufficient to show that it was caused by negligence.*"

In *Union Pacific R. R. Co. ads. Robert N. Grace*, 143 Pac. (Wyo) 353; 1915B, L. R. A. 608, it was held, in a case where the facts were identical with
20 the facts in the case at bar, that:

"No negligence sufficient to hold a railroad company liable for loss of hand baggage of a passenger is shown by the fact that the porter took it, with that of other passengers, to remove it from the car at destination, and placed it in the vestibule, and that when the owner, who was among the last to leave the car, reached the vestibule, it was gone."
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In the course of the opinion the Court said:

"When the train arrived at Cheyenne he assisted the passengers, including plaintiff, by carrying their hand baggage from their respective seats in the car to the vestibule at the end of the car at which they made their exit, and placed the baggage there. It is apparent that he could not have given any particular piece of baggage his undivided at-
40 tention; and it is probable that the plain-

10 tiff's suit case was taken by someone else in passing through the vestibule on leaving the train. *To hold the defendant liable for the loss of the suit case in this case would in effect be a holding that it was an insurer, which it was not.* Ordinary care did not require the defendant to see to it that no passenger took from the car other baggage than his own. It was so held in *Springer v. Pullman Co.*, 234 Pa. 172, 83 Atl. 98. 'To so hold would be to impose on the company the duty of seeing that no passenger left the car with any baggage except his own, which again would be virtually making the carrier an insurer, besides subjecting the passengers to a scrutiny and surveillance which the ordinary traveler would have a right to resent. We cannot think that the ordinary care exacted of the carrier requires any such officious interference as this.'

20 "There is no evidence in the present case showing or tending to show that the care taken of the suit case by Mayweather was not such as is usually and ordinarily taken of such property under similar circumstances. It may be that, in the absence of any evidence as to the care taken of the property while in the possession of a bailee, the proof of its loss creates an inference of negligence; but when it is made to appear what care was taken, and it is not shown that such care was not reasonable care, no such inference can be indulged in. We have not deemed it necessary to determine whether the defendant was a gratuitous or an ordinary bailee, as in our opinion the evidence is insufficient to warrant the conclusion that reasonable and ordinary care was not exercised in this instance."

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In *Springer v. Pullman Co.*, 234 Pa. 172, 83 Atl. 98, it was held that the carrier is only liable for negligence in the loss of baggage which passengers on its cars keep within their own control. The Court said (p. 101):

"In view of all the facts of the case, it seems impossible that the theft, for theft it undoubtedly was, was committed by an intruder. The person who took the satchel must have been either a passenger or an employee. It could hardly have been one of the latter class, since their attention had not been called in any way to the fact that the satchel contained valuables of any sort. Why should one of them without opportunity of knowing the contents select for plunder the one satchel in the room that carried such rich treasure? We may assume from the unusual value of its contents that this satchel was the richest, and, so far as appears, it was the only one disturbed. The evidence affords a more reasonable explanation. It does not appear how many passengers left that car that night at the intermediate stopping places; but the evidence shows that some did. To any one so leaving the car the plaintiff's satchel was exposed, since it protruded into the aisle. Certainly such a one had larger opportunity to take the satchel, and escape with it undetected than any passenger who remained in the car, or any servant; and the evidence to our mind makes it most likely that it was taken in this way. If it was so taken, will it be contended that that was an occurrence which ordinary vigilance on the part of the company would have prevented? To so hold would be to impose on the company the duty of seeing that no passengers

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10 left the car with any baggage except his own, which again would be virtually making the carrier an insurer, besides subjecting the passengers to a scrutiny and surveillance which the ordinary traveler would have a right to resent. We cannot think that the ordinary care exacted of the carrier requires any such officious interference as this. On the whole we are of the opinion that the evidence of negligence as the proximate cause of the plaintiff's loss was not sufficient to warrant a submission of the case to the jury. As the case was submitted the jury was left to conjecture that which the plaintiff was required to prove."

20 In *4 Michie on Carriers*, 3148, sec. 3475, the author says:

30 "It has been held that where a trainman acting in the scope of his employment, takes a passenger's suit case which has not been checked as baggage for the special purpose of assisting the passenger off the train, his position is that of the carrier but the carrier's liability is that of a bailee and not that of an insurer but for a theft by the *employee* the carrier is liable."

