Holtzclaw v. Duff et al 1858 Marion 409/6

597/16

27 Mo. 392

58/058

plaintiffs
Holtzclaw app

David Hawkins

delivered hemp to def
27,500 lbs - $1902
hemp gets wet

Duff def resp

William Osborne
Edward B Talcott

~~denied they wanted hemp~~
took care of hemp as well as could
didn't want 2nd order of hemp

Rich - as ~~carriers~~ contractors, the appellants properly posted they weren't resp for fires even though; "it was the duty of the def to exercise ordinary care, skill & diligence in preserving the hemp"

Rev & remanded

The State of Missouri, ss.

The State of Missouri, to the Honorable the Clerk of the Hannibal Court of Common Pleas — **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Hannibal Court of Common Pleas —

wherein Richard Holtzclaw and David C Hawkins were plaintiffs, and John Duff, William Osborne and Edward B Talcott were defendants —

in a civil action in said court — manifest error hath intervened, to the great damage of said defendants — as by their complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the third Monday in March next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the City of Saint Louis, the 27th day of January in the year of our Lord one thousand eight hundred and fifty-eight.

Wm S. Glanville,

CLERK.

Writ $1.50
Postage

Hallyclaw & Hawkins
-vs-
John Duff & Co
Writ of Error

State of Missouri, County of Marion,
City of Hannibal, p:

In compliance with the directions of the within writ, I, Charles D. Bourne, clerk of the Hannibal Court of Common Pleas, at the city of Hannibal in the said County of Marion, herewith transmit, annexed, a full, true and complete transcript of the record and proceedings had in said Court, touching the the cause therein specified

In testimony whereof, I hereto set my hand and affix the seal of said Court, at Hannibal the 15th day of February 1858.

Ch. D. Bourne, Clerk.

1

State of Missouri, } In the Hannibal
County of Marion, } Court of Common
City of Hannibal, ss. } Pleas -

December Term 1857 -

Be it remembered that heretofore, to wit, on the 9th day of May 1857, there was filed in the office of the Clerk of the Hannibal Court of Common Pleas, at the City of Hannibal in the County of Marion and State of Missouri, a certain petition, which is in the words and figures following, to wit:

Petition -

Richard Holtzclaw and David C. Hawkins } plaintiffs
against
John Duff
William Osborne & Edward B. Talcott } defendants

} In Hannibal Court of common Pleas, in Marion County in the State of Missouri -

Plaintiffs state that on the 1st day of September 1856, at the Palmyra Depot of the Hannibal & St. Joseph Rail Road they delivered to the defendants who were then and there common carriers of goods and chattels for hire, and the defts then and there accepted and received from the plaintiffs in good order and condition 100 Bales of undressed hemp weighing 27500 pounds, of the said pltffs. of the value of 1902 dollars, to be safely

2.

and securely carried and conveyed by defts. from said depot to the Mississippi River and there to be safely and securely delivered for the plaintiffs aboard some Steamer navigating the waters of said river to the port of St Louis Missouri, for certain reasonable reward to the defendants in that behalf - Yet the pltffs. say the defts. did not nor would whilst they so had the care and custody of said 100 Bales of hemp take due and proper care of the same or any part thereof but wholly neglected so to do - and the defendants by the mere negligence and carelessness of themselves and their agents and servants suffered and permitted the said hemp while so in their care & custody, to become wet and injured by which the plaintiffs have sustained great damage, for which they ask judgment for the sum of 500 dollars -

Plaintiffs further state that on the 2nd day of September 1856 at the Palmyra Depot of the Hannibal and St Joseph Rail Road they delivered to the defendants who were still common carriers of goods and chattels for hire and the defts. then and there accepted and received from the plaintiffs in good order and condition 100 other Bales of undressed hemp weighing 27500 pounds

3.

and 10 Bales of dressed hemp weighing 3000 pounds of the said plaintiffs of the value of 2170 dollars to be safely and securely carried and conveyed by the defendants from said depot to the Mississippi River and there to be safely and securely delivered for the plaintiffs aboard some Steamer navigating the waters of the said river to the port of St. Louis Missouri, for certain reasonable reward to the defts. in that behalf — Yet the pltffs. say the defts. did not nor would whilst they so had the care and custody of the said last mentioned 100 Bales of un=dressed and 10 Bales of dressed hemp take due and proper care of the same or any part thereof, but wholly neglected so to do — and the defts. by the mere negligence and carelessness of themselves and their agents and servants suffered and permitted the said last mentioned 100 Bales of undressed and 10 Bales of dressed hemp while so in their care and custody to become greatly wet and injured by which the plaintiffs have sustained great damage and loss, for which they ask judgment for the further sum of Six hundred dollars —

Plaintiffs further state that on the 17th day of October 1856 at the Palmyra Depot

4.

of the Hannibal and St. Joseph Rail Road they delivered to the defendants who were then and there common carriers of goods and chattels for hire, and the defts. then and there accepted and received from the plaintiffs in good order and condition 122 Bales of Tow of the said plaintiffs, of the value of 356 dollars, to be safely and securely carried and conveyed from said depot to the Mississippi River and there to be safely and securely delivered for the plaintiffs aboard some Steamer navigating the waters of said river to the Port of St. Louis Missouri, for certain reasonable reward to the defts. in that behalf - Yet the pltffs. say the defts. did not nor would whilst they so had the care and custody of said Tow take due and proper care of the same or any part thereof, but wholly neglected so to do; and the defts. by mere negligence and carelessness of themselves and their agents and servants suffered and permitted the said Tow whilst so in their care and custody to become greatly wet and injured, by which the pltffs have sustained great damage and loss, for which they ask judgment for the sum of Two hundred dollars —

2.

5.

H. S. Lipscomb
E. G. Pratt &
John D. S. Dryden
attys. for pltffs.

Richard Holtzclaw one of the pltffs makes oath & says he believes the above petition and the matters therein, as stated are true —

Subscribed & sworn to before the undersigned this 8th day of May 1857
Thos. E. Thompson, clk

R. Holtzclaw

And afterwards, to wit, on the said 9th day of May 1857, there issued from the office of the Clerk of the Court aforesaid, a certain writ of Summons, which is in the words and figures following, to wit:

State of Missouri,
County of Marion } S.S.

Summons - The State of Missouri, to the Sheriff of Marion County, Greeting:

We command you to summon John Duff, William Osborne and Edward R. Talcott, that they be and appear in the Hannibal Court of Common Pleas, at the Court House in the city of Hannibal, in the said County of Marion, on the first Monday in June next, then and there in our said Court, and before the Judge thereof, to answer

6. the petition of Richard Holtzclaw and David C. Hawkins, in a civil action; of which said petition the annexed foregoing is a copy - And this you shall in no-wise omit, and have then there this writ -

Witness my hand as Clerk of our said Court, and the seal thereof - Done at Hannibal in said County, the 9th day of May A. D. 1857 -

(L.S.)

Ch. D. Bourne, Clerk

On the back of which said writ of Summons, is the following endorsement, towit:

Shffs. return on Summons

"Executed this writ by delivering a true copy of the within writ and petition to Ewd. T. Talcott, Wm. Duff & William Osborne, all done in Marion County this 13th day of May 1857.

T. M. Hawkins, Shff. M. Co.

By Geo. W. Caplinger Dpty.

