No. 12627

Supreme Court of Illinois

Michigan Southern & Northern
Ind. R. R. Co.

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vs.

Richards, et al.

211

1267

1858

In the Supreme Court of Illinois
District of Ottawa
April Term 1858.

Jonathan Richards
Frederick Crumbaugh
Theodore A. Shaw
vs. } Appeal from Cook Circuit Court.
The Mich: Southern & Northern Ind^a R. R. Co.

Argument for Appellants.

This record involves "a question of very general concern, since few days in the year occur in which cases do not arise that may depend upon it."

Lord Kenyon in Hyde vs. Trent & Mersey Nav. Co. 5 T. R. 389 wished that that case were the occasion for a decision upon a point which should leave no doubt, in future, respecting the extent to which Common Carriers are liable. In this record, and, in others similar, either already appealed, or to be brought into this Court, a question in Carriers' liabilities, gravely affecting great interests, is involved. It is a question as to a Carrier's liability in the delivery of the goods which, in the course of his business, he transports. It is to be determined by this Court, when and how, a Carrier may divest himself of his more rigorous responsibilities and place himself under the milder restrictions of another character.

The particular question in this record is, whether at the time of the fire and loss of the goods, the defendant was a Common Carrier, with the well known liabilities of that character, or was merely a warehouseman, or ordinary bailee with only the risks incident to that Capacity.

The appellants maintain that defendant was still a common Carrier, when the fire destroyed the

[12209-1]

goods, and had done nothing, up to that time, to divest itself of a Carriers responsibility, and place itself under a mere depositories obligations.

The defendant claims that its Carriers Contract of insurance - or extraordinary risk - ceased with the discharge of the goods into the depot from the Cars on the 13th August, at 12 O'clock noon, and its capacity and duties, after that time, were only those of Warehousemen.

To determine which of these propositions is correct, we must consider what a Common Carriers duties and responsibilities are, in the delivery of goods. In other words, what is the delivery he is obliged to make?

His Contract or duty is for delivery as well as Carriage. "The Carrier must and may, without demand, deliver." "He can not" says Justice Scates 16 Illinois 505, "Sanction the idea for a moment, that the duties and obligations of Carriers end, the instant a train stops either at the way or final station of its route." "It is" says Justice Caton (15 Illinois 566) "but little satisfaction to the "owner to know that his goods have been promptly "forwarded, if they are lost or stolen after they get "through —" and, observes Justice Grose (5 Term R. 399) "it seems to me it would be of little importance "to determine that Carriers were liable as insurers, "unless they were also bound to see that the goods were "carried home to their place of destination: Since as "many frauds may be practised in the delivery as in "the Carriage of them"

These expressions of both our own and the English Judges strongly denote that delivery is as essential to the interest and safety of the owner, and as character=

=istic a part or element in the Carriers obligation as that of Carriage, and that his legal liability includes one as much as the other, and both equally. This ought to be kept in mind in this whole discussion.

As the delivery only terminates the transit and the Carrier's accountability, what is delivery? Justice Scates tells us "there must be actual or legal Constructive delivery to the owner or Consignee or to a Warehouseman for storage."

There can be no doubt, that in general, the Carrier must place the goods in the owner's actual possession, or at his residence or place of business. When the Carriage is by land, and, in the absence of established usage or special Contract to the Contrary, the goods must be carried to the residence of the Consignee. 2 Kent 604. Angell on Carriers Sec 295

The question was discussed in Hyde vs. The Trent and Mersey Nav. Co. whether the Carrier was bound to deliver at the house of the owner or Could be discharged by delivery to a porter at the inn in the place of destination. Lord Kenyon thought a delivery to the porter would discharge the Carrier, But the other Judges, Buller, Ashhurst and Grose, Concurred in the opinion that the Carrier's risk Continued until a personal delivery at the house or place of deposit of the Consignee — and Justice Buller Concluded by saying: "if the under= "taking was to Carry and deliver them, the goods "remain in their Custody as Carriers the whole time."

Mr. Angell (on Carriers Sec 297) remarks that on more recent occasions in England, the opinions of other distinguished Judges have settled down in favour of the doctrine as above as laid down by Mr. Justice Buller and Concurred in by Ashhurst and Grose

Justices, and an actual delivery to the proper person is now generally conceded to be the duty of the Carrier.

And in Gibson vs Culver 17 Wend 305 Mr Justice Cowen considers it well settled that prima facie the Carrier's obligation is for personal delivery. And so in Pennsylvania. Eagle vs White 6 Wharton 505. So Mr Angell says (Sec 297) it is considered to have been repeatedly ruled that a delivery at a point or place in close proximity with the place stipulated will not relieve the Carrier from his responsibilities as such, and that mere propinquity of delivery is no delivery. This then is the "actual delivery" to which Justice Scates refers.

We are thus particular in referring to this sort of delivery, not, certainly, to show that rail-way Carriers are obliged to ~~do~~ it, but because it is the general requirement of the law, and in such requirement of actual delivery, the policy, intention, spirit and reason of the law are most nearly and completely attained and reflected. And in these we discern that the owners interest — not the Carrier's — the safety of the property in transit — not the convenience of the one who Carries — are the very basis and essential Considerations of the law of Carriers' responsibility.

We believe this obligation of actual or personal delivery was imposed as the very best guarantee for the security of the property and for no other reason; and we think it manifestly follows that in the exceptional cases when personal delivery is excused and "legal Constructive" delivery is recognised, the security of the owner is still the controlling Considera-tion with reference to which the substitutes for personal delivery are to be regulated. As actual

delivery, when that was called for, was required as a guarantee that the owner should get his property, So, in "Constructive" delivery, that Consideration must exact of the Carrier the most he can do towards that purpose, and, in determining what sort of delivery, short of actual, is authorised, the Courts are set to look to the interest of the owner.

Constructive delivery is permissible only in modes of transportation in which personal delivery is impracticable or impossible. Steam transits, by land and water, are those by which Commerce now moves and Circulates – the vessel on the water, and the Car on the rail, are the vehicles in which the transmissions of the Country are mostly made. The dock and wharf for the vessel, and the station or depot for the rail-way are the termini of transits. They can only unload at these places. The law, therefore, accommodates itself to the nature and necessities of this kind of transportation. It dispenses with an actual delivery which neither the Craft nor the Car can make. But it abates none of its solicitude for the safety of the property which is transmitted by either. It still exacts that which is most nearly equivalent to personal delivery. And what is this nearly equivalent? Notice to the Consignee and reasonable time for him to take the goods. We wish to show that this is, and, ought to be, so. That it is so in water transportation, is very clear. A discharge of the Cargo on the dock, notice thereof to the Consignee, and, reasonable time, thereafter, to remove the goods, constitute Constructive delivery. In Price vs. Powell 3 Comstock 322 it is decided that a delivery of goods upon the wharf at the place to which they are Consigned does not discharge the

[12627-3]

carrier unless notice be given to the consignee, and, after notice to the Consignee, the carrier still continues liable until the Consignee has had reasonable time to remove the goods. Ex uno disce omnes. The case of Crawford vs. Clark 15 Illinois 561 is to the same effect.

Mere unloading is not delivery - because by that the owner has neither actual or potential possession of the goods. Neither does notice with unloading make a delivery - because notice would be unavailing, if the carrier might abandon the property on the wharf to the chances of weather and robbers before the owner had time to provide for ~~the~~ its removal. As notice is required so that though the goods may not be brought to the owner, the owner may be brought to them, there must be time given for receiving and providing for removing them. So that unloading, notice, and reasonable time, together, constitute a constructive delivery which releases the carrier. These successive or coincident conditions are wisely imposed, because the law, looking to the safety of transported property deems them conjointly the best and only admissible substitutes for personal delivery.

We insist that rail-road constructive delivery is, and ought to be, just what constructive delivery in the case of vessel carriage is. It is impossibility of access to the owner's residence which excuses the carrier by water from personal delivery. It is the same impossibility of access, by rail and car, for which constructive deliveries by these land carriers are permitted. We can perceive no sound, or even plausible reason, therefore, why deliveries at the depot should be distinguished from those at the dock. The considerations which impose a necessity of notice,

and of time for removal in one case are no more weighty and convincing when applied to the water Carrier than they are with reference to the rail-road transit. If it is reasonable, and for the protection of owners that responsibilities should continue over the goods from a vessel's hold until the Consignee may remove them, why is it not equally reasonable and equally demanded for the benefit of owners that a Carrier's insurance shall cover the goods on the platform or in the depot till there has been notice and time for their removal? Unquestionably it is as much the owners interest and right to have the time and notice in the last case as in the other. It must be remembered that his protection and interest are the reason of the rule. It is his interest to have the rule in both cases alike. Notice and time are no more inconvenient and impracticable in the case of railways than in that of vessels. If it should be suggested that rail-roads do a greatly larger transportation than vessels, and must be more inconvenienced by the duty of giving so many notices, we answer that if there are very many more persons, and very much more property to be protected by such a rule of responsibility, there is that much more reason why the rule is demanded for railway Carriers. But that it is either inconvenient or impracticable for rail-road Companies to give such notice is shown in the fact - and, as part of the general information and public knowledge of the times, it must be known to the Court - that there is a very general usage among rail-way Carriers to give such notices. A Consignee ought to have some official or authoritative notification of the arrival of his goods, for it frequently happens, or may happen, that he calls for his goods, and is informed they are

not arrived, when in fact they are in the depot, and are afterwards stored at expense of the owner.

Stevens vs. Boston & Maine Railway 1 Gray 277 is a case where a Consignee called for goods, and was informed they were not arrived. A rule which would oblige a carrier to a system of notices that would prevent such mischances, certainly, would not be unreasonable. Besides, in the unforeseen vicissi-
= tudes to which railway transportation is subject, there is reason why the rule of notice should be required. An accident — a break in the road, the elements, an unusual pressure of goods for Carriage, the Condition of the road and equipments, or the same Cir-
= Cumstances affecting a Connecting line, may, at any time, derange the arrangements or Capacity to Carry, and so irregularize, and render uncertain the times of the train arrivals, or of the particular goods shipped. Which is the more reasonable rule with reference to such Contingencies — that which shall require the owner to call for his goods at each arrival of a train, perhaps, day after day, or that which would impose it on the Company to notify to him actual arrival?

