No. 12722

Supreme Court of Illinois

American Express Co.

---

vs.

Baldwin

---

169 – 185

Herman Baldwin
vs
The American Express
Company

169

1272

1859

United States of America } Pleas, before the Honorable George Manierre
STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Second Monday, (being the Twelfth day) of April in the year of our Lord one thousand eight hundred and Fifty Eight and of the Independence of the said United States the Eighty Second

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

John L. Wilson Sherriff of Cook County.

Attest; Wm L. Church Clerk.

12922

Be it remembered, that heretofore, to-wit: on the 31st day of March AD 1858. Herman Baldwin by his attorneys Jenkins and Blanchard, filed in said Court, by leave of the Court first had and obtained, his certain amended declaration, which is in the words and figures following, to-wit:

State of Illinois } ss
Cook County }

In the Circuit Court of Cook County in the state of Illinois. To the April Term thereof AD 1858

Herman Baldwin
v.
The American Express Company

Herman Baldwin the plaintiff in this suit, by Messrs Jenkins & Blanchard his attorneys, complains of the American Express Company, defendant in this suit, in a plea of trespass on the case upon promises, For that Whereas the said defendant, on, to-wit: the sixth day of September AD. Eighteen Hundred and fifty seven, was a common carrier of goods and chattels and money for hire, from Chicago in the County of Cook in the State of Illinois, to Madison in the County of Dane, in the State of Wisconsin, and being such carrier, the plaintiff, at the request of the said defendant, caused to be delivered to him, certain goods of the plaintiff, to-wit: a package of bank bills of different denominations, and various amounts, and being of the value of One Thousand Dollars, to be taken care of, and safely and securely conveyed by the said defendant, as such carrier from said City of Chicago, in the State of Illinois, to the said City of Madison, in the State of Wisconsin, there to be safely and securely delivered, by the said defendant, to one David J Baldwin, or his duly authorized agent or agents, for a certain reward to be paid to the said defendant, in consideration whereof the said defendant, as such carrier, then received said package of bank bills accordingly, and became bound by law, and undertook and promised the plaintiff, to take care of said package of bank bills, and safely and securely to carry and convey the same from the said City of Chicago aforesaid, to the said City of Madison aforesaid, and there to deliver the same safely and securely, to the said David J Baldwin, or to his duly authorized agent or agents as aforesaid,

Yet the said defendant did not take care of said goods, nor safely and securely carry and convey and deliver the same as aforesaid, but on the contrary the said defendant so negligently conducted, and so misbehaved, in regard to the said package of bank bills in his said calling of common carrier, that by reason thereof the said package of Bank Bills, became and was wholly lost to the plaintiff,

To the damage of the said plaintiff of Seven Thousand Dollars:

And also, for that whereas, heretofore afterwards, to wit: on the said Sixth day of September, AD Eighteen Hundred and fifty seven, at, to wit: the City of Chicago, in the County of Cook in the State

of Illinois. in consideration that the plaintiff at the defen
3 ~ dants request. had delivered to him certain goods. to-wit
a package of Bank notes. of various denominations and
values respectively. but amounting in all, to the value
of One Thousand Dollars. to be conveyed by the defendant
from the City of Chicago in the County of Cook. in the
State of Illinois. to the City of Madison in Dane County
and State of Wisconsin. and there to be delivered by
the said defendant. for the plaintiff for reward to
the said defendant; the said defendant then and
at the said City of Chicago aforesaid promised the
said plaintiff. to take due care of said package
of bank notes. whilst the said defendant had the
Charge thereof. for the purpose aforesaid, and to take
due and reasonable care in and about the convey
~ ance and delivery of the said package of bank notes
as aforesaid. Yet the said defendant disregarded
his said promise in this, that he did not take due
care of the said package of bank notes whilst he
had the charge thereof for the purpose aforesaid,
and therein made default. And by reason thereof
and of the defendants carelessness and improper
conduct in the premises. the said package of bank
notes. whilst the said defendant so had the charge
thereof. to-wit: on the day and year aforesaid,
at the County aforesaid. became and was and
are wholly lost to the plaintiff. to-wit: at the
County of Cook aforesaid:

To the plaintiffs damage of Six Thousand Dollars

And thereupon he brings this suit
By Jenkins & Blanchard
his attys

And afterwards to wit: at the April term of said Court to wit: on the 24th day of May in the year last aforesaid, the said defendant by Scates McAllister Jewett and Peabody ~~its~~ Attorneys, filed in the Court aforesaid, his certain plea to the said plaintiffs amended declaration, which is in the words and figures following, to wit:

In the Cook County Circuit Court
Of the April Term A.D. 1858

American Express Co.
ads
Herman Baldwin

And the said defendants by Scates McAllister Jewett and Peabody their attorneys, come & defend the wrong and injury, when &c. and say that they did not undertake or promise in manner and form, as the said Plaintiff have above thereof, in and by his amended declaration, declared against them, And of this the defendants put themselves upon the Country &c

Scates McAllister Jewett & Peabody
Attys for Defts

And afterwards to wit: at the same term of said Court last aforesaid, to wit: on the 20th day of May in the year last aforesaid, the following proceeding "among others", were had and entered of record therein, to wit

5
11131 Herman Baldwin
v } assumpsit
American Express Company

This day comes the said plaintiffs by Arnold Learned and Bay his attorneys. and the said defendants by Scates McAllister Jarrett and Peabody its attorneys also comes. and by agreement of said parties now here given in open Court. the trial of the issues joined herein between said parties is submitted to the Court. and the intervention of a jury waived. and the Court after hearing the evidence and the arguments of Counsel, as well on the part of the said plaintiff as of the said defendant, and being fully advised in the premises, now finds the issues herein for the Defendants.

Therefore it is considered that the said defendant do have and recover of the said plaintiff its Costs and Charges by it about its defense in this behalf expended. And have Execution therefor:

Whereupon the said plaintiff by his Counsel, as to the finding and judgment of the Court in this Cause now hereby Excepts. And on motion of the said plaintiff it is ordered that he have — Thirty days to file his bill of Exceptions herein.

