

13145

No. _____

Supreme Court of Illinois

Western Transportation Co.

vs.

Newhall et al

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 221.

1860

Western
Trans Co
vs
Newhall

State of Illinois
Supreme Court
Third Grand Division

The Western Transportation Co
vs
Gilbert & Newhall et al

The Appellant having examined the written argument of the Appellee submit the following further considerations in reply.

II. The positions taken by us in respect to the conditions of the contract and the variance are not shaken by any of the authorities referred to by the Appellee's counsel. The case of Kingsley vs Ins Co cited ^{from} 8 Bush simply decides that the Charter and Bye Laws of an Ins Co printed on the sheet containing the policy but not purporting in any way to be any part of the contract of the parties either by reference or otherwise can not be considered a part of such contract. The same case decides that if the words of the proviso had constituted an exception to the liability they must have been noticed and negatived in the declaration. But the question of variance did not arise in that case because the Declaration contained a count setting out the proviso in hac verba.

The case of Brown vs R R Co 11 Bush is decided upon the ground that a notice printed on the back of a passenger ticket given the plaintiff as the evidence of his right to travel a certain distance on the road, was of itself no evidence of a special contract with him respecting the baggage or freight. This is merely an affirmance of the settled doctrine in this Court as to carriers notices. The owner in that case

had his trunk checked with no notice whatever of any limitation of liability with respect to it. Subsequently to this he procured a passage ticket. On the back of this ticket was some notice in regard to the baggage but this ticket was not in the nature of a special contract. It is not retained by the owner. It is surrendered before his arrival and is in fact a mere evidence of the payment of fare which the les has provided for its own convenience - and the notice on the back was no more evidence of a special contract than any other notice. But where the party shipping goods ~~receives~~ ^{receives} a bill of lading - that bill of lading is the contract of carriage and the reception of it by him, & delivery of goods under it makes it his contract as well as the carriers. He is bound to pay the freight therein agreed - and he is bound by all the stipulations and conditions to which by his acceptance and action under it he has made himself a party; and the Court in this very case of "Bushing" say that they decide it without "questioning the right of common carriers to make reasonable limitations as to the extent of their liabilities for baggage or merchandise to be transported by them".

III. It is stated in the written argument of the Appellee, that the defendants failed to show that they took care of the powder at Pickards Bridge, altho' it was proved that the powder could be safely stored in a canal boat if the boat was kept dry and was not suffered to leak.

This is not an exact statement of the language of a witness whose words (considering his position in the cause) should not be over-stated.

His words were - The powder

would have kept well in a canal boat "if she was dry and did not leak". He immediately added "Powder gathers and absorbs moisture rapidly when exposed to the damp atmosphere."

There is of course no doubt that if the boat was dry and the air in her was dry, the powder would have kept dry. But even this witness does not undertake to say that the atmosphere in a canal boat which was exposed thro' the winter in the manner this was obliged to be, could be kept dry - or that a dry atmosphere under the circumstances was not a physical impossibility - nor that an atmosphere ^{in America} ~~unusually~~ charged with humidity would not occasion all the damage which was received.

III. The argument for the appellee seems to place more reliance on an alleged offer of Tuttle to settle for the damages than on the legal ~~title~~ right to recover them on the facts.

We apprehend that an attempt of the les to compromise and settle this matter without litigation even if it had been carried further and resulted in a positive offer would not be suffered to prejudice their legal rights when such efforts have failed and they are thrown back upon those rights and the more especially when by the exclusion of the testimony of Mr Tuttle, the person who is said to have made such offers, the court are in possession of but one side of the story. It was manifestly for the interest of this company as it is of all such companies when the loss or injury to goods occurs while in their possession, to avoid litigation and to settle rather than contest a claim if they can do so on any fair and reasonable terms whether they are legally bound or

not. All that appears on this subject is that Tuttle agreed that after the freight had been received and the damage ascertained he would settle it - which amount to nothing more than a statement that if the plaintiff should receive the powder and pay the freight according to the contract, whatever damages the company should on examination be found liable to pay they would pay. It surely will not be pretended that these words of the agent at Chicago expressing merely a disposition to do all that they were bound to do, should be construed into a waiver of all right of examination into the merits of the claim, or investigation into its nature and amount. Suppose it had been ascertained that the powder was defectively manufactured and that the injury was from that cause - were they stopped from setting this up by these words of Mr Tuttle.

To give such words uttered in the spirit of fairness and evincing only the intention of honorable men to have the matter investigated and then pay what if anything they found to be justly and fairly due - into an absolute and unconditional promise to pay precluded^{ing} them from any defence is ^a most unjust and unwarranted perversion of the meaning and effect of the words and one which will not receive any countenance from this Court.

It is an attempt to sustain this enormous and most oppressive judgement without regard to the law or the facts and in the face of both

IV. The doctrine contended for by the appellees that negligence will be presumed against the bailee in a case where he refuses to give any account at all of the way the injury occasioned, supported by the

references to the note in 1 Parsons on Contracts p 606 and Logan vs Matthews 6 Barr 417 and Ware vs Bay 11 Pick 106 - although it is far from being a settled doctrine does not help his position in this case. All that the cases of 6 Barr holds is that when the bailee returns the property in a damaged condition and fails to give any account whatever of the matter or explain how it occurred, the law will presume negligence.

"But" say the Court "when he gives an account although it may be a general one, of the cause and show the occasion of the injury, it then devolves on the plaintiff to prove negligence."

This case supports the case made by the Appellants - because surely it will not be pretended that the facts proven here do not furnish a general account of the cause of injury and show generally the way it occurred - and that being done say the Court in that case, "it then devolves on the plaintiff to prove negligence."

Ware vs Bay 11 Pick 106 was a case of a carrier of passengers, and it appeared that a nut came out and a wheel came off. This was of itself unexplained a prima facie case against carriers of passengers who are bound to have "as good a coach as can be made and as skilful a driver as can be found."

The whole effect of the Penn case is that where the goods are delivered damaged and no cause or account of it however general is given, but the bailee is silent and makes no explanation whatever that the law will imply negligence under such circumstances. This may be admitted to be the law for the purpose of this case without affecting any of the positions taken by the Appellants.

V. The position asserted on the argument for the appellee that in the case of a special contract the burden of proof is on the carrier not only to prove the loss within an excepted ~~loss~~^{peril} but also to disprove negligence on his part, is not the law.

It is sustained by cases in two States only Ohio and South Carolina in which the doctrine of a limitation of the carriers responsibility by special contract has until recently been doubted.

The case cited from 9 Watts sustains no such position. In that case the plaintiff proved the negligence of the carrier. In the case of Beckman vs Shouse 5 Rawle 190 cited - the contrary doctrine is distinctly established. The Court say, "It is true that when a loss has been proved (or damage) ordinary care in the carrier is presumed, and the onus is thrown upon the plaintiff."

In the case in 13 Barber the statement on this point is a mere obiter. No such point arose in the case, and the doctrine is expressly over-ruled even in respect to carriers of passengers where the presumptions of negligence are much stronger in the case of Lurtis vs R R Co 18 N.Y. 534. In that case the Court say - "In no instance that we are aware of has it been said by any Judge that negligence on the part of the carrier was to be presumed from the mere happening of an accident except where the facts proved in the particular case fully warranted the presumption of negligence"

And further "The Judge charged the jury in this case that the fact of this accident occurring, was of itself presumptive evidence of negligence on the part of the defendant. If by this the Judge is to be understood as saying that in

cases of this kind, evidence of the mere happening of an accident resulting in injury to the plaintiff without proof of any of the circumstances under which it occurred, establishes *prima facie* the charge of negligence. We are not prepared to assent to the proposition."

The passage cited from Greenleaf on Evidence Sec 219 is evidently a mistake. In Sec 218 He says "If the notice (where a notice is legal) is proved by the carrier, its effect may be avoided by evidence on the part of the plaintiff that the loss was occasioned by the negligence of the carrier.

"But in all such cases the burden of proof of the negligence is on the party who sent the goods."

This citation is wholly inconsistent with the citation in Sec 219 relied on by the appellee - and for which no authority is cited except the case in South Carolina.

It is very clear that a notice does not stand on as strong a footing as a special contract or acceptance. The courts which refuse to sanction a restriction of liability by notice sustain it by special contract. And where it is sustained, it is upon the ground that the notice brought home amounts to a special contract.

It would appear therefore that the far lines in Sec 219, a rule precisely the opposite of that so fully and emphatically laid down in the previous section - must have been an inadvertence on the part of the learned author.

The contrary doctrine that so soon as the cause is brought *prima facie* within an accepted peril, the burden of proof is on the owner to prove

negligence is sustained by the high authority of the Supreme Court of the U.S. in *Black vs Barnwell* cited *supra* and by the Court of Kings Bench in *Muddle vs Stride* *supra*. It is held to be law in the case of *Hunt vs The Cleveland & McLean* 78 where Drummond J says "The damage is thus shown to be caused by dangers of navigation. It follows that the shipper must establish negligence or want of skill in the carrier. It must not be a matter of doubt merely but it shall clearly appear there was a want of proper care, skill or diligence," - and is sustained by the uniform current of decisions of the English Courts with respect to notices, and by all the leading text books on the law of bailments.

Edwards which is the most recent treatise thus states it.

"The distinction would seem to be that when there is a total failure to deliver the goods bailed on demand - the onus of accounting for the default lies with the bailee, otherwise he shall be deemed to have converted them to his own use; but when he has shown a loss or where the goods are injured the law will not intend negligence. The onus is then shifted on the plaintiff

In the case of a special acceptance, as the plaintiff must set forth the contract according to its terms he is it seems bound to show a loss or injury arising from causes or negligence for which the defendant is answerable"

Edwards on Bailments 567-568.

VII.

The counsel for the Appellees endeavor to get rid of the manifest error of the Court in refusing the Instructions asked, by a verbal criticism upon the words "clear affirmative testimony" which

words are found in the 4th and 8th Instructions only and do not appear in the 5th, 6th or 7th.

The only object and effect of these words was to do away in the mind of the jury with the presumption of negligence which the law attaches to the common carrier as such provided the damage had in their judgement been brought within one of the excepted perils.

It was merely stating that where the loss had been connected with a providential cause or excepted peril that this exused the carrier prima facie, and if the plaintiffs relied on the defendants negligence the plaintiffs must make out a case of negligence - and the Defendants were not to be held liable until they had done so.

Under the circumstances it was what the defendants had a right to ask and if given it would have given the jury a clearer idea of the law governing the case.

The 7th Instruction contains no such language. It is unobjectionable in every respect both in form and principle. These words "by clear affirmative testimony" amount to no more than the words "clearly appear" used by Lord Denman and the words of Drummond "It must not be matter of doubt merely but it should clearly appear there was a want of care &c"

VIII. In the case of 23 Vermont cited on the question of the power of the agent to make the contract it appears that the charter of the company was offered in evidence and gave the Defendants full powers to make the contracts of carriage sued on. In this case there is no evidence that the corporation

had any such power - and the contract set up is in violation of the written instructions to the agent.

It is said the Contract was not denied on oath. Suppose it appeared on the trial to be the contract of a married woman - would it be the basis of a judgement because not denied on oath? A corporation has no more power to contract than a married woman excepting so far as it is conferred by law.

The admission of General agency amounts to nothing. The agent could do no more than the corporation, and the corporation could do only what it was authorised to do, and nothing can be implied or presumed. As to domestic Corporations of a quasi public nature like Rail Roads the Court ^{possibly} ~~may~~ take notice of their acts of Incorporation - but mere private trading Corporations as Banks and Manufacturing Corporations the power to contract must be established.

In the case in 5th Duer 58 cited on the same point - it appeared that "the acts incorporating the Defendants were read in evidence and to be deemed a part of the case". That was a case against a Rail Road for loss of goods like this.

