

No. 13391

Supreme Court of Illinois

Matteson

vs.

Noyes

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 166.

Matteson
vs

Morgan

1861

13391

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the fourth day of June in the year of our Lord One Thousand Eight Hundred and Sixty and of the Independence of the United States of America the eighty fifth

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Vand A. Higgins }
Grant Woodrick } Judges.

Calvin Haran Prosecuting Attorney.

John Gray Sheriff of Cook County.

Attest, Walter Kimball Clerk.

Do it remembered that heretofore to wit
on the twenty sixth day of June in the
year aforesaid said day being one of
the days of the June term of said Court
the following among other proceedings
was had and entered of record to wit

John Hayes

of

Assumpsit

Joel A. Matteson

This day again comes said Plaintiff by
Arington and Peabody his Attorneys and the
said defendant by Beckwith and Merrick
his attorneys also comes and defendants -
motion heretofore submitted herein for a
new trial in this cause being heard and argued
by Annul it is considered by the Court that -
defendants motion for a new trial be and is
hereby overruled Wherefore Plaintiff might now
to have judgment entered in the verdict of
the jury heretofore rendered herein Therefore it
is considered that said Plaintiff do have ^{and}
recover of said defendant his damages of
One Thousand four hundred and fifty three
dollars in form aforesaid by the jury here-
found and ascertained and also his costs and
charges in this behalf expended and have
execution therefor

And thereupon, ^{defendant} prays an appeal herein to
the Supreme Court of this State which
is allowed to him on filing his appeal
bond in the sum of seventeen hundred
dollars to be filed and approved by a
Judge of this Court with bill of exceptions by
1st day of August next

And afterwards to wit on the sixth day of August in the year aforesaid said day being one of the days of the August Term the following among other proceedings was had and entered of record to wit

John Hayes }
24 } Assumpsit
Jed A. Matteson }

This day again comes the Plaintiff by Amington & Peabody his Attorneys and the Defendant by Beckwith & Merick his Attorneys also come and upon agreement of the parties as shown by a stipulation on the files it is ordered that ~~that~~ the time for filing the bill of exceptions in this cause be and is hereby extended until Friday August the 10th instant

And afterwards to wit on the eighteenth day of July in the year aforesaid Jed A. Matteson filed in the Office of the Clerk of this Court his appeal bond which are in the words and figures following to wit

Know all men by these presents that we
Joel A Matteson R E Woodell William Smith
J T M Dougall W Wood are held and
firmly bound unto John Hayes in the penal
sum of Seventeen hundred Dollars (\$1700⁰⁰/₁₀₀)
lawful money of the United States, to the pay-
ment of which, well and truly to be made, to
the said John Hayes his heirs executors admin-
istrators or assigns, we bind ourselves, our heirs,
executors, and administrators jointly and
severally. firmly by these presents

Sealed with our seals. Dated this
third day of July A D 1860
Whereas in a certain ^{suit} lately depending in the
Superior Court of Chicago County of Cook
& State of Illinois wherein the above named
John Hayes was plaintiff and the above-
named Joel A Matteson was Defendant
Judgment was rendered on the Twenty
sixth day of June A D 1860 in favor of
said plaintiff and against said defen-
dant for the sum of one Thousand
four hundred and fifty three dollars
damages besides costs of suit from which
Judgment the above named Joel A
Matteson has prayed for and obtained an
appeal to the Supreme Court of the State of
Illinois on filing this bond

Now therefore. Condition of this obligation
is such that if the above Bondsmen Joel A
Matteson shall prosecute his said appeal to
effect and without delay, and in case said
judgment shall be affirmed by the Supreme
Court, shall pay all judgment, costs
interest and damages that shall be awarded
against him. Then this obligation to be
void, otherwise to remain in full
force and effect

Appointed

Grant Grindick

Judge &c

J. H. Matteson (Seal)

A. E. Goodell (Seal)

N. McSmith (Seal)

J. J. McDougall (Seal)

W. Wood (Seal)

State of Illinois }
Cook County } p

I Walter Kimball Clerk of the
Superior Court of Chicago within and for said County
do hereby certify that the foregoing is a full, true, and
complete transcript of the orders granting appeal and
order extending time to file bill of exceptions together with
a copy of the appeal bond on file in my office in
a certain case wherein John Hayes is plaintiff
and Joel A. Matteson is defendant



In testimony whereof I hereby
subscribe my name and affix
the seal of said Court at
Chicago this 20th day of
April A.D. 1859

Walter Kimball Clerk

In the Supreme Court of Illinois--Third Grand Division.

JOEL A. MATTESON
vs.
JOHN NOYES.

} Appeal from the Superior Court of Chicago, Cook County.

ABSTRACT.

- Pp. 4, 5, This was an action of assumpsit. The declaration contains one special count, and is
6, 7, 8. upon a contract alleged between plaintiff and defendant for the sale by plaintiff to de-
fendant of 15,000 railroad ties, to be *eight* feet each in length, and to average eight inches
P. 4. width each on the face, and none of them to be less than six inches in width upon the face;
to be delivered by plaintiff in a reasonable time at Hough's side track in Chicago; to be re-
ceived ~~ordered~~ there by the defendant, and paid for by him at said Chicago as fast as said ties were
received and inspected, at the rate of 40 cents for each and every tie.
Arrangements ~~Agreement~~ that plaintiff began to fulfill, and delivered part of the ties according to
5, 6, 7. contract, to wit, 2350 ties, amounting in money, at the contract price, to \$940 00—which
it is alleged the defendant refused to pay; that the defendant has refused to receive any
more of the ties, and prevented and discharged the plaintiff from delivering the same;
that plaintiff was ready and willing to execute and perform—damages, the profits which
he might have realised—that he had provided fifteen thousand ties in accordance with the
contract, and ready to be delivered as by the contract required; that he was forced to sell the
ties at 30 cents and to pay \$200 for storage. Breach, the defendant's refusal to pay, &c.
P. 7-8. Plea, general issue (p. 8). On the first trial the jury failed to agree. The case was tried
11. again at April term, A. D., 1860: Verdict for plaintiff (p. 13) for \$1453, and defendant
11, 13. moves for a new trial. Motion overruled and judgment. Defendant appeals and files bond.
P. 14. 14, 15, 16.
19. The bill of exceptions is as follows, and presents all the questions arising in the case.

JOHN NOYES

vs.

JOEL A. MATTESON.

} Superior Court of Chicago.

- Be it remembered, that upon the trial of the above entitled cause, the plaintiff, to main-
tain the issue on his part, called as witness, A. H. Moore and James C. Smith, and proved
by them the loss of the letter or note referred to in the deposition of John Noyes, Jr.
11. The plaintiff then read in evidence the deposition of John Noyes, Jr., (with the ex-
ception of the 7th and 8th interrogatories and answers thereto) which deposition is in the
words and figures following, to-wit:
Answer to the Second Interrogatory.—I am acquainted with both the parties to this
suit; the plaintiff is my father.
Third Interrogatory.—Are you acquainted with the hand-writing of the defendant?
Answer.—I have seen it frequently.
20. *Fourth Int.*—Upon what occasion and to what instruments have you seen his signa-
ture, and how often?
Ans.—I have seen his signature to requisitions while he was Governor, and I pro-
cured one requisition from him myself. I have also seen his signature to railroad passes.
Fifth Int.—State whether in the spring of 1858, and ^{about} at what time in the spring, you
saw a letter or note signed by the defendant, addressed to A. H. Moore, in relation to
railroad ties; and if yea, in whose hands did you see it, and was it a sealed or open note?
Answer.—Sometime in the latter part of April, 1858, I saw a letter from Governor
Matteson, directed to A. H. Moore, in the possession of my father. It was not sealed,
and the letter was in relation to railroad ties.
Sixth Int.—State the contents of that letter as near as you can remember?
Answer.—The contents were: "I have bought 15,000 of Mr. Noyes," (stating the
description of the ties and when they were to be delivered,) ; I think the letter stated also
that the ties were to be 8 feet or 8½ feet in length, I forget which, and I think average 8
inch face; they were to be delivered at Hough's side track in Chicago; I think the price was
stated, but I would not swear positive as to that; my impression is that it was in; I think
the price was forty cents each. The letter was signed, Joel A. Matteson.
22, 21 *Ninth Int.*—Have you ^{any} personal knowledge in respect to the delivery by your father
at Hough's side track, of the ties for Governor Matteson? If so, state what you know
about it?
Answer.—I know ^{that} my father delivered a large quantity of ties there; I don't know
how many.

(The remainder of this deposition is omitted, as being of no importance upon the questions made. It will be found on pages 21, 22, 23, 24, 25 and 26, commencing with his cross examination, which was for the purpose of testing his credibility and memory. It is not deemed material, because the contents of the letter to which he testified is supposed to be more fully and ~~correctly~~ ^{correctly} stated by A. H. Moore, to whom it was addressed and who was called by plaintiff.)