There can be no practical difficulty in giving notice. Whatever form and mode of doing this is most Convenient and answerable to the business of the Community, will be adopted by the Carrier.

In Contending for the establishment of a rule of notice, on grounds of analogy, and on those of policy and reason, we are sustained by the opinion of Chief Justice Redfield. In his work on Railways (Chap. 16. Sec 7 par 6 p. 252) he says: "The Course of
" doing business upon railways, in being Confined to
" a particular route, having stated places of

" deposit, and generally erecting warehouses for the safe
" keeping of goods all seem to require that the same
" rule, as to the delivery of goods, should prevail which
" does in transportation by ships and steamboats."

The authorities are not uniform on this point of Notice. For this reason we have ~~took~~ tried to maintain the necessity of notice on what seemed to us grounds of analogy and propriety.

Mr. Angell (Carriers Sec 313) says:

" Such notice comes in lieu of, and answers for an
" actual delivery, when the goods, according to the
" usual course of business are to be deposited in any
" particular place. Carriers by ships and boats must
" stop at the wharf: Rail-road Cars must remain
" on the track, and notice of the arrival and place of
" deposit, in these cases, comes in lieu of personal delivery.
" The general rule is recognised in Fisk vs. Newton
" in New York, to be, that a Common Carrier is bound
" to deliver the goods intrusted to him for Conveyance
" personally to the Consignee at the place of delivery,
" with the qualification that, in certain cases, where
" the transportation is by vessels and boats, notice of
" the arrival at the place of deposit is sufficient."

A summary of the authorities is to be found in "Pierce on American Rail-Road Law" p 449- and this section we cite in extenso. " Whether it is
" the duty of the ~~Consignee~~ Carrier to give notice of the arri-
" val of the goods to the Consignee is an unsettled
" question. Generally, this duty is required of Carriers
" who are exempted from the obligation of personal
" delivery; but it may be dispensed with by a well-known
" and established usage, although, it seems, the knowledge
" of the usage is not brought home to the Consignee.
" Nor would it seem to be required, where by the

" receipt given by the Company the goods are deliverable
" to the order of the Consignor who already has
" Knowledge of the sending of the goods, or where the
" name of no Consignee is included, the goods being
" identified by a comparison of the marks and numbers
" with the way-bill. In other Cases it remains to be
" seen whether notice left at the residence or place of
" business of the Consignee, or deposited in the mail
" directed to him, will be considered as required by
" public policy. The usage of the Company which
" carries the goods, or of Companies generally in the
" same locality, may be taken into view in determining
" whether the duty of giving notice to the Consignee is
" implied in the Contract of transportation. The
" Course of business of rail-road Companies is such —
" the arrivals of goods being so frequent and various,
" the time occupied in transportation being more
" determinate than in the Case of Carriers by Water, the
" Custom prevailing of a Consignor to forward to the
" Consignee a receipt in the nature of a bill of
" lading notifying him of the Consignment, and enabling
" him to calculate with reasonable certainty on the
" time of the arrival, and the Company being provided
" with suitable warehouses — that it may be considered
" by the Courts that its duty to give notice to the
" Consignee does not arise as a Conclusion of law
" from the Contract to carry. In Vermont and
" Massachusetts it does not seem to be the duty of the
" Company to give such a notice, although the point is
" not directly decided. In Michigan it is required;
" and the liability of the Company Continues, as a Common
" Carrier ~~[illegible]~~ until it is given. Actual notice
" is required in Georgia, unless dispensed with by
" usage."

We think that it may fairly be inferred from the authorities as the better opinion, at least, and we conceive that principle, policy and convenience would warrant this Court in ruling, that the duty of giving notice is implied in, and part of the Contract of transportation.

This notice, says Pierce, may be dispensed with by a well known and established usage. From this record it appears that not only is there no usage exempting the defendant from such giving of notice, but on the contrary, that the Company holds itself out as undertaking to give notice. There was such a notice given in this particular case. It does not appear by any direct statement in the record, that it is the custom of the Company to notify Consignees. But the Court may infer one of two things from the record – either that there was a special undertaking of the defendant to furnish a notice to plaintiffs in this particular case, or that it is the general usage of the defendant to give such notices. The terms of the notice, we admit, would seem to justify this conclusion. But the result must be the same whichever inference the Court accepts. If there were a special undertaking, then defendant was bound, irrespective of what otherwise the law might require, to communicate notice of the arrival of the goods. It was, in such case, an engagement of the parties upon which plaintiffs might rely and act. If, on the other hand, the Court conceive a general Custom of the defendant can be implied from the terms of this notice, then such Custom was equivalent to a contract or engagement for notice. In either case – one by special undertaking, the other by usage – expectations as to getting notice were created and held out by defendant, and defendant must stand

by them and make them good. Plaintiffs, of course, were entitled to suppose the arrival of the goods would be signified to them, and that their repairing to the depot to watch and wait for their arrival was dispensed with. If usage may operate to dispense a carrier from giving notice, it is quite incontrovertible that it may also, operate to create an obligation on his part to give notice. The usage of a particular carrier is enough to bind him whatever of universality and general acquiescence may be necessary in a usage to excuse or discharge him. If a Carrier plead in his excuse a custom or usage of the place, it may well be required of him to show that it was a generally known, acquiesced in, and long established usage. But third or other persons may well bind a Carrier by his own usage or practice, whether long or only recently established, whether invariable or occasional. This is upon the principle of estoppel. He is not allowed to dispute, deny or evade a practice of his own. Though the Carrier may not bind Consignees and owners by a usage which contracts his liability, unless the usage have a generality and acquiescence from which the owner's privity with it is implied, he is permitted to obligate himself — and is held to his obligation — for the benefit, and in the interest of owners and Consignees. His employers have a right to take him at his word, and to accept and recognise his acts. It is entirely immaterial whether all or any of the rail-road Carriers centering in Chicago have or not been accustomed to give such notices. The defendant in this Case, either by Contract or by his own usage, has assumed to give notice, and that being so its Contract to carry these goods from

Toledo to Chicago included the duty of giving notice to plaintiffs of the arrival of the goods. This being so, what was the notice Defendant was bound to give, and plaintiffs were authorised to expect? What must a notice be? That apparently elastic accommodating, and often used phrase of the law, "reasonable notice," is what was required in this instance. There are one or two tests by which the reasonableness of the notice can be measured.

For instance, Price vs. Powell 3 Comstock 322 denotes, that a notice to be reasonable must be one that affords the Consignee time to provide for the removal of the goods.

Angell, speaking (Sec 313) of cases where delivery other than personal is allowed, says, "it is of "the essence of the rule that such is a good delivery "that due and reasonable notice should be given "to the owner or Consignee so as to afford him a "fair opportunity of providing suitable means to take "Care of and Carry off the goods."

Again — "The Carrier is, of Course, bound to "Continue his Care of the goods until a Knowledge "of the notice is brought home to the owner or Con- "signee". Angell Sec 315 2 Kent 604. 605.

Here then are two tests of the reasonableness of such a notice. — Time enough from the arrival of goods at place of deposit for the notice of such arrival to be received in person or through post, as the usage of the Carrier, in that respect, may be — and time enough after Knowledge brought home to the owner, to enable him, according to the general Course of business, to provide for receiving and removing the goods. Both these Circumstances, at least, must Concur to make a notice reasonable.

Tested by these Criterions, the notice, in this case, will not bear examination for a moment. It was not a "due" notice - given in due time. The way-bill showed that the goods had arrived at 9 o'clock night of the 12th August 1856. Defendant should have given or posted notice during the early business hours of the 13th. If such due notice had been given, it would have been in plaintiffs post office box a half hour afterwards, and in all probability, plaintiffs would have had knowledge of the arrival in time to send for and remove the goods during the business hours of the 13th. But the notice was not posted until the Close of business hours on the 13th. This late posting rendered its reception on the 13th improbable, and even, had it been received, the removal of the goods on that day entirely impossible. Their detention in the depot during the night of the 13th was the necessary and inevitable result of the defendants delay and negligence.

Now, if it be contended that this posting of the notice, though between five and six o'clock P.M. of the 13th was sufficient as to that part of defendants duty, still there must time enough, after its posting, have elapsed for plaintiffs to receive the notice and, after receiving it, time enough for them with reference to the usages of business, to have sent for and removed the goods. For these, as we have shown, are constituent Circumstances in such notices. As we have no idea that the Defendant itself would claim that the two hours elapsing between the posting of the notice and the burning of the depot, were any sort of "reasonable time" within the meaning of the rule. We forbear any further remarks on this phase of the subject.

We contend that as there was no actual delivery and as the notice given was not that "due and reasonable notice" which is a constructive delivery, the Carrier, at the time of the fire was not discharged, and Consequently, upon his Common Carrier responsibility must bear the loss of the goods.

But the defendant Contends that the goods were delivered by itself as carrier to itself as depositary or Warehouseman, and, therefore, there was that Constructive delivery which releases the Carrier. In other words, that the unloading and deposit of the goods in the depot, at 12 o'clock noon 13th August, were a definite and positive termination of the transit: that this is the delivery the law obliges it to make. We Concede that there are circumstances under which the Carrier becomes simply a bailee on ordinary responsibility. As Justice Buller says (5 T.R. 398.) he may fill both different Characters, but not at the "same instant." They are successive, not Coincident Capacities. That of Warehouseman Can not begin till that of Carrier ends. The mere unloading and deposit of the goods, in the depot, does not, of itself, accomplish the transformation of Capacities — Can not, ipso facto Convert a Carrier and his insurer's responsibilities into a warehouseman and a bailee's obligations. We claim that a Carrier, Can make no other Constructive delivery to himself as a depositary, than he Could to the owner himself — that is, the same Circumstances must concur before his extraordinary liability is dissolved.