From James G. Giddings
J. Appenz

Supreme Court
April 2. 1860
221 — 147
Western Transp. Co
3

G. G. Newhall. us
~~~~~

Argument of  
Appellant. vs  
reply to Appellee's  
written argument

Filed May 29. 1860  
S. Ireland  
Clk.

Grinnell & Sons



Supreme Court

Daniel J. Pawhall et al

<sup>To.</sup>  
Western Transportation Co.

It is insisted that there is a variance between the Bill of Lading or rather the receipt for the Powder, given by the Transportation Co. to the plaintiffs and the declaration, for the reason that a certain clause printed on the back of the receipt, under the head of "Condition and rules" is not stated in the declaration as one of the accepted points. - The clause referred to is in these words.

"The Companies will not hold themselves liable at all for injuries to any articles of freight during the course of transportation <sup>by the weather</sup> or as a result of an accidental collapse or natural tendency to decay."

It is insisted that this is a part of the contract under which the company agreed to transport Powder to Chicago and operates as a limitation of their liability - which should have



been noticed in the declaration.

The only way in which the Common Law liability of the Carrier can be restricted is by special Contract with the owner. It cannot be done by notice though brought home to the knowledge of the owner, for notwithstanding the notice the owner has a right to insist that the Carrier shall receive the goods subject to all the responsibilities incident to his employment.

If the delivery under such circumstances authorizes an implication of any kind the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the Carrier.

The notice cannot have the same effect. It does not raise the same presumption of acquiescence as arises in those cases when the Contractor has the absolute right to impose his own conditions.

The Carrier is under a legal obligation to receive and convey the goods safely or answer for the loss. He has no right to prescribe any other



turns and a notice can at most only amount to a proposal for a special contract which requires the assent of the other party. Putting the matter therefore in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, cannot warrant a strong presumption, that the owner is <sup>imposed</sup> ~~subject~~ to a restricted liability - on the part of the carrier, than it does that he intended to insist upon the liabilities imposed by law, and a special contract cannot be implied when there is such an equivocalness of probabilities.

Hedden v. Poulton 19 Wend. 234

Turner v. Mech. Bank in Champ Transfer. 23.

Vermont 186 - 265

N. E. Steam N. Eo in Merchants Bank 6 How 313.

Meigs v. Boston & M. R. R. 4 Foster 71.

Dow v. N. E. Steam N. Eo. 4. Sanford 136

Dow " N. E. Steam N. Eo. 1 Reman 485

Parsons v. Montreat 13. Barb. 353

Fish v. Chapman 2 Gil. 349

Mech. Loan. R. R. N. Eo. in Hale 6 Mich (2 July) 244

Ames Trans. N. Eo. Meigs v. Meigs 5 Mich (1 July) 368

Black v. Fox on 21 Wend 153

In all the cases cited in behalf of the



appellant to show that the endorsements on a Contract at the time of its execution are to be deemed a part of the contract. - ~~the endorsements~~ Either the endorsements are referred to in the body of the Contract and the Contract by its terms made subject to the endorsement or the Contract is referred to in the endorsement; but in the case before the Court no such reference whatever is made but the entire Contract is on the face of the instrument.

Again the cases cited on this point on the part of the appellant, are cases of ordinary Contracts where the party in whose favor the endorsement is made, is under no legal obligation to under the price required but has a right to impose such terms and conditions as he shall see fit and giving to the endorsement the operation and effect of a notice - the assent of the other contracting party will be implied; and notice with assent to the terms of it constitutes a Contract.

But no such implication can arise in favor of a common carrier



for he is under a legal obligation to  
render for a reasonable price the re-  
quired service.

Hollister vs. Houtan 19 Wend 234  
Farmers & Merch. Bank vs. Champ. S. Co.  
23 Remont 186-205

And it devolves upon the carrier to show  
affirmatively the terms of any contract  
which lessens his common law liability

Amer. Trans. Co. vs. Price & Smith (1 Cat.) 368

The case of Smith vs. R. R. Co. vs. Hale &  
Smith. (2 Cat.) 244, cited above is di-  
rectly in point. The receipt given  
in evidence in that case was as  
follows.

" Reich. Cent. R. R. Company.

Grand Lake Oct 26. 1857

" Recd of Hale Smith & Co as Consignors the  
articles marked and weighed as follows.

" article      Marks & Numbered      Weight.

" One Car of Wheat in Bulk

" Car No 4946

24,206

" To be transported over said Rail Road  
" to the Depot in Detroit, and then de-  
" livered to Hale Smith & Co as Order upon  
" the payment of the Charges thereon



" and subject to the rules and regulations  
" established by the Company of which no-  
" -fee is given on the back hereof "

William H. Pease Freight Agent M. & C.  
R. R. Enclosed on the back

" Abstract of the Rules & Regulations as  
" per Published Freight Tariff "

" The Company will not be responsible for  
" damages occasioned by delay from  
" Stumps, accidents, or other causes or by  
" decay of perishable articles by heat or frost  
" to such as are affected thereby, or for dam-  
" ages to the hidden contents of packages,  
" or by leakage or bursting or by reason of  
" improper packing when received at the  
" depot - Nor will it be responsible for  
" any Merchandise unless receipted for by  
" a duly authorized agent; Nor for a  
" greater amount than \$200. on any one pack-  
" age except by special agreement and up-  
" on payment of ~~extra~~ rates, and all goods  
" and Merchandise will be at the risk  
" of the owner thereof while in the Compan-  
" y's warehouses except such loss or injury  
" as may arise from the negligence of the  
" agents of the Company. Goods consigned  
" to irregular Stations (those not in Capitals



13  
" in the Freight-Tariff) will be delivered at  
" the nearest <sup>regular</sup> Station unless the owner gives a  
" written order to deliver them at the irreg-  
" ular Station at his risk."

The defendant below (see page 246) asked  
for the following instructions

" That the defendants had a right by con-  
" tract to limit their Common law liability  
" and if the jury shall find by the terms  
" of the receipt given by the defendants  
" to the plaintiffs in this case, it was  
" stipulated between them that all goods  
" and merchandise would be at the risk  
" of the owner thereof while in the defend-  
" ants' warehouses, & as to such loss  
" or injury as might arise from the neg-  
" ligence of the defendants' agents, such  
" stipulation will define and limit the li-  
" ability of defendants in this case"

The Court below refused to give this  
instruction and for this refusal error  
was assigned. On this question  
the Supreme Court at page 256 says:  
" This question involves under the facts  
of this case both the power of lim-



" itation by notice and by special agreement,  
" and in this respect it is ~~more~~ more broadly  
" put than the facts of the case warrant.  
" as the point thus stated assumes the  
" existence of an express contract or implies  
" it from the terms of the receipt and ac-  
" companying notice. The sum assigned  
" is that the court refused to charge that  
" the company had a right by contract with  
" the defendants in sum to limit their Com-  
" mon law liability and that if the jury  
" should find that by the terms of the re-  
" ceipt given by the company to such  
" defendants it was stipulated between  
" them ~~or~~ such stipulation would define  
" and limit the the company's liability  
" in this case."

" We say the question is more broadly  
" stated than the case warrants because  
" the assumption of the request that the  
" terms of the receipt, (by which was in-  
" tended the receipt and notice limiting  
" the company's liability - endorsed thereon)  
" determine the contract is not in accor-  
" dance with the law, all the cases  
" which give to such notice any validity  
" by agreeing that something more than  
" mere notice endorsed upon a receipt



or otherwise brought to the consignee's knowledge is necessary to relieve the carrier from his common law liability.

His assent to the limitation is still necessary and that is a question of fact for the jury to be determined by evidence alibis, and is not the subject of presumption from the terms of the receipt alone.

And this is the correct rule respecting notices of Common Carriers designed to have such effect. The Carrier can no more restrict his common law liability unless upon the free and full agreement of the party dealing with him than he can refuse to carry when required.

Such an agreement is not to be implied from the posting of notices or the simple delivery of one to the consignee, as this would be no more than limitation of his liability by a fact action. Some evidence of assent to the terms of the notice is necessary from which



" a Contract may be implied.

" On such a case if it is sought  
" to be inferred from the acceptance  
" of a receipt specifying a limitation  
" of liability or refusing to  
" an accompanying notice for  
" such limitation, or if it is sought  
" to be inferred from previous pro-  
" ceedings and dealings; if it appears  
" that the price of freight was  
" made lower in consideration  
" of such special restriction and  
" the party has received the benefit  
" of such reduction of freight.  
" Such and similar facts might  
" and undoubtedly would furnish  
" strong evidence of assent. as  
" in *Guth v. N. M. R.* 22 Eng. L.  
" & Eq. 315 and the Am. Trans.  
" *Co. v. Moore* 5 Mich. 348.

" But if in a case otherwise  
" similar no such difference in  
" the price of freight was made  
" or if the party had paid or  
" agreed to pay the higher rate  
" for the price uniformly deman-  
" ded according to the tariff of  
" the company in all cases, or



11  
" if no optional tariff of prices of  
" which the forwarding party may  
" avail himself is shown to exist,  
" little or no uniform assent to  
" such special terms can be drawn  
" without allowing the Company  
" in effect to limit their liability  
" by mere notice.

" Upon grounds of public pol-  
" icy this right should not exist  
" in the Company.

" The public has a right to  
" insist upon the full common  
" law liability as carriers un-  
" less a contract releasing the  
" Company from such liability  
" be clearly shown."

The Case at bar differs from  
the Case cited last above cited  
in these two particulars.

In the Case cited the en-  
dorsement on the receipt is ex-  
pressly referred to in the body  
of the receipt. In the Case at  
bar there is no such reference.

In the Case cited the  
notice endorsed was intended



to apply to the carrier with whom the contract was made. In the case at bar no such intention appears. On the contrary it is my evident that the rules endorsed upon the receipt were intended as a notice on the part of Rail Road Companies and to apply not to any particular shipment but to such goods as the Rail Road Companies might receive from the transportation company, to be transported on their roads, and as indicating, respecting such goods, the agreement or arrangement existing between such Rail Road Companies and the Transportation companies, - analogous to that which existed in the case of N. E. Steam N. Co. v. Merchants Bank 1 How. 383.

Stoddard v. D. C. R. R. Co. 5 Sanford 180.

Should the powder be injured while in the custody of the Rail Road company then in



an action by the owner against  
such Rail Road Company for  
such injury. These endorsements  
might be noticed, but they form  
no part of the contract with the  
transportation company, and in  
respect to this company they  
do ~~not~~ not operate even as no-  
tice.

The fact that Rail Road  
Companies are mentioned in  
these rules is evidence that  
they were intended to apply  
to them.

Harrison v. Douglas & Adolph & Ellis  
402.

30 Eng. L. & E. L. Rep. p. 196.

Every statement enclosed upon  
the back of a contract is not for  
that reason to be treated as a  
part of the contract.

Brown v. Eastern R. R. Co. 11 Leach. 97  
Low v. Pupell 4 March & Selwyn  
506.

The clause referred to among  
the rules enclosed upon the re-  
ceipt cannot be construed as



Any Exception, which the pleader in his declaration should have proved and negatived, for the reason that it <sup>was</sup> not inserted in that part of the receipt which contains the promise on the part of the company to transport the goods &c.

Kingsley v. N. H. Eng. M. Co. 100.  
8 Leach. 401

Injuries occasioned by the weather, accidental delays, or natural tendency to decay are not injuries for which the carrier is liable and they substantially come within the exception of dangers of navigation and acts of Providence.

Black v. Bamdell 12 How. and 283. 12 East. 381 4 Camp. 119 1 Taunton 15.

A contract to forward goods to a distant place is equivalent to a contract to <sup>transport</sup> ~~receive~~ the goods.

Wilcox v. Parmer 3 Sanf. Rep. 410



The party thus contracting engages to transport and deliver the goods at the place of their destination

Blifform et al vs. Griffin 3 Kernan 519.

The copy attached to the declaration is no part of the declaration and the only way in which advantage can be taken of a variance between the copy and the count is to raise over, demur and set out the copy in habeas corpus in the demur, and then the variance will become manifest.

McKendley vs. Braden 1 Scam. 14  
 Seasons vs. Lee 1 Scam. 195.

A Carrier is none the less a Common Carrier, although acting under a special and not an implied Contract.

He acts as a Common Carrier so long as he carries for all indifferently whether under the Common Law Liability or under a Contract with his employer restricting that liability, the restriction



will operate only as an addition-  
al exception, leaving the Common  
law rule in force as to all beside

Rich. Sent. R. R. Sec. 12 Heals

1 Rich (2 Corley) 261

Atwood vs. Reliance Trans. Co. 9 Watts 88.  
Graham vs. Davis 4 Ohio S. Rep. 379  
Spindler vs. Hilliard 2 Richardson Rep. 286

And in such cases it is incum-  
bent upon the carrier to show  
that the loss or injury arose from  
causes embraced within the terms  
of the restrictions and exceptions.

If the acceptance of the goods  
is special the burden of proof  
is still on the carrier to show  
not only that the cause of the  
loss was within the terms of the  
exception, but, also that there  
was on his part no negligence  
or want of due care.

2 Green. Ev. 219.

Atwood vs. Reliance Trans. Co. 9 Watts 88  
Baker vs. Brown 9 Rich. Law (S.C.) 201  
Graham vs. Davis 4 Ohio State Rep. 379  
Spindler vs. Hilliard 2 Rich. 286  
Dunlop vs. Wade 2 Seam. 288



Bukman Vs. Keizer 5 Rand 190  
Parsons Vs. Montath 13 Barb 360.

The liability of the Common Carrier commences with the delivery of the goods to him and continues until the delivery of the goods by him; any accidental delay may be an excuse so far as respects the time of the delivery, for as to the time of the delivery the carrier is only bound to exercise ordinary diligence, but this does not affect his liability for the delivery itself.

1 Parsons on Car. 657-659 & Cases cited in Note.

Stor on Bailments § 447 § 536

Wick Vs. Humphrey 11 Adolph & Ellis N. R. 45.

Even if the rule of evidence stated in defendants 4<sup>th</sup> point be correct, which the authorities then cited do not establish, for a large majority of them are cases of ordinary bailment, still it has no application to the case at bar.

The rule as then stated is.



"When a life is shown to have re=  
sulted from one of the excepted causes the  
burden of proof is on the plaintiffs  
to prove negligence and if it left  
in doubt &c". — The burden of  
proof is not changed until it is  
shown that the life resulted from  
one of the excepted causes.

Now in the case at bar there  
was no evidence showing or tend=  
ing to show that the injury to the  
powder was occasioned by one of the  
excepted causes.

It was shown that the Powder ar=  
rived in Buffalo in good condition  
— that it was then sent to Pick=  
ards Bridge, some 25 miles dis=  
tant, to remain during the win=  
ter, — and when it came out in  
the Spring it bore clearly the marks  
of having been, not in a moist at=  
mosphere, but actually in the  
water. — Some of the Casks were  
water soaked. — and the defend=  
ants failed to show that they took  
any care whatever of it while it  
was at Pickards Bridge; although



6  
at it was found that the powder could be safely stored in a canal boat if the boat was kept dry and not suffered to leak. Yet the defendants did not attempt to show the condition of the boat as to soundness when she was brought out in the spring: although they showed with great particularity her condition the fall previous. When the Powder arrived in Chicago no attempt was made in behalf of the Company to account for its damaged condition; on the contrary the liability of the Company was clearly admitted by their agent here and he promised in behalf of the Company to pay for the injury when the extent of it should be ascertained.

It appears from Mr. Eaton's testimony that he with Fuller went to H. R. Hooper Esq. the Company's attorney and Mr. Hooper testifies (his testimony is set forth in the Record immediately after the depositions read on the part of the



defendant, it is not refused to in the abstract.)

" About the time the first cargo  
" arrived I was consulted as to the  
" payment of the freight. Eaton said  
" the Powder was in a damaged  
" condition and wanted to examine it  
" before the freight was paid. I pro-  
" posed to Eaton to pay the freight and  
" to have the damages assessed af-  
" terwards. The powder was deliv-  
" ered in a very damaged state. I  
" advised Eaton to give a receipt  
" reserving the rights of the parties -  
" the following is the receipt  
" read by the witness to the jury.

" Received of Sch. Gray  
" Eagle, Clark Master, Sixteen Hun-  
" dred and Nine Kegs of powder, Ten  
" Hundred and Eighty-five half Kegs  
" of powder and Eighty-four cases  
" of powder in a badly damaged  
" condition as far as examined - the  
" amount of which damage cannot  
" now be ascertained. This receipt  
" is not intended to waive any  
" rights or claim to damage.



Chicago May 10. 1859  
D. Leaton & Co.

There was no attempt on the part of the Company even to account for the injury and in the case of an ordinary bailment, if the bailor returns the property in an injured condition, unless he gives some account of the injury the just and legal presumption is that it was occasioned by his negligence and the plaintiff is not bound to prove negligence until there is some attempt to account for the injury.