And afterwards. to-wit on the 25th day of May in the year last aforesaid. the said plaintiff by Jenkins and Blanchard. his attorneys filed in the Court aforesaid. his certain Bill of Exceptions which is in the words and figures following, to-wit:

6

State of Illinois }
Coles County } And Circuit Court of the April Term thereof A.D. 1858

Herman Baldwin
v
The American Express Company } Assumpsit

Be it remembered that on this twentieth day of May A.D. 1858, this cause coming on to be heard, the parties plaintiff and defendant, by their respective Attorneys, stipulated as follows to wit:

That this cause should be submitted to the Court for trial. That the package of money of the value of One Thousand Dollars, as specified in the said plaintiffs declaration, was received by the defendant, at Chicago, on the 6th Sept 1857, and the same in question to be delivered to David J Baldwin or his authorized agent at Madison Wisconsin,

That the defendant was a common Carrier of goods & money:

That said package was never received by said David J Baldwin or his agent: and that the said package was the property of the said plaintiff:

Be it further remembered that the said defendant to maintain the issue on his part, offered in evidence an order from D J Baldwin, in the words and figures following, to wit:

W. A. Douglas. agt Amn Ex Co. please deliver to C T Flowers or Dane County Bank any Pkgs that may come to your office for me, Baraboo Wis Aug 8th 1857. D J Baldwin" which was recieved in evidence,

The defendant then read the deposition of Henry A Douglas, as follows to-wit:

I reside in the City of Madison County of Dane and State of Wisconsin, in the Month of September 1857 I was the agent, at said City, of Defendant. I acted as such agent continually up to the 18 day of March 1858. Knew D J Baldwin of Baraboo Wis, on the 8th of September last, a package was recieved at the Office of the Defendant, marked. D J Baldwin Baraboo $1000". The Cars on which the Express matter of that day came, arrived at Madison at about four and one half O'clock in the afternoon + the Express matter of that day came to the office at 5 O'clock PM or a little before. After the messenger arrived that day I checked in the run by comparing his packages with the way bill, to see if they were correct. packages that I knew could be delivered, were entered on the delivery book: This particular package of which I have been speaking, was not entered on the delivery book, at the time I was checking in the run, the clerk from the Dane County Bank, was in the Office of the Express Company, as he usually was for packages for the Dane County Bank, I said to the Clerk, here is a package for D J Baldwin, will you take it. He said I will go to the Bank and ask them, he went out of the Express office at the front door, and came to answer me at the Hall door. And

[15722-B]

8

put his head in. and says let Storrers have it.
Some time after that Mr Storrers Clerk. Mr Willis came in and made some enquiry. about a team going to Baraboo. I told him there was a package for D. J. Baldwin and asked him if he would take it. I do not know that I showed him the package. but he asked me how much it was. meaning what amount of money it contained. I told him the amount of it. he told me that Storrers was away, & that he had not the Key to the safe. & that I should have to keep the package till morning. I do not remember the exact words; but I understood from him that he would not take it. & that I should have to keep it. after he went out I put the package into the safe. If "I had not done so before". I am positive the package was in the safe. After delivering all the packages he could. the delivering agent came back, to the office. and I settled with him. The last thing I did in the office that day. was to make up way bills for our freight to go by the train at 6½ O'clock next morning. I then went home. and am satisfied the safe was locked when I left it. and also the office in which the safe was. and the key of the safe and office I put in my pocket. The office was left without any person lodging in it. or being in it. at night at that time.
"Question by Plaintiffs Counsel". Was that a proper place to keep large quantities of money at night without any person lodging in the room"
"Question objected to by Defts Counsel"

The objection was overruled by the Court. and the answer of the witness given. To the overruling of said objection, and allowing said answer to be given the Deft by his Counsel then and there excepted. The witness answered. "I think not". Said witness further testified. We always take receipts on the delivery of packages,

The business of the defendant, on the 8th day of September last. was carrying goods and money for the public, I think I had delivered packages addressed to Baldwin, to Towers, I have not had experience in regard to different kinds of safes & I have not had occasion to examine different kinds of safes & locks. I consider, that safe, as good as any safe. but since that robbery, I have come to the conclusion that no safe is entirely safe without some one to sleep with it,

That safe was the only Office safe that the company ever had here at that time, Whatever valuables the Company had. they always kept in that safe, and there were valuables. belonging to the Company there, that night.

There were three bolts in the lock, Mr Treadway the Clerk of the Dane County Bank spoken of. was in the habit of recieving packages. from the Company addressed to the bank, more frequently than any other person, and he had also recieved packages for ~~or~~ – Baldwin and gave receipts for packages"

The Counsel for the plaintiff objected to so much of the above and foregoing testimony of the witness Douglas. as relates to what Treadway

11 told the witness being given. Said objection was overruled by the Court. and said testimony was given.

In the overruling of which said objection. and allowing said testimony to be given. the plaintiff by his Counsel then and there Excepted:

The said defendants further offered testimony tending to show that said Safes. on the night of the 8th of September 1857. was robbed by some person unknown. of about Sixteen Thousand Dollars in money & bonds among which was the plaintiffs said package of One Thousand Dollars:

The defendant further to maintain the issue on his part. offered the deposition of Frederick Meinhard. who testified as follows. to-wit,

My business was delivering goods for the American Express Company in September last. Express matter was then brought to Madison, on the Cars which arrived at the Depot in Madison at 5 and one half O'clock in the afternoon. It took us about a quarter of an hour to bring the Express matter to the office of the Company. I recollect the circumstance that on the 8th of September last. a package was recieved. at the Office of the American Express Company. addressed. to D. J. Baldwin of Baraboo. I did not see the package but Mr Douglas then told me he had a package for Mr Baldwin"

So much of Meinhards testimony as relates to what Douglas told the witness. was objected to by the plaintiff. The objection was overruled by the Court, and said testimony given.

11 To the overruling of which objection, and allowing said testimony to be given, the plaintiff by his Counsel then and there excepted.

"Mainhards Deposition Continued".

Mr Douglas told me to go to Mr Stowers. and tell him that he wanted Stowers. to receive the package. On my beat delivering packages. I went by Mr Stowers Store. and Mr Stowers was not in, his clerk Mr Fred Willis was there. I told him there was a package of money at the american express office. for Mr Baldwin of Baraboo. he said that Mr Stowers was not at home, then he said I will go up and see about it. I did not see Mr Willis go up. I went right straight back on my business and did not see Willis at the Office. this was about five O'clock or a little after. five in the afternoon on the 8th ~~day~~ of September last. after I had delivered the packages around, at that time, I went back to the Depot again after some more goods, when I got back to the Office. I settled up my delivery book with Mr Douglas. when I got through with him he told me that I could go home. I do not know of my own Knowledge, of any thing more that took place at the office that night.