June Term 1857

And afterwards, towit, on the 8th day of June 1857, it being during the June Term 1857 of the Hannibal Court of Common Pleas, continued and held at the Court-house in the City of Hannibal, in the County of Marion and State of Missouri, before the Hon. John T. Redd, Judge of said Court, the following proceedings were had, towit:

Leave to file ans.

Holtzclaw & Hawkins vs John Duff et. als

At this day come the parties, by their respective attorneys, and

7. on motion of the defendants, leave is given them to file their answer herein by the eleventh day of June, Instant. —

And afterwards, towit, on the eleventh day of June in the year last aforesaid, it being during the term aforesaid of said court, continued and held as aforesaid, at the place and before the Judge aforesaid, the following proceedings were had, towit:

Filing and. Holtzclaw & Hawkins vs John Duff, et. als } At this day come the defendants, by their attorneys, and file their answer herein — Whereupon it is ordered that this cause be continued to the next term of this Court —

Which said answer is in the words and figures following, towit:

Richard Holtzclaw & David C. Hawkins pltffs vs John Duff William Osborne & Edward P. Talcott deffts } In the Hannibal Court of Common Pleas — June Term 1857.

Answer — The defendants for answer to pltffs. petition admit that pltffs delivered to them one hundred Bails of Hemp at the Palmyra Depot to be conveyed and delivered for the pltffs. aboard of some Steamer navigating the waters of the

8.

Mississippi to the Port of St. Louis – But defendants deny that they were common carriers or that said Hemp was of the value of $1902 dolls. Defts. state that they carried said hemp to the Mississippi river and engaged a boat to take it to St. Louis the next day after its arrival at the river: – But that said Boat passed down in the night without stopping for the hemp and it was not until some time after that defts ascertained she had done so. – Defts further state that before any other boat could be engaged to take the hemp there was several showers of rain during which the hemp was covered with Tarpaulins – It was as well protected as the facilities of the defendants at the time would admit. – They had no warehouse for storing it at the Mississippi river which fact was well known to pltffs. at the time and defts could only stow it on the levy – that they protected it as well as they could from injury and shipped it to St. Louis as soon as they could do so – Defts. admit that some of the Bales were slightly wet by the showers of rain that fell before they were shipped – But they deny that it was occasioned by the mere negligence and carlessness of themselves and their agents that said hemp became wet & injured and they

deny that they did not take all the care to
9. prevent said hemp from getting wet or in=
jured that they were bound to do. —
Defts. admit that on the day of Septr. 1856.
the said pltffs. at the Palmyra Depot of the Han=
nibal & St. Joseph Railroad delivered to them
other 100 bales of hemp undressed and 10 bales
of dressed hemp to be conveyed by defts to the
Mississippi river and delivered aboard some
steamer navigating said river to the port of
St. Louis. — Defts. deny that they received
said hemp as common carriers — They deny
that said last named quantities of hemp
was of the value of 2110 dolls. They also state
that they do not know the quantity or
weight of said hemp - nor have they any
means of knowing or forming an opinion
as to the weight of said hemp and therefore
call for proof of the same. —

Defts. state that after receiving said
hemp they conveyed the same to the Missis=
sippi river and meeting with no boat there
on the arrival of said hemp they placed the
same on the levy & covered it with Tarpauling —
that they had no place for storage at their
command any more secure than the levy
where it was placed which fact was known
to pltffs. - Defts. deny that they and their agents &

servants by their carlessness & negligence suffered and permitted the said last named two lots of Hemp to become greatly wet & injured — Defts. say that after the arrival of said hemp at the river they shipped the same on board of a boat for St. Louis as soon as they could procure one to take it — they deny that pltffs. were damaged 600 dolls. by any injury to said hemp — or any other sum by their carelessness or that of their agents & servants. —

Defts. further answering admit that in October 1856, they received of pltffs. 122 bales of Tow to be carried to the Mississippi river and delivered aboard some steamer navigating the said river to the port of St. Louis; which defts. did — but they deny that they were common Carriers or recd. said Tow as such — they deny that they did not take due & proper care of said Tow — or that the same was greatly wet & injured while in their possession by the carelessness of themselves their agents or servants or that pltffs. sustained great damage or any damage by their carelessness or negligence or that of their servants & agents — or that they are entitled to judgment for any of the damages claimed in their petition, or any part of said sums. —

11. Defts. further answering say they were not Common Carriers as alledged in said petition that having to run constructive Cars on said road they being contractors for the building of said road they proposed for the convenience of citizens along the line of railroad to transport property and persons subject among other things to the following conditions - 1st that they did not assume the possition of common carriers and would not be subject to any responsibility as such.-

2nd That they would not be responsible for any loss or injury to persons or property which might result from accidents to the train, detention fire exposure to the weather or any other cause - That said conditions upon which they were willing only to transport property & persons were made known to the public and to the plffs by a printed publication of the same in handbill form - and posted up in the office of said railroad - and in the city of Palmyra where said plffs. reside and the same was read by & known to the plffs.- said publication was signed by the plffs. by the name of John Duff & Co. - and defts. aver that they received the hemp of said plffs. for transportation upon the condition that they were not common carriers and not to be subject to

* Defen. Ty.

12. any responsibility as such - and that they were not to be responsible to the said pltffs. for any loss or injury to said hemp by exposure to the weather or for any other cause - Wherefore defts. deny that they are liable to said pltffs. for any injury that said hemp may have sustained from any cause, or for any damages - said publication above referred is herewith filed and annexed to this answer -

Anderson & Richmond
attys. for Defts.

affdt. to answer } E. V. Talcott makes oath & says that he believes the foregoing answer and the matters & things as therein stated are true -

Subscribed & sworn to, before me this 11th day of June 1857.
Ch. D. Bourne, clk.

Edw. V. Talcott,

Dec. term 1857 } And afterwards, to wit, on the 15th day of December 1857, it being during the December term 1857, of said Court, continued and held as aforesaid, at the place and before the Judge aforesaid, the following proceedings were had, to wit:

Trial - Holtzclaw & Hawkins vs John Duff et. al } And at this day come the parties, by their respective attorneys, and the issue herein being joined, to try which come the Jurors of a Jury, to wit:

John H. Sevens, Wm L. Hearn, Wm T. Cleaver,
13. Peter Schmitter, Thomas K. Collins, J. C. Helm,
A. J. Settles, C. Humphreys, Wm Walden,
E. A. Lockwood, Wm Sausser & H. Christian,
twelve good and lawful men duly elected,
tried and sworn; and the evidence ad=
duced in the cause being heard, the
plaintiffs now here withdraw the third
Count in their petition, and take a non=
suit thereon:— and thereupon, after hearing
all the evidence adduced and arguments
of counsel, the Jurors aforesaid retire to
their room to consider of their verdict.
and the Jurors aforesaid upon their oath
aforesaid, return into Court the following
Verdict — verdict, towit, "Holtzclaw & Hawkins vs
John Duff & Co. The Jury find a verdict in
this case for Pltffs. and assess damages at One
thousand & twenty two dollars $1022, Wm
L. Hearn, Chm"— Whereupon, on motion
Judgt. — of the plaintiffs, it is considered by the
Court, that the said plaintiffs, Richard
Holtzclaw and David C. Hawkins have
and recover of the said defendants, John
Duff, William Osborne and Edward B.
Talcott, the said sum of one thousand and
Twenty two dollars, for their damages, so
as aforesaid by the Jury aforesaid assessed.

and also their costs and charges by them about their suit herein expended - and that said plaintiffs have their writ of execution for the damages and costs aforesaid -

And afterwards, towit, on the 16th day of December, in the year last aforesaid, it being during the term last aforesaid, of said Court, continued and held as aforesaid, and before the same Judge, the following proceedings were had, towit:

Filing Mo. for New trial

Holtzclaw & Hawkins vs John Duff et. als } And now at this day come the defendants, by their attorney, and file their motion for a new trial herein -

And afterwards, to wit, on the day and year last aforesaid, it being during during the term, last aforesaid of said Court, continued and held as aforesaid, and before the Judge aforesaid, the following proceedings were had, towit:

Mo. for new trial overruled

Holtzclaw & Hawkins vs John Duff, et. als } At this day come the parties, by their respective counsel, and the motion, for a new trial herein, being argued, said motion, is by the Court, overruled - And thereupon the defendants file their bill of Exceptions herein. -

15.