1 Parsons on Contracts 406  
Legan & Moulton 1 Barr 417  
Ware & Gay 11 Pick 106.

The instructions given in behalf of the defendants were much more favorable than a strict application of the law would allow

The 4<sup>th</sup> instructions refused should have been refused for the reason that by requiring of the Company no more than the exercise of rea-



sonable care and skill, it imposed upon them only the duties of ordinary bailees and ignored entirely their duty as Common Carriers. — and again by requiring of the plaintiffs proof of negligence on the part of the Company. The Chas affirmation testimony is an exclusion of every presumption arising from facts proved, and is violation of the rule that the verdict in civil cases, should be in accordance with the preponderance of the testimony. To ask for such an instruction is to ask the Court to instruct the jury with regard to the weight and effect of the testimony of which the jury alone are to be the exclusive judges. The same may be said of the 5<sup>th</sup> 11<sup>th</sup> 7<sup>th</sup> and 18<sup>th</sup> instructions which were excluded. The question of negligence on the part of the defendants was left to the jury in a manner more favorable to the defendants than the facts and law of the case could possibly warrant.

As to whether the Company should



7  
be bound by the contract by the  
Contract made by their General a-  
gent. The remarks of Justice Red-  
field in the case of Farmers & Mch.  
Bank v. Ch. Trans. Co. 23. Vermont  
page 204 are Conclusion.

There are also several other Conclu-  
sions as to this objection.

1 The Execution of the receipt by  
the Company was not denied by the  
oath of any officer of the Compa-  
ny. —

2 The Admission that Wilde was  
the general agent of the Company  
at Boston, whose business was  
the transportation of goods and  
that the signature of Wilde to  
the receipt was genuine was  
sufficient to hold the Company  
without any proof of special autho-  
rity.

Scherer v. Hudson R. R. Co. 5  
Dun 55.

3 The fact that the Company made  
no objection of the kind at the trial



concludes them.

Brown et al vs. Cagaza & S. R. Co. 2 Kernan  
486

Barnstead vs. Dindal (M. Co. Co. Co.)

2 Kernan St.

4 The acts of the President and officers of the Company at Buffalo and the statements made by the President & Secretary to plaintiffs agent at Buffalo were each distinct ratifications of the Contract.

The defendants agent at Chicago E. W. Tuttle was not a competent witness for the defendant.

He had executed the faith coming bond and was personally bound.

The bond is not executed nor does it appear to be executed in the name of the Transportation Company.

It is the seal of the Company affixed to it - nor can it in any sense be said to be the bond of the Company but is executed by and in the name of Tuttle as one of the obligors.



The extent of the injury to the powder was testified to by (Mr. Eator, the person selected by the agent of the Company to examine and the verdict as to amount was in exact accordance with his statement.

There is no error in the record and the Court must be satisfied that justice has been done in this case and that a new trial should not be granted.

A new trial will not always be granted even if the jury find against the weight of evidence against the instructions of the Court or through the misdirection of the Court on a point of law provided the Court is satisfied that justice has been done.

Gillett v. Smet 1 Gilch 475  
Smith v. Shulz 1 Scam. 496.

With regard to the condition of the Powder when it was taken from the Canal boat in Buffalo



and when it reached Chicago we  
hope that your Honors will read  
the testimony of George H. Clark  
Henry Pope (written Pop in the St-  
Lair) and Daniel Eaton, only a  
part of which is given in the St-  
Lair. They all speak  
of the Powder as having lain in  
the water and not of its having con-  
tracted Moisture from the atmos-  
phere, and of the water stains as  
indicating the presence of water,  
not Moisture.

Eaton states, it is true  
that Powder might be spoiled from  
packing in green kegs that fast  
upon staves might affect it if there  
was moisture enough to reach  
through the wood and that  
Powder might be defective manu-  
factured and cake up as I find.

But he no where inti-  
mises that this Powder was in-  
jured in that way. — on the con-  
trary he states that it was well  
manufactured and put up in proper  
packages — and the learned Coun-  
sel show the marks of their



case when the attempt importance  
to the Statement of the witness  
in regard to what might be the  
effect of paste upon the labels.

Mr. Eaton was asked to state  
the value of the Powder at the time  
it was delivered in Chicago and he  
states that it was not then worth  
to 4 cent \$2. per keg, — that it  
could not have been pistoned and was  
only fit for remanufacture.

The learned Counsel  
has entirely misapprehended the  
case in Quick 348.

That case does not decide that  
an exception limiting the liability  
of the Carrier and stated in the  
Bill of Lading is not a part of the  
Contract or that it requires any  
proof outside to make it a part  
of the Contract, but it does ~~not~~  
decide that endorsements on a  
Bill of Lading, setting forth lim-  
itations of the Carrier's liability  
operate much as notice and are not  
prima facie a part of the Contract.



but that to make them so  
proof against is necessary to show  
the shipper assent to such lim-  
itations - and this decision is  
in accordance with the cases  
in 11 Cushing 97, and in har-  
mony with all the leading cases  
cited to show that a carrier can-  
not limit his common law liability  
by mere notice, though brought home  
to the shipper - and we submit  
that to allow a common carrier to  
limit his common law liability by  
statements made on the back of a  
receipt or Bill of Lading to which no  
reference is made on its face and  
without requiring proof that they were  
assented to by the shipper would in  
effect be to allow him to make  
such a limitation by his own  
act - and this is opposed to  
public policy and to the settled  
law of this Country.

With regard to the con-  
-sistency between the receipts given in  
evidence and the copies attached  
to the declaration, upon which



so much stress is laid by Coun-  
-sel in their matter argument, the  
endorsements should not have been  
noticed if they were not a part of  
the contract; and again if the re-  
ceipts were admissible under either  
Count of the declaration we were  
entitled to read them to the jury.

As the copies were no  
part of the declaration a variance  
between them and the instrument of-  
ficed in evidence could not be ta-  
ken advantage of in this way.

If the copies were not cor-  
-rect the defendants might have been  
entitled to a continuance of the  
cause under the 8<sup>th</sup> section of the  
Practice Act.

Henry Miller & Son's  
for appellants



Debtal E. Whelan  
et al  
221-147 No.

Quak West Thomas Co.

Appariment.

Filed May 29. 1860  
L. Veland  
Clerk.

Henry Miller & Louis  
for Appellants



SCOTT & Co., PRINTERS, corner Clark and South Water Sts.

SUPREME COURT  
OF THE  
STATE OF ILLINOIS.  
THIRD GRAND DIVISION.

APRIL TERM, 1860.

THE WESTERN TRANSPORTATION CO.,  
*Appellant.*  
*vs.*  
GILBERT G. NEWHALL,  
WILLIAM H. JACKSON, AND  
FRANCIS COX,  
*Appellees.*

*Appeal from the  
Superior Court  
of Chicago.*

RECORD  
PAGE.

ABSTRACT OF RECORD.

125 (a)

THIS was an action of assumpsit brought by the appellees, then plaintiffs, against the appellant (then defendant), in the Superior Court of Chicago. The suit was commenced by attachment, and the damages of the plaintiffs alleged in the affidavit to be \$4,698.50.

2 to 5

The declaration contains eight counts, the first count being as follows :  
For that whereas, the said defendant, before and at the time of the making its said promises and undertakings hereinafter mentioned, was a corporation created by and existing under the laws of the State of New York, and was before and at the time of making its said promises and undertaking, a common carrier of goods and merchandise for hire, and the said defendant being such common carrier as aforesaid, the said plaintiffs, who were then copartners, and doing business under the firm



2 to 5

name of G. G. Newhall & Co., heretofore, to wit: on the 2nd day of November, 1858, at Boston, in the State of Mass., to wit: at the county of Cook aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, certain goods and merchandise, to wit: 1400 kegs of powder, 250 half kegs of powder, and 50 cases of powder, of the said plaintiffs, then in good order, of great value, to wit: of the value of \$10,000, of lawful money of the United States of America, to be taken care of and safely and securely carried and conveyed by said defendant as such carrier as aforesaid, to wit: from Albany to Chicago, and to be safely and securely carried and conveyed by said defendant, in and by sail vessel from Buffalo to Chicago aforesaid, and there, to wit: at Chicago, to wit: at the county of Cook aforesaid, to be safely and securely delivered by the said defendant, for the said plaintiffs, (dangers of lake and river navigation, risks of fire, collision on lake, rivers and railroads, and acts of Providence, excepted), and in consideration thereof, and of a certain freight and reward to the said defendant in that behalf, the said defendant then and there undertook and faithfully promised the said plaintiffs to take care of, and safely and securely carry and convey and deliver the said goods and merchandise as aforesaid, (the dangers of lake and river navigation, risks of fire, collisions on lakes, rivers and railroads, and acts of Providence, excepted).

And although the said defendant, as such carrier as aforesaid, then and there had and received the said goods and merchandise, to be carried, conveyed and delivered as aforesaid, and although a reasonable time for the carriage, conveyance and delivery of the said goods and merchandise has long since elapsed, yet the said defendant, not regarding its duty in that respect, nor its said promise and undertaking, but contriving and intending to deceive, injure and defraud the said plaintiffs in this behalf, did not nor would take care of, and safely and securely carry and convey the said goods and merchandise to Chicago as aforesaid, and there, to wit: at Chicago aforesaid, safely and securely deliver the same for the said plaintiffs, although no dangers of lake or river navigation, or accident, or loss, or injury by fire, or collision on any lake, river or railroad, or any act of Providence, prevented it from so doing, but on the contrary hereof, the said defendant, so being such carrier as aforesaid, so carelessly and negligently conducted itself in respect to said goods and merchandise, that by and through the carelessness, negligence and improper conduct of said defendant and its servants in that behalf, the said goods and merchandise became and were greatly damaged and injured, and a large portion thereof became and were wholly lost to the said plaintiffs, to wit: at the county of Cook aforesaid.

The second count is as follows:

5, 6

And, whereas, also, heretofore, to wit: on the day and year last afore-



- 5, 6      said, to wit: at Boston, to wit: at the county of Cook aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendant, divers other goods and merchandise, to wit: goods and merchandise of the like number, quantity, quality, description and value as those in the said first count mentioned, to be taken care of, and safely and securely carried and conveyed by the said defendant to Chicago aforesaid, and there, to wit: at Chicago aforesaid, to be safely and securely delivered for the said plaintiffs, for certain freight and reward, to the said defendant in that behalf, (dangers of lake and river navigation, risks of fire, collisions on lakes, rivers and railroads, and acts of Providence, excepted), the said defendant then and there undertook and faithfully promised the said plaintiffs to take due and proper care of the said last mentioned goods and merchandise, while it had the care and custody thereof, for the purpose aforesaid, and although the said defendant then and there had and received the said last mentioned goods and merchandise, for the purpose aforesaid, yet the said defendant, not regarding its duty in that behalf, nor its said last mentioned promise and undertaking, but contriving and intending to injure and deceive the said plaintiffs in this behalf, whilst the said defendant had the care and custody of the said last mentioned goods and merchandise, for the purpose last aforesaid, took so little and bad care of the same that, by and through the mere carelessness, negligence and improper conduct of the said defendant and its servants in that behalf, the said last mentioned goods and merchandise, being of the value aforesaid, became and were greatly damaged and injured, and a large portion thereof became and was wholly lost to the said plaintiffs, to wit: at the county of Cook aforesaid.
- 6, 7      The third count is the same as the first, excepting that there is no allegation that the defendant was a common carrier.
- 8, 9      The fourth count charges the defendant as a bailee for want of care.
- 9 to 11      The fifth count is the same as the first, excepting that other property is described, to wit: 300 kegs of powder, 200 half kegs of powder, and 50 boxes of powder.
- 11, 12      The sixth count is the same as the second, except that the property is the same as described in the fifth count.
- 12 to 14      The seventh count is the same as the third, except the property is the same as described in fifth count.
- 14, 15      The eighth count is the same as the fourth, excepting the description of the property, which is the same as in the fifth count.



The copy of the contract annexed to the declaration was as follows :

THE WESTERN TRANSPORTATION COMPANY.

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK.

CAPITAL, - - - \$800,000.

PRINCIPAL OFFICE, - - - BUFFALO, N. Y.

CYRUS CLARK, PRESIDENT, WM. FOOT, VICE PRESIDENT.  
GEO. H. BRYANT, SECRETARY, JOHN ALLEN, JR., TREASURER.

BOSTON AGENT, J. M. WILDER, 86 *State Street, Up Stairs.*

ALBANY AGENT, S. G. CHASE, 113 *Pier.*

TROY AGENT, JONA. W. TUTTLE, *Office 191 River St. cor. State.*

OFFICE IN NEW YORK, *No. 1 Coenties Slip, and 9 Astor House.*

HUGH ALLEN,  
JAMES H. WILGUS,  
AUGUSTUS COLSON,  
*Agents.*

BOSTON, Nov. 2nd, 1858.

CONTENTS OF PACKAGES UNKNOWN,  
MARKED :

E For  
G. G. NEWHALL & Co.,  
Chicago,  
Ill.  
W. T. Co.  
Sch. Ann T. Sipper.

Received from G. G. NEWHALL & Co.  
the following property, in good order,  
namely :  
1400 Fourteen Hundred kegs Powder.  
250 Two Hundred and Fifty half kegs  
Powder.  
50 Fifty Cases Powder.

TRIPPLICATE.

being marked and numbered as in the margin, which we agree to forward from Albany to Chicago, sail on Lakes, dangers of Lake and river navigation, risks of fire, breakages of glasses, glass, marble, demi-johns, carboys, and furniture, leakages of oils, or other liquids, collisions on lakes, rivers and railroads, loss of nuts or shot, from bags, and acts of Providence excepted, at and on the following rates and conditions, namely :

First class at      cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to      subject to classification of      R. R.  
Second class at      cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to      subject to classification of      R. R.  
Third class at      cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to      subject to classification of      R. R.  
Fourth class at      cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to      subject to classification of      R. R.  
Special class at 60 cents per 100 pounds, sail on Lake from Buffalo to  
Chicago, *subject to classification of*      R. R.

And in case of loss or damage for which the Western Transportation Company may be liable, said line shall have the benefit of any insurance effected by, or for account of, the owner or owners of the goods. And should the said goods be damaged or destroyed, by accident or fire, the freight and charges, to and at, the place where such loss or damage may happen, shall be paid by the owner or owners of said goods. Nor shall said line be held liable for any deficiency from, or damage in, packages of goods, not covered by above exceptions, if receipted in good order at Chicago.



All goods not marked "sail," or "steam," on the packages, may be forwarded by either, at option of carrier, and all packages marked "sail," may be forwarded, at the option of the carrier, by steam on lakes, if forwarded at sail rates.

J. M. WILDER, *Agent*,  
Pr. ABBOTT.

Deliver the above to order of D. Eaton & Co., Chicago.  
G. G. NEWHALL & Co.

And also, a similar bill for other property, to wit: 300 kegs of powder, 200 half kegs of powder, and 50 boxes powder.

The defendant below filed a plea of the general issue, and eight other pleas, which amounted to the general issue to the declaration, and issue was joined.

A motion was made to suppress the deposition of George H. Clarke.

33

1. Because it was not legally taken.
  2. Because it was not the party named in the commission.
- Which motion was overruled, and an exception taken.

44

The cause came on to be heard before Hon. VAN H. HIGGINS, and a jury, February term, 1860.

The plaintiffs below offered in evidence the contract following:

45, 46

THE WESTERN TRANSPORTATION COMPANY.

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK.

CAPITAL, - - - \$800,000.

PRINCIPAL OFFICE, - - - - - BUFFALO, N. Y.

CYRUS CLARK, PRESIDENT, WM. FOOT, VICE PRESIDENT.  
GEO. H. BRYANT, SECRETARY, JOHN ALLEN, JR., TREASURER.

BOSTON AGENT, J. M. WILDER, 86 *State Street, Up Stairs.*

ALBANY AGENT, S. G. CHASE, 113 *Pier.*

TROY AGENT, JONA. W. TUTTLE, *Office 191 River St. cor. State.*

OFFICE IN NEW YORK, *No. 1 Coenties Slip, and 9 Astor House.*

HUGH ALLEN,  
JAMES H. WILGUS,  
AUGUSTUS COLSON,  
*Agents.*

BOSTON, Nov. 2nd, 1858.

CONTENTS OF PACKAGES UNKNOWN,  
MARKED:

E For  
G. G. NEWHALL & Co.,  
Chicago,  
Ill.

W. T. Co.  
Sch. Ann T. Sipper.

Received from G. G. NEWHALL & Co.  
the following property, in good order,  
namely:

1400 Fourteen Hundred kegs Powder.  
250 Two Hundred and Fifty half kegs  
Powder.  
50 Fifty Cases Powder.

TRIPPLICATE.



45, 46

being marked and numbered as in the margin, which we agree to forward from Albany to Chicago, sail on Lakes, dangers of Lake and river navigation, risks of fire, breakages of glasses, glass, marble, demi-johns, carboys, and furniture, leakages of oils, or other liquids, collisions on lakes, rivers and railroads, loss of nuts or shot, from bags, and acts of Providence excepted, at and on the following rates and conditions, namely :