"Goods may not be thrown down in a "station house or on a platform at their destina- "tion in the name and nature of delivery. The

"responsibility of the Carrier must last until that of
"some other begins." Justice Scates, 16 Illinois 505

The obligations belonging to another capacity supervene, only when the Carrier has done that – or that has occurred – which the law considers equivalent to delivery. He can be permitted to assume the character of warehouseman only under circumstances when he could constitute any third person a warehouseman for the owner. Could the railway Carrier, without notice to the owner, and reasonable time to take them, store the goods, simply on warehouse responsibilities, in the custody of a warehouseman across the street or in a distant part of the City? If he could do this, where and what the use of the words in this notice – "You are requested to remove the same within twenty four hours, otherwise it will be put in store" &c? He very well understands that he could not store the goods except after notice. And why can not he do this? The reason is that notice must first be given to the owner; and another reason is, the owner has a right, in the first instance, to select his own warehouseman, and nobody can select and impose one upon him, except after his own default. If the owner asks the Carrier to keep the goods until he can conveniently send for them, then the Carrier is warehouseman. Angell (Sec. 304). But this is the owner's act or request which turns the Carrier into bailee. If the consignee has had reasonable opportunity to take away the goods – if he is absent, deceased, or refuses to receive the goods, or can not be found, the Carrier can then discharge himself from further liability by depositing them with some suitable warehouseman who becomes

bailee to the owner. Pierce Am. Rail Road Law p. 449. But these all imply some act or fault of, or, cause on account of the owner, as the circumstances which entitle the Carrier to discharge himself. Can he make himself Warehouseman to the owner on any easier terms? Can he change — or does the mere unloading of the goods in his depot change his Contract of insurance into one of Custody? We see no reason why he should be allowed to become a Consignee's bailee for Custody on easier terms than he Could Create such relation between the owner and any third person. That only which gives him the right to store the goods with an indifferent Warehouseman, ought to give him the right to become Warehouseman himself. We believe that the law is with us on this point, and that Mr. Angell accurately states it (Section 304) — "a "Common Carrier, therefore, when his responsibility "as such, is thus changed to that of a Warehouseman "is in the same situation as if he had offered to "deliver the goods at the residence of the Consignee; "that is, he has fulfilled his Contract." — We have abundantly shown that it is the notice and reasonable time thereafter which puts him in the same situation as if he had offered to deliver at Consignee's residence: When he Can not deliver, owing to neglect or fault of owner, or owner's refusal to receive them, he has "offered to deliver" and may himself put the goods in his own or another's Warehouse.

"In all Cases of this description the material "Consideration is, whether the Carrier retains possession "of the goods, or is to perform any further duty either "by Custom or Contract" — Angell Sect 304. —

This Company, as the record shows, was,

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either by Custom or Contract, to perform the further duty of giving the notice and the reasonable time afterwards.

"There may unquestionably be cases where
" at some time after the arrival at the place
" of destination, the strict responsibility of the
" Carrier, as such, for goods or baggage remaining
" in his possession undelivered without fault or neglect
" of his own, should cease, and he would then continue
" to hold them, not as a Carrier, insuring against
" all except public and inevitable perils, but as a
" mere bailee in deposit, gratuitously or otherwise,
" according to circumstances. ××× That liability
" does not terminate with arrival at the destined
" place, but continues till delivery unless it be
" shown from the Course of business, common under=
" standing of the parties or as a legal result
" from some act of the parties or other special
" fact that the Carrier's responsibility was at
" an end." Powell vs. Myers 26 Wendell, 591.

Upon this point, as well as upon the reasons for requiring notice to be given, we cite largely from the opinion of Justice Sawyer in Moses vs. Boston & Maine R. R. 32 New Hampshire R. 523.

"For all purposes which have reference to the
"difficulties and embarrassments in the way of the
" owner in attempting to prove loss or damage by
" the fault or neglect of the Company, to his inability
" to give to them any oversight or protection, and to
" his security against fraud and Collusion until he
" can have reasonable opportunity to see, by his
" own observation, or that of others than the Ser=
"=vants of the Company, that they have arrived, and
" to send for and take them away, he stands in the

" same relation to them as when they were actually
" in the course of transportation. The same broad
" principles of public policy and convenience upon
" which the common-law liability of the carrier
" is made to rest, have equal application after the
" goods are removed into the warehouse as before,
" until the owner or consignee can have that
" opportunity; and the same necessity exists for
" encouraging the fidelity and stimulating the
" care and diligence of those who thus continue
" to retain them in charge by holding that they shall
" continue subject to the risk.

" It is no satisfactory answer to this view to
" say that the Company having provided a warehouse
" in which to store the goods for the accommodation
" of the owner, after the transit has terminated, may
" be regarded, by their act of depositing them in the
" warehouse, as having delivered them from themselves
" as carriers to themselves as warehousemen. The
" question still is, when, having a proper regard to the
" principles which lie at the basis of their carrier
" liability, and to the protection and security of the
" owner, can the transmutation of the character in
" which they hold the goods be said to take place
" and this constructive delivery to be made.

" If this is held to be at any point of time
" before there can be opportunity to take them from the
" hands of the Company, then may the owner be compelled
" to leave them in their possession under the limited
" liabilities of depositaries or bailees for hire, contrary
" to his intention, and without any act or neglect on
" his part which may be considered indicative of his
" consent thereto. It may have been his intention
" to take them from their possession at the earliest

"practicable moment, for the reason that he may not be
"disposed to entrust them to their fidelity and care,
"without the stimulus to the utmost diligence and
"good faith afforded by the strict liability of Carriers.
"If he neglects to take them away upon the first
"opportunity that he has to do it, he may be said
"thereby to have Consented that they shall remain
"under the more limited responsibility. "But upon no
"just ground can this Consent be presumed when his
"only alternative is to be at the station where they are
"to be delivered at the arrival of the train at whatever
"hour that may happen to be, whether in the night
"or the day, in or out of business hours, and regardless
"of all the Contingencies upon which the regularity of
"its arrival may depend." It seems to us that the force of Justice Sawyer's suggestions is irresistible. It would seem to be Conclusive that it is only upon some act or neglect of the owner "indicative of his Consent thereto", that the Carrier may become warehouseman, and so his extraordinary become only limited and ordinary responsibilities. Certainly, a "proper regard to the principles which
"lie at the basis of their Carrier liability, and to the
"protection and security of the owner" would warrant such Conclusion.

"The Cases all agree" says Redfield (On Railways, Chap 16. Sec 7. par. 6. page 252) "that in
"regard to Carriers by ships and steamboats, nothing
"more is ever required, in the absence of special Con=
="tract, than landing the goods at the usual wharf,
"and giving notice to the Consignee and keeping the goods
"safe a sufficient time after to enable the party to
"take them away. After that the Carrier may put
"them in Warehouse, and will only be liable as a

"depositary for ordinary neglect." We have before cited his opinion, that from the Considerations he mentions, it would seem to be required "that the same rule "as to the delivery of goods should prevail which "does in transportation by ships and steamboats."

We are aware that there are cases which decide differently. The "leading Cases" to this effect are Thomas vs. Boston & Prov. R. R. Company 10 Metcalfe 472 and Norway Plains Co. vs. Boston & Maine R. R. Co 1 Gray 263.

These doubtless will be cited quite in extenso by defendants' Counsel and be put to all the service which they can afford to the defense. There were material Circumstances as we think, in those Cases which distinguish them from this, and which might make the decisions therein right upon principle without necessarily leading to the broad Conclusions deduced from them or asserted by the Court. One of the Cases which had a Controlling impress upon the Massachusetts Cases was that of Garside vs The Trent & Mersey Navigation Co. 4 Term R. 581. The more exact force and significance of this Case was indicated in the subsequent one of Hyde vs. Trent & Mersey Nav. Co. 5 Term R. 389. where the claim was asserted for defendants of being warehousemen instead of Carriers. The Judges in the latter Case were Careful to distinguish between it and the Case of Garside. In the first the engagement was to carry the goods to Manchester only - but in this it was a Contract to carry and deliver. It is true, the fact of paying Cartage was taken as a material Consideration in the decision of the Case, as showing an Engagement to deliver to the Plaintiffs. But the Judges intimate that the result would have

been the same as a legal result from the relations of the parties. Justice Grose says: "On the general "question of law I am not so perfectly clear; and if it "had been necessary to have decided this case on the general "law I should have desired further time to consider "of it. As far, however, as I have considered this case "the strong inclination of my opinion is that the defend= "ants would be liable as common carriers" — and then he gives the reason because delivery is as important as the carriage. In conclusion he says — "I do not "mean to be bound by the opinion I have now given, "though at present I think that common carriers are "answerable if the goods be lost at any time before they "are delivered to the owner"

But whatever the direct intrinsic import of the Cases in Dumford & East, and their reflex impress in the Massachusetts Cases, these latter are not now, at least, unchallenged and absolute au= thorities. They have been powerfully shaken, if not entirely overthrown, by the very recent case of Moses vs. Boston & Maine Railway 32 N. H. R. 523 — from which we have already profusely cited.

That was a case where a quantity of wool arrived at the Company's station, the place of its destination, about three o'clock in the afternoon. In the usual Course of business, from two to three hours were required to discharge the freight from the Cars into the warehouse, and that was closed at five, so that goods could not be removed until the next morning. The ware= house and the wool were destroyed by fire in the night. It was there laid down that the responsibility of rail-road Companies, as Common Carriers, for goods transported by them, continues till the goods are ready to be delivered at the place of destination, and

the owner or Consignee has had a reasonable opportunity, during the hours when such goods are usually delivered ~~them~~ of examining them, so far as to judge from their outward appearance, whether they are in proper Condition, and to take them away. It is true, it was also held in the Case, that Consignee must take notice of the Course of business at the station, and time of arrival of the train, and be ready to receive them in a reasonable time. But this does not apply to the case at bar - for here, either by Contract or Custom, plaintiffs were entitled to notice and instead of "taking" notice himself, was to receive notice.

The Massachusetts Cases were directly referred to in the New Hampshire case, and in these terms :- "We "are aware that this view of the liability of Railroad "Companies as Carriers Conflicts with the opinion of the "Supreme Court of Massachusetts as pronounced by the "learned Chief Justice of that Court in the recent Case "of Norway Plains Co. vs. these defendants 1 Gray "263. In that case, it was held that the liability as "Carriers ceases when the goods are removed from the cars "and placed upon the platform of the depot ready for "delivery, whether it be done in the day-time or in the "night - in or out of the usual business hours - and "Consequently, irrespective of the question whether the "Consignee has or not an opportunity to remove "them. The ground upon which the decision is based "would seem to be the propriety of establishing a rule "of duty for this class of Carriers of a plain, precise "and practical character, and of easy application, "rather than of adhering to the rigorous principles of "the Common law. That the rule adopted in that case "is of such a character is not to be doubted, but

"with all our respect for the eminent Judge by whom
"the opinion was delivered, and for the learned Court
"whose judgment he pronounced, we can not but
"think that by it the salutary and approved principles
"of the Common law are sacrificed to considerations of
"convenience and expediency, in the simplicity and
"precise and practical character of the rule which it
establishes."