Bill of Exceptions

Which said Bill of Exceptions is in the words and figures following, to wit:

Holtzclaw & Hawkins. Plffs

vs

John Duff & Co. defts.

Be it remembered that on the trial of this cause at this Decr. term 1857 of the Hannibal Court of Common Pleas, the plaintiffs introduced O. N. Cutler as witness who testified as follows - I was during the whole of the month of Sept. 1856 in the employ of the defts. as freight agent and conductor of the train on the Hannibal and St. Jo. Railroad - Defts were then running cars on said road transporting passengers and freights for pay, for all who might apply - they were also engaged in the construction of said Railroad, they being the contractors for that purpose, and were using the trains which ran daily in the transportation of materials for the construction of the work on said road - I was on the trains when the Hemp of the plffs was taken down from Palmyra - when the hemp arrived at Hannibal it was taken off the cars and placed on the levy in front of the Steam Boat landing at the Hannibal Depot of the said road - and between the Depot and the landing - the ground from the depot to

Evidence of O. N. Cutler

16.

the waters edge is an inclined plane of from sixty to one hundred feet to the mile - declining to the river, covered with gravel - The hemp was piled two bales high and two bales wide, resting on dunnage consisting of planks some one inch and some two or more inches thick lying on the gravel - the planks crossing the grade or running parallel with the river the hemp being covered with tarpaulins - the tarpaulins rested on the hemp - there was nothing placed on the hemp to raise the tarpaulins in the centre so as to raise the centre higher than the sides - The hemp lay on the levy six or eight or ten days after its arrival there, during which time there were quite a number of hard rains - I think I told some of the agents or servants of the defts in charge of the Depot that the hemp needed attention - I afterwards shipped the hemp aboard the Steamer Cumberland Valley and barges, part to J. B. Carson and part to Wm Mathews of St. Louis - at the time of the shipment I found all of the bales that rested on the dunnage were wet and a number of the bales of the second tier (cant say how many of them) were also wet - but to what extent the hemp was wet witness does not know -
At the time this hemp arrived at Hannibal,

the defts had a building at the latter point
17. about 15 feet wide and 40 feet long which they frequently used for storage of freights coming over the road - it was empty or nearly so at the time of the arrival of this hemp - defts had before that time put in the same building hemp of the pffs transported over the Haw. & St. Jo. R. R. - Witness further stated on cross examination that the defendants had no house at Hannibal for the storage of freights except the building (15 by 40 ft) above spoken of which building was an apartment in or part of a larger building used by the Rail road company as a Machine shop for the construction of cars &c - In the part used as a Machine shop there was a stationary Steam Engine in opperation - In the apartment used as a Machine Shop the floor was usually covered with shavings and rubbish from the work - There were warehouses in the city of Hannibal owned by different Commission Merchants sufficient to have stored this hemp, but they were distant from the depot some four or five hundred yards. — The witness was here shewn a duplicate of the Bill of lading spoken of by Mr Matthews in his deposition, containing the words "not accountable for

damages" – and the witness says that said words were not put in said duplicate at the time of signing the same by the officer of the boat – Defts then offered to prove by the witness that the Hannibal & St. Jo. Rail road was in an unfinished condition, but the Court refused the defts permission to make the proof as to any part of the road except that between Palmyra & Hannibal – to which opinion of the Court in refusing the introduction of said evidence the defts. by their counsel, at the time Excepted.

Plffs. then read in evidence the two folling receipts – the signature of O. N. Cutler, thereto, first having been proved, towit.–

Agents receipt } "Received, at Palmyra Depot Hannibal and St. Joseph Railroad Sept. 1st 1856, of Holtzclaw & Hawkins in good order and condition consigned to Messrs J. W. Carson & Co. St. Louis Mo. the following articles for transportation, towit;
no mark 100 Bales of hemp 27500 pounds
O. N. Cutler, Freight agent"

Agents receipt } "Received, at Palmyra Depot Hannibal and St. Joseph Railroad Sept. 2nd 1856, of Holtzclaw & Hawkins in good order and condition consigned to Mr. Will Matthews St. Louis Mo. the following articles for transportation, towit:

no mark 100 Bales Hemp 2750 lbs

19. Marked H 10 do do dressed 3010 "

Duplicate O. N. Cutter Freight Agent

Pltffs. then read the depositions of Henry J. Beer, Wm Matthews, John R. Carson, and Wilson C. Baker, taken in this cause, in the words & figures following, towit:

H. J. Beer: testimony } Henry J. Beer, of lawful age, being produced, sworn and examined on the part of plaintiffs, deposeth & saith. I reside in St. Louis and am by occupation a warehouseman and Commission Merchant. On the 18th of September 1856, or about that time, I received of Mr. Wm Matthews of St. Louis one hundred & thirty six bales of undressed hemp, and ten bales of dressed hemp. all of the hemp was more or less damaged. It was wet, at the time I received it. As far as my recollection serves, there must have been fully one half of the hemp that had to be put out to dry. I bought the damaged hemp myself and it sold for from twenty five to thirty dollars a ton less that it would have done if it had been in good order. The good hemp sold for one hundred & fifty five dollars a ton. My charge for overhauling and drying & rebaling the Hemp were one hundred & nineteen dollars. The hemp would lose six per cent in weight by the process to which it had to be subjected. The one hundred & thirty six bales were made into one hundred & nineteen bales,

out of which there were thirty nine damaged & eighty sound. the one hundred & thirty six bales had no mark that I recollect: and the ten bales were marked "H"-

H. J. Veer

Evidence of W. Matthews

William Matthews of lawful age, being produced, sworn and examined on the part of the plaintiffs, deposeth & saith: I reside in St. Louis and am by occupation a Commission Merchant. I am acquainted with the quality of hemp and the mode of preparing it and the effect of its getting wet in the bale. About the 9th of September 1856, I received per Steamer Cumberland Valley & barges one hundred bales of undressed hemp & ten bales of dressed hemp. The bill of lading had the exception of "Not accountable for damages", which bill of lading was headed "Hannibal & St. Joseph Railroad". I went down to the boat to examine the hemp and found it in a damaged condition, having been wet. I also learned from the boat that there was one hundred bales on board from the same parties consigned to John V. Carson, which hundred bales was turned over to me by said Carson to be sold. the whole lot being more or less wet we could not seperate our shipments. I sold to Messrs Johnson, Bartley & Lytle all the good undressed hemp in the two hundred bales at one hundred & fifty five dollars per ton, which amounted to sixty three bales - the weigh

Master to be the judge of the quality and to
21. assort it, which he did. The remainder of the hemp was sent to Capt. Peer's warehouse to be overhauled, dried and rebailed. He made one hundred & nineteen bales out of the quantity that was sent him - eighty sound and thirty nine damaged. The damaged hemp was sold to him at one hundred & twenty five dollars a ton. Peer's charge for drying & rebaling was one hundred & nineteen dollars, to which is to be added drayage to warehouse, storage, insurance & loss in weight. The exact amount of each item I cannot recollect. I do not think there were any marks on the undressed hemp, the dressed hemp was marked "H." The good hemp was sold at the usual market rate. The whole lot in its wet condition would probably have sold for one hundred & twenty to one hundred & twenty five dollars per ton on the levy without rebaling or opening. The proble loss in weight from opening, drying and rebaling would be from five to ten per cent. The hemp above referred to was consigned to me and Jno. P. Carson as the hemp of Holtzclaw & Hawkins of Palmyra, Missouri: I saw the hemp & examined it.