The Defendant then offered J D Treadway, who testified as follows. to wit:

I saw the package in question & think I had it in my hand, Douglas asked me if I would take the package. I first said I thought I would, but recollected that Mr Brown had expressed an unwillingness & said I would go around and see. I asked Brown if he would take it and he said no, not if Stowers would take it. I think I gave the answer of Mr Brown to Mr Douglas. but am not sure. Mr Brown may have spoken to Mr Douglas in the matter

I cant say whether I went to the Hall door to communicate to Douglas or whether I went around the building. I had frequently taken packages from the Express Office for the Band. directed to D. J. Baldwin. I was assistant teller and messenger in the Dane County Bank. I was in the Express Office when the package arrived:

The plaintiff then to maintain the issue on his part offered the deposition of Frederick A Willis as follows, to-wit:

On the 8th of September last I was lodging with C S Stowers. in the City of Madison Wisconsin. at that time I was clerking for Stowers. C. S. Stowers on the whole of that day was in Columbus Ohio I think. I want be positive. I know he was away from the City of Madison. I am not much acquainted with David J Baldwin. David J. Baldwin at that time, 8th September last. resided at Baraboo Wisconsin: at that time the business of Mr Stowers was a piano and melodeon establishment. at that time I was a little acquainted with Henry A Douglas. the agent of the American Express Company & with Frederick Meinhard the driver of the wagon of the Company. I had no orders or directions from Mr Stowers. or any one else. in relation to packages

13 directed to D J Baldwin. on the 8th of September last all that took place between me and the agent of the American Express Company was, that Mr Meinhard in passing Mr Storrs Store, mentioned to me that there was a package at the Office for D J Baldwin. That was all. I mean by the Office the American Express Office. I called at the Office and asked Mr Douglas if it would not be safe to leave the package there & he said that it would & I stated to him that Mr Storrs was out of the City. and that I did not wish to take the responsibility to receive it. I do not recollect any thing more being said at the time. I do not think I saw the package at all. That was all that was said. The distance from Mr Storrs Store to the office of the American Express Company was the width of one Block and two Streets. Meinhard did not come into the Store when he told me that the package was there. I was standing near the door. I had charge of Mr Storrs Store and of his store business. when he was gone away. We had no other Clerks.

The reason that Meinhard gave notice at Storrs Store, that there was a package for D J Baldwin was that Storrs was in the habit of receiving packages for Baldwin as I suppose. as a matter of fact I do not know that Mr Storrs received packages of the American Express Company for Baldwin, but I understood that he did. I think I have seen packages from the Express Company. addressed to Baldwin in Mr Storrs Store. I do not know what

14

was done with such packages as were left at Mr Storrs Store for Baldwin. but I understand that they were forwarded to Baldwin at Baraboo. I understood at the time. that the package which I mentioned in my direct examination was a package of money: The other packages of which I have been speaking. I understood were money packages. I understood that the business of Mr Baldwin at Baraboo was a Banker. I gave no other reason to Mr Douglas. why I did not wish to receive the package and wished him to keep it. other than that I did not wish to take the responsibility of receiving "it" Except that I think I told Douglas that I had not the Key of the safe. Nothing was said, as between me & Douglas as to any compensation to the Express Company for storing the package. I did not understand that the Company were to have any compensation for taking Care of the packages, all that I know with regard to the delivery of the packages by the Company, was that I saw Mr Storrs have one package. only that I supposed that it was the custom to call at the office of the Company for money packages. but I do not know any thing in regard to the custom of the Express Company with relation to the delivery of packages of money:

x The plaintiff further to maintain the issue on his part. offered in Evidence the deposition of Timothy Brown. as follows. to wit:

I reside at the City of Madison Wisconsin

and resided there on the 8th of September last. I
15 was acquainted with the agent of the American Express Company at Madison at that time. I am acquainted with D. J. Baldwin. and at that time he lived at Baraboo in the State of Wisconsin. at that time he was a Broker at Baraboo. previous to that time I had recieved packages of money from the American Express Company directed to D J Baldwin, My business is Cashier of the Dane County Bank,

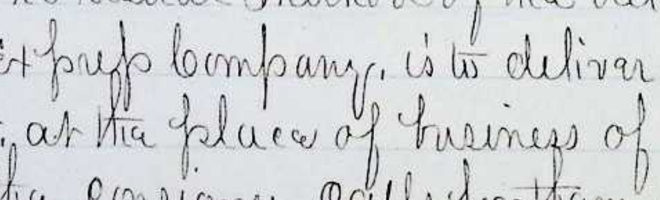
The Office of the American Express Company and the Dane County Bank. are in the same building

There is a communication from the Office of the Express company. and the Dane County Bank. into a back hall. through which. doors are only about four feet apart. W. A Douglas was the agent of the Express Company at that time. On the 8th of September last. between four and six O'clock in the after-noon. I was writing letters in the Bank. the doors from both offices into the hall were open. so that Mr Douglas & I could talk to each other, but we could not see each other. Mr Douglas called to me and said. I have a package for Mr Baldwin (D. J Baldwin). do you want it. or something to that effect. I said no if Towers will take it. I mean C. S. Towers. Nothing else occurred then in relation to that. I did not see the package. I had recieved packages before that for Mr Baldwin from the Ex-press Company. I do not know that I have ever recei-ved any without Baldwins express request.

Mr Baldwin sometimes wrote me, saying that he Expected a package at the Express office, and requested me to receive it for him. I had no information before hand of the package of the 8th of September last, the first I knew of it was when Mr Douglas told me of it. Mr Baldwin once asked me personally when he was here, if I would receive Express packages for him, and send them to him by Mail, I told him that I would do so, I do not know of Mr Flowers receiving packages of the Express Company for Mr Baldwin, Except that Mr Douglas the agent told me that he had an order from Mr Baldwin to deliver packages to Mr Flowers or to me.

The usual method of the delivery of packages by the Express Company, is to deliver them to the consignee, at the place of business of the consignee, unless the consignee calls for them at the office of the company, and then the Express company deliver them at their Office; The Company asks a receipt at the time when they deliver packages.

It is the usage of the company to carry a receipt book when they deliver packages, I do not know where Mr Flowers was on that day



The above diagram represents the relative situation of the office of the Express Company and Dane County Bank, and was shown by me (the witness).

The conversation that I have mentioned between
17 Douglas and me was as I have stated. Douglas called to me and said. There is a package here for Baldwin, do you want it. I said no not if Stowers will take it, I am positive about the language or I cannot tell whether Douglas said "there is a package" or "I have a package", or he may have said "here is a package". I am positive about the answer I made to Douglas, Douglas said in relation to the package. "Do you want it." I said no not if Stowers will take it, this was my answer. I think precisely. the truth was I prefered that Stowers should receive the package if he would, I would have taken it if Mr Baldwin had requested me, but in relation to this package he had not done so,

There was no regular Express line from here to Baraboo at that time, the distance is about forty miles,

The conversation between Douglas & myself was after banking hours. I do not know at what time Mr Stowers returned to the City of Madison, I did not know then that he was away: but was told so afterwards,

The Company always require me to give a receipt for packages on delivery. this package that I have been speaking of, the one directed to D J Baldwin, was never delivered to me, or to the Dane County Bank, that I know of, The Express arrived at the Office of the Company at about the hour of five o'clock in the afternoon at that time,

The Dane County Bank closed at that time, at about four o'clock in the afternoon. We were in the habit of receiving packages from the Express Company at the Dane County Bank, after banking hours, if we were in the bank

15

If this had been a package for the bank. I think I should have recieved it at that time. J. D. Treadway was employed at the Dane County Bank on the 8th of September last as a messenger in the Bank & swept the Office & run of Errands. he had authority by the Bank to get packages at the Express Office and to give a reciept for them. I mean packages directed to the Dane County Bank. I do not think he had any authority from the bank to recieve packages at the Express office directed to D. J. Baldwin. he may have taken a letter from Baldwin to the Express office and by that means got a package. I do not think he had any directions in relation to the package I have been speaking of. The Teller was at the bank at the time the Express came that day. and heard the conversation that I have been testifying of. I do not think there was any thing said by the teller Mr Medway & myself about the package at that time. I think if there had been I should have known it. as we were within a few feet of each other. I did not hear Treadway give Douglas any directions about the package that afternoon. I was within hearing distance of the door & think I should have heard if there had been any directions. I think it was not the custom of this Treadway. to go around to the Express Office as soon as the Express was in. he usually went to the post office. we frequently sent him round. when we were expecting packages. as soon as the Express Office was open.

