No. 11960

Supreme Court of Illinois

Woodbury.

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vs.

Frink, Impleaded.

Be it remembered that heretofore, to wit: on the twenty fourth day of August in the year of our Lord one thousand eight hundred and fifty, there was filed in the office of the clerk of the circuit court of Peoria county in the State of Illinois a declaration in the words and figures following, to wit:

State of Illinois, } In the Circuit Court
County of Peoria, set } August Term A.D. 1850.

Declaration

Charlotte A Woodbury complains of John Finch, Martin V. Walker, Benjamin F. Caddock, Aaron P. Burnell and Lorenzo P. Langer of a plea of trespass on the case on promises, for that whereas the said defendants before and at the time of the making of his said promises and undertakings hereinafter mentioned were common carriers of goods and chattels for hire in and by a certain Stage Coach from a certain place, to wit: from the city of Peoria in the county aforesaid to a certain other place, to wit: to the city of Springfield in the State aforesaid, to wit: at Peoria aforesaid and the said defendants being such carriers as aforesaid, the said plaintiff heretofore to wit: on the twentieth day of September A.D. one thousand eight hundred and forty seven at Peoria aforesaid at the special instance and request of the said defendants caused to be delivered to the said defendants so being such carriers as aforesaid at Peoria aforesaid certain goods and chattels, to wit: a traveling Trunk, packed full of young ladies clothes, to wit: dresses, aprons, chemises, caps, capes, collars, handkerchiefs, bonnets, shoes, hosiery &c of the said plaintiff of great value, to wit: of the value of one hundred dollars to be taken care of and safely and securely carried and conveyed by the said defendants, as such carriers as aforesaid in and by the said Stage Coach

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from Peoria City aforesaid to Springfield aforesaid and there, to wit: at Springfield aforesaid to be safely and securely delivered by the said defendants for the said plaintiff and in consideration thereof and of certain reward to the said defendant in that behalf, they the said defendants, being such carriers as aforesaid, then and there, to wit: on the day and year aforesaid at Peoria aforesaid undertook and faithfully promised the said Plaintiff to take care of the said goods and chattels and safely and securely to carry and convey the same in and by the said Stage Coach, from said City of Peoria to said City of Springfield and there, to wit: at said Springfield safely and securely to deliver the same for the said plaintiff and although the said defendant as such carrier as aforesaid, then and there had and received the said goods and chattels for the purpose aforesaid, yet the said defendants not regarding their duty as such carriers nor their said promise and undertaking so made as aforesaid but contriving and fraudulently intending craftily and subtly to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels or safely and securely carried or conveyed the same from said Peoria to said Springfield aforesaid nor have they to wit: at Springfield aforesaid safely or securely delivered the same for the said plaintiff but on the contrary thereof, they the said defendants being such carriers as aforesaid so carelessly and negligently behaved and conducted themselves with respect to the said goods and chattels aforesaid, that by ~~respect~~ reason and through the mere carelessness, negligence and improper conduct of the said defendants and their servants in this behalf, the said goods and chattels being of the value aforesaid, afterwards to wit: the day and year aforesaid at Peoria aforesaid, became and were

wholly lost to the said Plaintiff, to wit: at Peoria aforesaid to the damage of said Plaintiff one hundred dollars and therefore she sues &c. Said plaintiff further avers that she resides in said county of Peoria and that said cause of action arose in said county. Ballance for Plaintiff.

And afterwards at the March Term of said Court A.D. 1851, the following proceedings were had in said Court, to wit:

Tuesday March 4th A.D. 1851

mo: for rule to plead: Charlotte A Woodbury,

vs Assumpsit.

John Frink, Martin L. Walker & others.

This day came the plaintiff by Ballance her attorney and entered a motion for a rule on the defendants to plead to this action by the opening of court to-morrow morning.

Wednesday March 5th A.D. 1851

Rule to plead: Charlotte A Woodbury,

vs Assumpsit.

John Frink & others.

This day came on to be heard the motion of the Plaintiff for a rule on the defendants to plead to this action, whereupon it is ordered that the defendants plead to this action by Saturday morning next.

And afterwards on the eighth day of March A.D. 1851 the defendant Frink filed his plea in said cause in the words & figures following, to wit:

plea = Charlotte A Woodbury

vs Peoria Circuit Court.

John Frink & others March Term A.D. 1851.