Wm. Matthews -

John P. Carson, of lawful age, being produced, sworn and examined on the part of plaintiffs, deposeth &

22.

Evidence of J. R. Carow

deposeth & saith. I reside in St. Louis, am by occupation a Commission Merchant. About the 9th of September, 1856, I received a bill of lading for one hundred bales of undressed hemp per Steamer Cumberland Valley, consigned to me for account of Holtzclaw & Hawkins of Palmyra, Missouri. On the same boat were one hundred bales of undressed hemp & ten bales of dressed hemp for Mr. Matthews for account of same parties. When we came to examine the hemp we found it wet and damaged and in such a condition that it was impossible to seperate the shipments, as the whole was put out on the levy together. I accordingly turned over the hundred bales consigned to me to Mr. Matthews, who picked out sixty three bales of dry hemp and sold it to Johnson, Bartley & Lytle for one hundred & fifty five dollars per ton. the weight being seventeen thousand seven hundred & Eighty pounds and for which I collected of said firm of Johnson, Bartley & Lytle twelve hundred & thirty dollars and fifty two cents. The whole lot of hemp had originally been of the same quality of that which brought one hundred and fifty five dollars per ton. The best offer I coud get for the pile of hemp - 200 bales - as it lay on the levee in its damaged condition was one hundred and

twenty five dollars. The good hemp, which was
23. picked out and sold, brout the usual fair
merchantable value -

John R. Carson -

Wilson C. Baker, of lawful age, being produced,
sworn and examined on the part of the plaintiffs,
Evidence of W.C. Baker. deposeth and saith: On the 10th day of September
1856, I was called upon to examine a pile of
hemp, which was on the levee in St. Louis near
the foot of Caw & Cherry streets and which had
been brought here by the Steam Boat Cumber-
land Valley, and consigned to William Matthews &
John R. Carson. I found a large portion of the
hemp in a damaged condition and was directed
to select out what I considered in good order.
I selected out sixty three bales which weighed
Seventeen thousand seven hundred & Eighty three
pounds. The sixty three bales, being picked out
the wet hemp, naturally weighed more than it
would have done when weighed in Palmyra,
from the absorption of the dampness from the
wet hemp. The sixty three bales wer turned
over to Johnson, Bartley & Lytle. The remaining
portion of the hemp was sent to Beer's ware-
house. It was wet and damaged to the ex-
tent of an average of seven dollars a bale,
though on a good deal of it fifteen dollars a
bale would not have paid the damage. I am

24. the weigh Master of the city of St. Louis and do little else than weigh hemp, and the Merchants in St. Louis are accustomed to refer to me all matters of difficulty between them in regard to damaged hemp. I have great experience in hemp & am a Judge of the quality & extent of damage - I suppose the difference between good merchantable hemp at the time that hemp arrived here and the hemp and the hemp in the condition in which that was, would be from thirty to thirty five dollars per ton. I reside in St. Louis. This hemp, had it not been damaged, would have been first Class hemp, prime hemp - & would have brought the highest market price at the time it arrived here, which then ranged from $150 to $160 per ton.

W. C. Baker

The Defts. then read in evidence a certain publication of notice in the words & figures following, to wit: (Defts. first proving by the admission of Pltffs. that Pltffs. had seen & read said documents posted at several places before the delivery of the hemp by Pltffs. to defts. for transportation.) -

Railroad notice } Hannibal and St. Joseph Railroad -
Contractors Office, Hannibal June 16th. 1856.

For the convenience of Citizens along the line of Railroad, we propose to transport the articles named in the following table, at the rates annexed, subject to the following conditions which are hereby

25. made a part of all contracts for transportation of persons and property:

1st We do not assume the position of common carriers, and therefore, will not be subject to any responsibility as such.

2d We will not be responsible for any loss or injury to persons or property which may result from accidents to the train, detention, fire, exposure to the weather or any other cause.

3d The owner of property or his agent must deliver the same in good condition at such places as may be designated by our agent, properly packed for convenient transportation, and also receive the same on the arrival of the cars at the place of delivery.

4th No store-houses being provided at the stations on the Railroad, we cannot take charge of property transported after its arrival at the place of delivery: and we reserve the right in case the owner or his agent is not present to receive it, to cause it to be put in store subject to the charges for transportation, and at the owners risk and cost for drayage and storage.

5th The same rates will be charged on all articles received, or delivered, at points, not named in the table, as from the station nearest to said points

6th All charges advanced, or "back charges", and for transportation, must be paid on receipt

or delivery of property at our option.

John Duff & Co.

Charges for Transportation.—

Table of Charges

Articles	Quantities	Hannibal to Barkleys 10 Miles	Hannibal to Palmyra 15 Miles	Hannibal to
Passengers	Each	35 cents	50 cents	
Wheat, Corn and Rye	Per Sack	6 "	8. "	
Oats, Peas, Beans and Barley	" "	5. "	6. "	
Apples and Potatoes	" "	5. "	6. "	
Salt	Per Barrel	10 "	12 "	
Beef, Pork and Lard —	Per Barrel	20 "	25 "	
Wines and Liquors	" "	25 "	30 "	
Flour and Corn Meal	" "	12 "	15 "	
Salt	" "	15 "	18 "	
Pork, Bacon, Hams and Beef	per Tierce	60. "	75. "	
Pork or Hams in bulk, Dressed Hogs, Butter and Cheese	Per 100 lbs	6. "	8. "	
Dry goods, Glass ware, Boots, Shoes and Hats	" " "	8. "	10. "	
Hardware and Crockery in Casks or Crates, Sugar and Molasses	" " "	6. "	8. "	

27.

Feathers, Wool Cotton, Cotton Batting and Rags in bales	" "	8. "	10. "
Hides, Skins and Leather	" "	6. "	8. "
Hemp and Bale Rope	" "	8. "	10. "
Agricultural Implements, except Plows	" "	10. "	12. "
Plows	Each	20. "	25. "
Stoves, Hollow ware and Light Castings	Per 100 lbs	12. "	15. "
Heavy Castings, Bar and Bloom Iron an Steel	" "	8. "	10. "
Pig Iron and Lead	" "	6. "	8. "
Machinery (Boxed.)	" "	8. "	10. "
Hay (Pressed)	" "	12. "	15. "
Brick and Cut Stone	" "	6. "	8. "
Rough Stone	" "	5. "	6. "
* Pine Lumber and timber (dry)	Per 1000 ft. b.m.	$1.50	$1.75

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* Hardwood Lumber and timber	" " "	2.25	2.50
* Shingles and Lath	Per M.	20. cents	25 cents
* Staves and Heading	" "	$1.20.	$1.50
* Hoop Poles	Per 100	20 cents	25 cents
Pork, Beef and Whiskey Barrels	Each	6. "	8. "
Flour Barrels	"	4. "	5. "
Tierces and Hogsheads	"	8. "	10. "

* These articles to be loaded and unloaded by the owner, or at his expense. –

☞ Articles analagous to the above, will be charged at corresponding rates. –

Twenty-Five cents will be charged on any article, whenever the amount at the above rates is less –

Otis N. Cutler, Freight Agent.