The plaintiff further to maintain the issue on his part. Called James C Fargo. who testified as

follows, to-wit: I have the general supervision of the
19 business of the American Express Company, west of Detroit.
I reside in Chicago. Have been in same business since 1850.
The business of the Deft. was the transportation of goods
& money & making Collections. We deliver goods actually
to the person & by notice. The Defts usually have and
did have on the 8th of September last, large quantities
of goods & money in their possession for transportation and
delivery."

The defendant have conceded that there was,
in their said safe at Madison, on the night of the 8th
of September 1857, Eleven Thousand Dollars in money
& Five Thousand Dollars in Bonds, of packages directed
to different persons. Question by plaintiffs Counsel,
Would it be an ordinarily safe place to keep large
amounts of money, say fifteen or twenty thousand dollars
over night in an ordinary Iron safe, such as was in
the Express Office at Madison on the 8th Sept 1857
without any one sleeping in the room:

Objected to by defendants Counsel, The objection
was overruled by the Court, and the answer of the
witness given, To which overruling of said objection
and allowing said answer to be given, the defendant
by his Counsel then and there Excepted.

The witness answer was, If no one was —
sleeping in the room, I should not consider it safe.

Said witness further testified,
I Know the size and quality of the safe at Madison
on the 8th of September last. When we own waggons

we deliver goods & money to the persons. during Sept 1857. we were delivering goods and money in person.

When a special arrangement was made, we delivered at our Office. many preferred it. I am acquainted with the details of the business of the American Express Company. we were due at Madi-son at 4-37. P.M. it takes fifteen or twenty minutes to get to the Office. we meet a messenger on the Cars, at the Office the money safe is put into the office and opened. the way bills are taken and checked by the packages. to see if they agree. the custom was to Copy the way bills. on our delivery book. to be sent out and delivered. It is our Course of business al-ways to require receipts on delivery. The delivery book I have spoken of is our receipt book. We never deliver a package without a receipt on the receipt book. and we never deliver packages until we enter them on the receipt book. Mr Douglas has been discharged from the Companys Employ.

One reason for his discharge was we thought him incompetent for the place.

I do not consider any Bank vault or safe secure against Burglars and thieves. without a man with them. with a Six shooter. I have read accounts of the most difficult locks being picked. by sticks and wires and Jack Knives. it has been the habit of the Company to pay as high as four or five Hundred Dollars for locks. until they made up their minds that one lock was just as safe as another. & they came down to ten or fifteen dollar locks, what I have been stating of practice at Madison, is partly from information, and partly from what I have seen there. a failure to enter a package on the delivery book. would not prevent its delivery, so long as we got a receipt, We had no other mode of taking receipts except on the delivery books, The general instructions to agents, are to require a receipt & not to deliver to consignees without consignees signing a receipt Book.

I mean by saying that Douglas was incompetent that he was a poor Scholar, and did not take a proper interest in soliciting business, and that he had got to high & beyond his line, he had filled the Office of Messenger and delivery Clerk four or five years with Satisfaction, but was not competent to fill this place.

The plaintiff further to maintain the issue on his part offered William Van Vleet who testified as follows, to-wit. I reside in Chicago and occupy the situation of check clerk in the United States Express Office, I have been in the employ of the Company three years and as check clerk one year, I would not consider an ordinary iron safe, a secure place to keep large quantities of money, say fifteen or twenty thousand Dollars at night without some one sleeping in the room, I do not consider it ordinary care, to keep large quantities of money, say ten or twenty thousand Dollars in an ordinary iron safe at night, without some one sleeping in the room or in the building, in such proximity to the money, that if a noise was made, he could hear it. The general method of conducting an express business, is to take receipts, in a receipt book. The receipt book is called the delivery book;

The above was all the testimony in the case. The said Court thereupon rendered a judgment in this case for the defendant for Costs;

Whereupon the plaintiff entered a motion for a new trial herein; ## Which said motion for a new trial, after being considered by the Court, was overruled by the said Court, and to the decision of the said Court in overruling said motion for a new trial, the said plaintiff by his Counsel then and there excepted,

The said plaintiff by his Counsel thereupon entered a motion in arrest of judgment; which said motion in arrest of judgment, after being considered by the said Court, was overruled by the said Court; and a final judgment rendered herein by the said Court; and to the decision of the said Court in overruling said motion in arrest of judgment and rendering final judgment as aforesaid, the said plaintiff by his Counsel then and there excepted,

And afterwards, to-wit: on the twenty fifth day of May, AD 1858, the same being one of the days of said Term the said Plaintiff by his Counsel

for the following reasons, to-wit: That the said judgment was contrary to the evidence. That the Court erred in admitting the testimony of said Witness Douglas and Menhard, which was excepted to by the plaintiff as aforesaid;

23 filed the his Bill of Exceptions. and prayed that the same may be approved signed sealed and ordered to be made a part of the record in the case. which is done accordingly. this 25th day of May AD 1858

George Manierre (Seal)
Judge of 7th Judicial Circuit
Illinois

Herman Baldwin
vs
The American Express Company

And now comes the said plaintiff by Jenkins & Blanchard his Attorneys and says there is manifest error in the foregoing Record and makes the following

Assignment of Errors.

The plaintiff assigns the following Errors

1st The Court Erred in allowing the testimony of the Witness Douglas relating to what Treadway told the witness Douglas to be given

2 The Court Erred in allowing the Testimony of the witness Memhard relating to what Douglas told the witness Memhard to be given about the said package having been received by ~~by~~ defendant to be given.

{2702-13}

3d The Court Erred in overruling said plaintiffs Motion for a New Trial

4th The Court Erred in overruling said plaintiffs motion in arrest of judgement

5th The Court erred in rendering judgement for the defendant and in not rendering judgement for the plaintiff for the value of said package of money

Jenkins & Blanchard
Pl'ffs Attys.

In nullo est erratum

Scates McAllister & Jewett
for Deft

State of Illinois, }
COUNTY OF COOK. } S. S.

I, **WILLIAM L. CHURCH,** *Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of* the pleadings papers & proceedings *in a certain cause* lately *pending in said Court on the* Common Law *side thereof, wherein* Herman Baldwin was Plaintiff *and* The American Express Company were *defendents*

IN WITNESS WHEREOF, *I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this* Fifth *day of* March *A. D. 18*59

Fees for Record $5.85

Wm L Church
Clerk.