First class at        cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to        subject to classification of    R. R.  
Second class at        cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to        subject to classification of    R. R.  
Third class at        cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to        subject to classification of    R. R.  
Fourth class at        cents per 100 pounds, steam on Lake from Buffalo to  
and thence by railroad to        subject to classification of    R. R.  
Special class at 60 cents per 100 pounds, sail on Lake from Buffalo to  
Chicago, subject to classification of        R. R.

And in case of loss or damage for which the Western Transportation Company may be liable, said line shall have the benefit of any insurance effected by, or for account of, the owner or owners of the goods. And should the said goods be damaged or destroyed, by accident or fire, the freight and charges, to and at, the place where such loss or damage may happen, shall be paid by the owner or owners of said goods. Nor shall said line be held liable for any deficiency from, or damage in, packages of goods, not covered by above exceptions, if receipted in good order at Chicago.

All goods not marked "sail," or "steam," on the packages, may be forwarded by either, at option of carrier, and all packages marked "sail," may be forwarded, at the option of the carrier, by steam on lakes, if forwarded at sail rates.

J. M. WILDER, Agent,

Pr. ABBOTT.

Deliver the above to order of D. Eaton & Co., Chicago.

G. G. NEWHALL & Co.

*That portion of the contract which precedes  
was on one side, & that which follows  
on the reverse side of the same paper -*



CLASSIFICATION.

FIRST CLASS ARTICLES.

Bottled Liquors and Cedar Ware.  
Burning Fluids, (owner's risk of leakage.)  
Batting, Blinds.  
Books, Bonnets.  
Boots and Shoes.  
Bread.  
Broom Corn, pressed.  
Brushes and Brooms.  
Buffalo Robes.  
Camphene, (owner's risk of leakage.)  
China Ware, in boxes.  
Cabinet Ware and Furniture, "knock down," compact and well boxed.  
Cards.  
Cigars, boxed and strapped.  
Carpetings, Caps.  
Cork, Cigars, boxed and strapped.  
Clocks and Weights, boxed.  
Copper and Brass Vessels.  
Cotton Waste.  
Confectionery.  
Covers and Sieves.  
Cassia, in mats.  
Dry Goods, in boxes, bales and trunks. Trunks must be strapped.

Drugs, in boxes and bales.  
Feathers and Furs.  
Furniture, see Cabinet Ware.  
Fish, fresh, prepaid.  
Figs, in drums.  
Garden Seeds.  
Glass Ware.  
Glass, window.  
Grapes, in kegs.  
Hair, in sacks.  
Hats and Caps.  
Household Goods, (not Furniture,) well boxed.  
Indigo, Ink.  
India Rubber Goods.  
Iron Castings, light.  
Leather, loose.  
Lemons, sacked.  
Liquors, in glass.  
Machinery, boxed.  
Marble, wrought, owner's risk.  
Mats and Rugs.  
Measures and Tubs.  
Medicine.  
Muskets.  
Moss, in sacks.  
Musical Instruments.  
Mineral Water, in glass.  
Nuts, in bags.  
Oils, in glass.  
Oranges, sacked.

Oysters in kegs and cans.  
Palm Leaves, Peltries.  
Paper Hangings, in bundles.  
Peaches, prepaid.  
Piano Fortes, at owner's risk, boxed.  
Porter and Ale, in glass.  
Printing Presses.  
Preserves, in glass, at owner's risk.  
Pickles, do.  
Paintings, well boxed.  
Rattan.  
Russia Bristles.  
Scales and Scale Beams.  
Scythe Snaths.  
Sizing.  
Stove Plate, at owner's risk.  
Sweet Potatoes.  
Tin Ware, boxed.  
Trunks. Twine.  
Umbrellas. Veneering.  
Wadding. Wax.  
Wagon Fellos and Bows.  
Water, Mineral, in glass.  
Wheelbarrows. Waste.  
Wines, in boxes or baskets.  
Wooden Ware.  
Wrapping Paper. Whips.  
Whalebone.

SECOND CLASS ARTICLES.

Antimony, crude.  
Apples, dried.  
Axes.  
Bags and Bagging.  
Baking Powders.  
Berries, Bells, Bed Cords.  
Binders' Boards.  
Brimstone, in boxes or kegs.  
Bottles.  
Boiler Flues.  
Burlaps and Duck.  
Candles, Capstans.  
Carriage Springs, Axles and Boxes.  
Cassin, in bags or boxes.  
Cheese, in boxes and casks.  
China Ware, in casks.  
Cocon, Chocolate.  
Coffee, ground, in boxes or barrels.  
Congress and Bedford Water, in boxes or bbls.  
Chair Stuff, in rough.  
Chain, Cutlery.  
Copper Plates and Sheets.  
Copper Bolts, Pigs, Wire, Nails and Rods.  
Copper Bottoms.  
Copper Rods and Nails.  
Clover and Grass Seed.  
Crockery, boxes and bbls.  
Currants, dried.  
Domestic Sheetings, Shirting, Ticking, Denims and Duck, in original bales.

Drugs, in casks.  
Dye Wood, in bags and bbls.  
Deer Skins, pressed.  
Emory.  
Ex. Logwood. Ex. Coffee.  
Figs, in casks or boxes.  
Flax, boxed. Flax Seed.  
Forks, hay and manure.  
Ginger, Glue.  
Grass and Clover Seed.  
Groceries, assorted, not otherwise specified.  
Gum Copal.  
Hardware.  
Hemp, boxed.  
Herring, in boxes.  
Hides, dry, in bales.  
Hollow Ware.  
Honey, Hops, Hoes.  
Iron, hoop, band and sheet.  
Lead Pipe, bars and sheets.  
Leather, in rolls and boxes.  
Liquorice. Lampblack.  
Liquor, in wood.  
Moss, pressed in bales.  
Mahogany Boards and Plank.  
Marble, in slabs, unwrought, at owner's risk.  
Nuts, in barrels and casks.  
Oakum, Oil Cloth.  
Palm Leaf, pressed in bales.  
Paper, in boxes.  
Paper Hangings, in boxes.  
Pasteboard.

Paints, in boxes and cans.  
Peaches, dried.  
Pepper.  
Pickles, in casks.  
Printing Paper.  
Printers' Ink, in bbls. and kegs.  
Prunes, in casks.  
Pumice Stone.  
Raisins, strapped.  
Rags, in sacks.  
Rice, in barrels.  
Rubber Car Springs, loose.  
Rubber Packing and Hose.  
Saddlery.  
Sardines, in boxes.  
Scales and Scale Beams, box'd  
Scythes, Shovels and Spades.  
Sheep and other Skins in bales  
Shot, in bags.  
Soap.  
Spices. Starch.  
Sugar, in bags.  
Tallow.  
Tea.  
Tobacco, cut, in bales, boxes or bbls.  
Tow, boxed.  
Type.  
Willow Reeds, in bundles.  
Wire.  
Wood, in shapes.  
Yarn, pressed.  
Zinc, in rolls and sheets.



Anvils.  
Ale, in wood.  
Barilla, Bones.  
Bark and Cob Mills.  
Beer, in wood.  
Black Lead, in bbls.  
Cider, in bbls. or hhds.  
Chickory, Crucibles.  
Copper, in boxes and casks.  
Cotton, square bales.  
Dye Wood, in sticks.  
Epsom Salts, in bbls.  
Gum Shellac, in original packages.  
Guano.

THIRD CLASS ARTICLES.

Hides, green. Hemp.  
Hoofs and Horns.  
Herring, in kegs.  
Iron Railing, wrought.  
Iron Safes.  
Junk. Jute.  
Lead, in casks or pig.  
Lightning Rods, in bundles.  
Lime, in casks.  
Madder, in hhds.  
Manilla.  
Millstones, finished.  
Nails, in bags.  
Oysters and Clams, in shell, at owner's risk.  
Oil, in hhds. and bbls.  
Paints, dry and in oil, in casks, bbls. and kegs.  
Rubber Belting.  
Rubber Car Springs, in boxes and casks.  
Soda, in boxes.  
Shot, in kegs.  
Saleratus, in boxes.  
Spelter.  
School Slates.  
Vinegar.  
Wire Fencing and Rope.  
White Lead.

FOURTH CLASS ARTICLES.

Grindstones. Gas Pipe.  
Iron, bar, pig, boiler and r. r.  
Iron Castings, heavy.  
Iron Nuts and Rivets.  
Locomotive Tyres.  
Mahogany Logs.  
Molasses.  
Marble and Stone, in block, unwrought.  
Mill Stones, in rough.  
Nails and Spikes, Nail Rods.  
Plaster. Pitch.  
Rigging, Rosin, Rope.  
Rags, pressed, in bales.  
Railroad Chairs and Spikes.  
Rice, in tierces.  
Soda, in kegs, bbls and casks.  
Steel.  
Salt, Saltpetre, Soda Ash.  
Sugar, in bbls. boxes and hhds.  
Sumac, Tar, Tin.  
Saleratus, in kegs, bbls. and casks.  
Slate and Tile, for roofing.  
Telegraph Wire.  
Tobacco, in hhds. unmanufactured.  
Tobacco, in kegs or boxes.  
Wire Rope.  
Water Pipes. Whiting.  
Wool, foreign, pressed.  
Zinc, in casks.

SPECIAL RATES.

Agricultural Implements.  
Baskets.  
Batting, going alone.  
Cabinet Ware and Furniture.  
Carriages. Chairs.  
Demijohns.  
Hollow Ware.  
Looking Glasses.  
Mattresses.  
Moulding and Picture frames.  
Sleighs.  
Piano Fortes, boxed.  
Steam Boilers.  
Stove Pipe.  
Stoves, at owner's risk.  
Trees and Shrubbery, Toys.  
Wadding, going alone.  
Wagons, Children's.  
Wagons and Hobby Horses.  
Willow Ware.

CONDITIONS AND RULES.

The destination, name of the consignee, and weight of all articles of freight, must be plainly and distinctly marked, or no responsibility will be assumed for their miscarriage or loss; and when designed to be forwarded, after transportation on the route, a written order must be given, with the particular line of conveyance marked on the goods, if any such be preferred or desired.

The companies will not hold themselves liable for the safe carriage or custody of any articles of freight, unless receipted for by an authorized agent; and no agent of the line is authorized to receive, or agree to transport, any freight which is not thus receipted for.

No responsibility will be admitted, under any circumstances, to a greater amount upon any single article of freight, than \$200, unless upon notice given of such amount, and a special agreement therefor. Specie, drafts, bank bills, and other articles of great intrinsic or repre-



45, 46

sentative value, will only be taken upon a representation of their value, and by a special agreement assented to by the Superintendent of the receiving road.

The companies will not hold themselves liable at all for injuries to any articles of freight during the course of transportation, occasioned by the weather or accidental delays, or natural tendency to decay. Nor will their guarantee of special despatch cover cases of unavoidable or extraordinary casualties and storms. Nor will they hold themselves liable, as COMMON CARRIERS, for such articles, after their arrival at their place of destination, at the Companies' warehouses or depots.

Carriages and Sleighs, Eggs, Furniture, Looking Glasses, Glass and Crockery Ware, Machinery, Mineral Acids, Piano Fortes, Stoves and Castings, Sweet Potatoes, Wrought Marble, all liquids put up in glass or earthen ware, Fruit, and Live Animals, will only be taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed to the contrary. Gunpowder, Friction Matches, and like combustibles, will not be received on any terms; and all persons procuring the reception of such freight by fraud or concealment, will be held responsible for any damage which may arise from it while in custody of the Company.

Cases or Packages of Boots and Shoes, and of other articles liable to peculation or fraudulent abstraction, must be strapped with iron or wood, or otherwise securely protected, or the Companies will not be liable for diminution of the original contents; and the Companies will hold the freighter in all cases to bear the loss arising from improper packing.

All articles of freight, arriving at their place of destination, must be taken away within twenty-four hours after being unladen from the cars, each Company reserving the right of charging storage for the same, or placing the same in store at the risk and expense of the owner, if they see fit, after a lapse of that time:

And also a similar contract for other property, to wit: 300 kegs of powder, 200 half kegs and 50 boxes of powder.

58

The defendant below objected to this contract being received in evidence, assigning specially several grounds of objection:

*First.* There is a variance, because the contract offered was not set out in the declaration according to the legal effect of the same.

*Second.* Because true copies had not been given and appended to the declaration.

*Third.* Because the declaration charged the defendant as a common carrier, when in fact it was a special carrier only.

It was admitted that Wilder was a general agent for the defendant at Boston, (whose business was the transportation of goods), where they, said defendants, kept an office to receive freight for Chicago and the



West, and that the signature of said Wilder to the receipts or bills of lading were genuine.

No objection was made on the trial to the want of proof of the execution of the bill of lading, or to the authority of said agent to sign said bill of lading.

(But the corporate existence of the defendants was not admitted or proven, nor the authority of the corporation to make the contract sued on, nor any special authority of the agent to execute such contract, excepting such as can be lawfully implied from the facts above admitted).

The court allowed the contract to be read in evidence, and to the overruling of said objection and the allowing the contracts to be read, the defendant below excepted.

The following are the material portions of the testimony on the part of the plaintiffs below.

59        *George H. Clarke*, on the part of the plaintiffs, deposed, that he was  
the master of the schooner *Gray Eagle* during the spring and summer of  
1859. That said schooner received on board a quantity of powder, to  
60        be transported from Buffalo to Chicago. This powder was received and  
loaded on board said schooner, on or about the 19th day of April, 1859.  
The powder was loaded on to the schooner from a canal boat, whose  
name he did not recollect, lying along side of said schooner in Buffalo,  
near the light house pier.

61        In answer to the 5th direct interrogatory, he said: He could not speak  
as to the soundness of the canal boat; did not examine it; could not  
say whether there was any water in the canal boat at the time the powder  
was taken from it. He did not remember looking into it, the boat, or  
seeing the inside of it. *There were indications that water had been*  
*in the canal boat. These indications were the fact that there were some*  
*of the kegs of powder wet and discolored, and looked as if they had*  
*been lying in water.*

72        (This answer was objected to, and admitted, and exception noted).

62        The same witness stated—that some of the kegs containing the powder  
had their hoops loose, and when being lifted, the powder appeared as  
if it was packed together in a solid lump, as it would if laid in water.  
A part of the kegs were discolored more or less. Some of the kegs  
were discolored and damp. A part of the powder when received from  
the canal boat, was in a bad condition. Its appearance indicated that  
its bad condition had been produced by the powder having been wet.  
These indications were its dampness, its being discolored, and the packed  
or solid feeling condition of the powder in some of the kegs.

63        Some of the powder was left, and not put on board the schooner; the  
quantity left, he thought, was some two or three tons. This quantity  
was not put on board, on account of its bad condition; some of the kegs  
left were broken, and others were very badly stained or discolored. He



made the contract for the schooner to carry the powder, in the office of the Western Transportation Company, in Buffalo, with persons whose names he does not remember, but who were connected with, or in the employ of the said company. They were acting as up freight agents of said company.

64 This powder was consigned to D. Eaton & Co., at Chicago. The schooner carried the powder to Chicago and delivered it to D. Eaton & Co., of that place; arrived there on about May 4, 1859.

65 Witness did not carry any other powder to Chicago to deliver to said Eaton, during the spring of 1859, nor at any other time. The powder was well stored and cared for, and was not damaged on board the schooner.

68 He looked at, and examined the kegs or boxes containing the powder as they were being loaded on the schooner. His knowledge was derived from personal knowledge and examination. He saw that a portion of the boxes, about one-half of the kegs he took on the schooner, he thinks had had the appearance of being damaged; some of them were damp, and looked as if they had lately been in water, and some were discolored and had a dark or water stain on them. The kegs which were left had these indications more marked, and stronger. He saw nearly all the kegs and boxes as they were received on board the schooner; refused to take those that appeared most damaged, and these were passed back on board the canal boat. He made personal examination of those that appeared worst, as far as he could without opening them. He did not see the powder itself, except in about a dozen kegs, which had their heads stove in, and which he refused to take. In some of these the powder was damaged or wet, and in some it was dry.

72 *Henry Ross*, testified, on part of plaintiffs, that he was the sole owner of the schooner *Gray Eagle*, in the spring and summer of 1859. That said schooner received a quantity of powder, to be transported from  
77 Buffalo to Chicago, in April, 1859. The witness confirms substantially the statements of the witness *Clarke* as to the condition of the powder; and states that the contract to transport the powder to Chicago on said schooner, was made either with *Henry Sheffield* or one *Morgan*; that *Henry Sheffield*, he thinks, was acting at the time for the defendant; that he has acted for said company the season of 1859, and 1858, in the capacity of freight agent. Said *Morgan* was one of the proprietors and managers of said company.

79 Witness did not examine the powder itself; did not know anything about the soundness of the powder itself.

Has no personal knowledge of there being any water in said canal boat, and saw no other indications of water excepting the appearance of the kegs.



*David Eaton*, a witness for the plaintiffs, testified, that he had been in the gun powder trade more than five years, and dealt in powder fifteen years. He received the receipts in evidence from Newhall & Co. The defendants have an office in Chicago. J. W. Tuttle is their agent. They are carriers and transporters of goods; they had a line of boats on the lakes, and a wharf also. After receiving the bill of lading, he had notice, in May, 1859, that the powder had arrived; it came on the schooner *Gray Eagle*. He received the powder at his magazine, just out of the city limits.





RECORD  
PAGE.

13

87

88

88

89, 90



gunpowder, exceeding six pounds weight, in any one place for any longer period than twelve hours, except in such powder magazine as may be approved of by the common council, which said quantity of six pounds shall be separated in stone jars or in tin canisters, neither of which shall contain more than one pound, under the penalty of twenty-five dollars for each and every offense, and under a further penalty of fifty dollars for every twelve hours the said powder shall remain after notice from the mayor, or any engineer, or warden, or police officer, to remove the same.

Which ordinance was proven to be in force February, 1860, and for two years prior to that time.

91 to 96

