

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, 508.

~~5 Missouri, 51.~~

Moore 679.
Civil 4. N. H. 172. 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.

Value on

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, 202.~~

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, 3 East, 569.

Yate v. Willan, 2 East, 129.

6 Ham v. John 394. *Ferguson v. Cofe* 399

Clay v. Willan 1. N. B. 298.

2 Star Kil Co. 61.

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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.

X 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. ~~402~~ 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.

*Not it
not
moved?*

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.

Buckman 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,

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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

X 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.

Gosdun Leamed & Gosdun
 Atty for Applicant

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Western Trans Co

vs

Newhall & Co

Apollo Point

Filed May 17, 1860

Leland

Clark