169

Circuit Court of Cook Co

Herman Baldwin

v

The American Express Co

Record

Filed April 13. 1859
L. Lelwind
Clerk

State of Illinois
Supreme Court
3 G. D. April Term
A.D. 1859

Hermon Baldwin vs American Express Company } Appeal from Cook Cir Court

Argument by D. P. Jenkins for Appellant

I shall not attempt to follow Judge Scates in his argument of this cause but refer to what I consider a few of the prominent points in the case

1 There is nothing in the Record showing that the Witness Treadway had any authority to receive the pkg in question & the Witness Brown cashier of Dane County Bank swears that he thinks he did not have authority He was Errant Boy & swept the Bank — (See page 16 of Record)

2d The clerk of C. T. Flowers I think certainly did not have either authority to receive said Pkg or to negotiate in reference to it — Flowers agency was one Emphatically of "Confidence," It was to receive & forward large amounts of money I think it would not be contended that Deft in this cause would not be liable if they had delivered said Pkg, to Flowers clerk & he had converted it to his own use - Then what he done & said in reference to it - Cuts no figure in the case -

3 The PKg was not tendered - nor was it ready for delivery - It was not ~~placed~~ entered on the delivery or Receipt book & untill it was - It was not ready for delivery See pages 7 & 21 Record
And 2 Vol Greenleafs Evidence Sidge paging 603

4 But the Bank did not absolutely refuse to receive the Money - the effect of its Language was - Go first to Flowers & if he does not receive it I will
Did the Deft then go to Flowers for the purpose of delivering said PKg - he did not. It was not entered on the delivery book or sent as other PKgs were that Evening to the Consignee or his agents - Flowers clerk come to the Express office it is true - & probably on account of the notice he had received from the messenger of the Deft
It was not according to defendants usual course of business to deliver at their office but at the place of business of the Consignee (See page 20 of Record)

5 As to degree of Care required of Defts see 2d Count in Declaration & form given 2d Greenleaf Evidence Top paging 200 -

6 It seems to me entirely unnecessary to say more on the point of Delivery in this case than to say that the Law & the cases cited by Judge Scates going to show that where Steam Boats & Rail Roads delivered at their landings – or Depots – they would be discharged as Com. Carriers some times with & sometimes without notice to the Consignee – the law laid down in those cases cannot be applied to this case – Here the defendant held himself out to the public to carry light & valuable articles for a higher rate of pay and to deliver to the Consignee in person. The case cited by Judge Scates of Marshall et al vs Henry Wells et al tried & decided finally by Supreme Court in Wisconsin was not analagous to this – I was present throughout the trial of that cause in the court below and am able to state that the Evidence in that case – the money was regularly Entered on the delivery & receipt book & carried into the bank & offered – and was refused on the ground that they had closed for the day & that the Keys to the vault was gone. It also appeared that they had been in the habit of receiving money Pkgs from the Deft in this case after Banking hours

7 We contend that the Record in this case shows satisfactorily that it was not the ~~intention~~ intention of Defts agent Douglass to deliver this PKg — on the Evening of its arrival — else according to his own showing he would have Entered it on the receipt Book —

8 And we contend that they never could (so far as time is concerned) discharge themselves from ~~their~~ liability as Common Carriers — untill they used due dilligence to deliver the property Entrusted to them to carry + deliver — And now arises the question which I suppose to be the principal one in this case — "Was due dilligence used by Deft in trying to make a delivery — What constitutes due dilligence in such a case — Does it consist in an honest effort carried forward by Energy and discretion — We think something of this Kind is required — See Merwin vs Butler 17 Connecticut 138 — We claim that ~~that case~~ the last above case correctly sets forth the law on such cases — Except a slight inaccuracy in the use of language — Where the Judge says — "That the Exemption of the carrier from liability" would depend upon the degree of dilligence which the carrier used to let the officers of the bank

~~185~~ 169-185

Herman Baldwin
Appellant

vs

American Ex Co
Appellee

Appeal from Cook

Argument by
D. P. Jenkins for
Appellant

Filed May 17. 1859

L Leland
Clerk

know that he had a package to deliver them," Now I say this language is not strictly accurate — " It should be in such a case,— "It would depend on the degree of dilligence which the carrier used to deliver said package to the consignee — For suppose the stage driver had in the case cited used great dilligence in letting the bank know that he had a package to deliver to them — but refused to deliver & run away with the money — or insisted on retaining this untill they should pay him for other services which he might allege he had performed for them does any one suppose his principal would not be liable as a common carrier —

[12700-17]

me if I would take the package. I first said I thought I would, but recollected that Mr. Brown had expressed an unwillingness and said I would go around and see. I asked Brown if he would take it and he said no, not if Flowers would take it. I think I gave the answer of Mr. Brown to Mr. Douglas, but am not sure. Mr. Brown may have spoken to Mr. Douglas in the matter. I can't say whether I went to the hall door to communicate to Douglas or whether I went round the building. I had frequently taken packages from the Express office for the Bank, directed to D. J. Baldwin. I was assistant teller and messenger in the Dane County Bank. I was in the Express office when the package arrived.

The plaintiff then, to maintain the issues on his part, read the deposition of Frederick A. Willis as follows, to wit:

" 12 On the 8th of September last I was clerking for C. T. Flowers, in the city of Madison, Wis. C. T. Flowers, on the whole of that day, was in Columbus, Ohio, I think, I won't be positive. I know he was away from the city of Madison. I am not much acquainted with David J. Baldwin. He resided, 8th September last, at Baraboo. At that time the business of Mr. Flowers was a piano and melodeon establishment. At that time I was a little acquainted with H. A. Douglas, the agent of the Amer'n Ex. Co., and with Frederick Memhard, the driver of the company. I had no orders or directions from Mr. Flowers, or any one else, in relation to packages directed to D. J. Baldwin. On the 8th Sept. last all that took place between me and the agent of the American Express Company was, that Mr. Memhard, in passing Mr. Flowers' store, mentioned to me that there was a package at the office for D. J, Baldwin. That was all. I called at the office and asked Mr. Douglas if it would not be safe to leave the package there and he said that it would be. I stated to him that Mr. Flowers was out of the city and that I did not wish to take the responsibility to receive it. I do not recollect of anything more being said at the time. I do not think I saw the package at all. That was all that was said. The distance from Mr. Flowers' store to the office of the American Express Company was the width of one block and two streets. Memhard did not come into the store when he told me the package was there. I was standing near the door. I had charge of Mr. Flowers' store, and of his store business, when he was away. He had no other clerk. The reason that Memhard gave notice at Flowers' store that there was a package for D. J. Baldwin was, that Flowers was in the habit of receiving packages for Baldwin, as I suppose. As a matter of fact I do not know that Mr. Flowers received packages of the American Express Company for Baldwin, but I understood that he did. I think I have seen packages from the Express company addressed to Baldwin in Mr. Flowers' store. I do not know what was done with such packages as were left in Mr. Flowers' store for Baldwin, but I understood that they were forwarded to Baldwin at Baraboo. I understood that these were money packages, and that D. J. Baldwin's business was a banker. I gave no other reason to Mr. Douglas why I did not wish to receive the package, and wished him to keep it, other than that I did not wish to take the responsibility of receiving it; except that I think I told Douglas that I had not the key of the safe. Nothing was said, as between me and Douglas, as to any compensation to the Express company for storing the package. I did not understand whether the company were to have any compensation for taking care of the package."

