

MISSOURI & NORTH ARKANSAS RAILROAD COMPANY *v.* WOOD.

Opinion delivered October 16, 1911.

1. APPEAL—INSUFFICIENCY OF ABSTRACT.—A cause will not be affirmed for failure to file an abstract in accordance with Rule 9 of this court where appellant attempted in good faith to make a correct abstract of the record, though there was a material error in such abstract. (Page 313.)
2. SAME—MOTION TO ADVANCE AND AFFIRM.—Where, on a motion to advance and affirm a case for noncompliance with Rule 9, it appears, on consideration of the merits of the case, that there was no error,

the cause will be affirmed, though the motion was not sustainable, as no useful purpose would be served by awaiting the regular submission of the cause. (Page 314.)

Appeal from Cleburne Circuit Court; *George W. Reed*, Judge; affirmed.

W. B. Smith, J. Merrick Moore and *H. M. Trieber*, for appellant.

J. M. Brice, for appellee.

PER CURIAM. The plaintiff instituted this action against defendant railroad company to recover possession of two boxes of household goods held by the latter for additional freight charges. The plaintiff recovered judgment below, and the defendant appealed.

Plaintiff shipped the goods from Gilmer, Texas, a station on the St. Louis Southwestern Railway, to Edgemont, Arkansas, a station on defendant's road in Cleburne County, and paid to the agent of the initial carrier the sum of \$8.25, which was claimed as the amount of freight charges through to destination. A mistake was made by the initial carrier in routing the consignment, and when it reached the destination the agent of the defendant claimed the additional sum of \$11 as freight charges. Plaintiff refused to pay the amount, and instituted this action. During its pendency defendant's agent discovered that the goods had been misrouted, and, after correcting the erroneous charge, claimed the additional sum of 86 cents, over and above the amount paid to the initial carrier, as the proper freight charge by the direct route according to the rate filed and published with the Interstate Commerce Commission. The plaintiff refused to pay this amount, and the action proceeded to final judgment.

The total amount of freight claimed is based upon the aggregate weight of 665 pounds, but the bill of lading, copied into the transcript, shows that the weight of the two boxes of goods aggregated only 565 pounds. The error occurred in the addition. According to the correct weight and the rate filed and published with the Interstate Commerce Commission, the proper charge for the consignment should have been \$7.61, whereas the plaintiff was required by the initial carrier to pay \$8.25, which was in excess of the correct amount. It follows,

therefore, that defendant's agent had no right to hold the goods for an additional charge of 86 cents, as plaintiff had already paid more than the correct charge. Counsel for defendant have abstracted and briefed the case here as if the total weight of the freight was 665 pounds, and the plaintiff now moves the court to affirm the judgment on account of failure to file a correct abstract in accordance with Rule 9 of this court. It is manifest that counsel for defendant were misled by the error in addition, and that they attempted in good faith to make a correct abstract of the record. The fact that they have made an error in the abstract affords no ground for a summary dismissal of the appeal or affirmance of the judgment; but since, in considering the motion, we have carefully considered the merits of the case and find the facts disclosed by the record as hereinbefore set forth, no useful purpose would be served by awaiting the regular submission of the cause. The affirmance of the judgment must necessarily follow upon the record presented, and the same is ordered now.
