

although his exclusion from the possession and control of it may last for two days before it is thus destroyed.

7. I decline to affirm this proposition.

8. I decline to affirm this proposition for the reasons that the petroleum cars were presumably in the usual and proper place for them in the depot yard; that they were at a safe distance from the cars containing the plaintiff's goods, and were there secured by mechanical appliances usually employed for that purpose, that they might lawfully be kept there, and that their removal into contact with the other cars was the act of the incendiary mob which had, for two days before, maintained a forcible mastery of the situation.

9. I decline to affirm this proposition.

Upon the whole case I am of the opinion, and so find, that the loss complained of was caused by fire, while the plaintiff's goods were in transit by the defendant, within the meaning of the exception in the bill of lading; that the defendant is not shown to have been guilty of any negligence by which the efficiency of the exception is in anywise impaired; and hence that the plaintiff is not entitled to recover. Judgment will therefore be entered in favor of the defendant.

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**WERTHEIMER and another v. THE PENNSYLVANIA RAILROAD  
COMPANY.**

(Circuit Court, S. D. New York. January 23, 1880.)

**BILL OF LADING—COMMON CARRIER—SHIPPER.**—The acceptance of a bill of lading binds the shipper and precludes him from alleging ignorance of its terms.

**SAME—NEGLIGENCE—BURDEN OF PROOF.**—Where loss arose through one of the excepted causes contained in the bill of lading, the *onus probandi* rests upon the shipper to show that such loss occurred through the negligence of the carrier.

*Adolph L. Sanger*, for plaintiffs.

*Robinson & Scribner*, for defendant.

**WALLACE, J.** On or about July 17, 1877, the defendant received from plaintiffs, at the city of New York, for transpor-

tation to Pittsburgh, Pennsylvania, goods of the value of \$1,710. At the time of receiving the goods the defendant delivered to plaintiffs a bill of lading, whereby it agreed to transport the goods, subject to several conditions, among which was one that the company should not be responsible for loss or damage by fire, unless it could be shown that such damage or loss occurred through the negligence or default of the agents of the company.

On the seventeenth of July the car containing the goods was dispatched by defendant from Jersey City for Pittsburgh, reaching Pittsburgh about 1 o'clock A. M., July 20th, at which time a mob took possession of the defendant's property, including the car in question, and held possession until July 22d, when troops ordered by the governor of the state to aid the sheriff in retaking the property came in conflict with the mob, failed to disposes the mob, and the mob fired the property and thereby destroyed it.

The delivery of the bill of lading by the defendant, and its acceptance by the plaintiffs, at the time of the delivery of the goods, must be deemed to constitute a contract between the parties, with the conditions contained in the bill of lading. *York Company v. Cent. Railroad*, 3 Wall. 107; *Bank of Ky. v. Adams Exp. Co.* 93 U. S. 174; *Grace v. Adams*, 100 Mass. 505; *McMillan v. Mich. Southern & N. I. R. Co.* 16 Mich. 79; *Hopkins v. Westcott*, 6 Blatch. 64; *Kirkland v. Dinsmore*, 62 N. Y. 171. These cases all hold that the shipper who accepts the bill of lading cannot be heard to allege ignorance of its terms. It is unnecessary to refer to the cases where, from the peculiar circumstances attending the acceptance of the receipt, assent to its terms was held not to be implied, as the present case is the ordinary one, where no peculiar circumstances are shown. Neither are the cases in point which accede that assent on the part of the shipper will not be implied to any conditions which do not appear on the face of the bill of lading. Such was the case in *Ayres v. The Western R. Corp.* 14 Blatch. 9, which was decided upon the authority of *Railroad Co. v. Manufacturing Co.* 16 Wall. 318.

The effect of the contract made between the parties was to impose upon the plaintiffs the burden of proving that the loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark v. Barnwell*, 12 How. 272, Mr. Justice Nelson says: "Although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted on the shipper to show the negligence." [See syllabus.] In *Transportation Co. v. Downer*, 11 Wall. 129, the judgment of the court below was reversed because the jury were instructed that it was incumbent upon the defendant, the carrier, to bring itself within the exception by showing that it had not been guilty of negligence. Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this court.

The plaintiffs have not shown negligence upon the part of the defendant, and therefore cannot recover. But, irrespective of any considerations concerning the burden of proof, when it appeared, as it did here, that the fire by which the plaintiffs' goods were destroyed was the act of a mob, engaged in a struggle with the military authorities of the state, without anything to show that the defendant was bound, from the circumstances, to anticipate such a result, the defence was affirmatively established.

The motion for a new trial is denied.

## WOOD &amp; Co. v. THE PHOENIX INSURANCE CO.\*

*(District Court, E. D. Pennsylvania, March 23, 1880.)*

**GOODS CARRIED ON DECK—GENERAL AVERAGE—EXCEPTION—CUSTOM—BURDEN OF PROOF.**—The general rule is that goods carried on deck are not entitled to the benefit of general average. To this rule there are the following exceptions: *First*, where the goods are carried on deck in pursuance of a general custom; *second*, where they are carried on the decks of steam vessels; *third*, where they are carried on deck by contract and the suit is against the vessel only. *The Milwaukee Belle*, 2 Biss. 197, disapproved; *Lawrence v. Minturn*, 17 How. 105, distinguished. Where the exception is claimed on the ground of custom, the burden of proof is on the party alleging the custom, and the evidence should be clear.

**CARGO LOADED ABOVE AND BELOW DECK—EVIDENCE.**—The owner of a cargo loaded both above and below deck insured the portion below deck, the underwriter knowing of the storage of the balance above deck. During a storm the goods above deck were jettisoned. *Held*, that in the absence of clear evidence of a general custom so to carry the goods, the owner had no claim against the underwriter for contribution.

Libel by owner of goods jettisoned against the underwriter of the balance of the cargo to recover contribution by general average. The facts are sufficiently stated in the opinion.

*Henry G. Ward*, for libellant.

*Henry Flanders*, for respondent.

**BUTLER, J.** On the fourth of October, 1879, the libellants shipped on board the "Mary and Eva," then lying at Millville, New Jersey, a cargo of iron pipe, loaded in part above and in part under deck, 31 tons of which were to be delivered in New York and the remainder at West Point. In the course of the voyage the vessel encountered tempestuous weather, and it became necessary to throw a portion of the deck cargo overboard. The respondent had insured what was under deck with knowledge that similar cargo was to be carried above. The libel asserts "that it is the custom of the trade, in shipping cargo of iron pipe, to load a part thereof on deck," and claims that the respondent is liable to contribution by general average. The answer denies the existence of such a custom and of all liability for the loss. It would seem that the deck

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.