The plaintiff, further to maintain the issue on his part, read the deposition of Timothy Brown as follows, to wit:

" 15 "I reside at the city of Madison, Wisconsin, and resided there on the 5th of September last. I was acquainted with the agent of the American Express Company, at Madison, at that time. I am acquainted with D. J. Baldwin, and at that time he lived at Baraboo, Wisconsin. He was a banker at Baraboo. Previous to that time I had received packages of money from the American Express Company directed to D. J. Baldwin. My business is cashier of the Dane County Bank. The office of the American Express Company and the Dane County Bank are in the same building. There is a communication from the office of Express company and the Dane County Bank with a back hall, through which doors are only about four feet apart. H. A. Douglas was the agent of the Express company at that time. On the 8th of September last, between four and six o'clock in the afternoon, I was writing letters in the bank. The doors from both offices into the hall were open; so that Mr. Douglas and I could talk to each other, but we could not see each other. Mr. Douglas called to me and said: 'I have a package for Mr. Baldwin (D. J. Baldwin), do you want it?' or something to that effect. I said 'no, if Flowers will take it.' I mean C. T. Flowers. Nothing else occurred then in relation to that. I did not see the package. I had received packages before that for Mr. Baldwin from the Express company. I do not know that I have ever received any without Baldwin's express request. Mr. Baldwin sometimes wrote me saying that he expected a package at the Express office and requested me to receive it for him. I had no information beforehand of the package of the 8th of September last. The first I knew of it was when Mr. Douglas told me of it. Mr. Baldwin once asked me personally, when he was here, if I would receive Express packages for him and send them to him by mail. I told him that I would do so. I do not know of Mr. Flowers receiving packages of the Express company for Mr. Baldwin, except that Mr. Douglas, the agent, told me that he had an order from Mr. Baldwin to deliver packages to Mr. Flowers or to me. The usual method of the delivery of packages by the Express company is to deliver them to the consignee at the place of business of the consignee, unless the consignee calls for them at the office of the company. And then the Express company deliver them at their office. The company asks receipts at the time when they deliver packages. It is the usage of the company to carry a receipt book when they deliver packages. I do not know where Mr. Flowers was on that day."

Page 16 See diagram.

"The conversation that I have mentioned between Douglas and myself, was as I have stated. Douglas called to me and said: 'There is a package here for Baldwin, do you want it?' I said, 'No, not if Flowers will take it.' I am positive about the language, or he may have said, 'here is a package.' I am positive about the answer I made to Douglas. Douglas said in relation to the package: 'Do you want it?' I said, 'No, not if Flowers will take it.' This was my answer, I think, precisely. The truth was that I preferred that Flowers should receive the package if he would, I would have taken it if Mr. Baldwin had requested me to, but in relation to this package he had not done so. There was no regular express line from here to Baraboo at that time; the distance is about forty miles. The conversation between me and Douglas was after banking hours. I do not know at what time Mr. Flowers returned to Madison. I did not know then that he was away but was told so afterwards. The company always require me to give a receipt for packages on delivery. This package, directed to D. J. Baldwin, was never delivered to me or to the Dane County Bank that I know of. The Express arrived at the office of the company at about the hour of five o'clock in the afternoon at that time. The Dane County Bank cloaed at about four o'clock P. M. We were in the habit of receiving packages from the Express company at the Dane County Bank after banking hours, if we were in the bank. If this had been a package for the bank I think I should have received it at that time. D. J. Treadway was employed at the Dane County Bank on the 8th September last as a messenger in the bank, and swept the office and run of errands. He had authority by the bank to get packages at the Express office and to give receipts for them, I mean packages directed to the Dane County Bank. I do not think he had any authority from the bank to receive packages at the Express office, directed to D. J. Baldwin. He may have taken a letter from Baldwin into the Express office, and by that means got a package. I do not think he had any directions in relation to the package I have been speaking of. The teller was at the bank at the time the Express came that day and heard the conversation that I have been testifying of. I do not think there was anything said by the teller, Mr. Meadway, and myself about the package at that time. I think if there had been I should have known it, as we were within a few feet of each other. I did not hear Treadway give Douglas any directions about the package that afternoon. I was within hearing distance of the door and think I should have heard if there were any directions. I think it was not the custom of this Treadway to go round to the Express office as soon as the Express was in. He usually went to the post office. We frequently sent him round, when we were expecting packages, as soon as the Express office was open."

Jr

James C. Fargo, for plaintiff, testified as follows:

" 19 "I have the general supervision of the business of the American Express Company west of Detroit. I reside in Chicago. Have been in same business since 1855. The business of the defendant was the transportation of goods and money, and making collections. We deliver goods actually to the person and by notice. The defendant usually have, and did have on the 8th September last, large quantities of goods and money in their possession, for transportation and delivery."

" 19 The defendant here conceded that there was in their said safe at Madison, on the night of the 8th September, 1857, eleven thousand dollars in money and five thousand dollars in bonds, of packages directed to different persons.

Question by plaintiff's counsel:

" 19 "Would it be an ordinarily safe place to keep large amounts of money, say fifteen or twenty thousand dollars, over night in an ordinary iron safe, such as was in the Express office at Madison on the 8th September, 1857, without any one sleeping in the room?"

Objected to by defendant Objection overruled. Defendant excepted.

[12322-19]

Ans.:—"If no one was sleeping in the room I should not consider it safe. I know the size and quality of the safe at Madison on the 8th September last. When we own wagons we deliver goods and money to the persons. During September, 1857, we were delivering goods and money in person. When a special arrangement was made we delivered at our office. Many preferred it. I am acquainted with the details of the American Express Company. We were due at Madison at 4:37 P. M. It takes fifteen or twenty minutes to get to the office. We meet a messenger on the cars at the office; the money safe is put into the office and opened. The way bills are taken and checked by the packages to see if they agree. The custom was to copy the way bills on the delivery book to be sent out and delivered. It is our course of business always to require receipts on delivery. The delivery book I have spoken of is our receipt book. We never deliver a package without a receipt on the receipt book. And we never deliver packages until we enter them on the receipt book.

"Mr. Douglas has been discharged from the company's employ. One reason for his discharge was, we thought him incompetent for the office.

