

## PENDALL V. BENCH ET AL.

[4 McLean, 259.]<sup>1</sup>

Circuit Court, D. Ohio.

July Term, 1847.

## PROOF OF AGENCY—TRANSFER OF SPECIAL TRUST—RESPONSIBILITY OF CARRIERS.

1. An individual may prove his own agency.
2. But where a special trust or confidence is placed in an individual, he can not transfer that to another.
3. Bills of lading, which required the signature of a principal agent, can not be *held* good if signed by a person designated by the principal.
4. Common carriers are responsible for property confided to them, except it be taken or destroyed by a public enemy.
5. Any damage done to goods in the course of transportation, must be made good by the transportation company.

{This was an action at law by J. Morrison Pendall, who sues for himself and for the use of Alliance Mutual Insurance Company, against John Rench and others, who constituted a transportation company, to recover damages for loss of and damage to certain goods delivered to defendants as common carriers.}

Mr. King, for plaintiffs.

Mr. Fox, for defendants.

OPINION OF THE COURT. This action is brought against the transportation company from Cincinnati to New York, by the way of the Miami canal and the lake, etc.

Jury sworn.

N. P. Iglehart's deposition was read to the jury. He acted at Cincinnati as the agent of the company, signed the bill of lading marked A, which he was authorized to do. He knows of no order to change the consignee. The other bills were signed by Shaw, the confidential clerk of the witness, and who was authorized by witness to do so. The parties agreed as to the name

of the transportation company. E. T. Tucker, in his deposition, states that five hundred pieces of cotton bagging were delivered at Cincinnati, to be forwarded to New York. The goods were received at New York in a damaged state, and this action is brought for the damages.

It was objected that Iglehart was an incompetent witness, and that from the form of the contract, it must be held to be his, and not the contract of the transportation company. THE COURT held that Iglehart was a competent witness, and that he could prove his agency. That as to the contract or bill of lading signed by him, THE COURT would regard more the substance than the form of it. But THE COURT said, as regards the bills of lading, not signed by Iglehart, they could not be received as bills of lading. That the agency of Iglehart was, as he states, to make contracts for the transportation company, to transport freight from Cincinnati to Toledo, and to the Eastern cities, was one of special trust and confidence, and could not be discharged by a substitute. But, as Iglehart swore that he made the contracts for transportation, and adopted the signature of Shaw to the bills of lading, THE COURT permitted the bills to go to the jury, not as bills of lading, but as a part of the deposition of Iglehart, showing the contract for the transportation of the goods in question.

It was contended there was no contract showing that the defendants were common carriers beyond Toledo; and this being the case, the injury received by the goods must be proved to have been done on that route, to make the defendants liable. To this, THE COURT replied, the contract proved by Iglehart showed that it was for the transportation of the goods from Cincinnati to New York, and that that was a matter for the jury.

The goods were damaged when delivered at New York. Appraisers were called and wardens, as is the

custom on such occasions, to ascertain the amount of the damage. The charges for this service, and the charge of the auctioneer, who sold the goods, it is contended, constitute a part of the damages which the plaintiffs may claim. This was opposed by the defendants' counsel, who insists that the defendants can not be held liable for these.

THE COURT instructed the jury that the damages were to be ascertained by the value of the goods at New York, in a sound state. This was proved to be 12% cents per yard. The damaged goods were sold at auction at an average of about 10% cents per yard. That the sale at auction not being objected to for unfairness, will be received by the jury as evidence of the damage done to the goods. That the difference in value between the sound and damaged goods, together with the expenses of the appraisers and wardens, will constitute the amount the plaintiffs are entitled to recover. That this will place the plaintiffs in the situation they would have been in, had the goods been safely delivered at New York; and that this is all they are entitled to. That the plaintiffs were not entitled to recover the auctioneer's charge, as this would have been paid by plaintiffs, or charged as commission for selling the goods, had they been delivered 135 without injury. The charge of the auctioneer is the same as the charge for selling on commission.

It appears that the persons who delivered the goods at New York required the sum of eighteen dollars to be paid as a condition of the delivery. This was an unjust and illegal charge, but it was imposed by the agents of the transportation company, and was paid before the possession of the goods could be had. The defendants are responsible for this sum. It was paid of necessity, by the plaintiffs' agents, and it is an item which should be included in the damages to be recovered in this action.

The defendants, gentlemen of the jury, act in the capacity of common carriers. They hold themselves out to the world as such; and they are liable for all injuries done to the property they engage to transport; and nothing but the act of God, or the enemies of the country, can excuse a non-delivery of the goods, or an injury done to them. This results from the responsible business assumed by the defendants. Property of great amount is confided to them for the purpose of transportation, and for the protection of that property the utmost vigilance is not only required by all the agents of the defendants, but to secure the utmost safety to the goods, they are responsible for loss, except in the cases above specified.

The jury found for the plaintiffs, in accordance with the instructions of the court, \$971.41 judgment.

<sup>1</sup> [Reported by Hon. John McLean, Circuit Justice.]

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