40 The case of *Hasbrook v. N. Y. etc. R. Co.*, 95 N. E. 808, 202 N. Y. 363; 35 L. R. A. (N. S.) 537 may be cited by the plaintiff as some authority to support the verdict. The case is clearly distinguishable. In that case the plaintiff requested the conductor to send someone to assist her in taking her grip (which contained clothing necessary for the purposes of her trip) from the train. A trainman was sent who assisted her off and she later discovered three rings, which with some money were in a box at the bottom of her grip, had been stolen. The rail-

road company did not call any witnesses but rested its case on her testimony. Held liable. Vann, J., writing the opinion of the Court of Appeals said (95 N. E. p. 811) :

"The duty to help passengers on and off trains carries with it as an incident, under reasonable circumstances, the duty to assist a lady traveling with a heavy bag. * * *

10 Granting that he might refuse to carry off hand baggage if there were many applications, or he was otherwise engaged, in fact he did not refuse, but took possession of the plaintiff's suit case. In furnishing the assistance which he assumed to afford to the passenger he was obliged only to discharge that duty so as not to conflict with a similar obligation to other passengers, and if for that reason he could not have given the suit case undivided attention, and it had been rifled without any negligence on his part, the defendant would not have been liable; but in this case there is no explanation afforded whatever of how the loss occurred. There is nothing to show what care the trainman bestowed upon the suit case, and in the absence of any proof on the subject, the Trial Court or the jury would be allowed to infer that it had been occasioned by negligence. * * *

20 Therefore, the plaintiff's property was lawfully in the possession of the defendant, and the question arises what was its duty in reference thereto. Its possession was not that of a carrier, because the suit case had not been checked as baggage nor intrusted to it for the journey, but only for the special purpose of aiding a lady passenger in getting off the train, in accordance with a custom estab-

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lished by itself and hence it was not liable as an insurer. Its possession was that of a bailee, and the law of bailments measures its obligation to the plaintiff in regard to her property. Whether it was a bailee for hire in performing a service incidental to her carriage as a passenger with the obligation of ordinary care, or a gratuitous bailee with the obligation of slight care, the result is the same. In either event, as we held in the case cited, some care was required, yet none was shown. The law required the defendant to return all the property intact, or to explain its loss in some satisfactory way, but it did neither. It did not deliver the rings or money on the implied demand of the plaintiff as she got off the train, and when confronted by proof of the facts in court it called no witness and gave no explanation. If the rings were stolen from its trainman, it should have proved the fact, and if the trainman himself stole them, it would have been no defense, because the defendant was bound to employ faithful servants."

In *Wicker v. Boston & A. R. Co.*, 176 Mass. 275, 57 N. E. 601. Suit was brought by a passenger for loss of a handbag and the Court in holding that the company was not responsible said (p. 206):

"It is well established that the mere loss of an article is not evidence of negligence on the part of the defendant. Something more must be shown."

We contend that there was absolutely no evidence of any negligence on the part of the defendant, Thompson, who was acting as the agent of the defendant, Erie Railroad Company. To submit the

case to the jury merely left them to conjecture what possible scheme the defendants could have devised to prevent the loss. No different standard or method for the handling of baggage was proven to exist on other railroads and in the absence of such proof the jury's idea of how to run a railroad should not be the test of liability. *Kingsley v. D. L. & W. R. Co.*, 81 N. J. L. 536. *Traphagen v. Erie R. R. Co.*, 73 N. J. L. 759. *Feil v. West Jersey & Sea Shore R. R. Co.*, 77 N. J. L. 502. If the defendants are not to be held as insurers but responsible only for negligence the Trial Court should have directed a verdict in favor of the defendants at the close of the case for the proof then was both uncontroverted and uncontradicted, that in spite of the exercise of reasonable care by Thompson and the performance of his work in the usual and customary manner, some individual, presumably, a fellow passenger, stole the plaintiff's grip. There was no proof that at the point in question, thefts had been committed before so as to warn the defendants of the possibility of loss in that way and there was nothing about the circumstances on the particular occasion which would lead the defendants to believe that the grip might be stolen. While the loss of the grip to the plaintiff may be somewhat of a hardship it must be remembered that he could have imposed the liability of an insurer upon the defendant railroad company by checking his baggage. He chose to keep the control and custody of it himself. It appeared from the testimony that he had made the trip several times before and knew of the customary manner in which baggage of this character was handled.