*Isaac Morse*, on part of defendant, (appellant), testified, that he knew defendant; that he was captain of the canal boat *M. Freeman*, in the fall of 1858; that said boat was then running between Buffalo and New York City, carrying freight, etc. In the fall of 1858, he received on said boat a quantity of powder, at Albany, N. Y. He received it from a vessel and procured it on an order for it given to him by S. G. Chase, agent of defendant at Albany. The boat was then owned by defendant, (appellant), and he was in their employ, and running under orders of the defendant's agent. There was 2250 packages. It was all consigned to the defendant—the Western Transportation Company, at Buffalo, and all delivered to them in Buffalo.

The powder was in apparent good order when he received it, and in apparent good order when it arrived and was delivered in Buffalo. He received the said powder on the 13th of November, 1858, and it arrived at Buffalo the 24th November, 1858. The boat was in first rate order and condition when he received the powder, and continued in same order and condition to the time of the arrival and delivery in Buffalo. During all that time the boat was in first rate order and condition, and in every way well proved, and fit and proper to carry powder. The powder was stored on the bilge of the kegs, in tiers, to the top of the deck. It was all under deck, and perfectly protected from the weather. The boat had a good trip with said powder on board; no accident of any kind happened, no leakage occurred, and no rain got into the boat. When it arrived, the powder was apparently in as good order as when received.

100

He left the boat, with the powder on board, at the company's dock, in Erie Basin, in Buffalo.

97 to 101

On his cross-examination, he stated that he was present when all the powder was received, and saw each keg and package, and each appeared in good order.

101 to 109

*George H. Bryant*, on the part of the defendants, testified, that in the fall of 1858, he was in the employ of the Western Transportation Company, as their secretary, and had been nearly three years. He



knew of the receipt at Buffalo, on the canal boat M. Freeman, of 2250 packages of powder, arrived 24th November, 1858.

Navigation closed upon the Erie Canal, December 4, 1858. Navigation closed upon Lake Erie, very late for ports on Lake Erie, as late as December 24. For all general purposes of business the lakes were closed December 1, 1858, but the lakes were free of ice till much later.

This witness further proves that the powder could not be shipped forward to Chicago after its arrival, on account on the lateness of the season. That every effort was made to forward it by sail and steam on the lakes, but it could not be done, and the railroads declined to take it.

Witness further testified, that he ordered the canal boat with the powder on board to Tonawanda, 12 miles from Buffalo on the Erie Canal, about 1st December, 1858, and saw it there with the powder; that learning that the inhabitants would not allow the boat to remain there, he ordered it within three or four days after to be taken 12 miles further east on the canal, to Pickard's Bridge, where the company had a station agent, and ordered it to be kept there during the winter. It was stored there because the company had an agent there to take care of it, and because there were no laws or ordinances prohibiting its remaining there. Efforts were made to obtain storage for the powder during the winter. He applied, himself, to Grenther & Stevens, of Buffalo, who owned the only powder house in Buffalo, to have them receive it, but they declined for want of room. There was no other place in Buffalo where it could be lawfully stored.

112 to 117     *Samuel Eldridge*, a witness for defendant, testified, that he resided in Buffalo, and knew of the arrival of the powder there. Confirms the statement of Bryant as to the impossibility of forwarding the powder to Chicago on its arrival. The powder was in good condition apparently on its arrival in Buffalo. He saw the powder in the spring, which was left by the schooner, from 100 to 125 packages. The kegs were stained, and some of them needed cooperage.

118 to 120     The defendants then called *J. W. Tuttle*, who being sworn was objected to by the plaintiffs' counsel, and shown the forthcoming bond filed in this cause, which was as follows:

*Know all Men by These Presents*, That we, J. W. Tuttle, Agent, Asa Dow and Charles Walker, of Cook county, Illinois, are held and firmly bound unto John Gray, sheriff of Cook county, in the State of Illinois, and to his successors in office, executors, administrators and assigns, in the penal sum of \$9367 dollars, lawful money of the United States, for the payment of which sum we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Witness, our hands and seals, this 5th day of August, Eighteen Hundred and Fifty-nine.

The condition of this obligation is such, That whereas, on the 4th day of August, eighteen hundred and fifty-9, a certain Writ of Attach-



ment issued out of the Superior Court of the City of Chicago, of said County, at the suit of G. G. Newhall et al., Plaintiffs, against the estate of The Western Transportation Company, Defendants, directed to the Sheriff of Cook County to execute, by virtue of which said writ the said Sheriff, John Gray, has attached the following described property, to wit: The Propeller Plymouth, her engines, machinery, boats, tackle and appurtenances. And the said Western Transportation Company in whose possession the said property was found, being desirous of retaining the custody thereof, according to the provisions of the Statute:

Now, if the said estate and property shall be forthcoming to answer the Judgment of the Court in said suit, then this obligation to be void; otherwise to remain in full force and effect.

JON. W. TUTTLE, Ag't [SEAL.]

For the Western Transp't Co.

CHARLES WALKER. [SEAL.]

A. DOW. [SEAL.]

120 Witness stated that the signature, J. W. Tuttle, Agent for Western Transportation Company, was in his handwriting, and that said bond was signed by him and filed in this cause.

120 The court sustained the objection to the witness being sworn, on the ground that he was a party upon such forthcoming bond; to which decision the defendant excepted.

This was all the evidence given in the case.

The following instructions were given by the court on the part of the defendant, (appellant):

121 1. If the jury believe, from the evidence, that the injury to the powder in question proceeded directly from irresistible, natural causes, (to wit: the closing of navigation), they must find for the defendants, except as to 4½ kegs not delivered, unless they shall further believe, from the evidence, that the negligence of the defendants contributed to produce the injury.

121 2. If the jury believe, from the evidence, that the injury to the powder in question proceeded directly from the interposition of an act of Providence, and that the defendants exercised reasonable care and diligence in taking care of said property during the existence of said providential causes, that they must find for the defendants, except as to 4½ kegs not delivered.

121 3. The defendants are not liable for damage caused to the powder in question by the interposition of causes beyond their control, and which they could not overcome by the exercise of human skill.



9. If the jury believe, from the evidence in the cause, that the plaintiffs received from the defendants the bills of lading, (in evidence), and had knowledge of the rules and conditions endorsed on said bills of lading, and accepted the same under such rules and conditions, that the defendants are not liable for the damage to the powder in question, if the jury shall further believe, from the evidence, that the said damage was occasioned by the weather or accidental delays, during the course of transportation, and without the negligence of the defendants.

10. If rules and conditions, limiting the liability of a carrier, are endorsed upon the back of a bill of lading, and brought home to the knowledge of a party who ships goods by such carrier, such rules and conditions are binding on the party shipping such goods, if he knew of them at the time of shipping, and assented to the same.

11. If the jury believe, from the evidence, that by the conditions of the contract between the parties, the defendants were not to be liable for injuries to any articles of freight during the course of transportation, occasioned by the weather or accidental delays, or natural tendency to decay, and that the damage to the powder in question was occasioned by the accidental delay, and without any negligence on the part of the defendants, then the plaintiffs are not entitled to recover.

The following instructions were asked by the defendants, (appellants), and were refused.

122 4. If the jury believe, from the evidence, that the injury to the powder in question proceeded directly from irresistible, natural causes, beyond the control of the defendants, and that the defendants used reasonable care and skill in taking care of said powder during the period said causes existed, that the plaintiffs are not entitled to recover, unless they shall show further, by clear affirmative testimony, that the negligence or want of skill of the defendants concurred to produce said injury.

123

5. If in the opinion of the jury it is left in doubt what the cause of the damage to the powder in question was, they must find for the defendants.

6. If the damage to the powder in question proceeded directly from the interposition of the closing of navigation, the jury must find for the defendants, unless they believe clearly that the defendants were guilty of negligence in taking care of said powder.

7. If the jury believe, from the evidence, that the injury to the powder in question may as well be attributable to the interposition of Providential causes, (i. e. the closing of navigation), as to the negligence of the defendants, the plaintiffs are not entitled to recover in this action.



8. To entitle the plaintiffs to recover in this action, they must show, by clear affirmative testimony, that the damage to the powder in question was caused by the negligence or want of skill of the defendants in taking care of said powder.

To the refusal to give which instructions, defendants excepted.

124 A motion for a new trial was made, which was overruled, and exception taken.

125 The grounds of the motion were the exclusion of evidence, which was competent, the admission of improper evidence, and that the verdict was against the law and against the evidence.

The following errors are assigned :

1. That the declaration was insufficient, and judgment should have been for the defendant, (appellant).

2. Allowing the special contracts, or bills of lading, to be read in evidence.

3. Allowing improper evidence to go to the jury, and excluding evidence which was competent.

4. In rejecting the testimony of J. W. Tuttle.

5. In admitting the deposition of Geo. H. Clarke.

6. In refusing to give the 4th, 5th, 6th, 7th, and 8th instructions, as prayed by the appellant.

7. In overruling the motion for a new trial.

8. Because judgment against the law.

9. Because judgment against the evidence.

10. Because it does not appear by said record, and was not proven on said trial, that appellant was a corporation.

Joinder in error, by counsel for appellee.

GOODWIN, LARNED & GOODWIN,  
AND HOOPER & WILLARD,

*For Appellants.*



221-177-147  
Supreme Court  
Third Grand Division

---

The Western Transportation  
Company

vs

Gilbert S Newhall et al

---

Abstract

Filed May 1. 1860

L. Seland

Clerk



Supreme Court

Robert H. Brooke & Co

appellants

vs

The Western Transportation Company  
appellees

Notes of Minutes

Labadie Co vs Henry H. Miller being duly sworn appears and says that he is one of the attorneys for the appellants in the above entitled cause. - That when said cause was entered on the docket of this court arriving at first term day of the present term of this court. That arriving at first term day of said term the appellants & their counsel applied to the court for leave to further time to file the record of said cause. That this agreement and that said said application had on the contrary signed a stipulation consenting that the further time proposed be extended for a period of five days. Provided said cause could be tried at the present term of this court. That when the court came on said day said application was denied the Chief Justice called the



attention of Counsel to the terms of said  
Stipulation or rather to the proviso in said  
Stipulation and this argument then explained  
to the Court that his object was to give to  
the Counsel on the other side ~~the same~~  
~~as they might~~ to file the record provided  
his doing so would not prejudice arguments  
right to have the case tried at this term.  
The Motion extending time was therefore  
granted. - The record was filed during  
the first day and subsequently the  
abstracts of the record ~~not~~ being filed this  
argument extended <sup>as</sup> Motion for abstracts to  
be filed by a particular day. This Motion  
was granted and the abstracts were  
placed on file. - Subsequently this  
argument asked the Court for a rule  
that appellant file their points by  
a day to be named, in order that  
apparent might prepare to argue the  
case - This Motion was not granted.  
Deposits further Reg. 1877 to remain at  
attorney for seven two next week to  
try said case should the case be reached  
for trial. But on ~~the~~ Thursday next  
this argument stated to Mr. Campbell  
who had the papers for appellant in  
the case. and stated to Mr. Campbell



that this respondent was waiting for the trial of this case alone, that Mr Campbell then stated that they were ready to submit the case on their side upon points which he was ready to place on file and upon written arguments to be filed if this respondent would submit. It can in a similar way on the part of the appellants. Respondent readily assented to this and the case was set for the next.

Proceeding accordingly to the court and late yesterday afternoon respondent was informed by ~~an~~ a telegram from Mr Campbell that the submission on his part was made under a mistake and an application would be made to set it aside. Respondent immediately called of the next day came to Ottawa and upon consulting Henry that said submission was made under a mistake this respondent did not make the application but the submission aside although this respondent had been misled and had consequently made no preparation for an oral argument. Still supposing that the case would be tried when reached in the court and not wishing to be at a disadvantage



# said Campbell. stated other argument that they  
had received a letter letter from the court and it being  
authorizing it can be submitted and

of any inadvertence on the part of court -  
-ed he did not make any reference to  
the application. -

#  
Deponent says that, he supposed that  
said <sup>Campbell</sup> Campbell had full authority - to  
make such submission and must  
have relying upon that fact that  
the case had been submitted and  
would be decided at this term of the  
court. That to set said submission aside  
without at the same time directing that  
the case be heard at this term of the  
court, would be doing great injustice  
to his opponent and his clients  
that the case was regularly and within  
the time required by the rules placed on  
the docket that prints on both sides  
have been filed and this opponent  
was put aware that any further motion  
was required in order to get it on  
a hearing at the present term of the  
court. from the simple fact that the  
appellant had obtained time to file the  
record in order to have it appeal - that  
all that opponent asks is that the  
case be heard at this term of the court  
that opponent regards this as a great  
opportunity to his clients, as he



is quite apprehensive that this litigation will be further so far as the recovery of the judgment is concerned unless the sum is paid at this period at this time of the court.

Henry H. Miller



221  
Supreme Court

Robert H. Stoddard  
advs  
appellus

Walter Henshaw, Jr  
William V

— " —

affad on motion  
to set aside verdict  
— " —

Filed May 15, 1860  
L. Leland  
Clerk

1 copy furnished  
for apprais



State of Illinois  
LaSalle County

Geo. C. Campbelle being duly  
sworn saith on oath that he submitted  
No 221. in the Supreme Court at  
the present time for appealant  
that he appeared at the time that  
Moses Cook & Campbelle were atty  
in the case & as to the & Submit  
is, That it was entered upon this  
docket by B. C. Cook, and was submit  
ted by affiant in his absence, That  
affiant received printed points in  
the case sent & said Cook and  
supposed without reflection that  
the case was submitted upon  
said points That Yesterday he  
first stated ~~that~~ to said Cook, <sup>that it</sup> had  
been submitted & then learned that  
he was not atty & had no right  
to ~~submit~~ <sup>submit</sup>, that the case was  
entered upon our docket only  
that notice might be given to  
Mr Larned of the progress of the  
case, we having nothing to do with  
the case but to give such notice  
& to file such papers <sup>as</sup> he should  
send us

Subscribed & sworn to before me  
this 15th day of May A.D. 1866  
J. L. Larned, Clerk of Sup. Court

Geo. C. Campbelle



221  
Western Trans -  
Location Co  
vs

Newhall

221-

App'd to.

Filed May 15, 1860  
L. Leland  
clerk



Superior Court  
M. T. 1880.

Meriden Pump Co } No 221  
vs } Appeal  
G. S. Stebbins vs }

E. Charred on  
oath states that he never authorized Mr  
Campbell to act for him <sup>or</sup> in the above case  
that he employed B. C. Cook <sup>and indirectly</sup> simply  
to watch the case for him, and telegraphed  
him when it would be required to be here  
to argue the case - which this affiant  
deemed it important to argue orally &  
especially desired so to do. - That this  
affiant saw said Cook last week  
at Decatur who informed him that  
he did not think the case would be  
heard at this term - That the Record  
was not filed within the first three days  
and there was a rule of Court requiring  
such cases to be placed on the trial docket  
by special motion - and no such ~~rule~~  
motion having been made in this case  
and it being likely soon to be called the  
probabilities were it would be continued  
That this affiant when he went to Decatur  
intended to return by way of Ottawa to  
look after this case - but ~~when~~ upon  
being advised as above by said Cook  
he returned to Chicago



where ~~he~~ he especially desired to  
remain during the present week - for  
~~business~~ - that he came down from  
Chicago last night in obedience to a  
telegram from Mr Cook -.

That so far as any action has had  
submitting the cause - it ~~is~~ was  
wholly unauthorized on the part of any  
one - that Mr Cook was not the Attorney  
of Record in said Cause - or of counsel in it  
nor only employed to watch it as above stated  
and this affiant deems it important of the  
