

12118

No. _____

Supreme Court of Illinois

Updike

vs.

Henry.

71641  7

United States of America }
State of Illinois }

1
Place before the Hon Isaac
S. Wilson Judge of the Thirtieth
Judicial Circuit, of the State of Illinois
at a Term of Kane County Circuit
Court begun and holden at the
Court~~house~~ ^{House} in ^{General in} said County on the
10th day of May in ^{the} year of our Lord
one Thousand Eight Hundred and
Fifty Two,

Present, the Hon Isaac S. Wilson Judge
Amos B. Cook State Attorney
Luther Pearson Sheriff
Attest Charles B. Wells
Clerk

Whereas heretofore to wit
on the 25th day of February 1852 in vacation
of the Kane County Circuit Court
the following affidavit ^{was filed which} reads in the
words and figures to wit

Kane County Cir Court
Randolph Updike }

^{is}
George W. Henry }

State of Illinois ss
Kane County }

Randolph Updike Plaintiff in

this above action being duly sworn complaints and says that he is now lawfully entitled to the possession of two new two horse lumber waggons of the value of one hundred and twenty dollars which said two new two horse lumber wagons George W. Henry the said defendant of the County of Kane and said State now wrongfully detains from the said plaintiff at the Village of Genesee in the said county and State without the consent of the said plaintiff and against his wish & request and that the said lumber waggons have not been taken for any tax assessment or fine levied by virtue of any law of this State nor seized under any execution or attachment against the goods and chattels of the said plaintiff liable to Execution or attachment therefore the said plaintiff prays that he may have replevin of the said lumber wagons and that the said defendant may be summoned to answer unto the said plaintiff wherefore he the said defendant George W. Henry wrongfully detains the said lumber

Wagons as above complained against
his gages & pledges Randolph Updike
Sworn & subscribed before me this 25th day
of February A.D. 1852

C. B. Webb

Clerk

Whereas afterwards to wit on the 25th day of
February 1852 the following Parr was filed

State of Illinois - ss

Kane County Kane County Circuit Court of the
May Term of the said Court of 1852
County of Kane to wit George W. Henry
defendant in this Suit was sworn
to answer Randolph Updike the
plaintiff in this suit of a plea
wherefore he wrongfully detains two new
two horse lumber wagons from the said
plaintiff who is entitled to the possession
of the same against surities and pledges

And therefore the said Randolph
Updike by P. H. Mayborn his attorney
complains of the said George W. Henry
for that the said defendant ~~and~~ to wit
on the ^{twenty} fourth day of February A.D. 1852 at
Genoa in the County of Kane and
State of Illinois wrongfully detains
two new two horse lumber wagons of
the value of one hundred and twenty

Dollars from the said plaintiff although
the said plaintiff is entitled to the
possession of the same and he the said
defendant was to deliver to the said
plaintiff the same when requested but
the said defendant although often request-
ed hath refused and yet refuses to deliver
the goods chattels and property above menti-
oned to the said plaintiff and wrongfully
detains the ^{same} against sureties & pledges
until & wherefore the said plaintiff
saith that he is injured and hath sus-
tained damage to the amount of one
hundred and twenty dollars and therefore
he brings Suit &c

D. W. Maybourn

Attorney &c

Whereas heretofore to wit on the 25 day
of February 1852 ^{it being one of the days} of the Kane County Circuit
Court the following Replevin Writ was
issued by ~~filed with~~ the Clerk of said court which
said Replevin Writ reads in the words and
figures to wit

State of Illinois ss.
Kane County)

The People of the State of Illinois
to the Sheriff of said county
Greeting
If Randolph Updike shall give

you Bond with good and sufficient security
to make return of the following described
goods and Chattels to wit: Two two Horse
lumber wagons now of the value of one
hundred and twenty Dollars which
George W. Henry of the County of Kane and
State of Illinois, now wrongfully and unjustly
detains from him, against a good pledge
as he says and further to keep you harmless
in Repleving said property, then you are
to cause said property to be Replevied and
delivered to said Randolph Updike without
delay and to summon George W. Henry
personally to be and appear before the Circuit
Court of said County on the first day of the
next Term thereof to be holden at the Court
House in Geneva in said County on the second
Monday of May Next to answer unto the
complaint of the said Randolph Updike
for detaining said property and make
due return of this writ