And said defendant John Frink by H.M.

A. L. Memiman his attornies comes and defends the wrong and injury when &c and says he is not guilty of the said supposed grievances above laid to his charge and of this he puts himself upon the county &c. H. & A. L. Memiman Attys.

And Plaintiff doth the like — C. Ballance.

And afterwards at the August Term of said Court A.D. 1851 the following proceedings were had in said cause in said court, to wit

Thursday August 28th A.D. 1851

Charlotte A Woodbury,

vs Assumpsit

John Trink & others.

This day came the plaintiff and withdrew his demurrer to the plea filed herein.

And on the same twenty eighth day of August A.D. 1851 the defendant Trink filed his plea in said cause in the words & figures following, to wit,

plea — Charlotte A Woodbury,

vs Peoria Circuit Court

John Trink & als. August Term A.D. 1851.

Said defendant Trink comes and defends the wrong & injury when &c & says that he did not undertake or promise in manner and form as said plaintiff hath above declared against & of this he puts himself upon the county. H. & A. L. Memiman Defts Attys

And Plaintiff doth the like — C. Ballance.

Proceedings at a Circuit Court begun and held at the Court House in the City of Peoria in and for the county of Peoria in the State of Illinois on the second Monday of November in the year of our Lord one thousand eight hundred and fifty one, it being the tenth day of the month, Present the Honorable William Kellogg Judge of the Tenth Judicial Circuit in the State of Illinois, to wit:

Thursday November 13th A.D. 1851

trial. Charlotte A Woodbury

vs

John Trink, impleaded with
Martin Walker, Benjamin Haddock,
Aaron Burnell & Lorenzo Langer.

This day came the Plaintiff by Charles Ballance her attorney and the said John Trink by H.C. Newman his attorney and issues being joined, it is ordered by the court that a Jury be empannelled to try said issues whereupon came a Jury of twelve good and lawful men, to wit: Royce Allen, Matthew G. Wells, James Clark, Ivory Butler, William C. Stevens, Rufus H. Bishop, Imri Dunn, Mountain Watkins William Robinson, Lewis Mear, Isaac Pratt and I Van Buskirk who being duly chosen, tried and sworn, well and truly to try the issues joined and a true verdict give according to evidence upon their oaths do say, We of the Jury do find for the defendant John Trink. Thereupon the Plaintiff entered a mo: to set aside verdict. motion to set aside the verdict herein and grant a new trial because 1st the Court erred in instructing the Jury as moved by the defendant. 2nd The Court erred in refusing to instruct the Jury as moved by the Plaintiff. 3rd The verdict is contrary to the evidence in the case.

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Tuesday November 18th A.D. 1851

judgment:

Charlotte A Woodbury,

vs Assumpsit.

John Smith, Martin Walker,
Benjamin Haddock, Aaron Burnell,
Lorenzo Sanger.

This day came on to be heard the motion for a new trial in this cause and the court being fully advised in the premises overruled said motion. Therefore it is considered that the said John Smith go hence without day and have and recover of the said Charlotte A Woodbury his costs & charges by him about his defense in this behalf expended and that he have execution therefor; It is agreed between the parties by their respective attorneys that the Bill of Exceptions in this case may be settled and signed by the court in vacation.

And afterwards on the twenty first day of November in the year 1851, the following Bill of Exceptions was filed in said cause, to wit.

Bill of Exceptions:

Charlotte A Woodbury,

vs Nov Term A.D. 1851

John Smith et al.

Be it Remembered that on the trial of this cause the Plaintiff to maintain issues on her part introduced without objection, except as to the fourth cross-interrogatory & answer thereto which was not read to the Jury by either party, the deposition of Greenleaf M. Woodbury, which is as follows:

Charlotte A Woodbury vs John Smith & als. In Peoria Circuit Court — The deposition of Greenleaf M. Woodbury a witness produced and sworn on part of said plaintiff

Proceedings at a Circuit Court begun and held at the Court House in the City of Peoria in and for the county of Peoria in the State of Illinois on the Second Monday of November in the year of our Lord one thousand eight hundred and fifty one, it being the tenth day of the month, Present the Honorable William Kellogg Judge of the Tenth Judicial Circuit in the State of Illinois, to wit:

Thursday November 13th A.D. 1851

trial. Charlotte A Woodbury

vs

John Trinkle, impleaded with
Martin Walker, Benjamin Haddock,
Aaron Burnell & Lorenzo Langer.

