

PICKETT v. BULLOCK.

A lien upon a chattel will be waived when the party enters into any special agreement inconsistent with the existence of the lien.

Where the new agreement is not in writing, it will ordinarily be a question of fact for the jury whether the lien was waived or not.

TROVER, by Horatio G. Pickett against Wm. R. Bullock for a cow. About April, 1870, one Eliza Norcross, being the owner of the cow, sold it to the plaintiff at the price of \$40, upon the express condition that the animal was to remain her property till paid for. On April 8, 1871, the cow not having been paid for in full, Charles W. Scott, and Nelson Norcross, a brother of Eliza, acting as her servants or agents in the matter, took the cow from the plaintiff's possession and left it over one night in a barn owned by the defendant's mother, and whether this was done with or without the consent of the defendant was a matter in dispute. It appeared that, for some time before the conditional sale, in April, 1870, the plaintiff had been keeping the cow; and he testified that, at the time of the trade, there was due him for keeping, the sum of \$3.50, which had never been paid. On this part of the case the court instructed the jury that if they found that at the time of the sale it was agreed between the parties that the cow should be and remain the property of Eliza Norcross until paid for, that would amount to a waiver of any lien the plaintiff might have had on the animal for the keeping, so that he could not recover against this defendant by virtue of such lien. To this instruction the plaintiff excepted. Verdict for the defendant. Case reserved.

Hardy, for the plaintiff.

Albee, for the defendant.

SARGENT, C. J. The right of lien is to be deemed to be waived when the party enters into a special agreement inconsistent with the existence of the lien, or from which a waiver of it may be fairly inferred. Possession is not only essential to the creation, but also to the continuance of a lien; and when the party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of the lien. 2 Kent's Com. 638, 639.

The question in this case is, Could the court hold as matter of law, upon the facts stated, that the lien was waived, or should that question have been submitted to the jury? There was no change of possession or of property. Before the sale, the plaintiff had been keeping the cow as the property of Eliza Norcross, and after the sale it continued hers, and he still had the possession. Might not the parties have agreed that the plaintiff should hold the cow subject to the lien for a certain

time, under the new arrangement? It might be improbable, but we can hardly decide that it would be impossible.

We think in this case, as in ordinary cases where the contract is merely verbal, it must be a question for the jury whether the lien was intended and understood by the parties to be waived or not. The new agreement, with all its attendant circumstances, is to be considered; and if nothing is said about the lien, then the jury must find from all the evidence what their understanding was concerning it.

The verdict must be set aside, and a

New trial granted.

RIXFORD & A. v. SMITH & A.

A common carrier of chattels is not bound to insure them against their own fault or the fault of their owner, and is not liable to him for loss or damage caused by an inherent defect in the thing or animal carried without any fault of the carrier, or by the manner of packing or loading, the responsibility of which the owner has assumed, or by any want of care which the owner was to exercise.

The liability of a common carrier of cattle is governed by the general legal principles applicable to the common carriage of other property.

ASSUMPSIT, by Lucius Rixford and others against J. Gregory Smith and others, the defendants, as managers of the Vt. Central and Vt. & Canada railroads, and as common carriers. It was alleged in the declaration, that the defendants contracted to carry thirty-one young cattle and cows from St. Albans, Vt., to Keene, N. H., and there deliver them; that they were not delivered seasonably, but were unreasonably detained; and that the defendants so carelessly, negligently, and unskilfully managed, attended to, cared for, and transported said cattle, that they were greatly reduced in weight and value, and several of them died in consequence thereof, and others were so bruised, trodden down, jammed, and injured that they became of little value. Plea, the general issue.

One of the plaintiffs negotiated with Kibbe, the station agent of the defendants at St. Albans, for the hiring of a car for the transportation of the cattle; agreed to pay (and subsequently paid) \$68 for the use of the car, and informed Kibbe that one Rugg (of whom he had bought the cattle) would see to the loading of the car; and that he, the plaintiff, should not himself, or by any agent, accompany the train that would carry the cattle. One Keniston, employed by Rugg, drove the cattle to the St. Albans station, and, with assistance procured by himself, loaded the car. There was evidence tending to show that when Keniston was putting the cattle into the car, Kibbe, coming along,