

Dissenting Opinion : Bradley, J.

PHOENIX INSURANCE COMPANY *v.* ERIE AND
WESTERN TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF WISCONSIN.

Argued January 19, 20, 1886.—Decided March 1, 1886.

This case is reported in Vol. 117, U. S., pages 312 to 327. MR. JUSTICE BRADLEY delivered an oral dissent, which is noted on page 327. An imperfect copy of this having found its way into print, he prepared and filed the following :

MR. JUSTICE BRADLEY dissenting.

The insurer of goods which are lost while in custody of a carrier, upon paying the loss, is subrogated to the claim of the insured against the carrier. *Hall & Long v. Railroad Companies*, 13 Wall., 367. This being so, I think that the insured cannot, by separate agreement with the carrier, deprive the insurer of this right. Such agreement would be *res inter alios acta* and void as against the insurer. It would be a fraud upon him. The carrier would thereby protect himself against the consequences of his own negligence, and compel the insurer to indemnify him without paying any premium. The owner of the goods gives up no right himself against the carrier; but they two agree, behind the insurer's back, that he shall have no right of subrogation against the carrier, but that the carrier shall have such a right against him,—thus changing the law by their private agreement! It seems to me that this is contrary both to law and justice.