This day came the Plaintiff by Charles Ballance her attorney and the said John Trinkle by H.C. Merriman his attorney and issues being joined, it is ordered by the court that a Jury be empannelled to try said issues whereupon came a Jury of twelve good and lawful men, to wit: Royce Allen, Matthew G. Wells, James Clark, Ivory Butler, William C. Stevens, Rufus H. Bishop, Amri Dunn, Mountain Watkins William Robinson, Lewis Mear, Isaac Pratt and I Van Buskirk who being duly chosen, tried and sworn, well and truly to try the issues joined and a true verdict give according to evidence upon their oaths do say, We of the Jury do find for the defendant John Trinkle. Thereupon the Plaintiff entered a

Mo: to set aside verdict. motion to set aside the verdict herein and grant a new trial because 1st the Court erred in instructing the Jury as moved by the defendant. 2nd The Court erred in refusing to instruct the Jury as moved by the Plaintiff. 3rd The verdict is contrary to the evidence in the case.

Proceedings at a Circuit Court begun and held at the Court House in the City of Peoria in and for the county of Peoria in the State of Illinois on the second Monday of November in the year of our Lord one thousand eight hundred and fifty one, it being the tenth day of the month, Present the Honorable William Kellogg Judge of the Tenth Judicial Circuit in the State of Illinois, to wit:

Thursday November 13th A.D. 1851

trial. Charlotte A Woodbury

vs

John Trink, impleaded with
Martin Walker, Benjamin Haddock,
Aaron Burnell & Lorenzo Langer.

This day came the Plaintiff by Charles Ballance her attorney and the said John Trink by H. McHenimans his attorney and issues being joined, it is ordered by the court that a Jury be empannelled to try said issues whereupon came a Jury of twelve good and lawful men, to wit: Royce Allen, Matthew G. Wells, James Clark, Ivory Butler, William C. Stevens, Rufus H. Bishop, Imri Dunn, Mountain Watkins William Robinson, Lewis Mear, Isaac Pratt and I Van Buskirk who being duly chosen, tried and sworn, well and truly to try the issues joined and a true verdict give according to evidence upon their oaths do say, We of the Jury do find for the defendant John Trink. Thereupon the Plaintiff entered a

mo: to set aside verdict. motion to set aside the verdict herein and grant a new trial because 1st the Court erred in instructing the Jury as moved by the defendant. 2nd The Court erred in refusing to instruct the Jury as moved by the Plaintiff. 3rd The verdict is contrary to the evidence in the case.

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taKen by agreement of parties, notice of taKing the same being waived by defendants counsel, Said Woodbury being sworn deposes and says that he is the Brother of Plaintiff that the Plf went to Springfield to accompany her sister home in the fall of the year 1847 who was at that time liveing in Springfield after her arival there She concluded to spend the Winter there and wrote this deponent requesting him to send her her trunK and clothes to be sent to her directed to her to the care of Isaac S. Britton and to be left at the American House, Springfield agreable to her request this deponent with his wife packed her clothes into her TrunK and took the same with Ira A Barnes to Peoria we there saw Mr K D. Earl the defendants agent at Peoria and made an agreement with him to carry the said TrunK to Springfield for the sum of one dollar he requested this deponent to leave the said TrunK at the Clinton House and before leaving it this deponent went and got either one or two labels and which this deponent cannot now remember which and marked said label or labels with Pen & InK in large plain letters as follows as near as he can remember Miss C. A. Woodbury care of Isaac S. Britton Springfield Ill. to be left at the American House, the said label or labels were by this deponent securely nailed upon the end or ends of said TrunK he then took said TrunK to the said Clinton House and left the same with the person that had charge of the house or barr and requested him to put the same with the Springfield Baggage which was done, the contents of said TrunK and the value of the same this deponent cannot give the a list of the same but that the contents consisted of wearing apparell and other articles such as a young woman would generally have the wearing apparel composed the main body of the articles in the trunK said TrunK was a blK Leather traveling trunk some 26 or 28

inches in length, the said Trunk was filled to its utmost capacity, so much so that some few articles that Plaintiff wanted could not be put into said Trunk, the deponent would say that as regards the value of said Trunk and contents it is hard to arive at but having had some nearly twenty years experience in the purchase and selling of Dry Goods he would say that in his belief said Trunk and contents were ~~—~~ worth at least seventy five dollars.