26. The plaintiff then called

Joseph E. Young, who testified that he was in the employment of the Pittsburg and Fort Wayne railroad in the summer of 1858; that in July or August of that year the Pittsburg and Fort Wayne railroad bought of plaintiff a lot of about 4,000 railroad ties, which were at Hough's side track in Chicago; that the railroad paid plaintiff twenty cents apiece for some of the ties, and thirty cents apiece for others; that all the ties there averaged 8 inches on the face; six inches thick and eight feet long; those that we purchased did, so far as I examined; that he did not inspect them; that Mr. Kattee inspected them; that he did not think all of the ties there were merchantable; that less than 300 were bad and inferior; that the market price was 30 cents apiece; that ties eight feet long, eight inches face, and none less than six inches face, were worth 30 cents; that he did not know the market price of ties that were less than six inches on the face.

The testimony of Mr. *A. Van Brunt*, given in a former trial of this cause, was then read to the jury by consent of parties, and was as follows:

27. I inspected some ties on Hough's side track; can't recollect when; at one time 2,700 and at another 1,400, I think; I am not certain; at another time some, I can't say how many; Mr. Noyes, I think, had some 2,700 that I did not receipt for; those that I inspected

27. I receipted for; those I inspected were eight feet long, and a ~~portion~~ ^{portion} were over eight inches on face; if any were under six inches they were thrown out; I inspected them by the order of L. Darling; never had any conference with Matteson on the subject of the ties; I gave receipts for the ties I inspected under Darling's direction; some of the ties were under eight inches; none under six inches; can't say how many were under eight inches face; large proportion over eight inches; I inspected for Noyes under Darling's order, some 4,000 or 5,000; there were some 2,000 or 3,000 I did not inspect; do not think I told Noyes I would not inspect more; Darling was general agent of the St. Louis, Alton and Chicago railroad; I stopped to inspect on account of a dispatch I received.

27. The plaintiff then called *Hough*, who testified as follows:

That Noyes delivered some 4000 or 5000 railroad ties at his side track in the spring and summer of 1858, and that they were being received by Mr. J. T. D. Elliott; that he did not know how many were inspected; that the Pittsburg and Fort Wayne Railroad took the balance of the ties; that there were some 3000 ties on dock when Elliott received notice not to receive ties; that he did not know of his own (28) knowledge; that Elliott told him he had received notice not to receive any more; that it was in July.

28. The plaintiff then called *Loren Darling*, who testified as follows:

Was general agent of the St. Louis, Alton and Chicago Road in 1858; received instructions from Matteson and from A. H. Moore (who was general superintendent of the railroad) about Noyes's ties; Matteson was the president of the railroad; we received some 2300 of the ties; my instructions were to pay Noyes 80 per cent. on the price of the ties on delivery; had orders from A. H. Moore not to receive any more of the ties; don't remember of receiving the order from Matteson; should think that 2000 or 3000 ties were on the wharf when order came not to receive them; I was not in the habit of telegraphing to Matteson; often telegraphed to Moore; can't say I ever telegraphed Matteson for money to pay for the ties; I received orders from Matteson to pay for them; think Noyes came to me to telegraph down the road (but to whom I don't remember) about his account; I showed him the despatches I received, or told him the substance of them; think Noyes came to me several times and said he was ready to deliver the ties and asked me to receive them; this was after I had given him notice under my instructions that we should receive no more; I received a telegraphic despatch from Matteson, in relation to the ties, about May 17th, 1858; the original despatch I tore up; I can't state the contents of it from recollection.

29. Plaintiff's counsel here offered to place in the hands of the witness a paper, and asked the witness "if he received a despatch like this"—to which the defendant objected; the objection was overruled by the court; to the overruling of which the defendant excepted.

The paper was then handed to witness and he stated he received a despatch substantially as this. The plaintiff then offered to read the paper to the jury—to which the defendant objected; the objection was overruled by the court, and the defendant excepted.

The paper was then read to the jury, as follows :

"BLOOMINGTON, May 17, '58.
L. DARLING : Pay Noyes 80 per cent. for the first 900 ties at 40 cents per tie. Have all ties inspected, and measure the face ; receive none unless six inches on the face ; the whole are to average eight inches at smallest place in tie on the face. Much will depend on the man you send whether the ties are up to the contract or not.

J. A. MATTESON."

Darling further testified that Matteson in that year was the president of St. Louis, Alton and Chicago Railroad Company ; that he had no private business with Matteson, except that ^{he} purchased for Matteson some materials for his residence at Springfield, which he paid for out of the company's money, but for which he took special vouchers and sent them to Matteson ; had no money of Matteson's in his hands ; the money I paid Noyes for the ties, under instructions in despatch, was the company's (31) money ; paid the money at the office of the company in Dearborn street, in the city of Chicago ; Van Brunt was regular employee of the railroad company ; was paid out of the company's money ; the ties were received by Van Brunt for the company ; they were sent to Joliet and were there distributed where they were needed over the road ; had instructions from Moore ; told Noyes so, and that Moore was regulating his (Darling's) action in the matter ; Matteson was the principal manager of the railroad company ; never remitted money of the road to Matteson.

30. The plaintiff then called A. H. Moore, who testified :

That he received a note from Matteson, by hand of Noyes, in relation to contract with Noyes for ties ; that it was directed to A. H. Moore, Bloomington, and signed J. A. Matteson ; that Noyes's name was not signed to letter ; that the substance of the note was that he had bought a lot of ties (naming the number) for the road ; that they were to be of a certain size (naming it), and that they were to be delivered at Hough's side track in Chicago ; that I was to have them inspected and use them on the road where needed, and was to pay 80 per cent. on the price of them on delivery ; that he (witness) of his own account instructed Darling not to receive any more of the ties without further orders ; that he afterwards informed Matteson of what he had done ; that the understanding between Matteson and witness was, that witness was not to receive any more without notifying him ; that he told Matteson in the same conversation that he had (32) received a lot of ties that were rough and inferior, and not as good as they wanted, or as witness expected ; that Matteson assented to his action and approved of it ; that he was acting in the matter as superintendent of the road ; that he put the ties in the road.

31. The plaintiff then called N. H. Moore, who testified as follows :

Know the plaintiff and defendant ; had a conversation with Matteson about the ties ; Matteson said the ties he bought were different from what he was receiving, and requested me to write to Noyes ; I wrote a letter accordingly ; wrote as agent of the road, from Matteson as president ; this is the letter :

"JOLIET, May 13, 1858.

JOHN NOYES, Esq. :

Dear Sir—I saw Gov. Matteson to-day, and he told me the ties he was to have of you were to average 8 in. face. He was on his way to Springfield. The ties were distributed on the road. When he arrived at Dwight he telegraphed me not to receive any more ties until I heard from him. I presume he thought the ties were not according to contract.

Respectfully yours,

N. H. MOORE."

I think at this time about 1000 ties had been received, which I inspected ; I inspected them as assistant superintendent of the road.

32. The plaintiff then called J. T. D. Elliott, who testified :

That he loaded the ties at Hough's side track, in the spring of 1858, in care of St. Louis, Alton and Chicago Railroad Company ; that he told Matteson there were a lot of ties there in their way ; that he first told Darling of them, then Moore, then Matteson ; that Matteson told him not to receive any more ties on his account ; that he did not tell Noyes what Matteson said ; that he went to Matteson for instructions, because he was the president ; that he knew he was president ; knew he acted as president ; that he did not know the number of ties that were left on the dock when Matteson told him not to receive them ; that those that were left were afterwards taken by another road ; that Mr. Moore, an agent of the road, employed him, and that he supposed he was an agent of the road.

Page 32. The defendant, to maintain the issue on his part, offered the act of assembly incorporating the St. Louis, Alton and Chicago Railroad Company, and then proved, by A. H. Moore and James C. Smith, that Matteson was ^{the} president of the St. Louis, Alton and Chicago Railroad Company.

The defendant then offered a receipt of Noyes, which is in the words and figures following, to wit:

		"The St. Louis, Alton and Chicago Railroad Company	
		To John Noyes,	Dr.
33.	1858.		Dolls. Cts.
		For 2350 Railroad Ties, as per contract of J. A. Matteson, at 40c,	940 00
		Less 20 per cent. retained until completion of contract,	188 00
			\$752 00

"Received of St. Louis, Alton and Chicago Railroad Company, seven hundred fifty-two dollars, in full for the above account. Dated Chicago, June 5th, 1858.

JOHN NOYES."

33. The defendant then called Hendrickson, who testified, that he was in Governor Matteson's office, in Springfield, where plaintiff and Matteson were talking about the ties; that he thought the purchase of the ties had been made before he came into the office; that Matteson said he had bought for the road so many ties; that he wanted good ties, and was to keep back part of pay; that Matteson said he would give Noyes letter to the superintendent; that Matteson after ^{he had} ~~having~~ written the letter read it to Noyes; that it was addressed to A. H. Moore, Bloomington, Ill.; Matteson said the road was to pay for the ties on delivery; Matteson said he was buying the ties for the road.