cause to be tried at this time - that it  
should be argued orally -

That this affiant's engagements  
in Chicago at this time, and the  
present state of public affairs there  
make it a matter of deep interest  
to this affiant - & of some importance  
(at least in his own estimation) for him  
to be there - ~~but~~ and for that  
reason of under the circumstances  
he is legally entitled under the rules  
to a continuance of the cause

that this affiant needs  
he desires to have it - ~~the~~ ~~therefore~~  
~~and~~ ~~expected~~ ~~Mr Miller~~ ~~to consent~~ ~~to the selling~~  
~~of the cause~~ ~~and~~ ~~the~~ ~~assumption~~ ~~but~~ ~~at~~ ~~claimed~~ ~~it~~ ~~as~~ ~~his~~ ~~right~~  
~~for~~ ~~the~~ ~~been~~ ~~our~~ ~~above~~ ~~stated~~ C. C. Charnell



E. Charney by J. S. J. J. J.  
J. S. J. J. J. J. J.  
J. S. J. J. J. J. J.  
E. Charney

J. S. J. J. J. J. J.

15 19 9 1860

Before me

J. S. J. J. J. J. J.

10 J. S. J. J. J. J. J.



227  
Western Trap Co  
3  
Perkall

aff. E. Lane

Filed May 15. 1860  
E. Lane  
Clerk



Western Transportation Company }  
 vs Appellant }  
 Gilbert H. Newhall }  
 William H. Jackson }  
 Francis Cox }  
 Appellees }  
 Appeal from  
 Supreme Court  
 of Chicago

It is stipulated in the above cause  
 that the plaintiff be shall be allowed  
 pro daps. in which to file the Record  
 in this cause with the understanding that  
 the same shall be tried at this term  
 of this Court.

Wm. Newhall  
 for Newhall.

Edmund Larned  
 Atty for Appellant

42

S S



<sup>221</sup>  
Supreme Court  
And Grand Jurors  
-----

The Western Transportation  
Company  
vs Appellants

Gilbert G. Kerhall  
William H. Jackson  
Francis Cox  
-----

Stipulation

Filed April 18, 1860  
L. Leland  
Clerk

Gordon Larned Gordon  
Att. for Appellants



State of Illinois  
Third Grand Division  
Supreme Court of the State 1860  
The Western Transportation Company  
vs Appellants  
Gilbert, G. Newhall  
William H. Jackson  
Francis Cox  
Appellees)

Appellees  
Filed  
Chicago

And now comes the said  
appellant G. G. Newhall & Jackson  
& Hoper & Willard - their Atty - & makes  
the Court for ~~the~~ for days time  
in which to file the Record  
in this cause upon the  
written stipulation & consent  
of the counsel for the  
Appellees herewith filed  
G. G. Newhall & Jackson  
Atty for Appellants



22  
Supreme Court  
Handwritten Dues

The Media Transmitter  
Company  
Appellant

vs  
Newhall et al  
Appellee

~~Stipulation~~  
for Motion for  
judgment and  
to file Record

Filed Apr. 19. 1860  
L. Island  
Clerk



STATE OF ILLINOIS,  
SUPREME COURT, APRIL TERM, 1860.

WESTERN TRANSPORTATION CO. }

vs. }

GILBERT G. NEWHALL ET AL. }

POINTS FOR APPELLANT.

I. The conditions and qualifications of the bills of lading were a part of the contract. It is immaterial in what part of the paper they were printed. They were on it when delivered. They are stipulations beneficial to the defendant on a contract in the possession of the plaintiffs and sued on by them, and constitute the contract between the parties equally with anything else which appears upon the paper.

*Heywood v. Perrin*, 10 Pick. 230.

*Wheelock v. Freeman*, 13 Pick. 168.

*Stocking v. Fairchild*, 5 Pick. 182.

*Jones v. Fales*, 4 Mass. 245.

*Homer v. Wallis*, 11 Mass. 309.

*Springfield Bank v. Merrick*, 14 Mass. 322.

*Makepeace v. Harvard College*, 10 Pick. 303.

*Barnard v. Cushing*, 4 Met. 233.

2 Camp. 206; 3 Bibb, 11.

4 Maule & Sel. 25, 506.

~~5 Missouri, 51.~~ *Mon 679. C. & N. H. Ry. 8. Term 483.*

A paper purporting to be conditions of insurance, if annexed



to and delivered with a policy, is to be deemed *prima facie* a part of it, and this whether referred to in the policy or not.

3 Hill (N. Y.) 502.

2 Arnould Ins. 1274. 1277.

II. The conditions and exceptions on the back, being parts of the contract, go to qualify and affect the liability of the defendants, and the declaration should therefore have noticed them; and the omission so to do, constituted a fatal variance between the contract described in the declaration and the contract proved in evidence.

1 Saund. Pl. and Ev. 198.

*Tempany v. Barnard*, 4 Camp. 20; ib. 96.

*Strong v. Rule*, 3 Bingham, 315.

*Fairfield v. Slocum*, 19 Wend. 33. 329.

~~*Cope v. Goodwin*, 1 Rawle, 203.~~

*Davison v. Graham*, 2 Ohio N. S. 131.

*Austin v. Manchester*, 5 Law & Eq. 329.

*Latham v. Rutly*, 2 B. & Cress. 20.

*Stamp v. Hutchinson*, 11 Penn. State, 1 Jones, 533.

*Howell v. Richards*, 11 East, 640.

2 Greenleaf Ev. sec. 209.

*Clarke v. Gray*, 4 East, 569.

*Yate v. Willan*, 2 East, 129.

*C. Ham & John* 394. *Jurgensen v. Cops* 399

*Clay v. Willan* 1. 4. Bl. 298

2 *Starkil Co.* 61.



III. The copy of the contract, annexed to the declaration, omitted the conditions. If these were part of the contract, the contract offered varied from the copy and was not admissible, whether the conditions were such as it was necessary to set forth in the declaration or not.

*Pearsons v. Lee*, 1 Scam. 194.

*Bogardus v. Trial*, 1 Scam. 63.

IV. The instructions which were refused on the part of the defendant, should have been given.

When a loss is shown to have resulted from one of the excepted causes, the burden of proof is on the plaintiffs to prove negligence, and if it is left in doubt upon the evidence, whether the loss is to be attributable to the excepted cause, or to negligence, the plaintiffs cannot recover, and the seventh instruction should have been given.

Edwards on Bailments, p. 568.

Angell on Carriers, sec. 61—237.

*Clarke v. Spence*, 10 Watts, 337.

*Marsh v. Horne*, 5 B. & C. 489. 322

*Harris v. Packard*, 3 Taint. 264.

*Beckman v. Shonse*, 5 Rawle, 190.

*Wyld v. Bickford*, 8 Mees. & Wels. 419.

*Clark v. Barnwell*, 12 How. U. S. 279.

*Muddle v. Stude*, 9 Car. & P. 380.

Story on Bailments, sec. 573.

*Riley v. Horne*, 5 Bing. 217.

*Brind v. Dale*, 8 Car. & P. 207.

1 Esp. 314.

*Cooper v. Barton*, 3 Camp. 5.

*Schmidt v. Blind*, 9 Wend. 268.

*Rugan v. Caldwell*, 7 Humph. 134.

*Foote v. Storrs*, 2 Barb. 326.



V. In cases where there is an express contract for the carriage, the owner of the goods thereby waives the common law obligations of the common carrier, and his liabilities as insurer, and the burden of proof is on him in such cases to prove negligence, and the mere fact of loss or injury is not sufficient, without some evidence of negligence, to charge the carrier.

Angell on Carriers, sec. 237.

Addison on Contracts, p. 814.

*Clay v. Willan*, 1 H. Black. 298.

*Nicholson v. Willan*, 5 East, 507.

*Bignold v. Waterhouse*, 1 M. & S. 255.

VI. By the provision of the contract, that the Company were not to be held liable at all for injuries occasioned by accidental delays, the liabilities of the Company, during the detention of the goods at Buffalo, were not those of common carriers, but simply those of warehousemen or bailees, and they were liable only for loss from negligence, and the burden of proof of such negligence was on the plaintiffs.

*Bonman v. Teal*, 23 Wend. 309.

*Powell v. Myers*, 26 Wend. 597.

*Thomas v. R. R. Co.*, 10 Met. 476.

Story on Bailments, sec. 449.

5 Term, 389.

11 Adolph. & El. 43.

*Platt v. Hibbard*, 7 Cow. 499.



VII. The contract offered in evidence did not support the counts in the declaration, that the defendants undertook the carriage of the goods as *common carriers*. The contract offered purported to be made with an *agent* of the Company, and contained upon its face an express denial of the authority of the *agent*, "to receive Gunpowder on any terms." The plaintiffs, Newhall & Co., could not, by contract with the agent at Boston, charge the Company with the liabilities of common carriers as to articles which said plaintiffs were expressly notified he was forbidden to receive from them as such, unless the Company subsequently *ratified* such prohibited contract; and the fact that the powder was received by such agent and forwarded to Buffalo, and that other agents of the Company at Buffalo received and took care of the powder on its arrival there, and subsequently forwarded it to Chicago, would not amount to such ratification, or increase the liabilities of the Company.

Story on Agency, sec. 72—81—83.

*Rawson v. Curtis*, 19 Ill. 456.

Ware's Reports, 181.

*North River Bank v. Aymar*, 3 Hill, 262.

Angell on Corporations, sec. 304.

*Penn. Steamboat Co. v. Dandridge*, 8 Gill & John.  
323—4.

2 Eng. Law and Eq. 406.



VIII. The proof of damage to goods without any proof of the cause of such damage, does not establish negligence, even *prima facie*. Where a party is charged with a duty, the law presumes that he has performed the duty, and the fact of damage to goods by water, dampness or other cause, with no evidence of any negligent conduct of the bailee, would not make him liable for such damage.

Story on Bailments, sec. 410, 454.

*Brind v. Dale*, 8 C. & P. 212.

*Finucane v. Small*, 1 Esp. 314.

*Cooper v. Barton*, 3 Camp. 5.

*Dickman v. Shouse* ~~*Tompkins v. Sattmarch*~~, 5 Rawle, 179.

*Newton v. Pope*, 1 Cow. 109.

Edwards on Bailments, 304.

~~*Herman v. Drinkwater*, 1 Greenleaf, 27.~~

*Clarke v. Spence*, 10 Watts, 335.

IX. The evidence of J. W. Tuttle was improperly excluded. The signature to the forthcoming bond did not bind him individually. Taken in connection with the statute to which it referred, and the statement on the face of the bond, that the "Western Transportation Company had the possession of the property, and desired to retain such possession," and the signature for such Company, the bond will be held to be the bond of the Company, (the authority to execute it by Tuttle not being denied.) "The recent cases and the best reasons are for determining in each instance, and however the signature is made,



from the facts and evidence, that a party is an agent or a principal, *in accordance with the intention of the parties to the contract.*"

1 Parsons on Contracts, 47.  
*Long v. Colburn*, 11 Mass. 97.  
*Wilks v. Bach*, 2 East, 142.  
*Mott v. Hicks*, 1 Cow. 513.  
 Story on Agency, sec. 153, 154.  
*Mann v. Chandler*, 9 Mass. 336.  
*New Eng. Ins. Co. v. De Wolf*, 8 Pick. 61.  
*Campbell v. Baker*, 2 Watts, 83.  
 5 Gilman, 304.

X. The motion for a new trial should have been granted, there having been no evidence offered by the plaintiffs, establishing the power of the defendants to make the contract declared on.

It was not proven that the defendants were a corporation, nor that as a corporation they were clothed with the capacity to become common carriers of goods between the ports of Albany and Chicago, and Boston and Chicago, and to enter into the contracts sought to be enforced in this action.

Corporations have no powers save such as are expressly given by their charters, and such as can lawfully be implied from those so given. Nor could the failure of the corporation to object to the want of such evidence at the trial, affect this position, because

1. It was as much a part of the plaintiffs' case as the contract itself.



2. Because no estoppel arises from the making of the contract, or failure to object, as the consent of the parties to the suit cannot confer a corporate authority to contract, and it is against the policy of the law to allow corporations to exercise unauthorized powers.

Angell and Ames on Corporations, sec. 256—111.

*Penn. Steamboat Co. v. Dandridge*, 8 Gill & J. 243.

*Albert v. Savings Bank*, 1 May Ch. D. 407.

17 Mass. 479; *ibid.* 1.

*Hayden v. Turnpike Co.*, 10 Mass. 409.

*Head & Amey v. Ins. Co.*, 2 Cranch, 154.

*Bank U. S. v. Dandridge*, 12 Wheat. 68.

*Bank of Columbia v. Patterson*, 7 Cranch, 365.

2 Cowen, 699; 15 Johns. 383; 3 Barn. & Ad. 12.

XI. The contract offered did not support the declaration. It was the contract of J. G. Wilder, and not of the defendants. It is admitted that Wilder was an agent of the Company, and that the signature was his, but it was not admitted to be the contract of the Company. It is not executed by him in the name of the Company, and does not, in terms, bind the Company, but, on the contrary, is one which upon its face he was forbidden to make for the Company. If it be held that the forthcoming bond was not the bond of the Company, but of Tuttle,



*a fortiori* will it be held that the contract is not the contract of the Company, but of Wilder.

*Stackpole v. Arnold*, 11 Mass. 28.  
5 East, 147.

*Stone v. Wood*, 7 Cow. 454.

*Spencer v. Field*, 10 Wend. 90.

*Taft v. Brewster*, 9 Johns. 334.

*Savage v. Rex*, 9 N. Hamp. 263.

*Wiley v. Shank*, 4 Blackf. 420.

XII. The damages found by the jury exceed the amount which under the evidence the plaintiffs were legally entitled to recover, and a motion for a new trial should have been granted on that ground.

The powder was delivered to the plaintiffs, May 9th. The defendants were not liable for any injury which it received subsequently. The examination on which the estimate of damage was based, was not made until June. It appeared that powder very rapidly absorbed moisture, and when moistened requires to be remanufactured.

Record, pages 82 to 88.

The plaintiffs could not allow a perishable article, or one having a natural tendency to decay, to remain after delivery in a condition in which such injury or decay would be greatly increased, and throw the loss on the carriers. It was their duty to have separated the dry powder from the wet, and not to have permitted the two kinds to be stored together and remain in



contact ; and not doing so, they could only recover, in any event, for the damages which existed at the time of delivery ; and the proof having blended the damages occurring before and after the delivery, and the damages given including both, a new trial should be awarded.

Damages which are occasioned by the fault of the bailor, are not recoverable.

Angell on Carriers, sec. 57, 211.

*Warden v. Greer*, 6 Watts, 424.

XIII. The verdict is unsupported by the evidence. While there is no proof whatever of any negligent conduct of the defendants offered by the plaintiffs, the evidence of the defendants establishes affirmatively the exercise, on the part of the Company, of all the care, prudence and skill which the case admitted of. The powder was delivered to defendants at Albany, 13th November, 1858, on a canal boat. It was forwarded in due course. It arrived in good order at Buffalo, but too late to go forward that season. No place of storage in Buffalo could be found. It was, by the necessity of the case, stored in the boat in the canal. The boat is proved to be a sound, good boat, and well fitted for the storage of powder, (Abstract, page 14,) and the powder was carefully stored. The evidence of the plaintiffs is, "that it was a good boat, perfectly safe, and they had good men to take care of it," and this is not contradicted, (Abstract, p. 13).

It further appears that powder gathers and absorbs moisture rapidly when it is exposed to a damp atmosphere. It appeared



that the nail heads in the cases which contained it, were not discolored; *that a large portion of the kegs* showed dampness, but no discoloration, (Abstract, p. 13). Under these circumstances it is clear that the necessary exposure of the boat through the entire winter, to the influences of the atmosphere, which exposure was unavoidable, would naturally and reasonably account for all the damage proven; and where no other cause of damage was shown, and no neglect on the part of the defendants, the jury were bound to have found for the defendants.

*Goodwin Leavelle & Goodwin*  
attys for *Appellants*



221-147

Mrs. Transco

vs

Newhall & Co

Appts. Points

Filed May 17, 1860

L. Leland  
Clerk



1.  
Supreme Court. June 2. 1861

The Western Transportation Co  
vs  
Gilbert & Newhall et al

Miscellaneous Argument  
for Appellants

The facts in this case were briefly these. Newhall & Co made a contract with one Wilder who was acting as general freight agent of the Transportation Co in Boston for the forwarding from Albany to Chicago of a quantity of powder. The special contract entered into is found on pages 5 to 9 of the Abstract and contains various exceptions and qualifications of the liabilities of the carriers. A part of these appear on the one side and a part on the other side of the same sheet of paper, but the whole were on the paper when it was delivered as a contract - and form (as is claimed by the appellants) a part of the contract.

By reference to these conditions it is found that the destination, name of the consignee and weight of all articles of freight must be plainly marked, or no responsibility would be assumed for their miscarriage or loss.

That the goods must be receipted for by an authorized agent or the Company would not be liable.

That the Company would not hold itself liable at all for injuries to any articles or freight during the course of transit occasioned by the weather or accidental delays or natural tendency to decay.

The Declaration failed to notice any of these conditions or exceptions to the liability.

It also further appeared that Gunpowder would not be received on any terms.



It appeared in evidence that the contract was made by Wilder in Boston and that he was their general freight agent - but no evidence of any authority given him to deviate from the written instructions as to gunpowder appeared - nor was there any evidence of any ratification of such contract by any act of the Corporation itself. All the evidence offered to prove ratification consisted in the acts of certain other freight agents of the Co at Buffalo who received and stored the powder during the winter, and forwarded it in the succeeding spring.

The powder was received on board a canal boat of the Transportation Co at Albany late in November 1858 and did not arrive in Buffalo until the close of navigation when it became impracticable to send it forward. In consequence of this it had to remain in Buffalo during the winter. The proof shows that the most diligent and strenuous exertions were made to forward it, and that they proved unavailing.

The laws of the City of Buffalo forbid the storage of the powder in Buffalo except in powder magazines. Of these there was but one in the place and that was unable to receive it and in consequence it had to be stored on the boat through the winter and the boat had to be removed without the corporate limits of that city or of any town or city. The boat was accordingly towed to Pickards Bridge about 25 miles from Buffalo where she remained during the winter. The evidence shows that the boat was a first-rate boat and in first rate order and condition and in every way well proved and fit and proper to carry powder, that the powder arrived at Buffalo in good order; that