Cross Interrogatories

1 Please name the articles in said Trunk & the value of the same specifically.

The contents principally consisted of Dresses made of Silk, Cotton & Linen and under clothes with a shawl or shawls & handkerchiefs &c &c as to the value of each article I am unable to give specifically.

2 Please give a full and particularly description of said Trunk.

The Trunk I should judge was either 26 or 28 inches long covered with Blk leather and nailed with Brass nails & I believe the corners were covered with plated brass, the top of said Trunk was a regular Bellows top.

3 State the time said Trunk was left at the Clinton House in Peoria as aforesaid.

I think it was during the Term of Circuit Court of Peoria County for the fall of 1847 this deponent cannot give the date but think it was in the month of October.

5 Was the ~~fre~~ freight on said Trunk to Springfield paid by you or plaintiff.

I think it was to be paid at Springfield on the delivery of the same.

taKen by agreement of parties, notice of taKing the same being waived by defendants counsel, Said Woodbury being sworn deposes and says that he is the Brother of Plaintiff that the Plf went to Springfield to accompany her sister home in the fall of the year 1847 who was at that time living in Springfield after her arrival there She concluded to spend the Winter there and wrote this deponent requesting him to send her her trunK and clothes to be sent to her directed to her to the care of Isaac L. Britton and to be left at the American House, Springfield agreable to her request this deponent with his wife packed her clothes into her TrunK and took the same with Ira A Barnes to Peoria we there saw Mr. K D. Earl the defendants agent at Peoria and made an agreement with him to carry the said TrunK to Springfield for the sum of one dollar he requested this deponent to leave the said TrunK at the Clinton House and before leaving it this deponent went and got either one or two labels and which this deponent cannot now remember which and marked said label or labels with Pen & InK in large plain letters as follows as near as he can remember Miss C. A. Woodbury care of Isaac L. Britton Springfield Ill. to be left at the American House, the said label or labels were by this deponent securely nailed upon the end or ends of said TrunK he then took said TrunK to the said Clinton House and left the same with the person that had charge of the house or barr and requested him to put the same with the Springfield Baggage which was done, the contents of said TrunK and the value of the same this deponent cannot give the a list of the same but that the contents consisted of wearing apparell and other articles such as a young woman would generally have the wearing apparel composed the main body of the articles in the trunK said TrunK was a blK Leather traveling trunk some 26 or 28

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6 Did the plaintiff at the time said Trunk was left at Peoria aforesaid or during the winter or Spring following own or posess a trunk similar to the one above mentioned? I am unable to say from the fact she lived at Springfield and this deponent in the west part of this county.

7 What was the value of the Trunk above mentioned and did you have in your family either at the time above mentioned or since a Trunk like the one in dispute? I should say the value of said Trunk was from $5 to 7 dollars and have had no Trunk in my family of that description since. G M. Woodbury

[Subscribed & Sworn to before me this 17th 1851.
Jacob Hale, clerk.

She then proved that the defendants were partners in the business of carrying persons and parcels of goods between Peoria and Springfield as stated in said deposition and said Earl was their agent at the time of his receiving said Trunk of goods and this was all the evidence in the cause. Plaintiff then moved the court to instruct the jury as follows; that if they believe from the evidence that the Trunk and Goods in the declaration mentioned were delivered to the agent of the defendants to be delivered in Springfield to said Plaintiff the burden of proof is on the defendants to prove that said goods were delivered and failing to do so the plaintiff is entitled to recover. C Ballance.

which motion the court overruled and said instruction was not given to said Jury.

Defendant Trunk then moved the court to instruct the Jury as follows: That the burden of proof of the non-delivery of the Trunk at the place of delivery is on the plain-

tiff and until the plaintiff has shown some evidence that said Trunk was not delivered the defendant is not required to produce any evidence that it was so delivered, in order to sustain his defence.
Which motion the court sustained and gave said instruction to the Jury, to which decisions of said court plaintiff then and there excepted and prayed that this his excepted and prayed that this his exception be sealed and and made of record which which is done.