This being all the evidence in the case, the plaintiff asked the court to instruct the jury as follows:

34. Instructions for the Plaintiff:

1. "If the jury find from the evidence that the defendant in fact made the contract set out in the declaration, then the rule of law is, that he is personally liable for the fulfillment of the contract, if the plaintiff was ready and willing to perform on his part, &c., unless he, at the time of making it, clearly disclosed to the plaintiff, or the plaintiff knew that he was acting, in making said contract, as an agent, and not in his own behalf."

2. "If the evidence leaves it doubtful in the minds of the jury, whether the defendant, in making the contract, made it for himself or as agent for the railroad, still the defendant is personally liable on the contract; *unless he has proven to the satisfaction of the jury that he had authority to bind the railroad by the contract, or unless he has proven that the railroad is legally liable for the fulfillment of the contract.*"

3. "If the jury find from the evidence that the defendant made the contract as alleged in the declaration, and that he afterwards prevented the plaintiff from fulfilling the contract, then the jury will give the plaintiff, as damages, a sum equal to the difference between the price agreed to be paid for the ties, and the market price of the ties at the time of such prevention; and the jury will also give to the plaintiff the difference between the sum actually paid upon any ties that the defendant did receive, and the ~~same~~ ^{sum} that was to be paid for said ties by the terms of the contract."

35. To the giving of which instructions the defendant objected. The court overruled the objection, and the defendant excepted.

The defendant then asked the court to give to the jury the following instructions:

"That if the jury find from the evidence that Noyes contracted with Matteson as agent of the Railroad Company, and Matteson was agent for the road to make such contract to deliver the ties to the Railroad Company for his benefit and use, and agreed and understood he was to be paid out of its funds and by its officers, then the plaintiff is not entitled to recover.

"That the jury are to take all the circumstances together, and to determine from those circumstances, and from the conduct of Noyes in the matter; his delivering of the ties; the funds out of which he was paid, &c.; whether or not he intended to contract with said railroad as principal, and for its benefit; and if they find he did so intend to contract, and did so actually contract, then plaintiff is not entitled to recover in this case."

Which were given.

35. The Court also instructed the jury as follows:

“If the jury believe from the evidence that Matteson was president of the railroad company, and authorized to make contracts for material to be used on such road, and the ties were for the use of said road, and were to be paid for by said road, and this was known to plaintiff at the time he made such contract, then the defendant is not (~~87~~) liable therefor.”

36. “But if the jury believe from the evidence that the plaintiff did not know at the time of the contract that Matteson was acting on the behalf and agent of the company; or that plaintiff was authorized by all the circumstances to suppose, and did suppose he was contracting on the personal responsibility of Matteson; or if Matteson was not authorized by the company to make such contract, then the law is for the plaintiff.”

The errors assigned are:

I. The court erred in permitting the paper purporting to be a telegram from defendant Matteson to be shown to witness Darling, and in permitting said paper to be read in evidence to the jury.

P. 38. II. In giving the instructions for plaintiff, marked Nos. 1 and 2, and in giving the instructions on its motion, which follow in record after the instructions given for defendant, but are not numbered.

III. The court erred in overruling the motion of the defendant for a new trial, and in not granting to said defendant a new trial.

STEWART & EDWARDS,
For Appellant.

166-144
Abstract
of
John Stoyes

Filed May 3 1868
L. Leland
clerk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

JOEL A. MATTESON, Appellant, }

vs.

JOHN NOYES, Appellee. }

ARGUMENT FOR APPELLEE.

I. It is alleged that the contract laid in declaration is not supported by the proof.

The declaration alleges—1st, that ties were to be delivered “within a reasonable time;” 2d, that they “were to average 8 inches in width each on the face;” and, 3d, that defendant would pay therefor “as fast as said ties were received and inspected, at the rate of 40 cents for each and every tie.”

Evidence of the contract is furnished—

- a. In John Noyes Jr.’s deposition;
- b. In Matteson’s telegraph to Darling;
- c. In N. H. Moore’s testimony, including Moore’s letter to Noyes, written by request of Matteson.

1. Young Noyes testified that Matteson’s letter stated, “I have bought 15,000 of Mr. Noyes (stating the description of the ties, and *where* they were to be delivered,)” not *when*; and then young Noyes proceeded to state what the description was, and *where* they were to be delivered, to wit, “at Hough’s side track in Chicago.” The abstract prepared by appellants misquotes the record in this respect. Moreover, young Noyes says, in answer to 15th cross-interrogatory, “They were to be delivered at Hough’s side track. I don’t know whether it said anything about the *time* or not.” Then there is no variance here between the allegation and the proof.

2. Again. Declaration alleges that the ties “were to average 8 inches in width each on the face.”

Now, young Noyes swears that Matteson’s letter stated that the ties were to “average eight inch face.” Moore’s letter to Noyes, written under Matteson’s eye, says, they “were to average 8 inch face”; while only Matteson’s telegraph to Darling says they were to “average 8 inches at *smallest place* on the face.”

The preponderance of the testimony, therefore, sustains the allegation of the declaration as to this point.

So as to length of ties:

The declaration alleges they were to be “eight feet each in length.”

Young Noyes swears, “I think the letter stated, also, that the ties were to be 8 or 8½ feet in length, I forget which.”

Here, certainly, is no material variation between allegation and proof of contract.

3. Declaration alleges that contract was to pay “as fast as said ties were received and inspected, at the rate of 40 cents for each and every tie.”

Appellant’s witness, Hendrickson, swore that “Matteson said the road was to *pay for the ties on delivery.*” (Record, p. 33.)

This fully sustains the allegation. Darling’s statement, that “my instructions were, to pay Noyes 80 per cent on the price of the ties on delivery,” has no tendency to prove what the original contract was, but only what were his subsequent directions from Matteson, which are quite immaterial to the point.

II. Appellant objects, that the damages, \$1453, were too large, for the reason alleged, that appellee did not show that he had the full amount of 15,000 ties on hand which he was ready and offered to deliver. No complaint is made of the rule of damages adopted, nor of the correctness of the computation, supposing the appellee entitled to recover the balance of price for those received and damages for the 12,650 ties that appellant refused to receive.

No question is made by appellant upon the completeness of the proof that Matteson, after receiving the 2,350 ties, repeatedly notified Noyes that he would receive no more ties on the contract.

The appellant's objection on this point, as well as his objection to the instructions to the jury, given for appellee, assumes that, notwithstanding the proof of refusal on the part of appellant to perform his contract, and his repudiation of the contract, and preventing and forbidding the appellee to perform it, still the appellee must show that he had the full number of ties on hand required to complete the contract, of the proper kind and description, and that he was ready and offered to deliver them at the appointed place.

Now this is not the law.

The law is this,—and it is decisive of the point in issue in favor of the appellee:

That when a party alleges his readiness and willingness to perform a contract for the delivery of goods or chattels, and the purchaser, before the goods are all delivered, notifies the other party not to deliver any more, as he will not take them, this is such a *prevention* as will dispense with a tender of the goods, and the seller may maintain his action for damages.

Cort v. Ambergate Railway, 17 Q. B. 127, cited in Addison on Contracts, pp. 1121 & 1122 (top).

This rule, settled in Cort's case, is, *beyond question*, the law, and I desire to refer the court to the case as given in full in 17th Queen's Bench Reports, which I do not find in the library at Ottawa.

But it is clearly in proof, that appellee, after being notified that appellant would receive no more ties, several times offered to deliver the ties, and requested that they be received; but his offer was refused. This appears in Darling's testimony. (Record, p. 28.)

So that appellee performed and was ready to perform his contract, but for the prevention.

III. But appellant claims that the contract was made by Matteson, not for himself, but for the St Louis, Alton and Chicago Railroad Company.

An examination of the evidence will show an accumulation of proof showing that Matteson contracted on his own behalf, and that the attempt to prove that he contracted as agent, was a signal failure.

The chief evidence of the contract is, Matteson's letter to A. H. Moore, his telegram to Darling, and N. H. Moore's letter to appellee. In no one of these documents does Matteson describe himself as "agent," or "president," or allude to any official action or capacity. He says to Moore (Record, p. 20), "I have bought 15,000 of Mr. Noyes," and signs his letter "Joel A. Matteson." His telegram to Darling (Record, p. 29) is signed "J. A. Matteson." He told N. H. Moore (Record, p. 21) that "the ties *he* (Matteson) bought were different from what *he* was receiving," and directed Moore to write to Noyes that "the ties he (Matteson) was to have of you (Noyes) were to average 8 inch face."

That Matteson intended to use the ties on his railroad is probable. But that he contracted on behalf of the Railroad, or that appellee gave credit to the Railroad, and not to Matteson, nowhere appears. Several witnesses swore that Matteson was President of the Railroad, that Darling was an agent of the Road, that A. H. Moore, Van Brunt and others were employed in various capacities on the Railroad.

Now, although it is boldly asserted, in the argument of counsel for appellant, that Noyes knew that Matteson was President of the Railroad, that Noyes "must have known" that Moore was acting as Superintendent of the Road, "that the agents and employees of the Company, to the knowledge and with the assistance of the plaintiff, inspect and receive the ties," yet these assertions are sustained by no particle of proof. It would be of no consequence if Noyes had known all these facts,—of no consequence, even, if, at the time of making the contract, Noyes knew that Matteson was President of a railroad—of which there is no proof.