in the spring when it was removed from the Canal Boat to the vessel to be taken to Chicago it was found to be damp and a portion of the kegs had water marks upon them. It did not appear there was any water in the canal boat <sup>here</sup> nor the dampness and water stains shown to have been occasioned by any negligent exposure of the powder or by any want of care in its custody. It simply appears that the powder was damp, and some of the kegs were water stained. So far as can be gathered from this record the boat in which the powder was stored was not only every way suitable and sufficient, but the plaintiffs offered the statements of Defendants agents in evidence which are uncontradicted that "there were good men in charge of the boat". No want of care and no act of negligence of the Defendant was proven.

It further appeared that a large portion of the kegs showed dampness of the powder without any discoloration of the exterior surface - that the nail heads were not discolored.

It further appeared that moisture weakens powder - that it will keep for years if kept dry but that in the course of time it will weaken even if kept dry.

That it gathers and absorbs moisture rapidly when it is exposed to a damp atmosphere.

That the paste on the labels would affect it if there was moisture enough to reach through the wood.

It further appeared that the powder was delivered to Newhall & Co on the 9<sup>th</sup> of May and that although it was known to be damaged, nothing was



done with it until June. In the interval <sup>and dry</sup> the damp, were allowed to remain together, and no steps were taken to preserve any part of it.

The only witness who proved the amount of damage was the consignee of the powder - who was also as he swore agent of the plaintiffs and who swore to over \$6000. damage. This estimate of damage is all the damage which the powder showed in June when the examination was had and included of course whatever injury it received subsequent to its delivery.

The agent of the Defendants Mr Tuttle who also examined the powder at the same time was excluded from testifying on the ground that in executing the forthcoming bond for his principals he had signed in such a way as to bind himself personally.

On this evidence of one witness and he standing in such a relation to the case as to excite doubts of his fairness a Judgement of \$6320. damages was obtained against the Company which is now sought to be reversed.



The Appellants rely with entire confidence on the 1<sup>st</sup>, 2<sup>d</sup> and 3<sup>d</sup> Points in their printed Points as of themselves sufficient to obtain a reversal of this judgement.

The conditions printed on the paper delivered to the plaintiffs as the contract - and qualifying the contract, were treated by the Court as forming no part of the contract. They are spoken of as printed on the back of the contract. Whether you call the part of the paper where they appear back or front will depend upon when you begin to read. It would read as well and naturally to begin with what is termed the back and turn over to the other side as vice versa.

It appears too that the contract itself is expressly made subject to "the following conditions" and on the same instrument appear various qualifications of the same contract headed "Conditions and Rules". To say that a contract for the carriage of goods found upon a single piece of paper which paper contains express conditions and qualifications of that contract indorsed upon it and delivered at the same time and as a part of the same instrument shall not be considered as a part of it, is as repugnant to common sense as it is to well settled rules of legal construction, and to the express authority of numerous decisions of the best courts. It makes no difference on what part of the paper are written words which qualify and limit a contract. If they were written anywhere before the contract was delivered & were delivered with it - they form a part of it just as effectually as if they had been written on the face of it. Words in an Insurance Policy written on the margin or back but delivered with the policy become



a part of the contract.

The rule is well stated in *Barnard vs Bushing* 4 Met 231 where there is a review of the principal cases

"That a written stipulation not contained in the body of the instrument may be taken to be a part of the contract, and qualify what otherwise would be an absolute promise has been held in numerous cases"

And the same doctrine was applied to the conditions of an Insurance Policy in 3 Hall (N.Y.) 302

If these conditions were a part of the contract, there was a fatal misdescription of the contract in the Declaration. It was set forth as a contract to carry safely and securely omitting to set forth the qualifications and exceptions going to limit and restrain the liability which appears in the conditions.

That such a mis-statement of the contract is a fatal variance is decided in various cases both in England and this country.

The law upon this subject is well considered and clearly stated in *Davidson vs Graham* 2 Ohio (Warden N.S.) 133.

"It is requisite that a Declaration on a contract should set out the contract truly either in terms or by legal import. If the defendants had the right to make this special exception to their ordinary liability as common carriers it became a material stipulation in the contract and as such, became an essential part of the description of the contract in the Declaration."

It is claimed that these conditions and qualifications are matters of defence and to be set



7.  
up by plea and need not be noticed in the Declaration.

This is true only of such matters as are merely in defeasance of the contract or which go to lessen the amount of damages.

The distinction between the two cases is well stated by Buchanan 6 J 6 Harr & John 401.

"It is a well settled rule in pleading that in an action founded upon a contract if there be in the contract a proviso or condition which operates only in defeasance of it, or merely respects the liquidation of damages after a right to them has arisen by a breach of the contract, it is not necessary to be stated in the declaration, nor should come from the other side, but that if there be a condition precedent or a proviso or other matter which qualifies the contract or goes in discharge of the liability of the defendant it must be stated"

The exception "of the dangers of the seas" does not merely respect the amount of damages to be recovered, but it limits and restrains, it charges the general obligation and qualifies the particular contract of which it is as much and as material a part as any clause in it, and the general obligation being thus restricted the carrier is only answerable in his special undertaking.

The authorities cited under Point III fully sustain these positions.

There can be no question that several clauses and among others the 4<sup>th</sup> condition which absolves the carrier from all liability whatever - for any loss occasioned by delay - by the weather or by natural tendency to decay, is an absolute qualification of the contract which it was necessary to set out in



describing it in the Declaration.

But irrespective of the question whether the clauses and conditions referred to were of a nature requiring averments in the Declaration - if they were parts of the contract, the copy of the contract annexed to the declaration should have contained them. The copy is intended by way of an over of the instrument sued on - and it must set it forth correctly. Any material variance between the copy annexed and the instrument produced is fatal - and this without regard to the question whether the omissions are of facts necessary to be set forth in pleading or not.

The ground on which the Appellees attempt to get rid of the force of this objection is by denying the right of the carrier to limit his liability by the conditions referred to, and hence to exclude them from the contract; and they cite the case of Mich Cent RR Co vs Hoale 6 Mich 245 in support of this position.

The right of the carrier to limit his liability by special contract is now too well settled to be disturbed. In Michigan <sup>exploded</sup> the doctrine of the <sup>former</sup> ~~decisions~~ <sup>decisions</sup> was re-affirmed in Mich Cent RR Co vs Ward 2 Mich 538 where it was ruled that the carrier could not restrict his common law liability by special contract. The case in 6 Mich reverses that decision and seeks to return to the established doctrine, and <sup>that Court</sup> in retiring from its former position seeks to justify its change of view by writing an elaborate treatise which contains some nice distinctions and ingenious speculations.

In Merchants Bank vs N J Navigation Co 6 Howard 344, the leading case on this subject



well and firmly settled to be new and shaken. In the Michigan case the conditions are expressly embodied in and made a part of the contract by reference - so that so far as the loose dicta of the Judge in his opinion go, it is a denial of the right to limit the responsibility of the carrier at all even by express written contract without evidence aliunde the contract that some special equivalent in reduced price of carriage or other good consideration was received by the shipper for such waiver of the common law liability. The case itself as an authority simply decides

1<sup>st</sup> That the Mich Cent RR Co do not hold goods as carriers after their arrival at their depots and are ready for delivery to the owner (altho' no notice has been given him of such arrival) but simply hold them as warehousemen

2<sup>d</sup> That carriers may limit their responsibility by express contract and that the case in 2<sup>d</sup> Mich deciding otherwise is over-ruled.

The rest of the opinion as to what amount of evidence is necessary to make such a contract binding and what consideration it requires is the mere talk of the Court and has no force as a decision

But if the talk of the Court on this point is to be deemed of any importance in this discussion we have only to say that it is sustained by no adjudged case and is in direct opposition to the whole current of authority.

It will not be contended that the exceptions and conditions of a Bill of lading if they are in legal contemplation a part of the contract are of any less or greater force according



to whether they are written on the top middle or bottom or on the one side or the other of the sheet on which the contract is written or printed

The exceptions in the Bill of lading of fire, collisions, danger of Lake Navigation &c which appear on the face of the paper and are set forth in the Declaration in this case are equally limitations of the common law liability with those contained in the other conditions and equally within the objections made by Justice Martin in the Michigan case, but when was it ever heard in any Court that to sustain the validity of these qualifications of the contract, evidence that a lower rate of freight was charged in consequence of their allowance by the shipper or some other fact aliunde the contract moved to enforce its obligation. The doctrine is as unknown to the cases as it is unfounded in principle or good sense.

In *Gordon vs Walker & Serg & Rawle* 533 where there was an exception in the Bill of lading the Court say "the parties have a right to alter or modify their common law liability by special contract."

In *Dorr vs Steam Nav Co & Sandf* 146 the Court say

"The necessity of allowing common carriers to make special contracts was early seen and recognized and exceptions in bills of lading restricting the carriers liability have from time to time been added"

This doctrine is sustained in *Stoddard vs Long Island R R* 5 Sand 187.

In *Dorr vs Steam Nav Co* on appeal 1 Kernan 491 the very distinction was taken in that case that the exceptions in the contract amounted



to nothing more than notice brought home to the carrier, but the Court held that the exceptions to the common law liability being made in the bill of lading, and delivered to the agent of the plaintiffs must be deemed to have been agreed upon by the parties; thus denying in express terms the doctrine of Martin J in the Michigan case in respect to evidence of acceptance aliunde the contract itself.

The following cases also support the doctrine that exceptions in the Bill of lading are of themselves sufficient to limit the carriers common law liability.

Parsons vs Monteath 13 Barb 353

Moore vs Evans 14 Barb 524.

16 Penn 67. 8 Ruale 179.

In Davidson vs Graham 2 Ohio N.S. 139 the Court say - "No principle of public policy would seem to be contravened by a special contract restricting the liability of the carrier for losses not arising from any neglect or fault on his part and it would appear reasonable that he should be allowed the means of protection to himself against misfortune by limiting his liability as insurer" and this doctrine is sanctioned by the greater weight of authority in this country and also in England.

"The common carrier has therefore the right to restrict his common law liability by special contract and that extends to all losses not arising from his own neglect or omission of duty"

In this case there was no evidence of any assent to the restrictions and qualifications of the liability except that (as in this case) they appeared in the contract under which the plaintiffs claimed.



The Court of Appeals in *Dow v. New* 1 Kernan 492 say - "In other states where the right to restrict by notice has been questioned it seems to have been taken for granted that a special acceptance would excuse the liability of the carrier and it was so held by the Supreme Court of the U.S. Upon principle no good reason can be assigned why the parties may not make such a contract as they please. It is not a matter affecting the public interests. No one but the parties can be the losers & it is only deciding by agreement which party shall take this risk of the loss. The law where there is no special acceptance throws the risk upon the carrier. If the owner chooses to relieve him and assume the risk himself, who else has a right to complain.

To say that the parties have not a right to make their own contract and to limit the precise extent of their own respective risks and liabilities in a matter in no way affecting the public morals or conflicting with public interests would be an unwarrantable restriction upon trade and commerce and a most palpable invasion of personal right"

III. We claim that the Court erred in refusing the instructions asked by the Defendant

It will be seen by examination of these instructions that the Court instructed the Jury that even if the loss arose from providential causes the defendants would be liable unless they proved to the satisfaction of the Jury that they were guilty of no negligence, and by the refusal of the 7<sup>th</sup> Instruction they were forbidden to find for the defendant even if the proof left it in doubt whether the loss arose



from providential causes or from negligence. In other words the Court assumed throughout that the burden of proof lay on the defendants to disprove negligence and that in the absence of any evidence on the subject the damage being proven the Jury should presume negligence.

We contend that this was a mistaken view of the law applicable to the facts proven in this case for the following reasons -

1<sup>st</sup> The Transportation Co. at the time the damage occurred to their goods were not chargeable with the responsibility of common carriers but only of warehousemen.

By providential causes viz the closing of navigation - the goods could not be forwarded but were compelled to be retained at Buffalo during the entire winter. It would be most unreasonable and unjust to hold the carrier chargeable with all the responsibilities of a carrier while his public carriage is prevented by the act of God. If by irresistible causes he is compelled to suspend the carriage of the goods and to place them in store for safe keeping while further transportation continues impossible - his responsibilities become during such suspension those of a warehouseman and his special liabilities as carrier & insurer cease during the whole period in which his ability to carry is thus suspended. He is liable only for negligence.

Such seems to be the view of the Court in *Borman vs Teall* 23 Wend 309 - where the carriers' progress was prevented by the freezing of the river, and the Court say

"The freezing of our rivers has indeed been held



to be such an intervention of the vis major as excuses the delay of the carrier by water - but still he is bound to exercise at least ordinary forecast in anticipating the obstruction and to exercise due diligence in accomplishing the transportation so soon as it ceases to operate. And in the mean time he must not be guilty of negligence in taking care of the article detained."

In *Love vs Moss* 12 Dec 479 the Court say "In this case the freezing up of the river may have been a sufficient excuse for the non delivery of the goods at LaSalle that season - and the defendant may have been justified under the circumstances in storing them at Hennepin"

That the liabilities of the carrier do not necessarily continue the same until the actual receipt of the goods by the consignee is well settled. In *Powell vs Myers* 26 Wend 547 it is said "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 remaining in his possession undelivered without fault or neglect of his own should cease and he would then continue to hold them not as carrier but as mere bailee. Such a termination of the carriers responsibility and change of character of deposit would be regulated by usage, the course of business or sometimes by legal principles applied to special facts - the acts of parties and the common understanding of the transaction.

The same view of the law was applied in *Thomas vs Boston & Prov RR* 10 Met 476 to limit the responsibility of RR cos to a delivery of the goods at their depots and reducing their



liability after arrival there to that of bailees. And the only point really decided in the case of *Michigan Cent RR vs Ward* in 6 Mich cited by appellees is that the responsibility of the Rail Road as a carrier ceased under their charter upon the arrival of the goods at their depot in Detroit ready for delivery. It is the well settled rule with respect to goods remaining in the carriers hands by reason of the refusal of the consignee to receive them, or of his absence, or other cause constituting a sufficient excuse for the non delivery. Under such circumstances the cases uniformly hold that the responsibility of the carrier is changed to that of a mere bailee responsible for negligence only.

*Edwards on Carriers* p 522

*Fisk vs Newton* 1 Denis 45.

The law on this subject is thus stated in *Edwards on Carriers* p 515. "Circumstances sometimes qualify the duty of the carrier in relation to the delivery so as to reduce his liability to that of a warehouseman as where he is prevented from delivering them at the end of his route to the succeeding carrier by his non arrival, and in the mean time place them in his store house" citing *H Term* 581.