Wm Kellogg [Seal]

State of Illinois
Peoria county ss I Jacob Gale clerk of the circuit court in and for the county of Peoria in the State of Illinois do hereby certify ~~that~~ that the foregoing is correctly copied from the record of proceedings in said court in a certain cause therein at common law wherein Charlotte A. Woodbury is plaintiff and John Frink impleaded with Martin Walker, Benjamin Haddock, Aaron Burnell and Lorenzo P. Sanger is defendant, as the same remains of Record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said court at Peoria this eleventh day of May in the year of our Lord one thousand eight hundred and fifty two.

Jacob Gale, clerk.

Transcript fees for copy of do. $2.75—
certificate to do .25— } $3.00

Received payment of plaintiff—
by Charles Ballance—

Jacob Gale, clerk—

I do hereby certify that the fourth cross interrogatory and the answer thereto omitted above to be inserted in the deposition of Greenleaf M. Woodbury copied into the Bill of exceptions in said cause is in the words and figures following to wit "4. When did you first learn that said trunk was not received by said plaintiff and if by letter from her please attach such letter to your deposition? This deponent cannot give the exact time, but thinks that in a few weeks after he left the trunk he rec'd a letter from either the plaintiff or Isaac L. Britton of Springfield informing him that said trunk had not arrived, but cannot attach said letter to this deposition from the fact, that the letter is now at this deponents residence in Rane county Ill. if said letter has not been lost or mislaced."

And I further certify that the said interrogatory & in the handwriting of H. O. Merriman Esq and the answer in the handwriting of Greenleaf M. Woodbury as I believe.

I also certify that the Bill of Exceptions is in the handwriting of Charles Ballance Esq except the following "Except as to the fourth Cross interrogatory and answer thereto which was not read to the Jury by either party." which is in the handwriting of H. O. Merriman Esq as I believe and is attached to the Bill of exceptions on a slip of paper by a wafer.

In witness whereof I hereto set my hand and affix the Seal of said court at Pisna this seventh day of June A.D. 1852.

Jacob Gale. clerk.

Plaintiff by Ballance her attorney says that in the record and proceedings aforesaid is manifest error in this to wit

1st Said court erred in withholding from said jury the instructions asked for by said plaintiff

2nd Said court erred in giving said instructions asked for by said defendant

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3rd Said court erred in refusing to set aside said verdict and give said Plaintiff a new trial

4th Said judgement ought to have been for said plaintiff and not for said defendant

C. Ballance

And the said defendant in error Comes and says that there are no such errors in the record & proceedings of said Cause as above alleged nor any nor either of them

A. Manning for Pltf

Peoria

Charlotte A. Woodbury &c.

vs.

John Smith & wife &c.

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Pleas

Filed June 10th 1852.

L. Leland Clerk

by P.R. Leland Dep.

1852

1960

Peoria June 8 1859

Lorenzo Leland Esq

Please receive inclosed the record in the case of C. A. Woodbury et al. vs. John Frink et al. and send a process to Peoria and for fear Mr. Frink shall have left here for Chicago send one also to Cook county You will also find inclosed a five dollar bill to be credited on account of your fee

Yours in haste

C Ballance

[1960-]

C. A. Woodbury
vs
John Finnk in plea &c

Precipe

Filed June 10th 1852
Leland Clk
by F. K. Leland Dep.

Charlotte A Woodbury
vs
John Frink
Error to Peoria

This was Assumpsit brought by the appellant, against the appellee and others, as common carriers, for the value of a trunk of goods, delivered to them to be carried from Peoria to to Springfield. None of the dependents were served with process but Frink, and he alone pleaded. The value of the goods and their delivery to dependents under a promise to take them to Springfield, for a dollar, were proved, but what became of them did not appear. The court instructed the jury that the burthen of showing what become of them, or that they were not delivered, was on plaintiff, and upon this instruction the jury found for the dependent, and the court gave judgment accordingly.

To reverse this judgement appellant relies on the following points, and authorities.

1st Plaintiff had her option to bring her action in tort for the negligence, or in assumpsit on the promise. Orange Bank vs. Brown 3 Wend. 368; M'Call vs. Forsyth & Watts & Sargent 180.

2nd If a promise is relied on, it is assumpsit although negligence may be charged, and this even if a plea of not guilty be filed. Orange Bank vs. Brown above referred to, and Corbett vs Barkington 6 Barn. & Cres 268.