Admitting, however, for the moment, that Matteson was President of the road at the time of making the contract, and that Noyes knew it, still Matteson is personally liable, on the following grounds:

In verbal contracts, if the agent does not disclose his agency and name his principal, he binds himself.

Amer. Lead. Cases, 1st ed., p. 456.

The agent is bound,

I. When the name of the principal is not disclosed;

II. When the agent had no authority to bind the principal.

I. "In either case, (of a written or verbal contract,) unless the agent disclose his principal in the contract *so as to give an immediate right of action against him*, * * he is himself liable."

Ibid.

"If a contract be made by one on behalf of another, and he be sued upon it, he is bound to show that he had authority to bind his principal, and that he has given a right of action against him, or else he will be liable."

Ibid. 458.

And this case is one of those where no subsequent ratification by the principal would protect the agent from liability.

Story's Agency, § 245, § 246.

The cases in 3 Hill Rep. and 12 N. H. Rep., cited by appellant, are not in point.

But here is not only no authority shown in Matteson to bind the Railroad at time of making the contract, but no subsequent ratification by the Railroad is shown, nor any evidence of any kind tending to prove ratification by the Railroad.

To discharge himself, Matteson should have proved affirmatively, 1st, that at time of making the contract, he was President of the Road; 2d, that he acted for the Road in this business; 3d, that he so informed Noyes at the time; 4th, that he was duly authorized by the directors to purchase ties for the Road and bind them by the contract.

No one of these facts appears in the case, and the appellant is therefore personally liable on his contract, by every well settled rule of law.

Moreover, all the various facts bearing on the question of whether Matteson in truth acted on his own behalf, or for the Road, in making the contract, were laid before the jury at length.

The jury examined and gave its full weight to the printed form of receipt used by the Railroad Company in their business, and filled up and signed, as shown in the Record (p. 33); they had the witness, Hendrickson, before them, saw his manner of testifying, and gave such credit to his testimony as they thought it deserved; and after listening to and examining the whole evidence, they decided by their verdict, that Matteson was personally liable. There was abundant evidence to sustain their verdict, and this court will not disturb it on the ground that the testimony, as meagerly preserved in the Bill of Exceptions, does not leave the question of fact free from doubt in their minds.

IV. It is claimed that the telegram was improperly admitted in evidence.

The use of the telegraph has introduced some modifications into the rules determining the admissibility of evidence, and I think the court will sustain the view taken by the court below on two different trials of this case.

But even if the court hold that the dispatch was inadmissible, still this furnishes no ground to reverse the judgment; for the facts stated in the telegram are merely cumulative; they were each sufficiently proved by other testimony in various parts of the case, as will appear on examination of the whole evidence.

Graham and Wat. on New Trials, vol. 1, pp. 246, 247, 248.
9 Pick. 176.

The only fact stated in the telegram and not otherwise proved, is, that the ties were to "average 8 inches in smallest place on face." This was favorable to appellant, as tending to show a variance with the allegation in the declaration, and so could not have hurt the appellant's case.

V. I have already, in another place, discussed the point involved in the first instruction to the jury for the appellant.

In conclusion, I would remark, that the instructions given for the plaintiff fairly set forth the law of the case, and in no respect were calculated to mislead the jury. Take the instructions together, those for the defendant, those for the plaintiff, and the voluntary instructions, and it is not conceived how the appellant's rights could have been more fully set forth or guarded.

The evidence showed a fair contract by and credit to Matteson, and an equally unfair attempt by him to shift the liability and responsibility from his own shoulders to those of a bankrupt corporation.

The jury found the facts, after a long and impartial trial, and it is believed that this court will be satisfied that the law was properly given to them, properly applied by them, the facts properly found by them, and that the verdict and judgment will not, therefore, be disturbed.

F. B. PEABODY, for Appellee.

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Joseph A. Matteson

vs
John Noyes

Argument for Appellate
in in in in

Filed May 3rd 1861

L. Zealand

Clerk

United States of America
State of Illinois - Cook County } ss.

(1)

Pleas before the Honorable the Judges of the
 Superior Court of Chicago ~~within and~~ for the
 County of Cook and State of Illinois at a regular
 term of the Superior Court of Chicago begun and
 held at the Court House in the City of Chicago
 in the County and State aforesaid on the first
 Monday being the Fourth day of June in the
 year of our Lord one thousand eight hundred
 and sixty and of the Independence of the United
 States of America the eighth fifth.

Present. The Honorable John M. Wilson . . . Chief Justice
 of Superior Court of Chicago

Now W. Higgins and Grant Goodrich . . . Judges
 Carlos Haven Prosecuting Attorney
 John Gray Sheriff of Cook County

Attest

Walter Kissball - Clerk

Be it remembered that heretofore to wit on the Seventeenth day of November A. D. eighteen hundred and fifty eight came Arthur Hayes by his attorneys and filed in the Office of the Clerk of the Cook County Court of Common Pleas (now Superior Court of Chicago) his precept for summons against Arch. W. Matheson: Which precept is in the words and figures as follows to wit.

"State of Illinois } Cook County Court of Common Pleas
County of Cook } Nov. Second Special Term A. D. 1858,

John Hayes

vs

Arch. W. Matheson

Trespass on the case on promises

Damages \$3000.

The Clerk of said Court will issue a Summons in the above case directed to the Sheriff of Cook County in a plea of trespass on the case on promises returnable at the Nov. Sec. Special Term of said Court A. D. 1858 to the damage of the plaintiff of Three thousand dollars.

To H. Kimball Esq. Clerk, } Arrington P. Cabrey
Chicago, November 17, 1858 } Plaintiffs Attorneys"

And thereupon accordingly on the said seventeenth day of November in the year last aforesaid, there was issued out of and under the seal of said Court, Precept writ of Summons against said Matheson; Which Summons with the Sheriff's return thereon inclosed is in words and figures as follows to wit.

13/
" State of Illinois }
County of Cook } So.

The People of the State of Illinois to the
Sheriff of said County, Greeting.

We command you that you Summon Thos. A. Mather
if he shall be found in your County personally, to be and
appear before the Cook County Court of Common Pleas of
said County, on the first day of the next term thereof to be
held at the Court House in the City of Chicago, in said
County on the fifth Monday of November instant to answer
unto John Morse in a plea of trespass on the case or promises
to the damage of said Plaintiff as he says in the sum of—
Three thousand dollars.

13/
Now have you then and there this writ with an
endorsement thereon in what manner you shall have executed
the same.

Witness My hand Kimball Clerk of our said Court
and the Seal thereof at the City of Chicago in said
County this 17th day of Nov; A. D. 1858.

Witness My hand Kimball - Clerk."

(Endorsed) " Served by reading to the undersigned
defendant the 17th of November 1858.

John S. Nelson - Sheriff

By George Anderson Deputy."

And afterwards to wit on the twenty eighth day of
January, A. D. eighteen hundred and fifty nine the said
Plaintiff by his said Attorneys filed in the Office of the Clerk

of said Court, his Declaration in said suit; Which declaration is in words and figures as follows, to wit:

"State of Illinois } In the Cook County Court of
Cook County, } Common Pleas. Of the February term
A. D. 1859

John Noyes Plaintiff in said suit by Arrington & Peabody his attorneys Complain of Job. W. Matson the defendant, who is Summored &c of a piece of trespass on the case on promises.

(4) For that whereas heretofore to wit on the twenty third day of April A. D. 1858 at Chicago in said County in consideration that the said Plaintiff would at the special instance and request of the said defendant sell to the said Defendant Fifteen thousand Railroad ties, to be eight feet each in length and to average eight inches width each on the face and none of them to be less than five inches in width upon the face, & would deliver the same to said defendant within a reasonable time hereafter at Hough's side track in said Chicago, the said defendant undertook and then and there faithfully promised the said Plaintiff that he would receive said ties as aforesaid, and at the place aforesaid and would pay said Plaintiff at said Chicago as fast as said ties were received and inspected at the rate of 40 cents for each and every tie.

And the said Plaintiff in fact saith that conforming in the said promise & undertaking of said Defendant he the said Plaintiff, in pursuance & part performance of his said

(5)

promise and undertaking afterwards to wit on the day and year last aforesaid at said City of Chicago in said County of Cook did then and there begin to perform and fulfil the said agreement according to his said promise and undertaking and did then and there furnish and deliver to the said defendant at said Knapp's place back in said Chicago, a large number, to wit, Twenty three hundred and fifty Railroad ties, which said ties were eight feet each in length and averaged eight inches in width each upon the face and none of which were less than six inches in width upon the face. which said ties were then and there inspected & received by the said defendant - And the

(5)

said plaintiff in fact says that having delivered said Twenty three hundred & fifty Railroad ties to said defendant as aforesaid he the said plaintiff was then and there entitled to have and receive from said defendant in accordance with said agreement the said sum of Forty cents apiece for said ties amounting in the whole to the sum of Nine hundred & Forty dollars and the said plaintiff then and there demanded of said defendant said sum of Nine hundred & forty dollars in payment for said ties.