This was all the evidence in the Case –

The Court at the instance of the plaintiffs then gave the six following instructions to the Jury, to wit;

Instructions for Pltffs

1st If the Jury find from the evidence in the cause that the defendants were in Sept. 1856, engaged in the business of transporting the goods of such as chose to employ them for hire on the Hannibal & St. Joseph Rail Road then the defendants are

in contemplation of law, Common Carriers and
29, liable as such.-
2nd That under the contract as the same is
alledged by plaintiffs in their petition and ad=
mitted by defendants in their answer, the lia=
bility of the defendants as common Carriers,
W commenced when the hemp was delivered to
defendants and ended when the same was
delivered on a Steam Boat bound for St. Louis;
provid the Jury find the facts necessary to con=
stitute the defendants Common Carriers under the
1st instructions as above.-
3rd That if the Jury find the facts necessary to
constitute the defendants Common Carriers under
the 1st instruction, they are liable in this case for
any injury done to the hemp between the time
W said hemp was received by defendants for trans=
portation and the time it was delivered on board
of the Steam Boat.-
4th.- If the Jury find the facts necessary to
make the defendants Common Carriers, they can
not exhonorate themselves from liability, as
such without the assent of the plaintiffs, and
that such assent can not be inferred from a
general notice to Public limiting such liability-
5th If the Jury find from the evidence that
defendants were not engaged in transporting the
property of such as chose to employ them for hire

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as a business, then the defendants are not liable under the contract in this case unless the injury resulted from the want of such care upon the part of defendants in preserving the hemp from injury as a man of ordinary prudence would exercise in preserving his own property under like circumstances

C. The paper read in evidence by the defts. can not, although Pltffs has notice thereof, limit the liability of Defts, and the Jury will therefore exclude the same from their consideration in making their verdict.

to the giving of which instructions the defts. by their counsel objected, but their objection was over-ruled by the Court & the instructions were read & given, to which decision & opinion of the Court in overruling said objection, & in giving said instructions the defts. by their counsel at the time, excepted.

The defts. then asked the Court to give to the Jury the following instructions, to wit:

Instructions for defts

Defendants ask the following instructions -

1. The contract between plaintiffs and defendants as proven does not bind or obligate defendants to do more with the hemp about which the suit is brought than to deliver it safely at the point of destination.

2. Under the contract proven defendants were

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not bound to take charge of the hemp sued for after its safe discharge at the point of destination, nor were defendants bound under said agreement to deliver the hemp on board of a Steamboat after its arrival at the Mississippi River -

3rd The paper read in evidence by defendants, (designated a "notice) and admitted to have been brought to the notice of plaintiffs before the shipment of the hemp sued for, is sufficient in law to discharge defendants from all liability as common Carriers. —

4th If the Jury believe from the evidence that the notice signed by John Duff & Co. was brought to the knowledge of plaintiffs before they employed defendants to transport their hemp, then said defendants are not bound to plaintiffs as Common Carriers: —

5th That the contract sued upon created no greater responsibility upon defendants than as set forth in their notice which has been read in evidence and admitted to have been brought to the knowledge of pltffs. —

6th If the Jury believe from the evidence that the contract sued upon is different in any respect from the contract proven to have been made between plaintiffs and defendants then the Jury will give effect to the contract proven and not

that sued upon.—

6th. If the defendants delivered the hemp sued for upon the bank of the river in a safe condition, and that said hemp was damaged after such delivery, then defendants are not responsible to plaintiffs in the capacity of Common Carriers— To give which instructions the Court refused— to the decision & opinion of the Court in refusing to give said instructions, the defts. by their Counsel at the time excepted — and thereupon the Jury found a verdict for the pltffs.

The defts. then filed a motion for a new trial in the words and figures following, to wit:

Holtzclaw & Hawkins
against
John Duff & co.

Motion for new trial } And now at this day come the defendants by their attorneys, & move the Court to set aside the verdict rendered by the Jury herein for the following reasons:

First. Because the verdict is against the law & the evidence in the cause.—

Second. The Court excluded proper evidence offered by defendants.—

Third. The Court admitted improper evidence offered by plaintiffs.

Fourth — The Court gave improper instructions to the Jury for plaintiffs.—

Fifth. The Court refused proper instructions asked
33. by defendants –
Sixth – The Court gave instructions calculated to mislead the Jury –

Lamb & Lakenan, attys for Defts –

which motion was by the Court overruled – to the decision & opinion of the Court in overruling said motion & in refusing to grant defts. a new trial the defts. by their Counsel at the time excepted and they now pray the Court to sign and seal this their Bill of Exceptions and make the same a part of the record which is done accordingly. –

John T. Redd (Seal)

State of Missouri, County of Marion,
City of Hannibal, ss:
I, Charles D. Pourne, Clerk of the Hannibal Court of Common Pleas at the City of Hannibal in the said County of Marion, hereby certify that the above and foregoing writing contains a full, true and complete transcript of the record and proceedings had in said Court, touching the cause therein specified – as the same appear of record & on file in my office –

In testimony whereof, I hereto set my hand & affix the seal of said Court at Hannibal the 15th day of February 1858.

Ch. D. Pourne, Clk.

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(16)

October Term 1858

Richard Hottzclaw & al.
D.E.

v.

John Duff & others
P.E.

Error to Hannibal Court
of Common Pleas.

Filed 23d February 1858.
Wm. S. Glanville
Clk.

Lamb & Larkin
for Appellants

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As per appts attg 1.30
Spirit error / no stat & brief / apts brief / submitted /

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John Duff et. al. Pltffs in Error
vs
Richard Hollyclaw et al Dfts in Error

In the Supreme Court
of Missouri

And now at this day come the said plaintiffs in Error by their attorneys and assign the following as the Errors of the Court below.

1. The Court below admitted improper testimony on the part of Dff. in Error to go to the jury.

2d The Court below refused proper testimony, offered by pltff in Error to go to the jury.

3d The Court below gave erroneous instructions to the jury on behalf of Dft in Error

4. The Court below refused instructions offered by pltff. in Error which should have been given.

5th The Court below overruled the motion for a new trial which should have been sustained

6th The instructions given by the Court below were contradictory & were calculated mislead the jury.