Chief Justice Redfield also sustains the New Hampshire Case. Speaking of the implication in the Case 1 Gray 263, that the Company is not obliged to give notice to the Consignee of the arrival of the goods, he adds, (on Railways p 253) "this last proposition
"is perhaps not in strict accordance with most
"of the Cases upon the subject under analogous cir=
"cumstances." He then states the result of the New Hampshire Case — "No intimation is here
"given that a deposit merely in the Carrier's own
"Warehouse is sufficient to release the Carriers. And
"upon principle it seems more reasonable to conclude
"that it does not, until the owner or Consignee by
"watchfulness has had, or might have had, an opportuni=
=ty to remove them. This is certainly so to be regard=
=ed if the building of Warehouses, by Railways is to
"be considered part of their business as Carriers, and for
"their own Convenience. It seems to be settled that
"the depositing of freight, in their warehouses, at the
"time of receiving it, is to be so regarded, unless there
"are special directions given, and that the responsi=
"bility of the Carrier attaches presently upon the delivery"

"There is then no very good reason, as it seems to
"us, why the responsibility of the Carrier should not
"continue until the owner or Consignee might, by
"diligence have removed the goods. The warehousing

"seems to be with that intent and for that purpose, and
"if we assume, as we must, we think that there is no
"obligation upon Railway Carriers to give notice of
"the arrival of the goods, there does still seem to be
"reason and justice in giving the Consignee time and
"opportunity to remove the goods by the exercise of the
"utmost watchfulness before the responsibility of the
"Carrier ends. In the Case of Smith vs. Nashua
"& Lowell Railway, it is held, that there is no duty
"upon Railway Carriers to store goods after the Consignee
"has notice of their arrival, and reasonable time to re=
"=move them, of Course then there is no absolute duty
"to keep warehouses. It is only for their own Convenience
"in keeping goods, till the train is ready to depart
"or after their arrival, until the Consignee has rea=
"=sonable opportunity to remove them. After that there
"is no doubt the Carrier's responsibility as such
"Ceases, and if the goods remain in the warehouse of
"the Company, it is only with the responsibility of
"ordinary bailees for hire, as held in Norway Plains
"Co. vs. Boston & Maine Railway, or as was held
"in Smith vs. Nashua & Lowell Railway, with the
"responsibility of a bailee without Compensation. The
"former degree of responsibility seems to us, the just
"and reasonable one, as it is an accessory to the carrying
"business, and the Carrier, after he becomes a ware=
"=houseman, is, no doubt, fairly entitled to charge, in
"that Capacity. The omission to charge for warehousing
"in the first instance being the result of the Course
"of the business, and because it is a part of the
"Carriers duty to keep the goods safely, till the Consignee
"has opportunity, by the use of diligence, to remove
"them. And this seems to us the extent of the decis=
"=ion in Thomas vs. Boston & Providence Railway. 10 Allen 35

××× "But when the same rule is applied to "goods arriving out of time and before the Consignee "could have removed them, reason and justice seem "to us to require, that if the Company put them into "their warehouse, for their own convenience, their re=. "=sponsibility as Carriers should not be thereby termi= "=nated until the Consignee has reasonable opportunity "to remove them. We should therefore, have felt "compelled to rule the case of Norway Plains Co. "vs. Boston & Maine Railway in favour of the "Plaintiffs."

"We may be allowed to say" – he also adds – "that it seems to us the opinion and argument of the "learned Chief Justice (Shaw) might, for the most "part, be quite as well applied to the rule for which "we contend as to have reached the result it did."

In Michigan, as Pierce (p 445) states it, it has been decided that the Company, in lieu of personal delivery, is bound at Common law to give notice to the Consignee of the arrival of the goods; and until such notice has been given and the Consignee has had reasonable time to remove them, it is liable as a Common Carrier, although the goods have been unladen and deposited in its warehouse. The Case so holding is that of Michigan Central R.R. Co vs. Ward 2 Mich. (Gibbs) 538.

And it is said, the same rule in regard to notice is adopted upon general principles in Georgia. Rome Railway vs. Sullivan 14 Ga. R. 277. We have neither the Michigan or Georgia reports at hand to refer to.

With these direct authorities against them and with reasoning of such force as that of Justice Sawyer in the New Hampshire Case, and with an opinion

of as much weight as that of Chief Justice Redfield, to the Contrary, we may well, not only hesitate, to accept but may wholly reject the Massachusetts cases cited. We think the preponderance of authority, and certainly, the better reason and policy, regarding the peculiar law of Carriers are with and will sustain, the doctrine as declared in Michigan, as the general Conclusion of the law itself.

There is another phase of this case to which we ask the Court's attention.

It is that presented in the words of the notice in the record — "You are requested to remove the same "within twenty four hours, otherwise it will be put in "store at the expense and risk of the owner." What is the fair and reasonable interpretation of these terms?

We think the implication is that the defendant held the goods at its own risk for twenty four hours after notice. These terms estop the defendant from denying that the goods were at the defendants risk for the designated time ensuing notice. Why should it be said that the goods would be held at the owner's risk after expiration of twenty four hours if it is not meant — and if plaintiffs were not intended to take it as meaning — that during the twenty four hours ensuing the notice, the risk was the Carrier's? And if the risk were the Carriers, what sort of a risk was it, or would the plaintiffs understand it to be? Manifestly the Carrier's extraordinary responsibility as Carrier — an insurer's liability against all but the act of God and the public enemies.

Why should the notice declare the risk after twenty four hours to be in the owner? For after notice to the owners, and reasonable time to remove the goods,

[12627-14]

the risk would be on the owners, without any declaration to that effect by the defendant. Plaintiffs did not need to be told that - for they knew or are presumed to have known it. Plaintiffs could, and would fairly construe these terms of the notice to be an express recognition of the Carrier's insurance liability for twenty four hours after notice.

And, if it should be asked, why should the Company declare in terms a liability which the law affixed upon them at all events, we reply, that the Company intended to establish a time, which would be reasonable and uniform, as a rule, in all cases, within which the Consignee might inspect and remove the goods, and after which, if they were not taken away, the Company might store them, charge for storage, and take the risk incident to storage bailments. It was defendants' own measure of time, so held out to the Community, as its own rule, as to the duration, post transitum, of its Carrier's responsibility and Commencement of its warehouse Capacity.

Plaintiffs unquestionably could, and would likely construe the notice as a pledge of Con= =tinued Carrier responsibility, without expense to them, for the twenty four hours, that being the period, in defendants' estimation, and by its own Choice, most reasonable for their inspecting and removing the goods. Had plaintiffs received this notice in due time, it might well be, that they would be content to allow the goods to remain longer in the depot than if such a phrased notice had not been sent - that they might be lulled into less promptness to remove them - Knowing or made to believe they were still

under Carrier's risk. If such had been the result – could the Carriers be permitted, in the face of their own written and printed pledge to that effect, to charge plaintiff's with the remissness in removing the goods which the Carriers itself had induced.[2]

Though a Carrier can not, by any notice, alter or impair the law, he may, by his act and Conduct, assume or create a liability on himself which otherwise might not attach to him. Whether, or not, for the twenty four hours ensuing arrival of the goods or the notice the law made him an insurer, it was competent for him to make himself such to the plaintiffs. If his notification to them imply that he does continue his responsibility as Carrier, and plaintiffs took, or might have taken him at his word, he will be held to the full Consequences of his implication, and will not be heard to question, deny or repudiate the obligation he induced his Employees to suppose he had assumed.

The particular notice, then, in this case, as we assume, was equivalent to a declaration or engagement on the defendants' part of a Continued Carrier responsibility during a time within which the goods were lost, and so as Carrier the defendants must be answerable to the value of the goods.

We now briefly recapitulate the main positions we have endeavoured to substantiate:

1. A Carrier must deliver goods.
2. Delivery may be Constructive; but Constructive delivery is where notice is given and reasonable time elapses.

3. In this Case, either by Custom or Contract, defendant was bound to give notice — and did give one.

4. But this notice was not duly given, and it was not "reasonable", and therefore, was not equivalent to delivery or Constructive delivery.

5. That defendant could not — and that unloading of the goods, in the depot — did not change the Capacity of Carrier to that of Warehouseman.

6. The Character of defendant as Carrier continued and still subsisted when the goods were burned, and defendant must bear the loss.

Upon a survey of the whole subject it would not seem difficult, from authority, principle and policy, to deduce and establish a rule which holds the Carrier to his strict liability until he affords the owner a reasonable opportunity for the removal of his goods.

It will, we presume, be urged on the Court, that the Common law as to Carriers is rigorous, and is not to be rigidly enforced. Its rigour does sometimes, work injustice, at least hardship. "The books abound" says Kent 2 Com. 602 "with strong Cases of recovery against Common Carriers without any fault on their part; and we can not but admire the steady and firm support which the English Courts of Justice have, uniformly and inflexibly given to the Salutary rules of law on this subject without bending to popular sympathies or yielding to the hardships of a particular case". We are told that in two Cases of inevitable

accident, Sir Matthew Hale in the one, and Lord Mansfield in the other, delivered the unanimous opinion of the King's Bench in favour of what Kent calls "a ~~grand~~ great principle of public policy which has proved to be of eminent value to the morals and Commerce of the nation in succeeding generations." Common Carriers have taxed the resources of their ingenuity for Contrivances to evade, impair and defeat the rigour of the rule - and with such success in one form, or escape that with reference to it, Kent has observed that the English Judges have thought that the doctrine of exempting from liability by notice has been carried too far, and its introduction into Westminster Hall has been much lamented.

While the aim of Carriers is thus to weaken and fritter away, almost to the extent of actual irresponsibility what Lord Holt calls "a politic establishment Contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliged them to trust these sorts of persons", the tendency of the Courts is now to discourage and disallow the expedients of the Carrier, and to revert to the olden rigor and wise policy of the law. Chief Justice Redfield speaks of a recent Case as "Certainly not a little of a manifestation of a disposition in the English Courts, to restore, as far as practicable, the reasonable responsibility of Carriers, &c."