We respectfully submit that the Supreme Court erred in affirming the judgment and thereby ratifying the act of the Trial Court in refusing to direct a verdict, because there was no evidence of any negligence on the part of the defendants which was the proximate cause of the plaintiff's loss.

Conclusion

It is respectfully submitted that the judgment below should be reversed and a *venire de novo* ordered.

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May Term, 1927.

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NEW JERSEY

Court of Errors and Appeals

ERWIN K. GIRDEN,
Plaintiff-Respondent,

vs.

ANDREW THOMPSON AND ERIE
RAILROAD COMPANY,
Defendants-Appellants.

Action at Law
On Appeal
from New
Jersey
Supreme
Court.

BRIEF OF PLAINTIFF-RESPONDENT

The defendants in their brief, having expressly abandoned every ground of appeal, except that urged before the Supreme Court, to wit: that the trial court erred in refusing to non-suit the plaintiff, and erred in its refusal to direct a verdict for the defendants, all other questions may be eliminated from consideration.

It must be considered as established that the relationship of principal and agent existed between the Erie Railroad Company and Andrew Thompson; that in taking charge of plaintiff's baggage and removing it from the parlor car to the station platform, Thompson was acting within the scope of his authority; that for any negligent conduct on the part of Thompson, the railroad would be liable; and that the plaintiff was not guilty of any conduct which contributed to the loss of his property. These facts established, the rulings of the trial court in refusing to non-suit, or to direct a verdict in favor of the defendants, cannot be impeached, as will here-

after be demonstrated. The trial court's rulings will be discussed separately.

Point I

Proof of delivery of plaintiff's baggage to defendants, demand for its return, and failure by defendants to return it, established a prima facie case and therefore the refusal to non-suit was proper.

It is not controverted in this case that the plaintiff was a passenger upon the railroad of the defendant company and that he had purchased tickets both for transportation and for a parlor seat. As he approached his destination, the defendant, Andrew Thompson, who was a porter employed by the railroad and acting within the scope of his authority, requested plaintiff to be permitted to remove plaintiff's baggage from the parlor car to the station platform. Thereupon the baggage was delivered into the custody of the porter for that purpose. (State of Case, page 15, ll. 13, et seq.) (State of Case, page 58, ll. 15-30.)

The delivery by plaintiff of his baggage to the porter created a bailment and constituted the porter and his principal bailees for the purpose of safely removing the baggage from the parlor car to the station platform. *Hasbrouck vs. New York Central & Hartford R. R. Co.*, 202 N. Y. 363, 35 L.R.A., N.S. 537.

In the case cited, the plaintiff had delivered her baggage to a trainman whose duty it was to convey it from the train to the station platform, and in determining the nature of the relation created, the New York Court of Appeals said:

"As the trainman was acting within the scope of his employment when he took the suitcase, in legal effect it was the same as if the defendant, personified, had taken it. *Bunnell vs. Stern*, 122 N. Y., 539, 543, 10 L.R.A. 481, 19 Am. St. Rep., 519, 25 N.E. 910. Therefore, the plaintiff's property was lawfully in the possession of the defendant, and the question arises what was its duty in reference thereto. Its possession was not that of a carrier, because the suitcase had not been checked as baggage nor intrusted to it for the journey, but only for the special purpose of aiding a lady passenger in getting off the train, in accordance with a custom established by itself, and hence it was not liable as an insurer. *Its possession was that of a bailee, and the law of bailments measures its obligations to the plaintiff in regard to her property.*" (Italics ours.)

The courts of other jurisdictions have gone even further, and have held that where the carrier employs porters at stations to convey passengers' baggage from the railroad coaches to the carriages or hired vehicles of the passengers, the company's liability as carrier continues until the discharge of this duty by the porter; *so that although a passenger may have kept his baggage with him in the railroad coach, he may hold the company liable as a common carrier for a loss occurring after a delivery of it to the porter at the station.* 10 C. J., 1218, and cases cited.

The instant case, however, has been tried upon the more conservative New York theory and there has been no attempt to hold the railroad as insurer of plaintiff's baggage, but merely to measure

the obligation of the defendants by the law of bailments.

The principles quoted by defendants from 10 C. J. 1203, which appear on pages 5 and 6 of defendants' brief may be entirely correct; and it may be that "the mere fact of a loss without any circumstances connecting it, with a failure on the part of the carrier's employees to exercise due care, is not sufficient to show that it was caused by negligence." But these principles do not cover the situation presented in this case because they do not take into consideration the legal relationship arising out of a bailment by the passenger to the carrier.