Lamb & Lakenau
Attys for plffs
in Error

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Hollyetaun & Hawkins
vs.
John Duff & Co

Assignment of Errors. by
Lamb & Lakenau

Filed 2 April 1858.
Wm S Glennie
Ck

In the Supreme Court, St Louis
District - Mch Term 1858

Richard Holtzclaw &
David C Hawkins } pltffs & ~~respondents~~ below
defts in Error

vs

John Duff
William Osborne &
Edward B Walcott } Defts ~~Appellants~~ below
pltffs in Error.-

Error to the Hannibal Court
of Common Pleas.-

Statement of the case by John D. S. Dryden
atty for ~~respondents~~ defts in error.-

This suit was instituted in the Hannibal Com: Pleas on the 9th of May 1857.- There are three counts in the petition - the first charges

That on the 1st of Sept 1856, the pltffs at the Palmyra Depot of the Hannibal and St Jo Rail Road delivered to the defts who were then and there Common Carriers of goods and chattles for hire, and the defts then and there accepted and received from pltffs in good order

and condition 100 Bales of undressed hemp weighing 27500 pounds of the said plffs. of the value of 1902 dollars, to be safely and securely carried and conveyed by defts. from said depot to the Mississippi river and there to be safely and securely delivered for the plffs aboard some steamer navigating the waters of said river to the port of St. Louis Missouri, for certain reasonable reward to the defendants in that behalf — then avers that defts did not take due and proper care of the hemp but neglected so to do. and avers further that defts ~~and their agents~~ by the mere negligence and carelessness of themselves & servants, suffered and permitted the hemp while in their custody to become wet and injured, to plffs damage of 500 Dollars —

The second count is framed just as the first alledging the delivery by plffs to defts: on the 2nd Sept 1856 of 100 other Bales of undressed hemp weighing 27500 pounds and 10 Bales of dressed hemp weighing 3000 lbs, of the value of 2170 Dollars — laying damage at 600 Dollars —

The third count is framed as the others, and relates to 122 Bales of tow delivered by plffs to defts on

the 17th Oct. 1857 to be shipped.
(See the petition pages 1-2-3 & 4 of record.)

At the June term 1857 the defts files their answer to the petition, by which they expressly admit the delivery to them of the hemp mentioned in the 1st & 2nd Counts; and also in like manner admit the agreement of defts to convey and deliver the hemp aboard some boat navigating the waters of the Mississippi river to the port of St Louis, as charged in the petition. but deny that defts were common carriers, (but does not deny the facts charged which constitutes them common carriers) - denys the hemp was of the value charged. the answer then states that "Defts carried the hemp to the Miss. "river & engaged a boat to take it "to St Louis the next day after its "arrival at the river, but that "said boat passed down in the "night without stopping for the "hemp, and it was not until some "time after that defts ascertained "she had done so. Defts further state "that before any other boat could "be engaged to take the hemp there "were several showers of rain "during which the hemp was

" covered with Tarpaulin - It was
" as well protected as the facilities
" of the defts at the time would
" admit - they had no warehouse
" for storeing it at the Mississippi
" River, which fact was well
" known to the Plffs at the time,
" and defts could only stow it on
" the levy - that they protected it
" as well as they could from injury
" and shipped it to St. Louis as soon
" as they could do so - Defts admit
" that some of the bales were slightly
" wet by the showers of rain that
" fell before they were shipped -
" but they deny that it was
" occasioned by the mere negli-
" gence and carelessness of the
" defts & their agents that said
" hemp became wet and injured
" and they deny that they did not
" take all the care to prevent said
" hemp from getting wet or injured
" that they were bound to do" -

Defts then further say - "that
" having to run construction cars
" on said road - they being contractors
" for the building of said road,
" they proposed for the <u>convenience</u>
" of Citizens along the line of rail-
" road to transport property and
" persons subject among other
" things to the following conditions -
" 1st <u>that they did not assume the</u>
" <u>position of Common Carriers</u>, and

" would not be subject to any re-
" sponsibility as such.
" 2nd That they would not be respon-
" sible for any loss or injury to
" persons or property which might
" result from accidents to the
" train, detention, fire, exposure to
" the weather. or any other
" cause - that said conditions
" upon which they were willing
" only to transport property or
" persons were made known
" to the public and to the plffs
" by a printed publication of the
" same in hand bill form, and
" posted up in the office of said
" rail road and in the City of
" Palmyra where said plffs reside
" and the same was read by and
" known to the plffs. said publica-
" tion was signed by the defts by
" the name of John Duff & Co. -
" and defts aver that they rec.
" the hemp of plffs for transport-
" ation upon the conditions
" that they were not common
" carriers and not to be subject
" to any responsibility as such
" and that they were not to be
" responsible to the plffs for any
" loss or injury to the hemp by
" exposure to the weather or for
" any other cause" - (See the ans
" from page 7 to 12 inclusive of record).

At the Decr. term 1857 the cause was tried by jury who rendered a verdict for the Pltffs for 1022 Dollars damages. (See Record page 12 + 13.)

Pltffs moved by O. A. Cutler that he was during the whole of the month of Sept 1856 the freight agent and Conductor of the train of defts on the H. & St. Jo. R. R. - "that defts were then running cars on said road transporting passengers and freights for pay for all who might apply" - that defts were also engaged in constructing the road. Witness was on the cars when the hemp in question was carried. the hemp was placed on the levy at Hannibal where it lay from 5 to 10 days. Witness describes the ground and the means used to protect the hemp - hemp placed on dunnage consisting of planks some an inch thick - some more running across the grade to the river - tarpaulin cover but laid flat on top - proves the hemp was wet &c. Proves that he called the attention of defts servants to the fact the hemp need care - proves the defts there had a house in which hemp could have been stored & in which defts had

been in the habit of storing freight - then empty - hemp was wet both at bottom and top -

Defts offered to prove by the Witness that the H & St Jo R.R. was in an unfinished condition but the court refused the defts permission to make the proof as to any part of the road Except that between Palmyra & Hannibal and defts Excepted See Cullen Ev: Record pp: 15-16-17 & 18

Pltffs to prove the weight of the hemp, then read two receipts for the hemp signed by Cutler Pltf: agt: - (pages 18 & 19 of record)

Pltffs then to shew the condition of the hemp and the amount of damage, read the depositions of H. J. Beers, Wm. Matthews, J. B. Carson and W. C. Baker of St. Louis Mo. - (See their Ev: pages 19 to 24 of Record) -

Defts. then read in evidence the publication of the notice referred to in their answer, by which they seek to limit their liability as common carriers - the Pltffs first admitting they had seen & read said notice posted at several places before

the delivery of the hemp to the defts for transportation - (see said notice at pages 24 to 28 inclusive of the record) -
At close of the Evidence pltffs took nonsuit as to 3rd count of their petition - see judgment -
This was all the Evidence -

The pltffs then asked & the court gave the following instructions to the jury - to the giving of which the defts objected and excepted viz:
1st If the jury find from the Evidence in the cause that the defts. were in Sept: 1856 engaged in the business of transporting the goods of such as chose to employ them for hire, on the Hannibal and St Jo: R. R. then the defts are in contemplation of law common carriers and liable as such

2nd That under the contract as the same is alledged by the pltffs in their petition and admitted by the defts in their answer, the liability of the defts as common carriers commenced when the hemp was delivered to the defts and ended when the same was delivered on a steamboat bound for St Louis. Provided the jury find the facts necessary to constitute the defts common carriers under the 1st instruction as above. -

3.rd That if the jury find the facts necessary to constitute the defts common carriers under the 1st instruction they are liable in this case for any injury done the hemp between the time said hemp was received by defts for transportation and the time it was delivered on board of the steam boat.-

4.th If the jury find the facts necessary to make the defts common carriers they cannot exonerate themselves from liability as such without the assent of the pltffs, and that such assent cannot be inferred from a general notice to the public limiting such liability.-