We submit these as suggestions which the Court may not think out of place, in a Case where a Carrier claims to escape Consequences which the law, as we believe, makes him answerable for. And with one other suggestion we

close this argument. The suggestion of hardship in this particular case is quite out of place. If the defendant had given "due and reasonable" notice in the early part of the 13th there is every moral probability that plaintiffs would have removed the goods during that day — and if they pay this loss, they are only paying the penalty of their own neglect.

We trust the importance of the question involved will excuse us to the Court for the length and fulness of the argument.

Thos. A. Marsh &
Geo. Lisle King
for Appellants.

Since this argument was prepared, it has been admitted on the record that the "notice in this case was in printed form."

This admission, we presume, will be of much weight in aiding the Court to the conclusion that it was the custom of Defendant to give such notices

Marsh & King
By King.

211

Supreme Court
April Term 1858.

Richards & others
Appellants

against

The Michigan Southern
and Northern Indiana
Railroad Company.

AROUMENT
for the
APPELLANTS

Filed May 1st 1858
[illegible]
Clerk.

MARSH & KING.

United States of America } Pleas, before the Honorable George Manierre
STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Second Monday, (being the twenty fifth day) of October in the year of our Lord one thousand eight hundred and Fifty Seven and of the Independence of the said United States the Eighty Second

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

John L. Wilson Sheriff of Cook County.

Attest; Wm L. Church Clerk.

13627-18

Be it remembered that heretofore, to wit,
1. on the sixth day of November A.D. 1856.
Jonathan Richards et al by Marsh and
King their Attorneys, filed in the office of
the Clerk of said Court, their certain
declaration, which is in the words and fig-
-ures following, to wit!

State of Illinois }
Cook County } In the Cook Circuit Court
November Term 1856.

Jonathan Richards, Frederick Crum-
-baugh, and Theodore Shaw, Merchants and
partners, trading and doing business under
the name and style of Richards, Crumbaugh
& Shaw, plaintiffs, complain of the Michigan
Southern and Northern Indiana Rail-
Road company, a corporation created by the
laws of the State of   doing business
and having an office in said County, defen-
-dant, in an action of trespass on the
case on promises - For that whereas said
defendant was before, at the time of
making the promises hereinafter mentioned
and now is a common carrier of goods
& Chattels for hire by railway and cars
thereon from a certain place, to wit, from
Toledo in the State of Ohio to a certain
other place, to wit, the City of Chicago

2 in said County of Cook. Defendant being as aforesaid carrier, Plaintiffs heretofore to wit, on the 8th day of August in the year of our Lord, one Thousand Eight Hundred and fifty six at Toledo, in State of Ohio, to wit at the County aforesaid, at the special instance & request of the defendant, caused to be delivered to the defendant, such carrier as aforesaid at Toledo in State of Ohio, to wit, at County aforesaid, certain goods & chattels to wit, one box of Dry Goods consisting of assorted checks of said plaintiff of great value, to wit, of the value of Ten Hundred dollars, to be taken care of safely & securely conveyed by defendant as such carrier in and by the said Rail Way and the cars thereon from Toledo aforesaid, to the City of Chicago ~~aforesaid~~ in the County aforesaid, and there to wit, at the City of Chicago, to be safely securely delivered by said defendant to said plaintiff - In consideration thereof & of certain reward to defendant in that behalf, said defendant being such carrier as aforesaid then and there undertook and promised on the day and year aforesaid & at the County aforesaid, to plaintiff to take care of said Goods & chattels and safely & securely,

3.

carry the same on and by their said railway from Toledo aforesaid to the City of Chicago aforesaid, and then at said City of Chicago safely & securely to deliver the same to said plaintiffs. Though the defendant, carrier as aforesaid, then & there had & received the goods aforesaid, for the aforesaid freight not regarding its duty as such carrier, nor its said promise and undertaking hath not taken care of said goods & chattels or safely & securely carried the same from Toledo to the City of Chicago, nor hath there, to wit, at the City of Chicago safely & securely delivered the same to said plaintiffs, but on the contrary thereof, defendant so carelessly conducted itself with respect to said goods & chattels, that by the negligence of defendant & its servants in that behalf the said goods & chattels of the value aforesaid, became and were wholly lost, to the plaintiffs, to wit, at the City of Chicago aforesaid.

And whereas also afterwards, to wit, on the 9th day of August in the year of our Lord one Thousand Eight Hundred & fifty six, at Toledo, in the State of Ohio, to wit, at the County aforesaid in consideration that the plaintiffs did then & there deliver to said defendant at its special request a

$100.00

4 parcel of other goods of the plaintiffs containing assorted checks of the great value of Two Hundred Dollars, directed to the plaintiffs to be carried and conveyed by said defendant from Toledo aforesaid to the City of Chicago in Illinois, and there at said City of Chicago to be safely delivered to the plaintiffs for a certain reasonable reward to be by plaintiffs therefor to Defendant paid, for the care & trouble in that behalf, said defendant promised the plaintiffs, securely & safely to take care of carry and convey said goods to the City of Chicago, and there deliver them to the plaintiffs accordingly. Yet Defendant did not take care of, carry and deliver said parcel of goods in manner aforesaid, but hath neglected so to do, & by the negligence of itself & servants, lost the same.

And whereas also heretofore to wit, on the 18th day of August in the year 1856, at the City of Chicago, in the County aforesaid, in consideration, that the defendant at defendants special request, as common carriers of goods for hire, had the care & custody of divers goods & chattels of the said Plaintiffs, to wit, one box of assorted checks of great value, to wit of the value of Two Hundred Dollars, the said defendant undertook and then and there promised

the plaintiffs, to take due and proper care,
5. of the same while in its custody and then
deliver the same to the said plaintiffs in
said City. Yet defendant not regarding
its said promise, took so little, and bad
care thereof, that the same afterwards
to wit, on the 13th day of August 1856 at
the County aforesaid became, and were wholly
lost, and not delivered to the plaintiffs.
And whereas said
defendant afterwards, to wit, on the 1st
day of November in the Year of our Lord
1856, at the County aforesaid, was indebted
to the plaintiffs in the sum of Three Hun-
-dred Dollars, for so much money by the
said Plaintiffs before that time paid, laid
out & expended, to and for the use of the
defendant, at defendants request, and in
the sum of Three Hundred Dollars, for so
much money by said defendant before that
time had & received, to and for the use
of the plaintiffs, and also in the like
sum of Three Hundred dollars, then &
there found due, and owing said plaintiffs
on an account stated between them,
and being so indebted Defendant in
consideration thereof, then & there under-
-took and promised to said plaintiffs
said last mentioned sum of money

C. when thereunto requested aftertwards.

Yet Defendant not regarding its said promises & undertakings but contriving &c, although often requested so to do has not paid said plaintiffs either of said sums of money above mentioned, but so to do has hitherto wholly neglected and refused and still does neglect and refuse - To Plaintiffs damage Three Hundred Dollars whereupon plaintiffs bring this suit.

Marsh & King
for Plaintiffs

And afterwards to wit, on the 15th day of November, in the year last aforesaid the said defendant by A. B. Judd its attorney filed in the office of the Clerk of said Court its certain Pleas, affidavit of merits, which are in the words & figures following, to wit:

Cook County Circuit Court

Jonathan Richards, Frederick Cumbaugh & Theodore Shaw

vs

The Michigan Southern and Northern Indiana Rail Road Company

And the said defendants by
7. N. B. Judd, their Attorney, come & defend
the wrong & injury &c. and say
that they did not undertake & promise
in manner and form as the said plain-
tiffs, have above thereof complained against
them and of this they put themselves
upon the Country &c.

N. B. Judd
Defendants Atty

State of Illinois }
Cook County } ss.

Norman B. Judd being
duly sworn deposes & says, that he is the
Attorney for the defendants, in the above
entitled action, that a full statement
of the facts have been laid before him,
by said defendants, and that deponent
believes defendants to have a good &
substantial defence, to said suit upon
the merits

Subscribed & Sworn to before } N. B. Judd.
me this 10th day of November }
1856

L. D. Noird }
Clk }

and afterwards, to wit: at the June

8.

Special Term, of said Court, to wit, on the 16th day of July A.D. 1859, the following among other proceedings in said Court, were had and entered of Record, to wit:

640

Jonathan Richards, Frederick Cumbaugh & Theodore Shaw

vs

The Michigan Southern & Northern Indiana Rail Road Company

} Apl.

This day came the said parties by their attorneys, and by their agreement made here in open Court, this cause is submitted to the Court for trial, upon an agreed statement of facts on file.

And afterwards, to wit, at the October Term of said Court, to wit, on the 6th day of November, in the year last aforesaid, the following among other proceedings in said Court were had and entered of Record, to wit.

612

Jonathan Richards, Frederick Cumbaugh & Theodore Shaw

vs

The Michigan Southern & Northern Indiana Rail Road Company

} Apl.

This day came

the said Parties by their Attorneys, and this
9. cause having been heretofore (to wit on
the 16th day of July last past) submitted
to Court for trial, on an agreed statement
of facts, and the Court after due con-
sideration of said facts, and after hear-
ing the evidence adduced, and arguments
of Counsel, and being fully advised in
the premises, finds the issue for the
defendant.

Therefore it is considered
that said defendant do have and
recover, of said Plaintiffs its costs &
charges, by it in this behalf expended,
and have execution therefor.

Whereupon said
Plaintiffs pray an appeal, to the Supreme
Court of Illinois, which is granted, Bill
of exceptions, and Bond in the penal
sum of Two Hundred dollars, with
as surety to be filed
within thirty days.

And afterwards, to wit, on the 27th
day of November in the Year last aforesaid
the said Plaintiffs filed in the Court afore-
said, their certain Appeal Bond, which
is in the words and figures following,
to wit.

10. Know all men by these Presents, That we Jonathan Richards, Frederick Cumbaugh, Theodore A. Shaw and F. B. Newman of the County of Cook and State of Illinois are held and firmly bound unto the Michigan Southern and Northern Indiana Rail Road Company, also of the same County and State, in the penal sum of Two Hundred Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents. Witness our hands and seals, this 27th day of November A.D. 1857.