It is well settled that in an action by a bailor against his bailee, the plaintiff makes out a prima facie case of negligence by proving the bailment, the demand for the return of his property and failure by defendant to comply with the demand. *Jackson vs. McDonald*, 70 N. J. L., 594; *Levine vs. D. Wolff & Co.*, 78 N. J. L., 308; *Dantes vs. McGann*, 98 N. J. L., 55; *Grannan vs. Fox*, 100 N. J. L., 288; *Hasbrouck vs. N. Y. C. & H. R. R. Co.*, supra; *Fairfax vs. N. Y. C. & H. R. R. Co.*, 67 N. Y., 11; *Curtis vs. D. L. & W. R. R. Co.*, 74 N. Y., 116; *Clafin vs. Meyer*, 75 N. Y., 260; *Schmidt vs. Blood*, 9 Wend, 268; *Canfield vs. B. & O. R. R. Co.*, 96 N. Y., 532; *Steers vs. Liverpool New York & P. Steamship Co.*, 57 N. Y., 1; 10 C. J. 1233, and cases cited; 6 C. J., 1158, and cases cited.

In *Jackson vs. McDonald*, supra, the following rule was enunciated:

"The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient prima facie case against the bailee to put him upon his defense."

In *Levine vs. D. Wolff & Co.*, supra, Justice Minturn, speaking for this court, said:

"When, therefore, the plaintiff proved the delivery of the chattels in good condition to defendant, and their destruction thereafter by fire upon defendant's premises, the law presumes the negligence of the bailee to be the cause of the loss, and this presumption could be rebutted only by affirmative proof of reasonable care upon defendant's part."

Defendants do not contend and have not established that any of the factors necessary to establish a prima facie case of negligence against a bailee are lacking. Hence the trial court could not have done other than deny the motion for non-suit.

Point II

Defendants offered no sufficient explanation of the cause of the loss and hence the question of negligence was properly submitted to the jury.

The testimony of the porter, the sole witness for the defense, was that he took the bags of plaintiff and carried them to the vestibule platform of the train, and when the train stopped, he placed them upon the station platform together with ten or twelve grips belonging to other passengers. Then he gave his attention to assisting passengers to alight and in particular he turned to aid a lady in distress, whose dress had been hooked on the door of the car. When he turned around again, the plaintiff questioned him regarding the where-

abouts of his bag, but it had disappeared. (State of Case, page 48, ll. 15-35.)

A thorough perusal of the testimony of the defense will reveal no attempt to account for the loss of the bag in question. Not even a conjecture is advanced by the witness as to the fate of the bag.

Under these circumstances, defendants must be regarded as having failed to assume the burden of going forward with evidence sufficient to dissipate plaintiff's prima facie case. Where the bailor has made out a prima facie case of negligence, and the bailee fails to offer evidence excusing the non-delivery, the presumption of negligence is sufficient to carry the question to the jury. *Jackson vs. McDonald*, supra; *Fairfax vs. N. Y. C. & H. R. R. Co.*, supra; *Canfield vs. B. & L. R. R.*, supra; and *Steers vs. Liverpool, N. Y. & P. Steamship Co.*, supra.

In the *Fairfax* case, supra, the plaintiff had purchased a ticket from the defendant railroad and had checked his portmanteau through to his destination. The portmanteau was delivered to the defendant's baggage room and when plaintiff demanded it, it could not be found and no satisfactory account or explanation was given of the cause of its disappearance. It did not appear that there had been any burglary or larceny or that any other baggage was missing. It was held that without regard to whether the defendant became liable as a common carrier, it incurred at least the responsibility of a warehouseman, and that this evidence made out a prima facie case of negligence and therefore a direction to the jury to render a verdict for the defendant was error.

In the *Canfield* case, supra, the New York Court of Appeals said:

"Proof of non-delivery to a consignee on demand, of a portion of the goods delivered to it for transportation is prima facie evidence of negligence, in an action against the carrier, which, in the absence of any evidence excusing the non-delivery presents a question of fact for the jury."

In *Steers vs. Liverpool, N. Y. & P. Steamship Co.*, supra, it was held that proof of delivery of a trunk to a steamship company, demand for its return at the destination, and failure to deliver or account for the non-delivery by the defendant, is sufficient to make out a case from which the jury can find gross negligence.