3rd This being assumpsit, one of the incidents of that form of action was to throw the burthen of proof on the dependent. 1 Phil. Ev. 198; M'Call vs Stroth. 119; 5 U.S. Annotated Dig 60; Beckmen & Johnson vs. Shouse et. al. 5 Rawle 189; Platt vs. Hibbard, 7 Cowan 500.

4th There was however some proof of the non-delivery - enough to require from dependents to account for the goods. The 4th interrogatory asked by dependent and answered thereto, prove the non delivery. It is true an effort has been made to keep this out of the record, which effort is so effectually exposed by the certificate of the clerk, at the foot of the record, that plaintiff's counsel confidently hopes it will not succeed. It will be seen that as is usual the bill of exceptions is in the hand writing of the successful party's attorney, but there is a rider

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pound stuck on it, with a paper, in the hand writing of the defendants attorney, saying that it was not read to the jury, and it is left out of the record; but the clerk having his attention called to it inserted it in the latter part of the record; and that this question and answer ought to be in the record is manifest from the fact that the record has been here for more than a year, subject to the inspection of the attorneys of the defendant, with the certificate aforesaid, staring them in the face; yet they have not only taken no steps to have it stricken out of the record, but have by their entire silence on the subject acquiesced in it.

C. Ballance

C. A. Woodbury
vs.
Solon Hawk
Brief

The doctrine as laid down by Greenleaf on Evidence, 2 vol. Sec. 213, and in some other books, is stated more strongly against the plaintiff as to the onus probandi, than the cases relied on will justify, and the error comes by not paying due regard to the kind of action. In all or nearly all the cases where the onus is put on the plaintiff, the action was trespass on the case, and not assumpsit. I contend that where the promise to carry and safely deliver, are the cause of action; and that he did not safely deliver, the onus is on the plaintiff to prove that he did [deft.] receive the article, and promise, and the onus is on the defendant to show that he did deliver, or show a good excuse for not having done so, like any other suit on a promise: For instance to pay money. We simply show the promise and leave it to the defendant to prove that he did pay.

It is rare, or seldom ever, in the power of the plaintiff to prove negatively, that defendant did not deliver the article, but it is always in the power of the defendant to prove that he did deliver it, (if it be true,) by his clerk or servant who did it, or by the receipt.

In an action for criminal negligence however, whether the action be case or trover, some negative proof is required, because the law will not presume a person guilty of criminal negligence.

The case of Tucker vs. ~~Wheelock~~ Cracklin, 2 Starkie Rep. 385, relied to by Greenleaf is not at all in point. It went upon a point of variance between the

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declaration and proof, as to the place to which the goods were to be carried.

Nor ~~does~~ is the case of Griffith vs. Lee 1 C.&P. 110. The point relied on was the notice that the carrier would not be liable for any thing over five pounds. There was however some proof of non delivery which the court say was sufficient, but what have been the consequence had no proof been given, is not stated.

The other authority which he relies on, to wit, Day vs. Ridley 1 Washb. 48 so far from sustaining him, is really against his position. In that case the court say "Had this been an action of assumpsit against the defendants on their contract to deliver the meal at Troy, it might have been sufficient to prove the delivery to the defendants, and call on them to account for it." and the court refer for this doctrine to the same case of Zucker vs Cracklin.

The case of Fleming vs. Sloan 18 Johns. 403, is in point. It was case for fraud in the sale of a negro.

All that is said on the subject in 2 Phillips Ev. 75, is that "Slight evidence of loss of goods will be sufficient on the part of the plaintiff, as by calling the plaintiff's shop keeper who can state that he did not know of the arrival of the parcel, and that he would have known it, if it had arrived, and the same cases of Zucker vs. Cracklin and Griffith vs. Lee, and none others are referred to.

The case of Williams vs. The East India Co. 3 East 192, was simply a suit for putting on board a ship combustible matters without giving notice, and the whole question was as to the notice, and the court

decide that the plaintiffs who aver that it was done without notice, should prove the allegation. But action was for a tort, and not guilty the plea.

The case of Townsend vs. Small, 1 Esp. 315, was goods stolen from a trunk.

In the case of the Orange Bank vs. Brown 3 Wen. 368, it is said that "The plaintiff has his choice of remedies either to bring assumpsit or case, and that when one or the other action is adopted it must be governed by its own rules;" but if the party relies on a promise, although he may also state the custom, it shall be treated as ~~a promise~~ assumpsit. See beginning of next page.