Witness Charles B. Wells
Clerk of said Court and
the Seal thereof at Geneva
this 25th day February
A.D. 1852

Charles B. Wells
Clerk

upon the Back of said writ is the following
inclosurement ~~to wit~~ which reads in the words
and figures to wit

By virtue of the within writ
I did on the 26 day of February 1852 deliver the
property as within commanded to Randolph
Uplike and Summoned George. W. Henry to
appear at the next term of the Kane County
Circuit Court by reading to him the
contents of the within writ.

Luther Dearborn
Shyff Lane Co

And Whereas afterwards to wit on the 10th
day of May 1852 it being one of the days of
the Kane County Circuit Court the following
proceedings among others were had to wit

Randolph Uplike

George W. Henry

Replevin

This day comes the defendant
by Harrington his attorney
and moves to dismiss this Suit. The Court
being fully advised overrules the same

And Whereas afterwards to wit on the 17th
day of May 1852 it being one of the days of
the Kane County Circuit Court ^{afterwards} the following
proceedings among others were had to wit

Randolph Updike
v
George W. Henry } Replevin

This day comes the plaintiff
by May born his attorney
and files his demurrer the second and
third pleas of the defendant

Which said demur-
rer reads in words and figures as follows
to wit

Wang County Circuit Court

Randolph Updike of the May Term of
v
George W. Henry } the said Court for \$52
And the said plaintiff
as to the second and third pleas of the
said defendant by him secondly and
thirdly pleaded saith that the same
and the matters therein contained in
mannor and form as the same ~~as~~
above pleaded and set forth are insufficient
to bar or preclude him the said plaintiff
from having and maintaining his aforesaid
action thereof against the said defendant and
that he said plaintiff is not barred by
law to answer the same
And this he the said plaintiff is ready
to verify &c

And the said plaintiff Also
Shows the following special causes of demurrers

to wit: The second plea is defective and insufficient—

- 1st it does not traverse the allegations in the plaintiffs declaration
- 2^d Second it should conclude to Country
- 3^d It does not put in issue any of the allegations in the plaintiffs declarations
- 4th It presents an immaterial issue
- 5^c It is otherwise insufficient

The third Plea is insufficient in this to wit— first

- 1st It does not state the terms and conditions of the contract if any there was
- 2^d It attempts to set out a contract but does not
- 3^d It does not show any failure on the part of the plaintiff to perform.
- 4 It is otherwise insufficient & defective

J. W. Mayborn

Attorney for Plff

In which the defendant by Herrington his attorney joins. Which said rejoinder reads in words and figures as follows to wit

George W. Henry
at
Randolph Updike

May Term Kane Circuit Court
A.D. 1852

And the said defendant by

Herrington his attorney comes and defends
the wrong and injuries when he and says that
he did not detain the said goods & chattels
or wagons in the said declaration mentioned
or any or either of them or any part thereof
in manner & form as the said plaintiff
hath above complained against him
and of this he the said deft puts himself
upon the country &c

By Herrington his atty
And for a farther plea in this behalf
the said defendant says action non Bene
he says that the wagons in said declaration
mentioned at the said time when &c
where the property of the said defendant
and not the property of ^{said} plaintiff as by
the declaration is above supposed And
And this he the said defendant is
ready to verify wherefore he prays judg-
ment if the said plaintiff ought to have
or maintain his aforesaid action thereof
against him, and he also prays return
of the said wagons together with his costs
in this behalf according to the ^{form of the} Statute
in such case made and provided to be
adjudged to him &c &c

Herrington
atty &c

* Is not entitled to the suppression of the said wagons in said declaration mentioned
for the reason the said plaintiff