The Condition of the above obligation is such, That whereas the said Michigan Southern and Northern Indiana Rail Road Company, did, on the 5th day of November A.D. 1857, in the Circuit Court, in and for the County and State aforesaid, recover a judgment against the above bounden Jonathan Richards, Frederick Cumbaugh and Theodore A. Shaw for the sum of Dollars, cost of suit; from which judgment of the said Circuit Court, the said Jonathan Richards, Frederick Cumbaugh and Theodore A. Shaw have prayed for, and obtained an appeal

to the supreme Court of said State.

11. Now therefore if the said Jonathan Richards, Frederick Cumbaugh and Theodore A. Shaw shall duly prosecute their said appeal with effect, and moreover pay the amount of the Judgment, cost interest and damages rendered, and to be rendered against them in case the said Judgment shall be affirmed in the said Supreme Court, then the above obligation to be void: otherwise to remain in full force and virtue.

Taken and entered into before me, at my office in Chicago this 29th day of November A.D. 1857

Richards, Cumbaugh & Shaw (Seal)
F. Cumbaugh (Seal)
T. A. Shaw (Seal)
A. P. Newman (Seal)

Wm L Church
Clk

And afterwards to wit, on the day and year last aforesaid, to wit: November 29th A.D. 1857, the said Plaintiff by their Attorney aforesaid, files in said Court, their certain Bill of exceptions, which is in the words & figures, following, to wit:

State of Illinois - Cook County
In the Cook County Circuit Court
October Term 1857.

8127-247

12

Jonathan Richards, Frederick Trumbaught & Theodore A. Shaw

vs

The Michigan Southern & Northern Indiana Rail Road Company

Be it remembered, that heretofore, to wit, on the 6th day of November in the year 1857, on the trial of this case, before, and by the said Court, a Jury having been expressly waived by both parties, the parties Plaintiff and Defendant, offered and put in evidence as testimony in the case, the statement in writing, in words and figures following, which were agreed by both parties, to be the facts in the case.

Jonathan Richards, Frederick Trumbaught & Theodore Shaw

vs

Michigan Southern and Northern Indiana Rail Road Company

April Term 1857.

Cook Circuit Court

The parties, Plaintiff and Defendant agree, that the following are the facts in this case.

That the Defendant was a carrier of goods by railway between the Cities of Toledo in Ohio, and Chicago in Illinois.

That Plaintiffs purchased

in the City of Baltimore one Box of Goods,
13. at the price of One hundred sixty two
dollars, and ten cents, which now worth
at the City of Chicago, one hundred and
eighty five dollars

That said Box of Goods
came into Defendants possession at Toledo,
and was by said Company transported on
its cars to Chicago - that defendant paid
at Toledo, as back charges on said Box
three Dollars sixty three cents, - that defen-
-dants charge for transportation from
Toledo to Chicago was three dollars fifty seven
cents - that the cars containing the said
Box arrived at Chicago, at Nine O. clock
P.M. of 12th August 1856. - that the box was unloaded
from the cars into Defendants warehouse by
12 O'clock Noon of the 13th August - that
a notice of the receipt of the goods was
made out in the afternoon of the 13th
August, and put into the post office, be-
-tween the hours of five and six that afternoon.
which notice was the following

Mich. Sou. & Nor. Ind. R. R.
Freight Agents' Office
Chicago Aug 13. 1856.

W Dol 47!

Richards, Cranburgh & Shaw.

The following article assigned

14

to your address, are now ready for delivery at this Depot, viz:

1 Box 2 Goods.

Weight 420. Total Charge $7.20

You are requested to remove the same within twenty four hours, otherwise it will be put in store at the expense and risk of the owner. In no case will freight be delivered, except to the owner or consignee or to his written order. Unless it is called for by yourself please send this notice, after having signed the order below, and inserted the name of the person to whom you wish it delivered.

Yours, Respectfully
Chas M Gray, Agt

Agt M. St. & N. L. R. R.

Please deliver the above named article to.----------

That Plaintiff received said notice from the Post Office, on the forenoon of the 14th August about ten O'clock; that the post stamp on the envelope containing the notice was dated the 14th that it is customary in the Chicago Post office to examine the drop Boxes and distribute the letters from them every half hour, and that drop letters

15

do not generally lie in the drop boxes longer than a half hour, but are distributed in owners boxes for delivery.

That on the evening of the 13th August, between seven and eight O'clock, a fire broke out in a Stable near Defendants said warehouse, which fire extended to, and destroyed said Warehouse and its contents including the said bale of goods of Plaintiffs - that said fire did not happen or arise from any negligence of Defendants, nor was said defendant negligent in efforts to save said goods from burning.

The parties waive the intervention of a Jury, and agree to submit this case, to the Court upon the above statements of facts.

A. S. Judd
Atty for Defts.

Marsh & King
for Plaintiffs

and the foregoing being the entire and only testimony given or offered to be given by the parties, or either of them in said Case, the said Court, thereupon, gave Judgment for the defendants, to which decision of

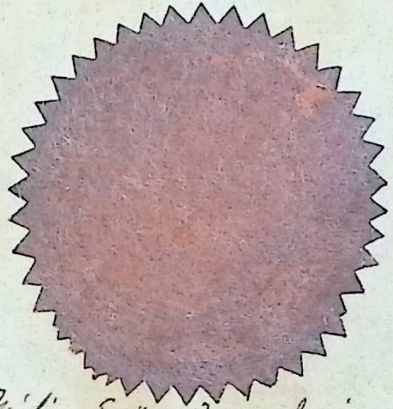
[illegible]

the court, the said Plaintiffs then and there excepted, and for placing said ordered or agreed facts and exceptions to said decision on record, the Plaintiffs pray said Court to seal this their bill of exceptions, which is done this 27th day of November in the Year 1857.

George Manierre [Seal]
Judge of 9th Judicial Circuit.
Ills.

The above seems to be correct.
Chicago April 16th 1858. Judd & Thurston

State of Illinois, } S. S.
COUNTY OF COOK.



I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All papers (except the Precipe & Summons) filed Proceedings had and entered of record in a certain cause lately pending in said Court on the Common Law side thereof, wherein Jonathan Richards et al were Plaintiffs and Michigan Southern & Northern Indiana Rail Road Co. was defendent

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Sixteenth day of April A. D. 1858

Fees for Record $4.00

Wm. L. Church
Clerk.

State of Illinois
In Supreme Court
District of Ottawa } April Term 1858.

Gurdon Hubbard
Frederick Crawbaugh &
Theodore A Shaw.
vs
The Michigan Southern and Northern Indiana R. R. Co } Appeal from Cook County Circuit Court

The said Hubbard, Crawbaugh & Shaw, plaintiffs below and appellants in this Court, assign for Error in the Judgment of the said Cook Circuit Court, that said Judgment was erroneous in this

1. Said Judgment is contrary to the law of the case.
2. Said Judgment is contrary to the evidence in the case.

Joslyn & Manlove
and Goodrich
for appellants.

And the said appellants say that in the record & proceedings aforesaid is manifest error & they pray that said Judgment may be reversed

N B Judd
for Appellants

Supreme Court
Ottawa Dist
April Term 1858

Jonathan Richards
& others
v } Appellants &c
Mich Sou & Nor I. R R Co

Assignment of Errors

IN SUPREME COURT.

APRIL TERM, 1858.

JONATHAN RICHARDS,
FREDERICK CRUMBAUGH,
and THEODORE SHAW, } Appellants.

vs.

THE MICHIGAN SOUTHERN
AND NORTHERN INDIANA
RAIL ROAD COMPANY, } Appellee.

Appeal from Cook Circuit Court.

Abstract of the Record.

This is an action of Assumpsit. The Declaration contains three Counts and the common Counts. The first Count states the Defendant to be a common Carrier, by Railway, of goods, from Toledo in Ohio to Chicago in Illinois; that plaintiffs on the 8th August, 1856, delivered to defendant a box of goods of the value of two hundred dollars, to be carried to Chicago and to be there delivered to plaintiffs; that for the charges to be paid thereon defendants received the goods and promised to carry and safely deliver them at Chicago to plaintiffs; but not regarding &c., did not take care of the goods, but lost the same and did not deliver them.

Page 1—3.

2d Count. In consideration that plaintiffs, at Toledo, delivered to defendant a parcel of goods directed to plaintiffs to be carried to Chicago and there be delivered to plaintiffs, the defendant promised to carry and deliver the goods at Chicago to plaintiffs, but did not deliver them.

Page 3—4.

3d Count. In consideration that the defendant as common carrier on &c. at Chicago, at its own request had the care and custody of plaintiffs goods, the defendant undertook to take due care of them while in its custody and deliver same to plaintiff but took so little care of them that they were lost.

Page 4—5.

2/12(27-37)

Common Counts for money paid, had and received, on account
Page 5—6. stated.

Page 6. The defendant pleaded the General Issue.

At the June Special Term, 1857, to wit on the 16th July, 1857, the cause was submitted to the court upon an agreed statement of
Page 8. facts on file.

At the October term, 1857, to wit on the 5th of November, 1857, the Court rendered judgment for the defendant.

Plaintiffs excepted to this decision, prayed an appeal which was
Page 8—9. granted. Bill of Exceptions and Bond to be filed within thirty days.

On the 27th November, 1857, plaintiffs filed Appeal Bond and Bill of Exceptions. The Bill of Exceptions (p. p. 12, 13, 14 & 15) states that both parties put in evidence the written statements therein which was all the testimony given or offered by both or either of the parties in the case. These facts are; that the defendant is carrier of goods, by railway, from Toledo in Ohio to Chicago in Illinois. That the plaintiffs bought at Baltimore a box of goods, worth, at Chicago, one hundred and eighty-five dollars, which came into possession of defendant at Toledo, and was carried by it to Chicago. The defendant had paid back charges of three dollars and sixty-three cents, and its charge for carriage to Chicago was three dollars fifty-seven cents. The cars containing the box reached Chicago at nine, p. m., of the 12th August, 1856, and the box was unloaded into defendant's warehouse at 12 o'clock noon, of the 13th August.

A notice of receipt of the goods was put into the Post Office at Chicago between the hours of five and six on that afternoon, the 13th August. The following is the notice;

MICHIGAN SOUTHERN & NORTHERN INDIANA R. R.
FREIGHT AGENT'S OFFICE,
Chicago, August 13th; 1856.