On the principles here established we submit that while the carrier's power to proceed with the carriage is interrupted by the act of God and he is meanwhile compelled to hold the goods in store, that he holds them during the suspension of his opportunity and ability to carry them as a mere warehouseman and liable only for neglect.

If this view of the law be correct and the Company held these goods during their detention



at Buffalo charged with the responsibilities of warehousemen only - then the rule of law is well settled that they were liable only for negligence - and that the burden of proof was upon the plaintiffs to establish that negligence - and that the mere fact of damage did not of itself establish a prima facie case. The well established rule is that the law presumes a person intrusted with any duty has performed the duty until the contrary be established.

In Schmidt vs Blood 9 Wend 271 the Court say "It appears to be well settled that a warehouseman is responsible only for ordinary care - and the onus of showing negligence seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods

See also cases cited under Point 8 & Tompkins vs Saltmarsh 14 Serg & R 275 & in Edwards on Bailments 304.

Story in his Bailments Sec 410 says "The burthen of proof of negligence is on the bailor and proof merely of loss is not sufficient to put the bailee on his defence. This has been ruled in the case of a horse hired and injured during the bailment when positive proof of negligence was required to sustain the action.

In the case at bar not only was no evidence of any negligence offered but the Court refused to instruct the Jury that if upon the evidence in the case it were left in doubt whether the injury resulted from providential causes or from negligence they should find for the defendants thereby clearly requiring the defendants to prove themselves innocent of negligence and relieving the plaintiff from



making out a case of negligence against them.

2. The goods were forwarded by the Company under a special contract restricting and limiting their common law liability - and under such a contract they are not regarded as common carriers but as private carriers for hire and liable only for negligence and the burden of proof is in such cases on the plaintiff to establish negligence.

Common carriers when they stand upon their common law liability are insurers and responsible as such for the goods unless they can excuse themselves, but private carriers for hire are responsible only like warehousemen for negligence and the burden of proof is on the plaintiff to prove negligence.

In *6 Howard (U.S.) 344*, supra the Supreme Court say "Altho' the carrier was allowed to exempt himself from losses arising out of events and accident against which he was a sort of insurer, yet inasmuch as he had undertaken to carry the goods from one place to another he was deemed to have incurred the same degree of responsibility which attaches to a private person engaged casually in the like occupation and was bound therefore to use ordinary care in the custody of the goods."

In *Dow vs N.J. Steam Nav Co / Kernan 443* the Court say "Where a special contract is made the carrier becomes as to that transaction an ordinary bailee and private carrier for hire"

In all cases of carriers other than common carriers the burden of proof is on the plaintiff to prove negligence. In *Foot vs Storrs*



re cover

2 Barb 326 it was held that in all cases where a defendant is bound only to ordinary care & liable only for ordinary neglect the plaintiff can not reason upon the mere loss (or injury) of the goods and that the onus is on plaintiff to give some evidence of a want of care in the bailee or his servant.

In the case of notices in England it has been uniformly held "that while the burden of proof was in the carrier to establish the knowledge of the notice by the shipper that when that is made to appear, the burden of proof is then on the person sending the goods to show negligence in the carrier which is contrary in case of common carriers." Angell on Carriers Sec 276.

3. The evidence in this case so far connected the injury proven with one of the excepted causes specified in the contract as to throw the burden of proving negligence on the plaintiffs.

The 4<sup>th</sup> condition of the contract excludes the company from all loss occasioned by the weather or accidental delays, or natural tendency to decay. But irrespective of this clause there is in the contract as set forth in the Declaration an exception of "dangers of lake & river navigation" and "acts of Providence".

There can be no controversy that the detention of the goods at Buffalo by the closing of navigation was an "act of Providence" which excused the carrier from proceeding with the transportation during the time it continued.

Now that this necessary unavoidable and therefore excusable delay & detention



of the goods was the cause of the injury which they sustained is not only made probable upon the evidence - but the evidence while it discloses no other cause of damage than this, clearly establishes the sufficiency of this cause to account for all the damage proven. Or to take the most favorable view of the evidence for the plaintiffs it certainly makes a case of doubt whether the damage proven was not attributable to the delay and its inevitable injurious consequences; and in such case the loss being by the testimony connected with the delay and to be accounted for by it - it was incumbent on the plaintiffs to prove negligence on the part of the defendants.

The sole ground on which the plaintiffs rely is that a part of the kegs in which the powder was contained had water stains on them. From that they seek to have negligence presumed. If as a matter of physical science or natural law it were true that no water stains could be upon the casks without the negligence of the defendants there would be force in the reasoning. - But if water might have stained the casks without negligence on the part of the defendants - then there is no more evidence of negligence furnished by this fact than by the proof of injury from any other cause. The proof simply shows an injury. An injury by water is no greater evidence of negligence of Defendants than an injury from fire - falling of a building or other cause of damage. The agent affecting the injury may be water, air, fire or gas - but such agency may be put in motion with or without the fault of the Defendants.



But in point of fact the evidence clearly  
 disproves all negligence and points to the delay  
 and its necessary consequences as the true and  
 only cause of the injury. For it appears that  
 the powder arrived at Buffalo in good order. It  
 was a necessity that it should remain in the canal  
 boat out of the limits of the city during the period  
 of its detention. The boat is shown to be a suitable  
 safe and proper one - well fitted and prored and  
 taken care of during the winter. The powder was  
 well and carefully stored. Every thing is shown  
 to have been done that could be done. No act of  
 omission or commission on the part of the Defendants  
 is proven - No fault or neglect is shown. The powder  
 when taken from the canal boat in the spring is  
 found to be damaged. There is no evidence of any  
 leak in the boat - nor that there was any water  
 in the boat. The only evidence is that there were  
 water stains on a part of the casks, and that the  
 powder was damp. It was damp and injured  
 in a large part of the kegs which had no water  
 stains - kegs in which the nails were not rusty,  
 and which showed no signs of water externally.  
 It is proven that powder is peculiarly liable to  
 injury from a damp atmosphere. Powder Magazines  
 besides being made of brick or stone are lined inside  
 with wood and a space of air between the two being  
 to prevent dampness. How could it be otherwise  
 than that powder necessarily kept all winter in a  
 canal boat should be injured by the liability to  
 dampness which such exposure unavoidably occa-  
 sioned? There was a boat which would be in the  
 water of the canal, whose decks would be covered  
 with the ice and snow of winter whose seams and



and joints would be subjected to the contracting and expanding effects of the changes of temperature from winter to spring. Was it hardly within the limits of possibility that a cargo of powder compelled to be thus exposed should not suffer injury? Is it probable, nay, hardly possible that the utmost efforts of human skill and expenditure of care and diligence could have in any way prevented that injury?

Is not then the damage connected with providential causes, as to bring the carrier within the exception unless the negligence of the carrier has contributed to produce the injury - and does not the burden of proof fall upon the plaintiffs to prove that such is the case? And in the absence of such evidence the damage being established, and the acts of providence proven which furnish one satisfactory cause of <sup>the</sup> damage, and no other evidence being offered the defendants were entitled to a verdict.

The case of Clark vs Barnwell 12 Howard 280 is analogous in some respects to the case at bar, and fully sustains the position which we take with regard to the burden of proof and the legality of the instructions which were refused.

In that case the court say, "Where evidence has been given bringing the particular loss or damage within one of the dangers or accidents of the navigation it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention. But in this stage and posture of the case the burden is upon the plaintiff to establish the negligence as the affirmative lies upon him. On this ground in the case of Muddle vs Stride 9 Car & Payne 380 which was an



action for damages to goods - Lord Denman & I in summing up to the jury observed, "if on the whole it be left in doubt what the cause of injury was, or if it may as well be attributable to perils of the sea as to negligence, the plaintiff can not recover. That the jury were to see clearly that the defendants were guilty of negligence before they could find a verdict against them"

X If this statement of the law made by the highest Court in England and in the United States is correct then the refusal to give the 7<sup>th</sup> Instruction asked for the Defendants was erroneous - for it is word for word in the language of Lord Denman.

The language of the 6<sup>th</sup> Instruction is also in the words of the charge of Denman in *Middle vs Stride*.

That Instruction is clearly the law. If the damage to the powder proceeded from the closing of navigation (an act of providence an excepted peril of navigation) then the jury must find for Defendants unless they believe clearly that the Defendants were guilty of negligence in taking care of said powder.

Is not this sustained by all the cases? If it is traced to a providential or excepted cause, is not the carrier excused unless negligence is shown, and is it not for the plaintiffs to prove it? And if they fail to make it clearly appear - if they leave it in doubt whether there was any negligence do they not fail to make a case and is not the carrier entitled to a verdict?

The Court evidently were laboring through all these instructions under the belief



that the burden of proof was on the carrier, not only to bring the case within an excepted peril, but after having done so, to disprove all negligence on his part - which is contrary to the well settled rule sanctioned by the cases and the books.

This error was one of vital consequence and entitling the Appellant to a new trial.

So far from the fact of the water stains on the kegs being evidence of negligence on the part of the company it is clear that the necessary operation of natural laws would satisfactorily and sufficiently account for it. In *Clark vs Barnwell* (12 Howard supra) it appeared that the article damaged was peculiarly subject to the effect of humidity and dampness. The Court say "No doubt the unusual duration of the voyage in connection with the fact that it was one in which the ship passed from a northern to a southern latitude and in a season of the year when the change from a cold to a warm climate must have been considerable, greatly increased the dampness, and also the influence of it upon the goods liable to damage from that cause."

X So in this case the goods were compelled to be kept on board the canal boat a long period of time, and pass through a transition from the cold of winter to the warmth of spring. This change of temperature with the physical results incident to it in an atmosphere necessarily charged with dampness causing the condensation of the moisture of atmosphere in the form of water upon the exterior surfaces of the kegs would readily and naturally account for every appearance of water which has been proven. Only about 250 out of 2250 of the



packages showed any water stains upon them  
(At p 12)

At all events in the language of the Supreme Court in that case "For aught that appears in this case every precaution was taken that is usual and customary or known to shipmasters to avoid the damage in question. And hence we are obliged to conclude that it is to be attributed exclusively to the dampness of the atmosphere of the vessel without negligence or fault on the part of the master or owners"

The article damaged (gunpowder) is one much more liable to injury from dampness than the thread in the case in 12<sup>th</sup> Howard - and the Court say, "it has been held if the damage proceeded from an intrinsic principle of decay naturally inherent in the commodity itself whether active in every situation or only in the confinement and closeness of the ship, the merchant must bear the loss. And the same rule applies in the case of damage on account of the humidity and dampness of the ship."

VIII. The amount of damage for which judgement has been given is extravagant and can not justly be supported by the proofs.

It will be perceived that while the utmost amount of damage which the consignee of the powder and agent of the owners could swear to in the fall of 1859 when he made the attachment affidavit was \$4698<sup>12</sup>/<sub>100</sub> - That judgement was rendered in the suit for over \$6300. The explanation sought to be given for this by counsel is that the powder turned out worse than he expected. It would appear



then that the sole witness as to amount of damage makes his estimate of what the powder was worth May 9<sup>th</sup> when it was received by what he found it to be worth a long time afterward. The reasons why it turned out worse than he expected do not appear. Suppose it was from neglect of the owners to take the proper measures to prevent such a result - Suppose they allowed it to remain in a condition where the damage would be increased - would their own neglect entitle them to recover heavier damages? By their own statement (arguendo) it appears that the witness has changed his sworn statement of damage made in the affidavit for attachment in consequence of the condition of the powder at a period long subsequent to its delivery and without any evidence of any attempt to prevent such increased damage.

X It is very clear that the carrier would not be liable for any damage the powder received after its delivery to the consignee, which the exercise of due care would have prevented. It is shown that it is an article which absorbs moisture very rapidly and readily. It is proved that there was moisture in many of the kegs and water in some of them. It is proved that the whole powder wet and dry was put together in the same magazine early in May. There is no evidence that any separation of the wet from the dry was made or attempted. It is self evident that the damage would spread and increase by absorption.

The examination was not made until June in which the estimate of damage sworn to by Eaton was based. The request is that the Company are by this evidence made to pay for all the additional damage which the powder suffered by laying



together in this wet and damaged state for so long a period. There is no principle of law, or of justice on which such a verdict can be sustained.

It may be answered that it was for us to show the amount of increased damage between the delivery and the examination by way of reduction of damages, but the error lies in this - Here is a perishable article having an inherent tendency to decay. The amount of damage for which the carrier is liable is that which exists when the goods are delivered. All of the article which is then good and sound and free from damage should be ascertained and separated and the amount of damage to the remainder which existed at that time should be determined. The owner can not hold on to such goods indefinitely and charge all the subsequently accruing damage to the carrier.

Take the case of a cargo of oranges. Suppose parts of every box are wet rotted & bruised when delivered. They are liable to decay. The contact of the wet, rotted and injured with the sound promotes such liability. Can the owner lie by a month before examining the cargo - and taking no steps to separate the good from the bad - leaving all together - come in and claim the whole loss and damage which appears at the end of the month? If so it would work the grossest injustice on the carrier. The owner must either refuse to receive the goods and thus give the carrier power to dispose of them in such manner as to prevent further damage or if he does receive them he must show what the damage was to perishable articles of this nature when they were received, and not what it was weeks or months afterward, and if he fail to



furnish the jury with any satisfactory evidence of what it was at such time, he would be entitled to nominal damages only.

In this case an article the most liable to decay and susceptible to injury of almost any article of commerce, perishable from its very nature was received May 9<sup>th</sup> and the examination on which the witness bases the estimate of damage was not made until the following June. That estimate therefore clearly included damages which the party was not entitled to, and was as clearly illegal as it would have been in an action for non delivery to have offered the market value of the goods at a different time and place from that at which the contract called for their delivery.

It was error therefore in the Court upon such a state of facts to refuse the motion for a new trial.

There are various other grounds on which error is assigned. These are however sufficiently stated in the printed points, with the authorities, and it is not deemed necessary to elaborate them more at length.

Respectfully Submitted

Wm. H. Garrison  
for Appellant



Suprem Court. App. 2. 1860

Western Transp. Company

221 vs. 147

G. G. Newhall. et al  
\_\_\_\_\_

Amicus Argument  
for Appellants -

Filed May 29. 1860  
L. Deland  
Clerk.

Greenham & Son