And for a further plea in this behalf
the said defendant says actio non because
he saith that the said plaintiff ought
not to have or maintain his aforesaid
action thereof against him because he
saith that the said ^{margin} plaintiff ~~James~~ * Randolph
Upsdike did not comply with a certain
contract made and entered into between
the parties hereto, by the terms of which
he the said Upsdike was to pay the said
defendant Henry for said wagons a certain
amount agreed to between the parties to
wit, at the time and place aforesaid
the said defendant would over that
said Upsdike disregarded his said
contract, in this, that he never paid
one cent to said defendant for said
wagons and therefore is not entitled
to possession of the same, and consequently
the said defendant was not to deliver
the said wagons to said plaintiff.
Wherefore he prays judgment, if the said
plaintiff ought to have or maintain his
aforesaid action thereof against him
he also prays a return of said wagons
together with his costs in this behalf
expended according to form of the
Statute in such cases &c. Herrington, Atty

And whereas afterwards to wit on the 9th
day of November 1852 it being one of the
days of the ^{November term of the} State County Circuit Court
the following proceedings among others were
had to wit

"Randolph Upsdike

vs

George W. Henry

} Replevin

Motion by Plaintiff for
continuance"

which said motion was founded upon the
following affidavit which reads in the words
and figures as follows to wit

State County Circuit Court

Randolph Upsdike

vs

George W. Henry

} State of Illinois State
County S.S.

Randolph Upsdike the plaintiff
in the above entitled cause having been first
duly sworn doth depose and say on oath
that the Suit now pending in the said
Court between this affiant and the said
G. W. Henry was brought to get the possession
and control of two lumber wagons that he had
previously bought and paid the said Henry
for and that he expects and believes that he can
prove by one Phillip Remyer late of Geneva but
now gone to Oregon as this affiant is informed
and verily believes true that he this affiant did

pay said Henry for the said wagons by selling and
delivering to him a note against ^{William} ~~one~~ ^{cash} of
one hundred and fifty dollars and that he said
Reyer knows that the said Henry agreed to
and did take and receive the said note in payment
for the said wagons and that this was the price
and ~~moreover~~ that he was to pay said Henry
for them and that said Henry was to have
the said wagons finished and deliver them as
soon as the middle of December 1851 to this
officer and that this officer paid said
Henry in full for said wagons as he agreed
and that said Henry accepted it and that
he made said payment some time in the
early part of December 1851

And this officer further saith that he
has frequently made enquiries of the family of
the said Reyer who are still residing at
Geneva if they had yet learned or heard of
his arrival in Oregon for the purpose of ascer-
taining the whereabouts of the said Reyer
so that he could take his deposition
but that they have always informed this
officer that they had as yet received no
intelligence of his arrival at Oregon although
they daily expected to and that he knows
of no other witness by whom he can prove these
facts by. And this officer further saith

That he believes that this is a just and ^{memorable} action
and that he cannot safely proceed to the
trial of this case with out the testimony of said
Ryer and that he has been so informed
and advised by his Council J. H. Mayborn
after he had stated to him what he expected
and believed that he could prove by him and
that he thinks he can procure his deposition
by the May term of this Court if not before
and that he shall and will take steps to do
so as soon as he can learn where he is in
Oregon and that this application is not
made for delay but that Justice may be
done in the case

Sworn and subscribed to before
me this 9th day of November

A. D. 1853

Randolph Updike

Charles B. Wells

Clerk

And whereas afterwards to wit on the 10th
day of November 1853 it being one of the
days of the Kane County Circuit Court
the following among other proceedings was
had

appeared

Randolph Updike

George W. Henry

Replevin

The Court being fully
advised as to Plaintiff's motion

heretofore entered for a continuance overrules
the same.