The case of M'Call vs. Forsyth, 4 Watts & Serg. 180, is direct on the question as to the option of the plaintiff to sue in case or assumpsit, and to be governed accordingly.

In the case of Corbett vs Barkington, 6 Barn. & Cres 268 = 13 Com. Law Rep. 170. The action was declared to be assumpsit and not case, although there was a plea of not guilty, simply because there was alleged a consideration and promise, as in the present case.

In 1 Phillips 198, The doctrine is laid down which in fact is found in all the books, that the fact must be proved by the party within whose possession the proof is. Here plaintiff cannot know what become of the goods, but defendant can only avoid that knowledge by the commission of "gross negligence" In that event it is his business to find them, or pay for them.

In the case of M'Call vs. Brock, 5 Strobh. 119 = 5 U.S. Annal Dig. 60, it is said that "In an action against a common carrier it is sufficient for plaintiff to prove that the goods were received by ~~by~~ the Carrier, and that he has failed to deliver them according to his undertaking. If the carrier cannot show that the loss of the goods has occured, by one of the excepted perils, he must pay the loss. Proof negligence is unnecessary

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to charge him and proof of diligence will not excuse him."

In Buckman & Johnson vs. Shonse et al. 5 Rawle 189, it is said that "All a plaintiff has to do, in the first instance is to prove the contract and the delivery of the goods, and this throws the burthen of proof that the goods were lost on the carrier.

As to this question of the onus probandi the court will please read the instruction of Judge Walworth to the jury, in the case of Platt vs. Hibbard, 7 Cowan 500.

The case of Clark & co. vs Spence, sometimes referred to, is badly written, but if it means any thing, it is in my favor rather than against me.

I have examined all the authorities usually referred to by the elementary writers on this subject, but think it unnecessary to take further notice of them except to say that although some remarks in the elementary works (at first blush) may seem to militate against my position, that yet when the cases referred to are read with the distinction between actions ex contractu and in tort kept in the mind, I think my position will be found impregnable.

But one side of the authorities, it seems to me by analogy and reason, I am sustained, beyond a doubt. If I owe a man, and charge that in consideration of $100 he undertook and faithfully promised to deliver me a certain horse, and that disregarding his promise &c. he did not deliver the horse, does any one doubt that I have made out my case, when I have proved that I paid him the $100, and in consideration thereof, he promised to deliver the horse? Does any one suppose I have to prove he did not deliver the horse, or what became of him? But should I not rely on the promise of delivery, but sue him in tort for the conversion, injury, abuse or destruction of the horse, so that he was not delivered, the case is equally clear, that I would have to prove

the tort.

A man frequently has his choice of actions, and his reasons for his choice. If in these cases a man brings assumpsit, he has less proof to make, but he must sue all who are equally liable; whereas if he sue in tort, he will recover although it may turn out that others were equally liable; and in as much as it is generally difficult, and often impossible to know all who are liable, it is usual in these case to sue in tort; and hence doctrines are laid down generally, that only apply to actions in tort.

C. Ballance.

[11960-10]

Woodbury
vs
Frink

Ballance's
Points & authorities

Filed July 12th 1853.
L. Leland Clk.
By P.K. Leland Dpty.

STATE OF ILLINOIS, } The People of the State of Illinois,
Supreme Court.

To the Sheriff of the County of Peoria — Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of Peoria — county, before the Judge thereof, between Charlotte A. Woodbury plaintiff and John Frink impleaded with Martin Walker, Benjamin Haddock, Aaron Burnell, & Lorenzo Sanger

defendant, it is said that manifest error hath intervened, to the injury of the said Charlotte A. Woodbury

as we are informed by her complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said John Frink

that he be and appear before the justices of our said supreme court, at the ~~next~~ term of said court, to be holden at Ottawa, in said state, on the second Monday in June A.D. 1853, ~~next~~, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said John Frink notice, together with this writ.

Witness, the Hon. **SAMUEL H. TREAT**, Chief Justice of our said Court, and the seal thereof, at Ottawa, this 10th day of June in the year of our Lord one thousand eight hundred and fifty two.

L. Leland Clerk of the Supreme Court.

By P. K. Leland Depy. Clk.

[11960-11]

State of Illinois }
Peoria County }

Served on the within named John Frink by reading to him this writ for him to appear at the time & place as he is required and as I am commanded, July 20th 1852

James L Riggs
Sheriff P. C. Illi

servin 50
mile ret 15
65

Charlotte A Woodbury
vs.
John Frink imp[lea]d &c

Sci. Fa.