Point III

There was evidence of negligence in the case beyond the presumption arising from the bailment and hence, in any event, the question was properly submitted to the jury.

The State of the Case will reveal that plaintiff was not content to rest his case merely upon the proof of delivery and failure to return the baggage, but that there are other facts tending to charge the defendants with negligence. During the course of the trip from Port Jervis to Jersey City, the defendant, Andrew Thompson, had several times performed small services for the plaintiff and plaintiff was well known to him. He was also entirely familiar with the appearance of plaintiff's bag, having noted its excessive weight, color, and general appearance. Thompson, himself, testified that he remembered the position in the line of bags, where he placed plaintiff's bag on the sta-

tion platform, and he expressly asserted that he placed it at the end of the line. (State of Case, page 51, ll. 29-40.)

In the light of this positive assertion of knowledge as to the appearance and location of plaintiff's property, and in the light of the fact that there were not more than ten or twelve other bags in the line, it is certainly a debatable question whether the porter was exercising due care in guarding the bags from loss or misdelivery.

Thompson further testified that while he was assisting passengers to alight from the train he paid no attention to the bags (State of Case, page 59, ll. 13), and to the question:

Q. "But they could pick up a wrong bag and walk away with it, and you would have nothing to say about that?" he replied:

A. "What could I say?" (State of Case, page 59, ll. 24-26.)

This attitude of Thompson was not indicative of a reasonable alertness in watching the bags intrusted to his care. The jury was entitled to take into consideration these portions of the testimony.

It may be that the defendant railroad company has imposed too many duties on the defendant, Andrew Thompson, but it being conceded on this appeal that the care of the baggage of the passengers in the parlor car was among those duties, it became incumbent upon the defendants to discharge this duty with reasonable care. Thompson cannot be permitted to say that the necessity for rendering assistance to passengers alighting from the train prevented him from using reasonable care in watching the bags; and the defendant railroad company cannot be permitted to say that the multiplicity of Thompson's duties should diminish the extent of the obligation to watch the

bags. Yet this in effect is what the defendants do say in their brief, when they quote from the opinion in *Union Pacific R. R. Co. v. Robert N. Grace*, 143 Pac. (Wyoming), 353, 1915 B, L. R. A. 608, where it was said that:

"It is apparent that he could not have given any particular piece of baggage his undivided attention; and it was probable that plaintiff's suitcase was taken by someone else in passing through the vestibule on leaving the train."

An examination of the facts in that case will reveal that the determinative factor in the decision was the position which the employee occupied. He was not a porter; he was a cook. It was no part of his duty to carry the baggage of passengers and his undertaking to do so was purely a gratuitous service for the passengers. If the bag were stolen, it was while he was attending to his duties as cook; the plaintiff had followed him to the vestibule and had seen him deposit the bag there and leave it there. In view of the fact that the sole defendant was the railroad, the failure by plaintiff to establish that the agent was acting in the scope of his employment was sufficient to dispose of the entire case.

Having decided it on this point, the court in subsequent dictum declared that even if the cook had been proven a porter there was no evidence that he was negligent in doing what he did. It will be remembered that the testimony offered by the cook was that "if the baggage was stolen, it was while he was attending to other duties as cook in said car" and that plaintiff had followed him to the vestibule and had seen him deposit the baggage there and return to the car. This

dictum must therefore have been based upon the theory that the bailment had been terminated. To hold the defendant liable in such case would, in effect, have been to hold that it was an insurer, which it was not. On this theory, the court's conclusion was sound. This was undoubtedly the rationale of the matter, particularly in view of the fact that it was based upon the case of *Springer vs. Pullman Co.*, 234 Pa. 172, 83 Atl. 98, in which no question of bailment was involved.

The Springer case, which is also brandished by the present defendants, was an action for the loss of personal effects which the passenger had retained in his own possession while occupying a place in the defendant's sleeping car. Plaintiff, after examining his baggage and determining that the contents thereof were intact, placed the suit cases under his berth, and during the night they disappeared. It was held that the sole duty of the company was to put a conductor and porter in charge of the car who should be watchful and vigilant, and since this was done the company was not liable for the loss of the suit cases.

As the court in the Union-Pacific case used the Springer case as authority, it must certainly have felt that the baggage lost was actually in the custody of the passenger when lost. This fact distinguishes both these cases from the instant case and deprives them of the dignity of authority. In like manner the principles governing the instant case are distinguishable from those involved in any case where the goods are not actually in the custody of the defendant when lost or injured.