Yet the said defendant neglected and refused & still does neglect & refuse to pay to the said plaintiff the said sum of Nine hundred & forty dollars or any part thereof in payment of said ties.

And said plaintiff in fact further alleges that he was always from the time of the making of said agreement until such refusal and wrongful prevention & discharge by the defendant as hereinafter mentioned and thus hitherto ready and willing to execute and perform the said promise and

(6)
undertaking of the said plaintiff for the sale and delivery
of the said Fifteen thousand Railroad ties of the kind & in the
manner and at the place aforesaid & whereof the defendant
always during the time aforesaid had notice.

(6)
Nevertheless the said defendant afterwards to wit during the
time limited for the execution and performance of the said
promise and agreement by the said plaintiff, to wit on the day
and year last aforesaid at the County of Cook aforesaid,
wrongfully & injuriously & wholly refused & hath thence hitherto
wholly refused to accept or receive of or from the plaintiff or to
pay for the residue to wit Twelve thousand six hundred &
fifty Railroad ties so agreed to be furnished as aforesaid & so
agreed to be received & accepted and paid for by the defendant
as aforesaid, or any part thereof, according to the said agreement
promise & undertaking of said defendant as aforesaid, and the
said defendant did then and there & hath thence hitherto wholly
& wrongfully prevented & discharged the Plaintiff from the
furnishing of the said residue of the said Railroad ties & from
the further execution & performance of the said promise and
agreement of the said plaintiff, by him the said plaintiff
thereby he the said plaintiff has been wholly deprived of & has
wholly lost all the benefits profits & advantages which might
and would have arisen and accrued to him from the complete
execution & performance by him, the said Plaintiff of the said
promise & undertaking of the said plaintiff, which said profits
& benefits might and would have amounted in the whole to
a large sum of money, to wit, Five thousand dollars.

17/
And the said plaintiff after the making of said agreement
aforesaid, to wit on the day and year last aforesaid, in reliance
upon the performance & fulfillment of the said undertaking &
agreement by said defendant & for the purpose of fulfilling, & in
pursuance of said plaintiff, provided a large number of Railroad
ties to wit, fifteen thousand Railroad ties of eight feet each in
length & averaging eight inches in width each on the top &
two of them less than six inches in width each on the top
ready to be delivered to the Defendant at Hough's side track
in Chicago aforesaid in accordance with the terms of said
agreement and then and there offered to deliver them to the
said defendant to wit - at the place aforesaid.

17/
And the plaintiff was by reason of the Defendants said
breach of said agreement - as aforesaid forced and obliged to
sell & did sell the said fifteen thousand ties & fifteen
thousand Railroad ties of said fifteen thousand Railroad ties to
other parties than the said defendant at a large loss from
the price agreed to be paid therefore by the defendant as
aforesaid to wit - for the sum of thirty cents for each of
said Railroad ties, being a loss & damage to the plaintiff of
fifteen hundred & sixty two dollars, and by reason of said
breach of said agreement - as aforesaid, by said defendant the
plaintiff was obliged to pay a large sum of money to wit -
two hundred dollars for the storage of said Railroad ties
while they lay waiting at Hough's side track, to be received
by said defendant.

Yet the defendant, though requested, has not paid to
the plaintiff said several sums of money or either of them

(8)

and which is to the damage of said Plaintiff Three thousand
dollars & therefore the Plaintiff brings suit.

Strington & Peabody
Plaintiff's Atty's."

And hereafter to wit on the fourth day of February
A. D. eighteen hundred and fifty nine came the said
Defendant by his attorneys and filed in the Office of the
Clerk of said Court his Plea & Affidavit of Merits which
Plea & Affidavit, is in words and figures as follows to wit

'Book County, Court of Com: Pleas.
Of February Term 1859,

(8)

Isaac M. Arnold
and
John Noyes } Counselor

And the said defendant by Isaac M.
Arnold his attorney, comes and defends the wrong & injury
whereof he and saith that he did not undertake or promise
in manner and form as the said Plaintiff hath above thereof
complained against him, and of this he puts himself upon
the Country &c

Isaac M. Arnold
Def's Attorney."

" Isaac M. Arnold
and
John Noyes } Book Co. Ct of Com: Pleas

to
the said defendant Isaac M. Arnold

9
upon oath states that he has a good defense in the above
cause upon the merits of the same.

J. A. Matteson,

Subscribed and sworn to before me this 10th day of
Decr 1858

Witness my hand and Notarial Seal the day
and year above written.

(Seal.)

L. B. Adams

Notary Public

(9)

And afterwards to wit on the twenty first day
of September A. D. eighteen hundred and fifty nine (being
one of the days of the September Term of said Court A. D.
1859) the following proceedings were had in said cause
and entered of record in said Court, to wit,

" John Morse

vs

Assumpsit.

J. A. Matteson

This day comes said plaintiff by Arrington
P. Peabody his attorney and said defendant by Arnold Lay P.
Gregory his attorneys also comes and issues being joined herein
it is ordered that a Jury come whereupon comes the Jury of
good and lawful men to wit

Byron Cleveland	James Rich	J. Rock
Wm. Lumbard	G. B. Kelley	Philip Dean
W. B. Bigelow	Charles Beebe	S. P. Melner and
J. J. Kemp.	J. Seymour	Chs. Leib-

(18)

who being duly elected tried and sworn to but the issues joined
aforesaid after hearing part of the testimony adduced, and the
hour of adjournment having arrived upon agreement of the
parties it is ordered that Jury separate and meet Court on
the opening of the Court at 9 o'clock tomorrow morning.

And afterwards to wit on the twenty second day of
September (being the of the said September term of said
Court) A. D. Eighteen hundred & fifty nine the following
further proceedings were had in said case and entered of
record in said Court, to wit:

(19)

John Moses

(vs)

Geo. W. Matheson

Defendant

And now again come the parties to
this suit by their respective Attorneys as aforesaid and the
Jury empanelled herein on yesterday for the trial of this
cause also come, and after hearing all the evidence, &
arguments of Counsel and instructions of the Court retire to
consider of their Verdict, and afterwards Court being about
to adjourn it is ordered that when the Jury shall have
agreed upon a Verdict they shall reduce the same to writing
sign and seal the same and meet the Court tomorrow
morning.

And afterwards to wit on the twenty third day of September (being still of the said September Term of said Court) A. D. eighteen hundred and fifty nine the following further proceedings were had in said cause and entered of record in said Court, to wit.

" John Noyes
vs } Resumptio
Geo. A. Markson

(11) And now again comes the parties to this cause by their respective attorneys as aforesaid and the Jury empanelled for the trial of this cause, and who have retired to consider of their Verdict now also come into Court and say that the Jury cannot agree upon a Verdict herein Whereupon it is ordered that the Jury be discharged.

And afterwards to wit on the fifth day of April (being one of the days of the April term of said Court) A. D. eighteen hundred and sixty the following further proceedings were had in said cause and entered of record in said Court to wit,

" John Noyes
vs } Resumptio
Geo. A. Markson

to this day comes said plaintiff again by Arrington P. Peabody his attorneys and said defendant by

(12)

Beckwith & Merrick his attorneys also comes and issues being joined herein it is ordered that a Jury come. Whereupon comes the Jury of good and lawful men to wit-

G. D. Cook	Nicholas Berdell	August Eberhard
Irwin Porter	F. R. Wright	Oliver Stratton
W. L. Millard	Nicholas Berger	J. Murray and
Edwin Marsh	Garret Francis	Augustus Triggell

Who being duly elected tried and sworn to try the issues joined aforesaid, and the hour of adjournment having arrived it is ordered by the Court that the Jury separate and meet Court to morrow morning.

Now afterwards to wit on the sixth day of April (being still of the said April term of said Court) A. D. Eighteen hundred and sixty the following further proceedings were had in said cause and entered of record in said Court to wit-

" John Hayes

vs

Geo. W. Matheson

} Assumpsit

And now again comes the parties to this cause and the Jury empanelled herein on yesterday for the trial of this cause also come, and after hearing evidence arguments of counsel and instructions of the Court retire to consider of their Verdict and the hour of adjournment having arrived upon agreement it is ordered by the Court that when the Jury shall have agreed upon a Verdict they shall

reduce the same to writing sign and seal the same & afterwards separate and meet the Court to morrow morning.

And afterwards to wit on the seventh day of April (being yet of the said April term of said Court) A.D. Eighteen hundred and Sixty the following further proceedings were had in said cause and entered of record in said Court to wit.

' John Wines	}	Assumpsit
vs		
<u>Geo. W. Matheon</u>		

(13)

And now again come the parties to this suit and the Jury empanelled herein for the trial of this cause as on yesterday also come and submit their verdict and say that the Jury find verses for said plaintiff and assess his damages herein to the sum of One thousand four hundred and fifty three dollars.

And hereupon said defendant submits his Motion herein for a new trial in this cause.