"I do not consider any bank vault or safe secure against burglars and thieves, without a man with them with a six shooter. I have read accounts of the most difficult locks being picked by sticks and wires and jack knives. It has been the habit of the company to pay as high as four or five hundred dollars for locks, until they made up their minds that one lock was just as safe as another, and they came down to ten or fifteen dollar locks. What I have been stating of practice at Madison is partly from information and partly from what I have seen there. A failure to enter a package on the delivery book would not prevent its delivery so long as we get a receipt. We had no other mode of taking receipts except on the delivery book. The general instructions to agents are to require a receipt and not to deliver to consignees without consignees signing a receipt book. I mean by saying that
Page 21 Douglas was incompetent, that he was a poor scholar and did not take a proper interest in soliciting business, and that he had got too high and beyond his line. He had filled the office of messenger and delivery clerk four or five years with satisfaction, but was not competent to fill this place."

William Van Vleet for plaintiff, testified as follows:

" 21 "I reside in Chicago, and occupy the situation of check clerk in the United States Express Office. I have been in the employ of the company three years, and as check clerk one year. I would not consider an ordinary iron safe a secure place to keep large quantities of money, say fifteen or twenty thousand dollars, at night, without some one sleeping in the room. I do not consider it ordinary care to keep large quantities of money, say ten or twenty thousand dollars, in an ordinary iron safe at night without some one sleeping in the room or in the building, in such proximity to the money that if a noise was made he could hear it. The general method of conducting an Express business is to take receipts in a receipt book. The receipt book is called the delivery book."

JENKINS & BLANCHARD, Att'ys for Plaintiff.
SCATES, MCALLISTER & JEWETT, Att'ys for Deft.

169-185
Am Exp Co
ads
Baldwin

STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, 1859.

AMERICAN EXPRESS CO.
ads.
HERMAN BALDWIN.
} *Error to Cook Circuit Court.*

POINTS AND AUTHORITIES FOR DEFENDANT.

BY W. B. SCATES
Counsel for Defendant

STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, 1859.

AMERICAN EXPRESS CO.
ads.
HERMAN BALDWIN.
} *Error to Cook Circuit Court.*

It is well enough to note particularly the issues formed and tried in this case.

The declaration counts upon an agreement by defendant, as a common carrier between Chicago and Madison, Wisconsin. Plea general issue.

There was no controversy about the fact that defendant received a package of bank bills of the value of $1,000, on 6th Sept., 1857, to be carried from Chicago to Madison, and there delivered to plaintiff, or his authorized agents; and that defendant made this contract as a common carrier; and that Baldwin never received the package.

The question in controversy arises upon the facts offered in evidence.

Defendant proved the following order of plaintiff in evidence:

"H. A. Douglass, Agt. Am. Exp. Co.: Please deliver to C. T. Flowers, or Dane County Bank, any pkgs. that may come to your office for me. Baraboo, Wis. D. J. Baldwin."

The package in this case was addressed to D. J. Baldwin.

Defendant further proved that the package was duly received at Madison by Douglass, its agent; and that he said to the clerk of the Dane County Bank, here is a package for D. J. Baldwin—the clerk of the Bank being in the Company of the defendant—will you take it? He—the clerk—said he would go to the Bank and ask them. After going he replied, let Flowers have it.

Afterwards, the same evening, Mr. Flowers' clerk came into the Express office, and Mr. Douglass asked him if he would take this package. Don't know whether package was showed him. He asked how much was in it, and on being told the amount, he declined, saying that Flowers was away, and he had no key to the safe, and that said Douglas would have to keep it until morning.

The Clerk of the Bank, in the office, and to whom the package was offered, had been in the habit of receiving packages addressed to the Dane County Bank. Packages addressed to Baldwin had been delivered also to Flowers.

The Clerk of the Bank had also received packages addressed to Baldwin, and receipted for them; and he, more frequently than any other, those addressed to the Bank.

Mr. Brown, the Cashier of the Dane County Bank, was also asked if he would take the pakage.

The foregoing is the substance of the evidence in relation to the delivery, or attempt or offer to deliver this package.

Now, is this sufficient evidence to establish such a delivery as will discharge the liability of defendant as a common carrier, or change it into the liability of a warehouse-man, or common bailee, or depository?

I lay out of view all the evidence about the sufficiency of the safe, the office, and of the carelessness of the defendant in not keeping a watch in the office. Because this suit is against defendant as a common carrier, and he is liable unless there was an actual delivery to the consignee or his agents, or such a readiness or offer to deliver as will change the liability to that of a common bailee.

In this latter case, there is no liability in this action, because there is no count charging any such contract with defendant.

Plaintiff cannot sue upon one contract and recover upon another.

When we are charged with a common bailment and breach by gross negligence, we will then plead to and try it.

All that proof is, therefore, irrelevant to the issue made and tried here.

Defendant is liable here whether he kept the package carefully or carelessly, unless he has discharged that liability by a performance, or offer to perform, by delivery.

I, therefore, lay all that portion of the evidence out of view, and address myself to the question of the delivery, or acts tantamount.

I.

The offer to deliver the package to the officers of the Bank and to the Clerk of Mr. Flowers was sufficient to complete the contract of defendant a sa common carrier, and thereafter the package remained in its possession as a common warehouse-man or bailee, and its liability depended upon its want of care or its culpable negligence; but for which, even if it existed, no recovery can be had under the counts in this declaration.

As this presents the real point in controversy, I may examine some cases upon this point to illustrate the effect of the facts and circumstances in evidence as tending to show a delivery, or an offer to deliver, which fulfilled defendant's contract as carrier.

In Smith vs. Nashua and Lowell R. R., the defendant had carried hides safely to Nashua, of which plaintiff had notice, and an opportunity to take them away; he was present at the depot after the arrival of the hides.

The Court say: "It is clear that the plaintiff, being present at the depot, and having reasonable opportunity to take them away, the duty of defendants, as common carriers, was fully discharged, and their responsibility as such terminated."

But the carrier may not, therefore, leave the goods where they happen to be—"he still continues to owe a duty to the owner; still remains liable for the care and custody of the property until he has delivered it to the owner, or his agent, or has placed it in such a situation as may be fairly regarded as equivalent to a delivery to him."

See also Ostrander vs. Brown, 15 John. R. 35.
Fisk vs. Newton, 1 Denio R. 45.
1 Parson Cont. 659.
Story on Bailmts. 347.
Ang. on Carr 289.

But a neglect to perform this latter duty to the owner, as a bailee or depository, raised and imposed by implication of law, does not revive the original liability as a carrier, nor can he be held to answer for its breach, upon a count against him as a carrier.

In Thomas vs. Boston and Providence R. R. Co., 10 Metclf. R. 477–8–9, defendant had carried and deposited in their depot the goods of plaintiff, who lived in a neighboring town.

The Court held it to be such a delivery as discharged the liability of defendant as a carrier. The case of Garside vs. Proprietors of Trent.

and Mersey Navigation, 4 Term R. 581, is cited and very fully approved on this point.

