WINTERS v. COWEN et al.

(Circuit Court, N. D. Ohio, W. D. October 10, 1898.)

No. 1,418.

1. CARRIERS OF PASSENGERS—SALE OF TICKETS—REPUDIATION OF CONTRACT.
A railroad company which authorizes another company to issue and sell mileage tickets good over its road makes the latter company its agent, and cannot repudiate the contract so made with a passenger who in good faith buys a ticket from such agent.

2. EXEMPLARY DAMAGES—INCLUDING EXPENSES OF LITIGATION.
Under the decisions of the Ohio courts, where punitive or exemplary damages are allowable, the jury may take into consideration the fair and reasonable expenses to which the plaintiff has been subjected in the vindication of his rights by litigation.

3. SAME—IMPLIED MALICE—EJECTMENT OF PASSENGER BY CARRIER.
Where the general passenger agent of defendant railroad company deliberately repudiated a large number of mileage tickets which had been issued and sold to the public by his authority, and, in consequence of his orders, plaintiff, who had purchased one of such tickets in good faith, was ejected from a train, such a reckless disregard of the duties of the defendant and the rights of its ticket holders, by one of its controlling officers, constituted implied malice, and warranted the imposition of exemplary damages.

On Motion for New Trial.

Motter & McKenzie and James M. Brown, for plaintiff.
J. H. Collins, for defendants.

HAMMOND, J. Briefly, the facts are that the defendants and the Cincinnati, Jackson & Mackinaw Company had an interchangeable mileage book arrangement, and, by a ticket agent at Cincinnati, sold one of the books to the plaintiff. It was repudiated by the defendants, and the plaintiff was ejected from their train without violence, indignity, or other injury than that resulting from the inconvenience and delay incident to the occasion, as it appears in the proof. The Mackinaw Company had sent for sale in bulk at wholesale something over 600 of these books to the agent in Cincinnati. Instead of selling for cash, as he was expected to do, he trusted the broker, who did not pay, and, failing to recover them, the Mackinaw Company instructed all its conductors to outlaw every book presented within the designated numbers covering the 600 books. It also demanded of the defendants that they should reject, according to a list of the numbers, each of these 600 outlawed books; but the defendants, declining to take this burden, repudiated its contract by refusing to receive any book whatever issued by the Mackinaw Company, and so instructed their conductors. The plaintiff's book was not in the outlawed list, having been purchased before the trouble arose. The correspondence between the general passenger agents of these two companies, who were the officials responsible for this ejection of the plaintiff, shows how recklessly they disregarded the rights of the public holding their interchangeable mileage books, innocently, and without notice of any trouble in the premises. It was an entirely unjustifiable performance on their part to ignore the right of the plaintiff certainly, and others of the public who had bought books unaffected with the alleged in-

firmity. Even as to the 600 tickets, they were not stolen or embezzled or counterfeited; nor were they in any sense defective on their face or in their issue. By their own neglect the companies had put them on the market without receiving, as they expected, cash for them; and the proposition was to impose this loss on the public, or, at least, to mitigate it by putting all holders to the trouble of an investigation, delay, and expense of attention to the matter of securing a refunding of their money, which comparatively few would incur perhaps. These superior officials did not seem to care for the loss, inconvenience, or injury resulting from the rejection of their tickets to passengers; nor for the human indignation they would feel at being put off a train while holding a good ticket, or else being forced to pay fares unlawfully demanded, with only a suggestion to carry their complaints to a distant headquarters, and show that they had a good claim against the company,—to prove that they were innocent of the offense of buying a ticket which the company had itself placed on the market, but which, through the mismanagement of its own agents, had been sold to brokers on a credit that had failed. And on the witness stand neither of them seemed to regret the predicament of the plaintiff, or to recognize that he had the least ground of complaint on any score. The purchase money of his ticket was not tendered, even by the pleadings here, or otherwise. My purpose in charging the jury was to restrain their natural sense of the outrage of this transaction, and to confine their verdict within temperate limits. It is rather larger than I would have given if on the jury, or if the case had been tried without a jury, for the reason that the conductor's treatment of the plaintiff was so very gentlemanly, and he discharged the disagreeable duty imposed by his superiors with so much regard for the plaintiff's situation that there is no just cause for complaint of his conduct on that occasion.

There was an incident occurring at the trial which possibly inflamed the jury somewhat, though everything was done by the court to prevent that mishap, it being quite apparent that the defendants here sued were not responsible for it, nor their counsel. Shindler, the Mackinaw Company's passenger agent at that time, and who was largely, if not entirely, responsible for the reckless disregard of the rights of the plaintiff in the premises, by assuming, as he did, that he might reject perfectly good tickets sold to unsuspecting purchasers, and forcing the defendants, by his unreasonable demands, to assume that they might lawfully reject all tickets, good or bad, because it was burdensome to them to distinguish good from bad, was called as a witness for the plaintiff. He demanded of the plaintiff in open court, before the jury, that his fees and mileage should be paid before he would testify; and, this being ruled in his favor, they were paid. When it was developed in the testimony that he was largely responsible for the trouble, there was an evident dissatisfaction at his ill-natured demand for his fees in advance; but the court, by admonition and restraint of counsel, protected the defendants against any undue influence of the incident. So, take it altogether, there is no reason for setting aside the verdict for $1,000, because it is too large.

The main ground urged for a new trial is the contention that the de-