U. Fol. 471.

RICHARDS, CRAMBURGH & SHAW:

The following articles consigned to your address are now ready for delivery at this Depot, viz:

1 Box D. Goods,

Weight 420. Total Charges $7.20

[illegible]

You are requested to remove the same within twenty-four hours, otherwise it will be put in store at the expense and risk of the owner. In no case will freight be delivered except to the owner or consignee, or to his written order, unless it is called for by yourself. Please send this notice after having signed the order below, and inserted the name of the person to whom you wish it to be delivered.

Yours Respectfully,

CHALES M. GRAY, Agent,

Agt. M. S. & N. I. R. R.

Please deliver the above named articles to.....

.....

Plaintiffs received this notice from the Post Office at ten o'clock forenoon, August 14th. It is customary in the Chicago Post Office to examine the drop boxes and distribute letters from them every half hour, and drop letters do not generally lie in the drop boxes longer than half an hour before they are distributed into the owners boxes for delivery. The stamp on this notice was that of the 14th.

On the evening of the 13th August, between seven and eight o'clock a fire broke out in a stable near defendants warehouse, which extended to and destroyed the warehouse containing plaintiffs goods. The fire did not originate in any negligence of defendant, nor was defendant negligent in efforts to save the goods from burning. The goods of plaintiff were burned in said fire.

It is admitted by the parties that this notice was in printed form Except the date, No of folio, address of the plaintiffs, 1 Box Dyeards, Weight 420 Total charges 7.20 and signature of the agent.

[12627-3]

211

Jonathan Richards
& als
vs

The Mich. Sou. & No. Ind
R.R. Co

Filed April 8, 1854.
L. Leland
Clerk

Jonathan Richardson
appt

211 vs.

Mich. Sou. & Nor. Ind. R.R. Co

Record

Transcript of Errors

Filed April 21. 1858
S. Leland
Clk

March & King. attys. for Appt

Fees $4.00

The Michigan Southern & Northern Ind R. R. Co. ads. John a than Edwards et al

Appeal from Body

Argument for Appellee

The question presented to the Court in this case is this;

What is the liability of a Railroad Company for goods transported on their road after the goods have arrived at the place of destination, been unloaded from the Cars & have been placed in the warehouse of the Company, and notice has been given by post to the Consignee & the goods have been destroyed, without any want of care on the part of the Company, before in the usual course of business, the Consignee had time to receive the notice and remove the goods.

In such case is the liability of the Railroad Company that of a Common Carrier or that of a Warehouseman?

[12627-32]

Upon this question there is some conflict of authority and as the Law is now to be settled in this State we propose briefly to discuss the question as one of reason and principle —

The Law is that a common carrier is an insurer of goods entrusted to his care against loss occasioned in any manner except by the act of God or the public enemies — What was the reason of this strict rule, and does the reason apply to a Railroad Company after the goods are transported & have been placed in Store?

The reason of the rule is thus stated by Lord Holt in the case of Coggs v. Bernard 2. Ld Raym. 909. which is the leading case on that subject — "The Law (says he) charges the carrier thus intrusted to carry goods, against all events, but acts of God and enemies of the King — For, though the force be never so great, as if an irresistable multitude of people should rob him

nevertheless he is chargeable — And this is a politic establishment, contrived by the policy of the Law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings — For else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c; and yet doing it in such a clandestine manner as would not be possible to be discovered" —

And Chief Justice Best in Riley v Horne 5. Bing 217. supports the views of Lord Holt — He observes: "When goods are delivered to a Carrier, they are usually no longer under the eye of the owner; he seldom follows or sends his own any servant with them to the place of their destination — If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collu-

sion with them, the owner would be unable to prove either of these causes of loss & his witnesses must be the carriers servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves - To give due security to property, the Law has added to that responsibility of a carrier, which arises immediately out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an <u>insurer</u> -"

The reasons then, for the rule which makes a carrier liable without any default on his part are:

1st The danger of fraud or collusion on the part of the carrier -

2d - While the goods are in transitu they are not under the eye of the owner or his servants -

3d - The owner cannot interfere in any manner with the custody of the goods, and more than all no amount of vigilance & watch

ful ness on his part would enable him to guard or preserve his prop- erty —

Where the reason of the rule fails the rule itself ceases, and if none of the reasons which led to the enforce- ment of this strict rule of liability a- gainst Common Carriers, exist in rela- tion to Railroad Companies after the carriage has been performed, and the goods are in store, then the Court will not enforce such rule against them —

Is there any more danger of fraud or collusion on the part of the agents or servants of a Railroad Company in charge of a warehouse, than there is on the part of the agents and ser- vants of any other Warehousemen? why then, should the rule be different? It is certain that the owner may controll the goods immediately on their arrival, the absolute control of the Carrier then ceases, and the de- gree of watch ful ness which is sought to be enforced against the Company if exercised by the owner would en- able him to protect & preserve his own

[12627-34]

property - The rule for which we contend still leaves upon the carrier the burden of proving that the goods had arrived in proper order at the place of distination and that they had been removed from the cars & placed in the warehouse for Storage - The responsibility of the carrier would last until he had shown that the responsibility of the warehouseman began -

The Record in the case at bar shows, by the admission of the parties, that the loss was not occasioned by any fault of the Company or its agents, the technical rule which makes a person liable for a loss which happened entirely without his fault is characterized by all courts as a harsh one, and this court we are persuaded will not extend it so as to embrace cases which are neither within the policy nor the reason of the Law, especially when the effect of the enforcement of such rule is considered -

The Railroad Company are bound

by Law to provide warehouses for the Storage of goods received.

Mc Henry v R. R. Co. 4 Harring. 450 - and it results from the nature of their business that these warehouses will usually be full of property just received, and in case such warehouse is consumed by fire, Large quantities of goods which the Law compels them to keep for the owner are destroyed, there has not been time since the arrival of the train to notify the numerous consignees & have the goods removed. The Company is without fault, it has exercised due care & diligence, but the profits of a year are swept away at once, and this although the exercise of ~~the~~ of the highest degree of care and diligence on the part of the Company would not have saved the goods, and the exercise of the highest care and diligence on the part of the owner would have enabled him to have received his goods at the depot on their arrival. This would impose upon

[12627.35]

Railroad Companies a burden too great to be borne -

Originally when carriage of goods was principally done by wagons on land, the Carriers responsibility was only terminated by personal delivery - The contract to carry was from the point where the goods were received by the Carrier, to the place of residence or business of the consignee, there to be delivered into his own custody or that of his agent, a duty arising from the carriers mode of doing business, his wagons being easily moved from place to place, the goods entrusted to his care were with facility distributed among the various consignees along his route -

This rule was soon modified in the case of Carriers by water whose modes of transportation did not admit of personal delivery, unless by the intervention of a sub-contractor, and a delivery on the wharf, with notice to the consignee substituted in its place -

Chickering vs Fowler 4. Pick. 371
3. Cowen & T. 322.
Hayde v Trent & Mersey Nav. Co. 5. T. R. 389-
Story on Bailments § 302. 303. 304-
2 Kents Com. 604-
Lesse v Cordova 1. Rawle R. 203-

Wharves & Landing places especially in large cities are very much exposed to depredations of thieves, and goods placed upon them are subject to injury by the elements, hence the Law required this notice to consignees, in order that they might guard against such casualties - In the cases cited the Carriers did not provide any place for the deposit & safe keeping of the goods, but placed them upon a public wharf, & the goods being lost it was held that the carriers were liable, because they had not terminated their responsibility as carriers, that notice should have been given to the consignees to remove the goods, they having been left in such

[illegible]

exposed situations that they might be easily lost, stolen or destroyed This was without doubt the proper rule of law in such cases —

But we insist that where the Carrier by Railroad provides at the termination of his route, good and sufficient warehouses for the storage of goods in an ordinarily safe manner, where they will be protected from danger of injury by the elements and the depredations of thieves & robbers, and the goods upon their arrival are unloaded and placed in such warehouses, that in such case the rule which first made the Carrier responsible as such, until a personal delivery & second until delivery upon the wharf with notice to the consignee, that has been still further modified, so as to relieve the Carrier from liability as such when the goods are so deposited in a safe warehouse provided by the carrier, and then he becomes a warehouseman & liable only for the loss of the goods upon

McKeever v. R.R. Co. 4 Kerrington 448 -

negligence being shown -

Thomas v Bos. & Prov. R.R. Co	10. Met 472 -
Smith v Railroad	7. Foster 86 -
Norway Plains Co. v B. & M. R.R.	1. Gray 263.
Stone v Mail	31. Maine 409
	18. V.T. 131.
	23. V.T. 186.
	6. Neil 157 -
Hayde v Trent & M. Nav. Co.	5 T.R. 397.
Garside v Sarne	4. T.R. 581.
In re Webb	8. Taunt. 83.
	2 B. 443.
Story on Bailments	§§446 — 450

In the case cited from 10 Met. Newbard Judge, says "when suitable warehouses are provided & goods which are not called for on their arrival are stored safely in such warehouses or Depots, the duty of the proprietors as Common Carriers, is in our judgment terminated They have done all that they agreed to do, they have transported the goods safely to the place of delivery & the consignee not being present to receive them, they have unloaded them & placed them in a safe & proper place for the consignee to take them away; and he can take them at any

[12 637-39]

reasonable time. The duty liability of Common Carrier being ended, the proprietors are by force of Law, depositaries, are by of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care."

In the case cited from 1. Gray 263. - Shaw C.J. says, "The liability of goods carriers of goods by Railroads, the grounds and precise extent and limits of their responsibility are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters & Canal boats on water, and in others like that of wagons on land; but in some respects it differs from both."

and in laying down the rules which apply to each the court say;

"This rule (of personal delivery) applies, and may very properly apply to the case of goods transported by wagons and other vehicles, traversing the common highways & streets

and which therfore can deliver the goods at the houses of the respective consignees: But it cannot apply to Railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place by its side, at some intermediate point".