And whereas afterwards to wit on the 15th
day of November 1852 is being one of the days
of the Kane County Circuit Court the fol-
lowing among other proceedings were had

Randolph Upsdike

v } Replevin
George W. Werry }

This day comes the plaintiff
and files his demurrer to

the defendants amended plea filed Oct 8th
1852 in which the defendant joins

Which said plea and rejoinder reads in
words and figures as follows to wit—

And for a farther plea in this behalf
the said defendant says Actio Non, because

he says that the wagons in said declaration
mentioned at the said time when &c were

not wrongfully detained by said defendant
as is alleged in said plaintiffs declaration

but that said wagons ^{were} ~~were~~ lawfully and
rightfully in the possession at the time when

&c of the said defendant ^{and this by the said defendant.} is ready to verify
wherefore he prays judgement if the said

plaintiff ought to have or maintain his
aforesaid action thereof against him

& he also prays return of the said wagons
together with his costs in this behalf

According the form of the statute in such case made and provided to be adjudged to him &c

A. M. Herrington

~~Defendants Attorney~~

And the said plaintiff by his attorney says that he ought to be bound from having and maintaining his aforesaid action against the said defendant by reason of any matter or thing set out & forth in the above plea ^{apology for said factory, insufficient in law &c and that he is} of the said defendant as it is not bound to answer the same &c. And the said plaintiff also assigns the following ^{Special} causes of demurrer. First it does not set up the right of property in defendant or any other person or to the possession thereof.

Second

It is double

Third it amounts to the General issue

Fourth it concludes with verification and should conclude to the Country

Fifth it is other wise insufficient & per time and in aptly drawn

J. W. Mayborn

Atty for Plff

After argument of Counsel the Court sustains said demurrer. It is therefore considered by the Court that the Plaintiff have and

and recover from the defendant his costs
about his demurrer expended and have
execution therefor and the defendant have
leave to amend.

And whereas afterwards to wit on the 29th day
of November 1852 ~~the~~ being one of the days
of the Kane County Circuit Court ^{General} the following
among other proceedings was had

Randolph Updike,

v

Replevin

George W. Henry

This day comes the plaintiff
and files his demurrer ag-
ainst the defendants amended plea in which
the defendant joins.

Which plea reads in words
and figures as follows to wit

And for a further plea in this behalf the
said defendant Says Actio non. Because
he says that the said wagons in said
plaintiffs declaration mentioned, at the said
time when & were the wagons of the said
defendant and that he was entitled to the
possession thereof at the said time
when & without this the said plaintiff
was entitled to the possession thereof at
the said time when & as by the said
declaration is above supposed —

And this he the said defendant already

to verify wherefore he prays Judgment if
the said plaintiff ought to have or
maintain his aforesaid action thereof
against him

Herrington

Atty

And the said plaintiff by his attorney
says that he ought not to be barred from
having and maintaining his aforesaid
action against the said defendant
by reason of any matter or thing set
forth in the above plea of the said defendant
as it is wholly insufficient in form and
that he is not bound to answer the same
And the said plaintiff assigns the follo-
wing special cause of special demurrer

1st The plea is double

Second It should conclude^{to} the country
and not with a verification

Third It amounts to the General issue

Fourth It is otherwise insufficient defective
and in artfully drawn

J. H. Mayborn

Atty for Plf

~~"After argument of counsel the court overruled
said demurrer. It is therefore considered
by the court that the defendant have
and recover from the plaintiff his costs."~~

about his demurrer expended and have execution therefor

And whereas afterwards on the 1st day of December it being one of the days of the Kane County Circuit Court the following among other proceedings were had

Randolph, Upsdike

Replevin

George W Henry

This day comes the plaintiff by Maybourn his attorney and the defendant by Herrington his attorney and on motion of the plaintiff it is ordered by the court that a Jury come whereupon came a Jury of good and lawful men

George J. Peck Marshall, Clark

George Minard Thomas A. Scott

John Wilson Munsel, Winchell

Columbus Phinney Willis Hotchkiss

A. L. White John King

Isaac Van Fleet George C. Moore

being severally elected tried and sworn also come and after hearing the evidence and instructions of the court return under charge of an officer of the court to consider of their verdict and it is agreed between the parties to this suit that when the Jury agree they may reduce their verdict to

Kane County Circuit Court

Randolph Updike

v.s.