And afterwards to wit on the twenty sixth day of June (being one of the days of the June term of said Court) A.D. Eighteen hundred and Sixty the following further proceedings were had in said cause and entered of record in said Court, to wit.

" John Morse

vs

Assumpsit.

Loco. B. Matteson

This day again comes said plaintiff by
 Carrington & Peabody his attorneys and the said defendant by
 Beckwith & Merrick his attorneys also comes and defendants
 Motion heretofore submitted herein for a new trial in this
 cause being heard and argued by Counsel it is considered by
 the Court that defendants Motion for a new trial be and is
 hereby overruled Therefore plaintiff ought now to have judgment
 entered on the Verdict of the Jury heretofore rendered herein.

(14/

Therefore it is considered that said plaintiff do have and
 recover of said defendant his damages of One thousand four
\$1153.00 hundred and fifty three dollars in sum aforesaid by the Jury
 here found and assessed, and also his costs and charges in
 this behalf expended and have execution therefor.

And thereupon defendant prays an Appeal herein to
 the Supreme Court of this Court which is allowed to him
 on filing his Appeal Bond in the sum of five hundred
 dollars, to be filed and approved by a Judge of this Court
 with Bill of Exceptions by 1st day of August next.

And thereafter to wit on the Eighteenth day of
 July A. D. Eighteen hundred and sixty the said defendant
 by his said attorneys filed in the Office of the Clerk of said
 Court his Appeal Bond in said cause, which Bond is in
 words and figures as follows, to wit.

"Know all Men⁽¹⁵⁾ by these Presents That we Joel W. Matteson, R. B. Goodell, William Smith, J. J. Mc Dougall & G. Wood are held and firmly bound unto John Noyes in the sum of Seventeen hundred dollars (\$1700^{00/100}) lawful money of the United States, to the payment of which well and truly to be made to the said John Noyes his heirs executors administrators or assigns we bind ourselves our heirs executors and administrators jointly and severally, finally by these presents.

Sealed with our Seals Dated this Third day of July A. D. 1860.

(15)

Whereas in a certain suit lately depending in the Superior Court of Chicago, County of Cook and State of Illinois wherein the above named John Noyes was plaintiff and the above bounden Joel W. Matteson was defendant, judgment was rendered on the twenty sixth day of June A. D. 1860 in favor of said plaintiff and against said defendant for the sum of One thousand four hundred and fifty three dollars damages besides costs of suit, from which judgment the above bounden Joel W. Matteson has prayed for and obtained an Appeal to the Supreme Court of the State of Illinois on filing this bond.

Now therefore the condition of this obligation is such that if the above bounden Joel W. Matteson shall prosecute his said appeal to effect and without delay and in case said judgment shall be affirmed by the Supreme Court shall pay all judgment, costs interest and damages that shall be awarded against him, then this obligation to be void,

(16)

otherwise to remain in full force and effect.

Approved	Ch. B. Matheon	(Seal)
Grant Goodrich	R. E. Goodell	(Seal)
Judge & C.	Thos. Smith	(Seal)
	J. P. Mc Dougall	(Seal)
	Wm. Wood	(Seal) "

And afterwards to wit on the sixth day of August (being one of the days of the August Term of said Court) A.D. Eighteen hundred and sixty and the following further proceedings were had in said Cause and entered of record in said Court to wit

(16/

" John Morse	}	Assessors
do		
<u>Joel A. Matheon</u>		

This day comes said plaintiff by Arrington P. Prabor, his attorneys and the Defendants by Beckwith & Merrick his attorneys also comes and upon agreement of the parties as shown by a stipulation on the files It is ordered that the time for filing the Bill of Exceptions in this Cause be and is hereby extended until Friday August the 10th instant.

And thereafter to wit on the tenth day of August A.D. Eighteen hundred and sixty, and there was filed in the Office of the Clerk of said Court a certain stipulation in said Cause in words and figures as follows, to wit,

(17)
 "States of Illinois } Superior Court of Chicago
Cook County } August Term 1860.
 John Hayes v. Jacob W. Mackeson.

It is stipulated by the parties to above entitled suit that the time within which Defendants Bill of Exceptions is to be filed shall be extended until Wednesday Aug. 15th 1860.
 W. B. Peabody. Plffs Atty.
 Beckwith, Merrick & Cassin. Defts Atty's.

(17)
 And hereafter on the fifteenth day of August A. D. eighteen hundred and sixty, one, there was filed in the Office of the Clerk of said Court, a certain other stipulation in said cause, in words and figures as follows to wit:

John Hayes
 v.
Jacob W. Mackeson } Superior Court of Chicago

It is agreed by the parties to the above entitled cause that the time to file the Bill of Exceptions herein may be extended until the 22nd day of August A. D. 1860.

W. B. Peabody,
 Plffs Atty.
 Beckwith, Merrick & Cassin
 Defts Atty's

(18)

And hereafter to wit on the Eighteenth day of August A. D. Eighteen hundred and sixty three was filed in the Office of the Clerk of said Court, in said cause, a certain other Stipulation: Which last mentioned Stipulation is in the words and figures as follows, to wit:

" John Moses

vs

Joel W. Matteson

} Superior Court of Chicago.

It is hereby stipulated between the parties to the above Entitled cause that the time for the filing the Bill of Exceptions therein may be extended to Thursday the 5th day of September 1860.

Dated the eighteenth day of August 1860,

J. B. Peabody

Plaintiff's Atty."

(18)

And afterwards to wit on the fifth day of September
A. D. Eighteen hundred and sixty the said defendant by
his said Attorneys filed in the Office of the Clerk of said
Court his Bill of Exceptions in said cause: Which said
Bill of Exceptions is in words and figures as follows, to wit,

" John Noyes
_____ v _____ } Superior Court of Chicago.
Joel A. Weston }

19 Be it remembered that upon the
trial of the above entitled cause the plaintiff to maintain
the issue on his part called as witnesses A. H. Moore and
James B. Smith and proved by them the loss of the letter
or Note referred to in the deposition of John Noyes Jr.

The plaintiff then read in evidence the deposition
of John Noyes Jr (with the exception of the 7th & 8th
Interrogatories and answers thereto) which deposition is in
the words and figures following, to wit.

Answer to 2nd Int:

I am acquainted with both the parties to this
suit - the plaintiff is my father.

Third Int:

Are you acquainted with the handwriting of
the Defendant.

Answer - I have seen it frequently.

Fourth Int:

Upon what occasion and to what instruments

(20)

have you seen his signature and how often?

Answer -

I have seen his signature to requisitions while he was Governor and I procured one requisition from him myself. I have also seen his signature to Railroad passes.

Fifth Int:

(21)

State whether in the Spring of 1858 and about what time in the Spring you saw a letter or note signed by the defendant addressed to A. H. Moore in relation to Railroad ties? and if yes, in whose hands did you see it, and was it a sealed or open note?

Answer -

Sometime in the latter part of April 1858 I saw a letter from Governor Markham directed to C. H. Moore in the possession of my father. It was not sealed, and the letter was in relation to Railroad ties.

Sixth Int:

State the contents of that letter as near as you can remember?

Answer

The contents were "I have bought 15000 of Mr. Moses" (stating the description of the ties and when they were to be delivered), I think the letter stated also that the ties were to be 8 feet or 8 1/2 feet in length, I forget which, and I think average 8 inch face. They were to be delivered at Hough's side track in Chicago. I think the price was stated but I would not swear positive as to that, my impression is that it was in. I think the price was forty cents each. The letter was signed Joel A. Markham.

Ninth Interrogatory 22.

Have you any personal knowledge in respect to the delivery by your father at Hough's side back of the lot for Governor Matteson? If so, state what you know about it.

Answer - I know that my father delivered a large quantity of his there. I don't know how many.

(22/ p1)

First Cross Int:

Have you ever seen Governor Matteson?

Answer - I have.

Second Cross Int.

How often?

Answer - Only once.

Third Cross Int:

When was that once?

Answer - It was in the latter part of his official term as Governor. I saw him sign his name to a requisition I got.

Fourth Cross Int:

What time in the year was it that you saw the latter you have spoken of?

Answer - I think it was after the 20th April.

Fifth Cross Int:

Have you had any conversation lately with any person with regard to this matter, and if so, with whom and when?

Answer - I have spoken with my father and the Counsel Mr. Peabody in relation thereto.

Sixth Cross Int: (22)

Have you had any conversation with your father relative to the contents of that Note. If so, when, and what was it?

Answer. I was asked to day by Mr Peabody and my father if I recollected the contents of that note. I told them I did.

Seventh Cross Int:

Did your father repeat to you what the contents were?

(23) Answer. He did not.

Eighth Cross Int:

Have you been examined in this case before in a former trial?

Answer. I have

Ninth Cross Int:

What kind of a letter was the one you speak of? Was it on a large piece of paper, a sheet, or small piece? Was it in an envelope or not? If in an envelope to whom was said Envelope addressed?