The case of *Hasbrouck vs. N. Y. C. & H. R. R. R. Co.*, 202 N. Y., 363, decided by the New York Court of Appeals is submitted to this Court as declaring

the correct rule in this type of case. A passenger who had retained her suit case in her possession during the journey, requested the conductor to send someone to take it off at her destination. About ten minutes later a trainman wearing the usual badge of his position came to her and informed her that she was approaching her station and that he would take her bag. When she alighted from the train, he handed her the grip, and thereafter she discovered that certain of her valuables had been removed. It was proven that it was among the duties of the trainman to assist passengers off with their baggage. It was held that the position of the railroad was that of bailee and that the law of bailment measured its obligations in regard to her property.

"whether it was a bailee for hire in performing a service incidental to her carriage as a passenger, with the obligation of ordinary care, or a gratuitous bailee with the obligation of slight care, the result is the same. In either event, as we held in the case cited, some care was required, yet none was shown. The law required the defendant to return all the property intact, or to explain its loss in some satisfactory way, but it did neither. It did not deliver the rings or money on the implied demand of the plaintiff as she got off the train, and when confronted by proof of the facts in court it called no witness and gave no explanation. If the rings were stolen from its trainman, it should have proved the fact, and if the trainman himself stole them, it would have been no defense, because the defendant was bound to employ faithful servants. 4 Elliott Railroads, Paragraph 163."

The judgment of the lower court in favor of the plaintiff was affirmed.

The general principles governing the submission or refusal to submit the case to the jury, should be remembered. The rule has been thus stated, 38 Cyc., 1567:

"Doubts should, in all cases, be resolved in favor of the submission of the case to the jury. It is only when the court can find no evidence which in its deliberate and ultimate judgment, is entitled to be weighed, that the jury should be instructed in terms, that there is no evidence to support the burden of proof which rests upon the party. A verdict should not be directed except in cases where the evidence is so conclusive that reasonable minds could not differ as to the result to be reached."

Our own court has stated the rule thus:

"The rule is fundamental and the decisions are numerous in this court, that if there be any evidence which raises a debatable question upon the issues involved, a case is presented for the consideration of the jury. S. M. Neg., 15, *Pa. R. R. Co. vs. Righter*, 13 Vroom, 180"; *Bowell vs. Public Service Corp.*, 77 N. J. L., 231.

There was in this case considerable evidence that the defendants failed to use reasonable care in carrying out the terms of the bailment. Whether the defendant has used reasonable care presents, in every case, a question of fact for the jury. *Levine vs. D. Wolff & Co.*, supra. *Grannan vs. Fox*, supra.

"It is a general rule that in actions between a bailor and a bailee, the degree of negligence or care required, is a question of law for the court; but whether the bailee has exercised due care is a question for the jury, except in cases where but one reasonable inference can be drawn from the undisputed facts." 6 C. J., 1163.

In 9 A. L. R., 569, it is stated that if the bailor has made out his prima facie case,

"the burden is then on the bailee to prove that he has not converted the property and this he may do by showing its loss and the manner of its loss; but by the manner of loss is meant not only the isolated fact of destruction by fire or loss by theft or otherwise, but the circumstances connected with the occasion of the fire or other cause of loss or injury as far as known to the bailee and the precautions taken to prevent the loss or injury. *From these facts, coupled with any testimony on the subject, the bailor may introduce, it is for the jury to say whether the bailee was negligent.* This rule is entirely reasonable "

There being evidence in the case from which the negligence of the defendants could be inferred, defendants' request for a direction was substantially a request that the trial court weigh the evidence. The defendants now make the same request of this court. That it is not one of the powers of this court to usurp the function of the jury by weighing the evidence, is a rule of long standing, its latest application being found in *Grannan vs. Fox*, supra.

Point IV**Conclusion**

The conclusions of plaintiff, in brief, are as follows:

That the presumption arising from the bailment, the demand and the failure to return, made out a prima facie case of negligence against the defendants; that the burden was then upon the defendants to go forward with evidence sufficient to dissipate this presumption; that they failed to meet this burden and therefore even in the absence of other evidence of negligence, plaintiff was entitled to go to the jury; that whether defendants met this burden or not, there was evidence of negligence beyond the presumption and, therefore, in any event the case was rightfully submitted to the jury.

For these reasons, it is submitted that the judgment below should be, in all things, affirmed.

Respectfully submitted,

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