In the latter case, Mr. Justice Buller remarked, that "the keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for, when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly; *and it was only because there was no person ready at Manchester to receive these goods, that the defendants were obliged to keep them.*"

"And so in the case at bar," (remark the Court in the case in Metcalf,) "the *plaintiff, who lived in a neighboring town, was not ready to receive all his goods, and they were left for his convenience, and not for any benefit to the defendants.*

The absence of the owner or consignee at the place of delivery, does not prevent such a delivery, by deposite of the package or goods, as will change the degree and character of liability from that of common carrier to that of bailee, by fulfilment of the former.

See also
Hyde vs. Proprietors of Trent. & Mersey Navigation, 5 Term. R. 389.
Matter of Webb, 8 Taunt. R. 443.
Gibson vs. Culver, 17 Wend. R. 305.
2 Kent Com. 600.
Story on Bailm., Secs. 446—450.

The case of Young et al. vs. Smith, 3 Dana R. 91, is a very strong and pointed case on this point.

Defendant had shipped certain boxes of silver on board a steamer for N. Orleans. The owner was a passenger on the boat. The boat arrived about the close of banking hours, and it was raining at the time. The owner for these reasons requested that the boxes remain over night on the boat. They were placed accordingly in the clerk's room, the clerk sleeping that night in the cabin; one box was stolen, by entering the window.

The Court held that an offer or readiness to deliver, though no tender or actual offer to deliver be made, will discharge the carrier's liability; and that this readiness, where the owner or consignee has a fair chance to receive the package, is not confined to banking hours, but may operate as a discharge, if shown to exist, or an offer to have been made during the usual hours of business.

No actual delivery, or offer to deliver, is required. An ability and a readiness to deliver will effect the fulfilment of the carrier's contract, and discharge his liability, where the owner or consignee is absent, and cannot be notified, or where he is notified, and has an opportunity to take away the goods, and declines or neglects to do so, without regard to the reasons or motives that may have induced him to decline the receipt of the goods.

The case of Storr vs. Crowley, McClelland & Younge Exch. Rep. 129, was decided upon the same, though the Court held that from the particular facts and conduct of the carrier, the liability had not ended, because the carrier had refused to deliver until payment of the freight.

This doctrine is repeated and amplified in its application in the case of the Norway Plains Company vs. Boston and Maine R. R., 1 Gray R. p. 264.

The goods were to be safely carried to Boston and delivered to ——— or order at the depot at Boston.

They were deposited in the warehouse of the railroad.

The cartman was at the depot after the arrival of the cars, and waited some time, and went away because the turn to haul up that car in which the plaintiff's goods were, to the position where they were unloaded and accessible to the cartmen, had not come. After he left, the car was brought up to a position that would have been accessible, and at which he had at times taken goods, though not the usual one for unloading; nor was it inside the depot. This was in time for the cartman to have taken the goods to the consignee's store, before the time of closing the store.

One package arrived Saturday and was delivered into the depot from the cars, and ready for delivery to consignee as early as the following Monday.

No notice was given to consignee; but the fact of the arrival of the package was actually known to a truckman, who was their authorized agent to receive and remove the goods.

Ch. J. Shaw, after noticing what is a reasonable delivery from the cars into the depot, goes on to show what would be a delivery as carriers in the absence of the consignee, and where he cannot be notified, or fails to attend after he has been notified:

He says, "in analogy to the old rule, that delivery is necessary, it may be said that *delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delive-*

ry which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence."

See also

Van Santvoord vs. St. John, 6 Hill. 157.
McHenry vs. Phila., Wilmington, & Balt. R. R., 4 Harringt. R. 448.

This principle is not new. Where the consignee of goods sent by a common carrier to London had no warehouse of his own, but was accustomed to leave the goods in the wagon office or warehouse of the common carrier, it was held that the transit was at an end, when the goods were *received* and *placed* in the warehouse.

Rowe vs. Pickford, 8 Taunt., 83.
Also *In re.* vs. Webb, 8 " 443.

The Court in the case in 1 Gray 275–6, were strongly inclined to hold that a deposite of the goods out of the cars, upon the platforms in the Company's depot, would be a good delivery, without any notice to consignee, and it matters not whether he has had an opportunity or not to have taken the goods away.

That high degree of responsibility is not to be protracted by circumstances beyond the carrier's control. When the goods are safely deposited in the care of the carrier, at the end of the route, he has done all he can do, and ought then to be regarded as a bailee. This is a reasonable rule. The policy of the law does not demand that high degree of liability for the protection of the consignee, to continue longer than the transit of the goods, and their delivery or deposite in some safe place or custody. The common liability of a bailee or warehouse-man is amply sufficient for the owner's protection, after such deposite.

This view of the subject seems to have governed the Court in the case of Goold et al. vs. Chapin et al., 10 Barb. S. C. R. 612, where it was held that the transfer of the goods from the boat to a "*float*" was not a delivery—the float being in no sense a "*warehouse*"—but that it would have been a good delivery, had the goods been placed in a *warehouse*, and the carrier's liability would thereby have been discharged.

The arrival of the goods at the place of their destination, and a *readiness* to deliver will discharge the carrier.

The same principle governed the cases of Farmers' & Mechanics' Bank vs. Champlain Transportation Co., 16 Vermt. 52, where a boat delivered a package of money to the wharfinger, and the Court held the carrier discharged as carrier, without notice to the consignee.

See same vs. same, 18 Vermt. R. 131.
Scott et al. vs. Petit, 3 Bos. & Pull. R. 469.

The act of the agent of the consignee will bind the consignee in reference to what he may do, and what he may omit to do in the delivery and receipt of the goods.

This is fully laid down and sustained by Lewis vs. The Western Railroad Co., 11 Metclf. R. 509.

The application of the principle will discharge defendant in this case. Had Baldwin himself been in the Express office, and Douglass had called to him, telling him that he had this package for him, and asking him if he would take it, as he did to the clerk of Flowers, and to the messenger and cashier of the Dane County Bank, both of whom had been authorized to receive packages, there certainly could not be a moment's doubt as to the sufficiency of the delivery to discharge the defendant.

Plaintiff must abide the conduct of his own appointed agents.

Mr. Chitty, in his treatise on Common Carriers 155, lays down the general rule that a tender of the goods at the house of the consignee will discharge the carrier. Here was a tender of a light, portable package to the porter and cashier, and in the same building with the Bank.

A personal delivery to the consignee or his agent, or an offer to deliver, will discharge the carrier, though it may not be done at the appointed place.

Russell *et al.* vs. Livingston *et al.*, 19 Barb. S. C. R. 346.

II.

The declaration charges the defendant as a common carrier only.

If the liability of defendant as a common carrier has ended by a fulfilment of his contract as such, although it may remain liable as bailee, yet the plaintiff cannot recover under this declaration.