"Another peculiarity of Railroad transportation is (and herein it differs from both carriage by land & by water) that the car can not leave the track or line of rails on which it moves; a freight train moves with rapidity, and makes very frequent journies, and a loaded car while it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course it is essential to the accomodation and convenience of all persons inter-

[12627-38]

ested, that a loaded car, on its arrival at its distination, should be unloaded, and that all goods carried on it, to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety, the car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accomodation ~~to~~ by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the Court are of opinion, that the duty assumed by the railroad corporation is — and this being known to owners of goods forwarded, must in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them.

them — that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for — This it appears to us, is the spirit and legal effect of the public duty of carriers, and of the contract between the parties, when not altered or modified by special agreement" —

"This we consider to be one entire contract for hire; and though there is no seperate charge for storage, yet the freight to be paid fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage as for the carriage — This renders both the services, as well the absolute undertaking for the carriage, as the contingent un-

SJR 627-39

dertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by Railroad, we think there results two distinct liabilities; first that of Common carriers, and afterwards that of keepers for hire or warehouse keepers, the obligations of each of which are regulated by law." "We may say then, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers to deliver the goods to the consignee; or in analogy to the old rule, if delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses

occasioned by their fault or negli-
gence" -

The court further say " they are strong
ly inclined to the opinion that in
regard to the transportation of goods
by Railroad, as the business is gen-
erally conducted in this country,
the rule — that the rail road company
are responsible as common carriers
of goods until they have given no-
tice to consignees of the arrival of
goods — does not apply - The im-
mediate safe storage of the goods
on arrival in warehouses provi-
ded by the rail road company,
and without additional expense,
seems to be a substitute better a-
dapted to the convenience of both
parties" — "We think therefore, that it
would be alike contrary to the contract
of the parties, and the nature of the
carriers duty, to hold that they shall
be responsible as common carriers
until the owner has practically an
opportunity to come with his wag-
on & take the goods, and it would
greatly mar the simplicity and ef-

[1837-40]

ficacy of the rule, that delivery from the cars into the Depot terminates the transit".

And in McKenny vs R R Co. in 4 Haring The Court says "that if the owner or consignee be not present to receive the goods at the time of their arrival, the carrier will not be excused, if he leaves them at the stopping place, in such situation as exposes them to injury by the weather or loss by theft. It is his duty to have them put in some safe place for security of protection; and until he has done so, his liability as common carrier does not cease"

"By storing the goods the defendants would have become mere warehousemen; and been liable only for such losses as arise from want of good faith, reasonable care and ordinary diligence. But until the goods were safely put in a warehouse, the defendants continued responsible as common carriers";

"The business in which they were engaged, required them to have a

warehouse - If they had none of their own, they were bound to find one. The costs and expenses of the storage of goods is a proper subject of charge against the owner or consignee, until after notice given he comes and takes them away"

The Case of Moses v. The Boston & Maine Railroad 32. N. H. 523. is relied upon by Appellants, as laying down the rule, that the liability of the Carrier as such is not terminated until notice has been given and a reasonable time has elapsed for the consignee or owner to remove the goods.

This is the only case where it has been attempted by Courts to lay down such a rule & we think the rule as there laid down is too vague, uncertain, unreasonable & unjust to find any favor with Courts desirous of adapting & applying the broad & comprehensive principles of the Common Law, founded on reason & natural justice, to new circumstances, by considering the fitness & propriety, the reason and

$10,509-41

justice which grow out of these circumstances —

The Court in that case held, that upon the arrival & Storage of the goods, notice must be given to the various consignees of their arrival, and that he must have reasonable time to take them away, before the liability of the Carrier is discharged or changed to that of Warehouseman and in this connexion they say: "The Extent of the reasonable opportunity to be afforded him for that purpose (of removing the goods) is not however to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience & accomodation that he should have longer time or better opportunity, than if he resided in the vicinity of the Warehouse, and was prepared with means and facilities for taking the goods away — If his particular circumstances require a more extended opportunity, the goods must be

considered, after such reasonable time as but for those peculiar circumstances, would be deemed sufficient, to be kept by the company for his (the consignees) convenience under the responsibility of depositaries or bailees for hire only" Thus the rule as there laid down is only for the benefit of consignees who may be fortunate enough to "live in the vicinity" of the warehouse of the Company and "are prepared with facilities for taking the goods away", for the Court say; "If the peculiar circumstances of any consignee require a more extended opportunity than if he resided in the vicinity of the Depot had facilities for removing the goods, then the goods are kept by the Company for such consignees convenience, under the responsibility of depositaries or bailees for hire only"

It is only necessary that the proposition should be stated that that its absurdity may appear —

If the rule contended for by the appellant should obtain, it

[1862-43]

would impose upon Railroad Companies a burden too great to be borne. It would subject them to liability as insurers of vast amounts of property, under precisely the same circumstances, where if they had not previously carried the goods, they would only be liable for reasonable care and diligence -

Is there any more danger of collusion and fraud when the servants of a Railroad Company have charge of a warehouse, than where the servants of a mere warehouseman have the same charge? And under the rule as contended for by us, the burden of proof is upon the Carrier to show, that the goods have arrived at the depot safely, have been unloaded and properly stored in his warehouse, before his liability as carrier ceases -

The learned Judge in the case last cited assigns as a reason, why the carriers liability should be continued after the transit is completed & until notice has been given & reasonable

time has elapsed for the consignees to remove the goods, that if the goods are purloined, destroyed or damaged by fraud or neglect, before they can be removed, the owner is left to prove the larceny or fraud by the servants of the company, they having, it may well be supposed, feelings and interests adverse to him, and that the servants of the Company in charge of their warehouse have great facilities for manufacturing evidence of a burglary or creating proof of the destruction of the goods by fire set by himself for concealing his agency in their larceny —

Do the agents & servants of a Railroad company in charge of their warehouse have any better opportunity for committing frauds of this kind, than the agents & servants of any other warehouseman?

Are Railroad Companies in the habit of employing in their warehouses persons devoid of integrity & character, so that it becomes necessary for courts to discriminate against

[12627-43]

warehouses under their charge?
If not, there is no force in the
reasons urged in favor of the rule,
or the rule should be extended,
so as to include all warehousemen -

The warehouses of Railroads are
commonly filled with goods, the
large proportion of which, have
just been received, and if at any
moment in the entire course of their
business a fire should be com-
municated to their warehouse &
the servants of the Company, should
use the highest possible care and
diligence to prevent the destruc-
tion of the goods; yet under the
rule sought to be enforced the
Company would be liable for the
entire loss -

This can not be the policy of the Law;
such a rule would not tend to
stimulate the care and diligence
of those who thus have charge of
goods, for they could only be ex-
cused when the destruction was
caused "by the act of God or of
the public enemies," no amount

of care and diligence will under such a rule discharge the company from their liability -

In this case at bar, it is admitted that the defendants used ordinary care and diligence as warehousemen -

Much stress is laid, by Appellants, upon the fact that ~~that~~ the Defts by giving a certain notice, have thereby made a prima facie case, either that they were bound by their contract to give such notice in this particular case, or that it showed their general custom of doing business; And that in either case the plaintiffs had a right to expect the notice, and were therefore not bound to be on hand to receive the goods on their arrival -

But if the rule of law is that the responsibility of the carrier as such ceases, upon the unloading & disposing of the goods in a safe warehouse prepared by him for such purpose - then the notice given in this case cannot affect such liability in the least, so far as

[12627-44]

increasing it is concerned -
Can it be held that when the carrier has by a certain act become divested of his responsibility as carrier become a warehouseman liable only for ordinary care & diligence, that he can by giving the owner of the goods notice that that the goods are in his Depot, ready for delivery, and that unless they are removed within twenty four hours, they will no longer be stored "free of charge", but will be "at the expense & risk of the owner", Can it be held that by such a notice he again becomes liable as carrier?

The Court will observe in the Abstract page 3. that the gist of this notice is to charge the Plffs with warehouse charges on the goods if he does not remove them in a reasonable time, and was not intended to Terminate their liability as carriers, but to terminate their status as warehousemen under the original contract & subject

the consignee to pay the storage if the goods were not removed — It seems to us that an inspection of the notice will be sufficient to satisfy the court that it never could have been intended by the company to Terminate their liability as <u>carriers</u> by any such means, and it manifestly could not change their liability from that of warehousemen back To that of carriers — The notice states that the goods of the Plffs" are ready for delivery at the Depot" of Defts, when by the rule as laid down in 10th Metcalf & 1st Gray &c &c the liability of the carrier as such had ceased, hence this much of the notice, can only be construed to have given information to the owner that the Defts had possession of the goods as warehousemen — The notice then informed the owner that unless he removed said goods within twenty four hours "they would be put in store at the expense & risk of the owner", the

[12627 45]

only effect them, which this notice could have, was to subject the owner to pay warehouse charges after the Termination of the 24. hours - Until the twenty four hours had elapsed the Company were warehousemen for a reasonable time, under their original contract to carry, and store for a reasonable time, and by this notice were endeavoring to terminate this condition - The Carrier can not bind the consignee to pay warehouse charges until reasonable time has elapsed for the removal of the goods, and what is reasonable time will depend upon whether the consignee or owner had notice of the fact that the goods were in the Company's Depot ready for delivery - and in the case at bar it was the evident intention of the defendants in giving the notice to thus subject the consignee to charges unless the goods were removed -

We think that the notice given

in this case can have no bearing on the qustion as to whether the Railroad Company at the time of the loss were carriers or warehousemen, and in this view we are sustained by the opinion of the court in the case in 10 Metcalf before cited. The Court there say "as the Defendants are not Common-carriers, the notice we think becomes unimportant, as it would not screen the defendants from loss occasioned by their negligence or want of ordinary care, and beyond that they are not chargeable"

And in 1 Gray 263. before cited the Court say It was argued in the present case that the Railroad company are responsible as common carriers of the goods until they have given notice to consignees of their arrival. The Court are strongly inclined to the opinion that in regard to the transportation of goods by Railroads this rule does not apply

From a careful analysis of all the leading cases on this subject we are satisfied that

[13609-46]

the best settled doctrine is, that where a Carrier by Railroad safely transports the goods to their destination, unloads them & the consignee not being present, stores them in a safe place provided by him for that purpose; that then his liability as Carrier ceases, and he becomes a warehouseman, liable only for a neglect of ordinary care & diligence &

Under this rule the defendants in this case can not be liable for the loss of the goods in question —

B. Babcock &
Geo. Campbell for
Appellees —

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92

The Michigan Southern & N. I. R. R.

ads.

Johnathan Edwards et al

Argument for appellee

92

Filed May 13. 1858
L. Leland Clk

1 Hawks's @ 44. S10.
See.

Rex v Wakefield
Crown cases Res and Seen
Custom usages 1827.