Answer. At my memory serves me, it was on a small sheet of paper. It was not on a full sheet - It was in an Envelope and addressed to A. B. Moore, I think it was in an Envelope. I won't be positive whether it was on a small sheet or part of a sheet of paper. There was but very little writing in it. - a short note.

Tenth Cross Int:

Did you not testify in a former trial that it was

1231

on a small piece of paper.

Answer. I think it was a small piece of paper I think I so testified.

Eleventh Cross Int:

Are you positive that it was addressed to A. S. Moore and was that the full address of the note?

Answer. I think I am positive, and I think that that was also the address there was to it.

Twelfth Cross Int:

Did you not testify on the former trial that it was addressed to A. G. or A. S. Moore, Bloomfield?

Answer. I did not.

Thirteenth Cross Int:

1232

Did you testify on the former trial that it was addressed simply to A. S. Moore?

Answer. I think that was about my testimony.

Fourteenth Cross Int:

Are you positive that you did not say on the former trial it was addressed to A. G. or A. S. Moore?

Answer. I am pretty sure that I said it was addressed to A. S. Moore.

Fifteenth Cross Int:

Was anything paid in the letter about the inspection or delivery or payment of the ties?

Answer. I don't remember whether there was anything paid about the payment or not. They were to be delivered at Hough's side track. I don't know whether it paid anything about the time or not. I don't remember now about

(24)

there being anything in the letter about the inspection.

Sixteenth Cross Ques.

Did you not say on a former trial that it (the letter) did not contain anything about inspection or payment or delivery as to time?

Answer.

I won't be sure how I testified before, but I think the letter did not contain anything about inspection or payment or delivery as to time; and so testify now and I think I so testified before.

Seventeenth Cross Ques.

(24) Was there anything on the letter and not on the Envelope that led you to suppose it was addressed to W. H. Moore? If so, what?

Answer.

I don't remember positively but I think it was addressed to him on the inside.

Eighteenth Cross Ques.

Did you not testify on the former trial that there was no reason for your supposing that it was addressed to Mr. Moore except that he was to pay for the ties?

Answer.

I don't recollect.

Nineteenth Cross Ques.

Was not that the only reason for supposing it was addressed to him?

Answer.

I saw the letter. It was addressed to W. H. Moore on the outside and I think it was on the inside, the reason assigned in the question was not the only reason.

^{to}
Twenty Second Cross Ques.

What was your employment in the Spring and

(25) 15-

Summer of 1858 from April of that year?

Answer - I left for California in July or August 1858 previous to that I was not doing much of anything. Prior to April I was in the employ of the City of St. Louis. I was not in the employ of any one from April 1858 until I left for California.

Twenty third Cross Int;

Did you assist your father in getting these ties, or in the delivery thereof, or were you in anyway connected with the ties?

(26)
Answer - I had nothing to do with them, nor in anyway interested in them. I went to see them several times.

Twenty fourth Cross Int;

Did not the letter read "I have bought 15000 ties of Mr. Noyes for you" & then go on and give the description?

Answer - I don't think it did.

Twenty fifth Cross Int;

Are you positive it did not?

Answer - No, I am not positive.

Twenty sixth Cross Int;

Was not the letter addressed to A. H. Moore Superintendent?

Answer - I think not, it was just addressed to A. H. Moore.

1st Re-direct Int.

Did the letter say anything whatever about Moore's

(26) 261

paying for the ties?

Answer.

I don't think it did,

2nd Re direct Int.

How many times have you seen Gov. Jackson's signature to requisitions and railroad passes?

Answer.

I have seen it quite a number of times

The Plaintiff then called

(26)
Joseph E. Young who testified that he was in the employment of the Pittsburgh & Fort Wayne Railroad in the Summer of 1858 - that in July or August of that year the Pittsburgh & Fort Wayne Railroad bought of Plaintiff a lot of about 4000 Railroad ties, which were at Stough's pile track in Chicago - that the Railroad paid Plaintiff twenty cents apiece for some of the ties and thirty cents apiece for others - that all the ties there averaged 8 inches on the face - six inches thick and eight feet long - Those that we purchased did so far as I examined - that he did not inspect them - that Mr. Katter inspected them - that he did not think all of the ties there were merchantable - that less than 300 were bad and inferior - that the Market price was 30 cents apiece - that ties eight feet long - 8 inches face, and more less than 6 inches face, were worth 30 cents, - that he did not know the Market price of ties that were less than 6 inches on the face.

The testimony of Mr. A. Vautbrunt given in a former trial of this case was then read to the Jury by consent of parties, and was as follows.

(27)
" I inspected some ties on Hough's side tracks can't
recollect when - At one time 2400 - and at another 1400 I
think - am not certain - at another time some - I can't say
how many. Mr. Noyes I think had some 2400 that I did
not receipt for - those that I inspected I receipted for -
Those I inspected were 8 feet long & a foot or over 8 inches
on face - If any were under 6 inches they were thrown out.
(28)
I inspected them by the order of E. Darling - never had any
conference with Matheon on the subject of the ties. I gave
receipts for the ties I inspected under Darling's direction - Some
of the ties were under 8 inches - now under 6 inches - can't
say how many were under 8 inches face - larger proportion
over 8 inches - I inspected for Noyes under Darling's order
some 4000 or 5000 - there were some 2000 or 3000, I did
not inspect - Do not think I told Noyes I would not inspect
more - Darling was general Agent of the St. Louis & N. W.
Chicago Railroad - I stopped to inspect on account of a
dispatch I received.

The Plaintiff then called
Hough who testified as follows.

That Noyes delivered some 4 or 5000 railroad
ties at his side tracks in the Spring and Summer of 1858
and that they were being received by Mr. J. F. D. Elliott
that he did not know how many were inspected that the
Pittsburg & Fort Wayne Railroad took the balance of the ties.
that there were some 3000 ties on dock, when Elliott received
notice not to receive ties - that he did not know of his own

Kumbeago - that Elliott told him he had received notice not to receive any more - that it was in July.

The Plaintiff then called
Loren Darling who testified as follows.

Was Genl Agent of S. S. & Chicago Road in 1858 - received instructions from Matteson and from A. H. Moore (who was Genl Sup^t of the R. R.) about Noyes' ties - Matteson was the Pres^t of the R. road. He received some \$300 of the ties. My instructions were to pay Noyes \$0 per ct on the price of the ties on delivery. Had orders from A. H. Moore not to receive any more of the ties - Don't remember of receiving the order from Matteson. Should think that 2000 or 3000 ties were in the Wharf when order came not to receive them.

(28/)
I was not in the habit of telegraphing to Matteson - After telegraphed to Moore. Louis says I never telegraphed Matteson for money to pay for the ties - I received orders from Matteson to pay for them - Think Noyes came to me to telegraph down the road (but to whom I don't remember) about his account.

I showed him the despatches I received or told him the substance of them - Think Noyes came to me several times and said he was ready to deliver the ties and asked me to receive them - This was after I had given him notice under my instructions that we should receive no more - I received a telegraphic despatch from Matteson in relation to the ties about May 17, 1858. The original despatch I tore up, I can't state the contents of it from recollection.

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Plaintiff's Counsel here offered to place in the hands of the witness a paper and asked the witness "if he received a dispatch like this" To which the Defendant objected - the objection was overruled by the Court - To the overruling of which the Defendant excepted.

The paper was then handed to witness and he stated he received a dispatch substantially as this - The Plaintiff then offered to read the paper to the Jury - to which the Defendant objected - The objection was overruled by the Court and the Defendant excepted, The paper was then read to the Jury as follows.

"Bloomington May 17./68.

29 "S. Darling

Pay Money 80 per cent for the first 900 ties at 140 cents per tie. Have all ties inspected and measure the same - receive now under 8 inches on the face - the whole are to average 8 inches at smallest place in tie on the face - Much will depend on the man you send whether the ties are up to the contract or not.

J. C. Matheon."

Darling further testified that Matheon in that year was the President of St Louis & Chicago Railroad Co. that he had no private business with Matheon, except that he purchased for Matheon some materials for his residence at Springfield, which he paid for out of the Company's money; but for which he took special vouchers and sent them to Matheon. Had no money of Matheon's in his hands. The money I paid Money for the ties under instructions in dispatch was the Company's

money - paid the money at the Office of the Company in Dearborn Street in the City of Chicago - Van Brunt was regular employee of the Railroad Company - was paid out of Company's money. The ties were received by Van Brunt - for the Company - they were sent to Abiet and were there distributed when they were needed over the road. Had instructions from Moore - told Noyes so, and that Moore was regulating his, Darling's, action in the matter. Matheon was the principal manager of the Railroad Company. Never permitted money of the road to Matheon.

The Plaintiff then called

A. H. Moore who testified

(30)

That he received a Note from Matheon by hand of Noyes in relation to contract with Noyes for ties. That it was directed to A. H. Moore, Bloomington, and signed J. C. Matheon. That Noyes name was not signed to letter. - that the substance of the Note was that he had bought a lot of ties - (naming the number) of ties, for the road - that they were to be of a certain size (naming it) and that they were to be delivered at Hough's side tracks in Chicago - that I was to have them inspected and use them on the road where needed and was to pay 80 per cent on the price of them on delivery.