Served June 20th 1852
ab2

Filed July 24th 1852.
L. Leland Clk.
By P. R. Leland Dep[u]ty.

Ch[arlotte] A[.] Woodbury ... return ... fees ...

State of Illinois, sct.

WRIT OF ERROR—FREE TRADER PRINT.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Peoria ——— **GREETING :**

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Peoria county, before the Judge thereof, between

Charlotte A Woodbury plaintiff and John Frink impleaded with Martin Walker, Benjamin Haddock, Aaron Burnell & Lorenzo Sanger

defendants, it is said manifest error hath intervened, to the injury of the aforesaid Charlotte A. Woodbury as we are informed by her complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distintly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid at Ottawa, in the county of La Salle, on the 2d Monday in June A.D. 1853 ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. Samuel H. Treat, Chief Justice of our said Court, and the seal thereof, at Ottawa, this tenth day of June in the year of our Lord one thousand eight hundred and fifty two.

L. Leland Clerk of the Supreme Court.

By P. H. Leland Depy Clk

[11960-12]

Charlotte A. Woodbury
vs.
John Frink in pl.& &c.

Writ of Error.

Filed June 10th 1852.
L. Leland Clk.
By P.K. Leland Dep'y.

State of Illinois
Supreme Court
Wm Trimble & others
vs
Charlotte Woodbury

Sept Bridge Court

Action of Assumpsit. for trunk & contents

The proof in the case shows that an agreement of Defts agent to carry Plffs trunk from Peoria to Springfield. & that the trunk by mutual arrangement was left by Plffs brother at Clinton house in Peoria with the baggage for Springfield & that the trunk & contents was worth $175.00

Upon this proof the verdict was for the Defendant

The Plaintiff brings the cause to this court, and assigns as error. the instruction given by the court below that the plaintiff could not recover without proof of the non delivery of the trunk at Springfield. And a refusal to instruct the Jury that if they believed from the evidence that the trunk was delivered to the agent of the defendants to be delivered to the plaintiff in Springfield. that the burden of proof was on defendants &c.

1. The Court properly refused the instruction asked by the plaintiff below

1st because it is not sufficient to entitle the plaintiff to recover, that the Jury should believe the trunk was delivered to the agent of Defendants to be carried to Springfield. But the Jury should also have believed from the evidence that the defendants were carriers. The instruction was therefore erroneous as it did not embrace all the conditions upon which the defendants liability depended

$11960-13

3rd The instruction given by the Court below to the Jury at the request of the defendants Counsel is not erroneous.

1. It is alleged that the trunk was not delivered

See declaration

2nd Greenleaf Evidence Section 213

If the loss or non-delivery of the goods is alleged the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character

Angel on law of Carriers Section 270. Sec 471

It makes no difference whether the action is in form assumpsit or case. Some evidence tending to show a non-delivery must be given by the plaintiff in order to recover & before the defendant can be put upon proof of fulfilment of the contract

Angel's law of Carriers Sec 38.

In trover a demand and refusal is sufficient on the part of the plaintiff to put the defendant on his defence. But in case & assumpsit the plaintiff must prove his case prima facia as charged

Day et al vs Ridg et al 16 Vermont 54

"It is undoubtedly true that he who affirms a fact is usually bound to prove it: And when a culpable neglect or omission or breach of duty is charged, the plaintiff is bound to prove it though he may have to prove a negative"

3. It is a general principl that a fact not necessary to be proved, need not be alleged And that which is necessary to be proved must be alleged in pleading

The plaintiffs declaration in this case would fail to make a cause of action without an allegation of non-delivery

The allegation in the declaration being necessary to make a cause of action, it is necessary that the plaintiff should have some evidence to show a failure to deliver

No proof was given tending to show a non-delivery. On the contrary the plaintiff relied upon mere proof of delivery to the defts agent and asked the court to declare such evidence sufficient to entitle the plaintiff to recover

The Judgment should therefore be affirmed

Manning & Smith
For Defts in Error

[11960-14]

Supreme Court

John Frink et al
ads
Charlotte A Woodbury

Defts Brief & Points

Filed July 17th 1853.
L. Leland Clk.
By F.K. Leland Dep.