George W Henry

November term of the
Said Court for 1852

and the said plaintiff
by J St Mayborne his attorney. as to
said plea of the said defendant by
him. fourthly and lastly pleaded
in the above entitled cause says.

preclusion because he says that the
said Waggon in the said plaintiff dec-
laration mentioned at the time therein
mentioned were the property of the
said plaintiff and that the plaintiff
as the owner thereof & was entitled to the
possession thereof as in the said declaration
mentioned & that they were not the property
of the said defendant nor was he entitled
to the possession of thereof in his above
plea alledged. And this he prays may
be enquired of by the County &c

J St Mayborn
Atty for plaintiff

And the said deft
doth the like

By A. M. Herrington
his Atty

After agreement of counsel the Court
overrules said demurrer. It is therefore con-
sidered by the Court that the defendant has
and recover from the plaintiff his costs

Writing sign seal up the same and meet
the court to morrow morning
And whereas afterwards to wit on the
3^d day of December 1853 it being one of the
days of the Kane County Circuit Court
the following among other proceedings
wer had to wit

Randolph Upsdike

v

George W. Henry

} Replevin

This day comes again
the parties to this Suit and
the Jury heretofore impannelled herein also
come and for a verdict upon their Oaths say
that we the Jury find the issues joined
in favor of the dependant and assess his
claim ages at the sum of one Hundred and
Thirteen Dollars thereupon comes the plaintiff
and moves for a new trial.

And whereas
afterwards to wit on the 4th day of December
it being one of the days of the Kane County
Circuit Court the following among other
proceedings wer had to wit

Randolph Upsdike

v

George W. Henry

} Replevin

This day comes on to be heard
the plaintiffs motion heretofore made
for a new trial thereupon comes the dependant

and remits the damages assessed by the
jury: It is therefore considered by the court
that the motion for a new trial be overruled
thereon comes the defendant & moves in arrest
of the judgement which is overruled by the
court it is therefore considered by the Court
that the defendant have a return of the
property Replevied and have a writ of
Habeas Returna and have execution
therefor and recover against the plaintiff
his costs in this suit expended and have
execution therefor.

Kane County Cir Court
 Randolph Updike } November Term of the
 Vs } Said Court
 George W. Henry } for 1852

Be it remembered that at the november-
 term of the said court^{for 1852} that the plaintiff
 made two applications to the court for the
 continuance of the said cause, one before and
 the other, after all the issues in the said
 cause were settled, based upon affidavits
 made & filed submitted to the court

Kane Co Circuit Court
 Randolph Updike } November Term of said Court
 Vs } for 1852
 George W. Henry }

State of Illinois
 Kane County, I. S.

Randolph Updike the plaintiff in the
 above entitled cause having been first duly
 sworn doth depose and say on oath, that
 the suit now pending in the said court between
 this offiant and the said G. W. Henry was
 brought to get the possession and contrroll
 of two lumber waggonz that he had previously
 bought & paid the said Henry for and that
 he expects & believes that he can prove by one
 Phillip Meyer late of Geneva but now gone
 to Oregon as this offiant is informed & verily

first affidavit for 1852

beloves true. that he this officer did pay the
said Henry for said ^{the} waggons by selling and
delivering to him a note against one William
Cass of one hundred & fifty dollars and that
he said Reyer knows that said Henry
agreed to and did take & receive the said
note in payment for the said waggons and
that this was the price and manner that he
was to pay said Henry for them And
that said Henry was to have the said
waggons finished & deliver them as soon
as the middle of December 1857 to this officer
and that this officer paid said Henry
in full for said waggons, as he agreed &
that said Henry accepted it, and that he
made said payment some time in the
early part of December 1857