That he (witness) of his own account instructed Darling not to receive any more of the ties without further orders.

That he afterwards informed Matheon of what he had done. That the understanding between Matheon & witness was - that witness was not to receive any more without notifying him.

That he told Matheon in the same conversation that he had

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received a lot of ties that were rough, crooked and inferior and
not as good as they wanted, or as witness expected - That Matteson
assented to his action and approved of it. That he was acting
in the matter as Superintendent of the Road - That he put
the ties in the Road.

The Plaintiff then called
Mr. H. Moore who testified as follows.

Knew the Plaintiff and Defendant - Had a
conversation with Matteson about the ties - Matteson said the
ties were different he thought were different from what he was
receiving and requested me to write to Morse. I wrote a
letter accordingly. I wrote as agent of the Road from Matteson as
Pres. - This is the letter.

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"Colist, May 13/58.

"John Morse Esq. Dear Sir,

"I saw Gov. Matteson to day and he
told me the ties he was to have of you were to average 8 in. long,
he was on his way to Springfield, the ties were distributed in
the Road. When he arrived at Dwight he telegraphed me not
to receive any more ties until I heard from him. I presume he
thought the ties were not according to contract.

"Respect Yours

H. H. Moore."

I think at this time about 1000 ties have been
received, which I inspected - I inspected them as Assistant
Superintendent of the Road.

The Plaintiff then called
J. F. O. Elliott who testified.

(32)

That he loaded the ties at Hough's side track
 in the Spring of 1858 in care of St Louis, Alton & Chicago
 Railroad Company - That he told Mattheson there were a lot
 of ties there in their way. That he first told Darling of them,
 then Mr. Moore - then Mattheson. That Mattheson told him not
 to receive any more ties on his account. That he did not
 tell Moses what Mattheson said - that he went to Mattheson
 for instructions because he was the President - that he knew
 he was President - knew he acted as President. That he did
 not know the number of ties that were left on the dock when
 Mattheson told him not to receive them - that those that were left
 were afterwards taken by another road. That Mr. Moore was
 agent of the Road employed him and that he supposed he was
 an agent of the Road.

The defendant to maintain the issue on his
 part offered the Act of Assembly incorporating the St Louis
 Alton & Chicago Railroad Company, and then proved by A. H.
 Moore and James S. Smith that Mattheson was the President
 of the St. Louis Alton & Chicago Railroad Company

The defendant then offered a receipt of Moses
 which is in the words and figures following to wit:

" The St. Louis Alton & Chicago Railroad Company
 To John Moses Dr.

1858.

(38/1331

Dolls Cts

For 2350 Railroad Ties as per Contract
of A. W. Mattoon @ 40¢ 9400 " 00

Less 20% retained until

Completion of Contract 188 " 00

\$ 4520 00

"Received of St. Louis Alton & Chicago Railroad Company
Seven hundred fifty two dollars in full for the above acct.
Dated Chicago, June 5th 1858. John Noyes."

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The defendant then called

(38/133

Hendrickson who testified

That he was in Gov. Mattoon's Office in Springfield
where plaintiff and Mattoon were talking about the ties. That
he thought the purchase of the ties had been made before he
came into the Office. That Mattoon said he had bought for
the road so many ties; that he wanted good ties and was
to keep back part of pay. That Mattoon said he would
give Noyes letter to the Superintendent. That Mattoon after he
had written the letter read it to Noyes - that it was addressed
to Atk. Moore Bloomington Ill. Mattoon said the road
was to pay for the ties on delivery. Mattoon said he was
buying the ties for the road.

This being all the evidence in the case the plaintiff
asked the Court to instruct the Jury as follows

Instructions for Plaintiff

1. " If the Jury find from the evidence that the defendant in fact made the Contract set out in the Declaration then the rule of law is that he is personally liable for the fulfillment of the Contract, if the Plaintiff was ready and willing to perform on his part &c., unless he, at the time of making it, clearly disclosed to the Plaintiff, or the Plaintiff knew that he was acting in making said Contract as an Agent and not in his own behalf."

Given

2. " If the evidence leaves it doubtful in the minds of the Jury whether the Defendant, in making the Contract, made it for himself or as agent for the Railroad, still the defendant is personally liable on the Contract unless he has proven to the satisfaction of the Jury that he had authority to bind the Railroad by the Contract, or unless he has proven that the Railroad is legally liable for the fulfillment of the Contract."

Given

(34)

3. " If the Jury find from the evidence that the defendant made the Contract as alleged in the declaration & that he afterwards prevented the Plaintiff from fulfilling the Contract, then the Jury will give the Plaintiff as damages, as soon equal to the difference between the price agreed to be paid for the ties and the Market price of the ties at the time of such prevention - and the Jury will also give to the Plaintiff the difference between the sum actually paid upon any ties that the defendant did receive and the sum that was to be paid for said ties by the terms of the Contract."

Given

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To the giving of which instructions the defendant objected - the court overruled the objection and the defendant excepted.

The defendant then asked the Court to give to the Jury the following instructions.

Given

"That if the Jury find from the evidence that Norges contracted with Matheson as Agent of the Railroad Company, and Matheson was agent for the Road to make such contract to deliver the ties to the R.R. Co. for his benefit & use, & agreed and understood he was to be paid out of its funds & by its officers, then Plaintiff is not entitled to recover."

(35)

Given

"That the Jury are to take all the circumstances together and to determine from those circumstances and from the conduct of Norges in the matter - his delivering of the ties - the funds out of which he was paid &c - whether or not he intended to contract with said Railroad as principal & for its benefit & if they find he did so intend to contract and did actually so contract, then he is not entitled to recover in this case."

Which were given.

The Court also instructed the Jury as follows.

"If the Jury believe from the evidence that Matheson was president of the Railroad Co. and authorized to make contracts for material to be used on such Road, and the ties were for the use of said Road, and were to be paid for by said Road, and this was known to the Plaintiff at the time he made such contract, then the defendant is not

liable therefore."

(36)/(36)

"But if the Jury believe from the Evidence that the Plaintiff did not know at the time of the Contract that Matheson was acting on the behalf and agent of the Company, Or that Plaintiff was authorized by all the circumstances to suppose and did suppose he was contracting on the personal responsibility of Matheson. Or if Matheson was not authorized by the Company to make such contract, then the law is for the Plaintiff."

The defendant moves the Court for a new trial upon the following grounds to wit:

" John Hayes

vs

- Geo. W. Matheson

} Superior Court of Chicago.

(37)/(36)

And the said defendant by Beckwith Merrick & Cassin his Attorneys, moves the Court for a new trial, for the following reasons.

- 1st That the Court mis-instructed the Jury as to the law.
- 2nd That the Verdict is contrary to the evidence.
- 3rd That according to the Evidence the Verdict is excessive.
- 4th That the Court permitted improper Evidence to go to the Jury.

Beckwith Merrick & Cassin

Attys for Defendant."

The Court overruled the Motion for a new trial and to the ruling of the Court in that behalf the Defendants excepted.

And inasmuch⁽³⁷⁾ as the above matters do not appear of record in said cause the Defendant by his Counsel asks the Court to sign and seal this his Bill of Exceptions which is accordingly done,

Grant Goodrich (Seal)!

State of Illinois }
Cook County . . . } ss.

(37) 37

I Walter Kimball Clerk of the Superior Court of Chicago (formerly the Cook County Court of Common Pleas) within and for the County of Cook in the State of Illinois Do hereby Certify the above and foregoing to be a true and perfect Transcript of the Pleading, Summons, Sheriffs return, Declaration, Plea & Affidavit of Merits, Appeal Bond, Stipulations and Bill of Exceptions, now on file in my Office, together with the Orders and Judgments entered of record in said Court in a certain suit heretofore pending therein, wherein John Hayes was Plaintiff and Joel A. Matheson Defendant.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Superior Court at Chicago in said County the Eighteenth day of March A.D. Eighteen hundred and Sixty one.

Walter Kimball Clerk



State of Illinois Supreme Court. 3rd Grand Division
Joel A. Matteson Appellant

vs

} Appeal from the Superior
Court of Chicago, Cook County.

John Hayes Appellee
Now comes the Appellant by Stuart and Edwards his
attorneys and says that in the record and proceedings
herin there is manifest error, and assigns the
following to wit

1st The Court erred in permitting the paper purporting
to be a telegram from defendant Matteson to be shown to
the witness Darling, and in permitting said paper to be
read as evidence to the jury -

2nd The Court erred in giving the instructions for
plaintiff marked H.^o 1. & 2nd and in giving the instructions
on its own motion, which instructions are not numbered but
immediately succeed those given by the Court on behalf of
the defendant.

3. The Court erred in overruling the motion of defendant
for a new trial. and in not granting said defendant
a new trial.

Wherefore re. Stuart & Edwards. for Appellant

166 144
State of Illinois }
Cook County . . }

John Wines

vs

Isabel A. Matheon }

Record.

Filed April 5, 1861
L. L. Leland

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