5.th If the jury find from the evidence that the defts were not engaged in transporting the property of such as chose to employ them for hire as a business, then the defendants are not liable under the contract in this case unless the injury resulted from the want of such care upon the part of the defendants in preserving the hemp from injury as a man of ordinary prudence would exercise in preserving his own property under like circumstances.-

6.th The paper read in evidence by the defts, cannot, although pltffs had notice

thereof, limit the liability of defts and the jury will therefore exclude the same from their consideration in making their verdict.-

The defts then asked the following instructions which were refused & defts excepted. viz.-

1st The contract between pltffs and defts as proven, does not bind or obligate defts to do more with the hemp about which the suit is brought than to deliver it safely at the point of destination.-

2nd Under the contract proven defts were not bound to take charge of the hemp sued for after its safe discharge at the point of destination, nor were defts bound under said contract to deliver the hemp on board of a steam boat after its arrival at the Mississippi river.-

3rd The paper read in evidence by defts (designated a notice) and admitted to have been brought to the notice of pltffs before the shipment of the hemp sued for, is sufficient in law to discharge defts from all liability as common carriers

4th If the jury believe from the evidence

that the notice signed by Wm Duff & Co. was brought to the knowledge of the Plffs before they employed defts to transport their hemp, then said defts are not liable to Plffs as common carriers.

5th – That the contract sued upon creates no greater responsibility upon defts than as set forth in their notice which has been read in evidence and admitted to have been brought to the knowledge of the Plffs.

6th – If the jury believe from the evidence that the contract sued upon is different in any respect from the contract proven to have been made between Plffs and defts, then the jury will give effect to the contract proven and not that sued upon

7th – If the defts delivered the hemp sued for upon the Bank of the river in a safe condition and that said hemp was damaged after such delivery, then defts are not responsible to Plffs in the capacity of common carriers. (See instructions from p. 28 to 32)

The defts then moved for new trial, which was overruled & defts excepted to overruling –

The grounds for new trial are

1 - The verdict is against law & Evidence
2nd The Court improperly Excluded Evidence of defts
3rd. The Court admitted improper Evidence offered by Pltffs - (No objection was made to the admission of any Evidence of Pltffs)
4th - Court misdirected the jury at Pltffs instance
5th Court refused defts. instructions -
6th - Instructions given were calculated to mislead the jury. - See motion pages 32-3 of record) -

Defts below bring the case here by writ of Error. -

Understanding that the only grounds which will be urged by the counsel for John Duff & Co for the reversal of the judgment of the Hannibal Court of Common Pleas, will relate to the supposed impropriety of the 4th Instruction to the jury given at the instance of the pltffs below. in behalf of the defts in Error and in support of the doctrine of that Instruction I content myself by referring to the following authorities -

New Jersey Steam Nav. Co vs Merchts Bank 6 How (U.S.) R. 382 - 383 -

Story on Bailments Sec. 570 note 5 - id Sec. 571. — These authorities prove that a carrier cannot limit his common law liability by the publication of a notice such as was read and is relied upon in this case - I apprehend the Courts of Missouri would not feel inclined nor deem it consistant with sound policy. Now that the rail road. the carrying interest of the state is becoming a vast interest in point of power. and often antagonistic to private right. to abate anything from the rigor of the doctrine of the authorities referred to -

The Courts of New York, from considerations of public policy have

in some cases gone greatly further and held that a common carrier could not even by contract expressly limit his common law liability –

Gould et al vs Hill et al 2nd Hill, N.Y. 623
Hollister vs Nowlin 19th Wend: 240
Cole vs Goodwin 19 ib 272-282

John D. S. Dryden
Atty for Holly Claw & Hawking
Defts in Error.

John Duff & Co
Plffs in Error

vs

Holly Claw & Hawkins
defts in Error

Statement & Brief
of Counsel for
H & H. defts in Error

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authorities

6 How: (U.S.) R. 382-3
Story on Bailments. Secs
570 & note 5 & Sec
571
2nd Hill R 623
14th Mend R. 240-
272 & 282

Filed 20 April 1858.
[illegible]
Dryden C/c
for defts in Error

John Duff & Co } Plff in Error
ADS
Hottzclaw & Hawkins } Respondt.

In the Sup. Court
of Mo. Oct. T. 1858

Plaintiffs in error admit that the written statement of the case filed by deft. in error is substantially a correct history of the case, except so far as the testimony of the witness Butler is concerned and to whose testimony at page 15, 16 & 17 & 18 of the record the attention of the court is respectfully directed.

Points and authorities for Plffs in error submitted by Lamb & Lathrop their attorneys.

1. From the Respondents own testimony Plffs in Error were only shown to be Carriers of persons & property upon the Hannibal and St. Joseph Rail Road. They were not proven to have been in the habit of carrying at any other place nor upon any other thoroughfare. Nor were they proven to have been in the habit nor engaged

in the business of shipping their freight or passengers on board of Steam Boats or storing freight at Hannibal or other places. See Cutters Testimony.

In this case plffs. in error are charged with being Common Carriers and as such with receiving the hemp sued for & agreeing to carry it over the Rail Road and ship it on board of a Steam Boat. Plffs in error deny that they were Common Carriers, but substantially admit that they received and agreed to carry and ship the hemp as stated. Now admit that J. Duff & Co were Common Carriers, the question arises where or over what thoroughfare were they Common Carriers? The question is answered by the witness Cutter. He says — page 15 — "that Duff & Co were running Cars on the H. & St. J. R Road, transporting freight & passengers for all who might apply"; but does not say a word — nor does any other witness — in relation to Duff & Co re shipping freight upon Steam Boats. Then if Duff and Co were responsible for not shipping the hemp on a Steam Boat in a reasonable time & ~~that~~ the hemp was damaged in consequence, they may be responsible upon the

agreement as stated in the petition but they are not responsible in their Capacity of Common Carriers. The Court below in its instructions to the jury took the ground that Duff & Co were bound as Common Carriers until the hemp was safely delivered on board of a Steam Boat. If Duff & Co had agreed to carry the hemp to Hannibal & there manufacture it in to Bale Rope or other fabrick and the hemp should have been damaged in the process of manufacture, ~~they as~~ Duff & Co would have been equally responsible in the Capacity of Common Carriers. as in the case of shipping, unless they were shown to have been engaged in the business of shipping in direct Connection with their business as Common Carriers in making through shipments. See Story on Bailments Page 504 - Sec. 495.

The hemp was transported over the Rail Road & landed safely at Hannibal. If the hemp were afterwards damaged and John Duff & Co be ~~resp~~ responsible at all for that damage they are responsible - as before shown - either upon the agreement

stated in the petition and admitted in the answer or as warehousemen or forwarding merchants and not as common carriers.

~~See 8 Mees & Welsby's R 358~~

See Story on Bailment page 550 Sec 546
" " " " 452 " 446

~~By~~ The last cited authority shows that an entire compensation does not prevent a separation of the character to which the liability attaches. See also 4 Term Reports 581. (Bruford & East.)

The distinction between the liability of a Common Carrier and that of a forwarding merchant or warehouse man is too well understood to need authority or argument.

The 2d & 3d instructions given at the instance of plaintiff in the Court below being in conflict with the views here taken it is contended that the Case should be reversed ~~and the cause stated~~ and remanded.