And this officer further saith that he has
frequently made enquiries of the family of
the said Reyer who are still residing at
Geneva if they had ~~yet~~ learned or heard of
his arrival in Oregon for the purpose of ascer-
taining the whereabouts of the said Reyer so that
he could take his deposition, but that they
have always informed this officer that they had
as yet received no intelligence of his arrival at
Oregon, although they duly expressed to And
that he knows of no other witnesses by whom

he can prove these facts by
And this officer
further saith that he believes that this
is a just and veritoy actione and that
he cannot safely proceed to the trial of this
case without the testimony of saide
Nizer and that he has been so informed
& advised by his counsell J. H. Mayborn ofen
he had stated to him what he expected
believed that he could prove by him,
And that he thinks he can procure his
deposition by the may term of this Court
if not before, and that he shall and will
take steps to do so as soon as he can learn
where he is in Oregon And that this
application is not made for ~~the~~ delay but
that justice may be done in the case -
Sworn & Subscribed to before
me this 9th day of November
A.D. 1852

Randolph. Urdike

Charles B. Webb

Clerk

Kane County Circuit Court

Randolph Updike

v

George W. Henry

November Term of
said Court
for 1852

State of Illinois

Kane County I.S.

Randolph Updike the plaintiff in the
above entitled cause having been first duly sworn
doth depose and say on oath that the suit
now pending in the said Court between this
affiant and the said G. W. Henry was brought
to get the possession & contrall of two lumber
waggons which he had previously bought and
paid the said Henry for and that affiant
believes that he can prove by one Phillip
Reyer late of Geneva, but now gone to Oregon
as this affiant is informed and verily believes
true, that he this affiant did purchase of and
pay the said Henry for said waggons by
assigning selling and delivering to him a certain
promissary note against one William Cass
of one hundred & fifty dollars. And that said
Reyer also knows that the said Henry agreed
to and did take & receive the said note
in pay for the said waggons & that this
was the price and monie that he was to
pay the said Henry for them and that

Second Affidavit

Knows of no other witness by whom
he ^{can} prove the same facts by and
this officer further saith that
he believes that he has a just and
meritorious cause of action in this
case and that he cannot safely
proceed to the trial of this case
without the testimony of the said
Reizer and that he has been
so advised by his counsel -
J. H. Mayburn after he had stated
to him what he expected and
believed he could prove by the
said Reizer and that he shall
and will take steps to procure
his deposition at the earliest
opportunity and that this applica-
tion is not made for the purpose
of delay but that justice may
be done in the premises
sworn & subscribed to
before me this 30th day
of November 1852

Randolph Updike

Charles B. Wells

Clerk

Said Henry was agreed to have the said
Waggons made finish & to deliver
them as soon as the middle of December
1851 to this officer at the said village
of Geneva. And that this officer paid
said Henry in full for said waggons
as he agreed before the time he was
to have delivered the said Waggons
to him as before stated in this affidavit
and that said payment was
made or about the middle of December 1851
And this officer further saith that
he has frequently made enquiries of
the family of the said Meyer who
are still residing at Geneva whether
they had as yet heard or received any
intelligence of his arriving in Oregon
for the purpose of ascertaining the
whereabouts of the said Meyer and
when he arrived there so that he
could take his deposition to be used
on the trial of ^{this} cause but that they
have always informed this officer
that they have as yet received no
intelligence of his arrival at Oregon
although they daily expect to and
that he made such enquiry only
a few days ago and that he

The court after hearing the said
affidavit read and arguments
of Counsel refused the continuance
this said cause which ruling and
decision the plaintiff the and there
excepted prepared this his bill of
exceptions thereto & prays that
the same may be signed & sealed
& made a part of the record in
the said cause which is done

Isaac G. Wilson ^{Esq}
Judge

(Copy of Testimony)

Urdike v. Henry ³/₃

Jeremiah Henry Called & Sworn as a witness deposed That he is son of the deft he heard a conversation in Nov or Decr 1881 between the plff and defendant in relation to some lumber waggon Deft was to make & let plff have three waggon during the winter for which plff was to let him have a note of \$150 against one Cass and get the Hights to endorse it I afterwards saw the note in possession of the deft & heard him say that the plff let him have it on the waggon trade I also know that the plff deft delivered a waggon to plff on the trade before the commencement of this suit. Defendant was engaged that winter in the manufacture of waggon
Crap ex, Heard a conversation between the parties a short time before the commencement of this suit, Deft. tendered back the note in question to the plff and told him that he had not done as he agreed about getting the Hights to endorse it that the Hights were not holden on the note and he should not take it.