The plaintiffs in Error (Duff & Co.) had a right to Exempt themselves from liability - as Common Carriers by giving the notice which is admitted was seen by respondents before they made the shipment of their hemp. They were Contractors for Constructing a thoroughfare and incidentally while using their trains for Con= structing the road Carried freight and passengers for hire. ~~and~~ It is submitted that under such Cir= Cumstances ~~as suggested~~ public policy and public Convenience would require that the Carrier should be privileged to exempt himself from the liability which the Law attaches to a Common Carrier. That plaintiffs in Error had a right to exempt themselves from liability - as Common Carriers See 13 Barbour 353 which overrules 2d Nice and 19 Wendell Cited by the Counsel for Respondent.

Story on Bailment page 553 Sec 549
2 Kents Commentaries 605-6
2d Campbell R 415 Angell on Common Carriers 224-5 3d Bannell & Cresp. 606.
By an examination of the opinions of the different members of the Court in the Case Cited by Respondents

from 6 Howard 382-3 it will be seen that the liability of the Carrier turned upon his grade of negligence.

One of the elements necessary to constitute a party a Common Carrier is wanting in this case & that is the pltffs in Error were not engaged in Carrying as a business nor did they hold themselves out to the world as Carriers except under the limitation in their published notice.

The Court below should have permitted the testimony offered by pltffs in Error ~~[illegible]~~ in relation to the Conclusion of the Rail Road ~~& that it was~~ to go to the jury as it directly tended to show the real business and employment in which they were engaged and repudiated the idea of their holding themselves out to the Community in ~~[illegible]~~ false light.

The Plaintiffs in Error were not bound to Carry at all for the benefit of the public and in this respect they differed materially from Common Carriers.

This Court will look fully into the real employment of pltffs in error and attach to them such responsibility as that employment should impose upon them. As they had a right to refuse to carry at all they clearly had a right to refuse to become Common Carriers
2 Comstock 204

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~~John~~ Dubb & Co
ads
Holtzclaw

Points and authorities for Plff in error by Lamb & Lakeman

Filed 21 Oct. 1858.
Wm L Glanville Ch.

25. Holbyclaw et al vs Duff et al

The defendants were the contractors for the construction of the Hannibal & St Joseph Rail-road and used so much of the road as was finished in running cars for transporting materials for the work and in carrying passengers and freight for compensation. They caused notices to be published and posted at the stations on the line of the road, which were seen by the plaintiff before they made the shipments that led to this controversy, to the effect that they proposed for the convenience of citizens along the road, to transport persons and the articles of merchandise therein named upon certain conditions which should become a part of all contracts for transporting persons and property, to wit. 1st That they did not assume the position of common carriers, and would not be subject to any responsibility as such. 2. That they would not be responsible for any loss or injury which might result from accidents to the trains, detention, exposure to the weather or any other cause. 3. That the owner must receive his goods on the arrival of the cars at the place of delivery, and. 4th That as store houses had not been provided at the stations on the road, they could not take care of property after its arrival at the place of destination, and therefore reserved the right in case the owner should not be present to receive his property, to store it, subject to the charges for transportation at the owners risk and cost for drayage and storage.

On the 1st & 2nd Sept. 1856 the plaintiff delivered to the defendants at the Palmyra depot, two bales of hemp in good order, which they agreed in consideration of a reasonable reward to be paid by the plaintiff, to carry safely to the Mississippi river (at Hannibal), and there to be safely delivered on board of a steamboat for the purpose of being carried to St Louis. When the hemp arrived at Hannibal it was removed from the cars and deposited on the levee in front

of the steamboat landing and while lying there awaiting a boat, being insufficiently protected, was injured by rain. The defendants had no house at Hannibal for storing freight. They kept a building fifteen by forty feet, which was sometimes used for that purpose, but a portion of it was occupied as a machine shop in which a steam engine was in operation. It appeared however that there were warehouses in Hannibal owned by different commission merchants, sufficient to have stored the hemp, distant from one fifty hundred yards from the terminus of the road.

The Court instructed the jury that the defendants were common carriers, that they could not limit their common law liability as such by a general notice to the public, and that they were liable for any injury to the hemp from the time they received it until they delivered it on a steamboat to be carried to St Louis.

It is not necessary for us in the decision of this case to determine the legal effect of the notice which the defendants gave the public, nor whether they were common carriers, for whether they were such or not, the notice would not excuse them from loss occasioned by their negligence or want of ordinary care, and beyond that, in this case they are not liable.

Assuming however that they were common carriers, the fair construction of the contract is, that they undertook to carry the hemp safely to the terminus of the railroad, and there to deliver it on board of a steamboat to be transported to St Louis; and the contract subjected them to the liability of common carriers until the hemp reached the point where it left the road, and then to the liability of forwarders for storage and delivery to a steamboat, Pierce Railroad Laws 451. Both duties

were embraced in one contract for hire, and although there was no separate charge for taking care of the hemp after it reached Hannibal, and for shipping it to St Louis, yet the freight which the plaintiffs were bound to pay covered the compensation for the whole services — for the storage and forwarding as well as for the carriage. The contract imposed distinct duties, for a failure in which the defendants were subjected to two ~~distinct~~ separate liabilities in different degrees of responsibility, first that of common carriers, and next that of warehousemen and forwarding agents. Story Bail. §446. As common carriers they were to a certain extent insurers of the hemp as long as it was in transitu, subject only ~~only~~ to the exceptions which will excuse a delivery arising either from the act of God or from the public enemies. But after the hemp reached the termini of the road, and was removed from the cars, a different and by means stipulation was assumed, and they became liable as warehouse-men and forwarding agents, and as such were only bound to take reasonable care of the property, and were only ~~[illegible]~~ answerable for losses occasioned by their fault or negligence.

This principle has a familiar illustration in the leading case of Bussell vs Trent & Mersey Nav. Co. 4. Term. R. 581. The defendants in that case, who were common carriers between Stourport and Manchester undertook to carry goods from the former place to the latter, and to forward them from thence to Stockport. When the goods arrived at Manchester there was no Stockport carrier there at the time by whom they could be sent on, and they were deposited in the defendants warehouse to await an opportunity of being sent to the place of destination by the Stockport carrier, but before an opportunity occurred they were destroyed by an accidental fire.

[illegible] and while lying there
It was held that the carrier was not liable because
his obligation as carrier had ceased, and that of
warehouseman had commenced before the loss.

It was the duty of the defendants to
exercise ordinary care skill and diligence
in preserving the hemp after it was taken from the
cars, and in determining what is reasonable care,
the nature of the commodity, its liability to injury from
exposure to rain, the kind of weather at the time
it arrives, the usual mode of storing or piling
on the levee, and the ordinary manner of protecting
such property out of doors are circumstances
to be considered by the jury. For what would be
deemed ordinary care in reference to lead, pig
iron, or other articles of commerce not easily
injured by exposure, would be prof negligence in
in reference to flour grain hemp or other produce
affected by dampness and requiring greater
attention. When the plaintiffs delivered the hemp
to the defendants they had the right to expect that they
would deal with it in good faith and take reasonable
care of it, and they must answer for any loss
the plaintiffs have sustained for the want of
ordinary care on their part.

The other judges concurring the
judgment will be reversed and the
cause remanded

J. C. Richards

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Holly claw & others

Daff and others

Opinion of the Court

Ur remanded

Filed 25 Dec. 1858.
Wm S Glanville Ck

Richardson