Recd. by plff - The plff refused to take the note claimed that he had done as he

agreed, & that there was no child's play
with him.

Here the plff rested
The Defendant then called William Hight
who was sworn as a witness and by whom
the deft offered to prove that the Messrs
Hights of whom the witness was one End-
orsed the said note at the request of
the plff. but that the Hights endorsed
said note with the express agreement
and promise on the part of the plff. that
they should incur no liability by their
endorsement nor be responsible for the pay-
ment of said note but that he desired
their names merely to satisfy the deft.
The plff. objected to this evidence the
objection was sustained by the Court & the
testimony not received, This was all the
testimony given in the case

Copy of Instructions given by the Court.
Urdike v Henry 3

The Court at the request of both parties instructed the jury orally. The Court instructed the jury that this is an action of Replevin in which the plff. claims that the deft withholds from him ~~two~~ lumber waggons to the possession of which plff avers that he is entitled. Under the proof in the case his right of possession depends upon the question whether at the time of suing out of the writ he was the owner of the property replevied. To substantiate the title to the wagons he relies upon an alledged purchase of the same from the deft.

three To establish a sale of personal property these things must concur there must be parties competent to contract an agreement or meeting of minds of the contracting parties as to the terms of sale and a delivery either actual or constructive of the thing sold. In order to constitute an actual delivery the purchaser must either take the same into his possession or the same must be specifically designated or pointed out at the time of the purchase and sale. If the jury believe from the evidence

that there was a sale and delivery of the wagons in question by the Deft to the Plff. they will find the issues in favor of the Plff. If not they will find for the Deft.

To these instructions the plaintiff excepted and asked the court to give the following written instructions viz

- W¹ No actual moving or separating of property is necessary in order to constitute a delivery of the property sold if it is sufficient, if it is previously pointed out, as the property sold or bought if among other property—
- W² If the property sold is specifically designated & pointed to the purchaser by the seller at the time of sale as the property purchased & sold, this is a sufficient delivery although the seller should afterwards refuse to deliver it to the purchaser
- W³ If the jury believe from the evidence that the defendant sold two wagons to the plaintiff and that he had paid him for the property and that it had been designated or pointed out by the parties as the property sold or purchased and that the time of the contract of purchase had been performed this is a delivery—

The court also further instructed the jury orally that if they found for the plaintiff that the form of their verdict, would be, we the jury find the issue joined in favor of the plaintiff ~~he~~ assess his damages for the detention of the property as they should think the proof warranted.

And if they find for the defendants, that we the jury find the issue joined in favor of the defendants, and assess the damages for the detention of the property at such sum as they should think the proof warranted.

The jury then retired under the charge of an officer and afterwards returned into court with the following verdict

We the jury find the issues joined in favor of the defendants and assess the damage at one hundred & thirteen dollars. J. A. Scott Foreman
Whereupon the plaintiff moved for a new trial
And assigned the following causes of error

First

The Court erred in refusing to continue the cause on ^{the} affidavit filed —

Second The Court erred in instructing the jury orally

Third The Court erred in ^{refusing to} giving the ~~third~~ instruction asked

Fourth

The Court erred in not giving the first instruction as asked without inserting the words

Specifically.

Fifth The court erred in not giving the second instruction as asked, without inserting the words Specifically — designated and striking out the following words "After sold" And the purchaser has complied with his contract of purchase or sale

Sixth Verdict is against the evidence

Seventh The verdict is against the Law & Evidence in the case

The court after hearing the argument of counsel refused to set aside the verdict & grant a new trial on the defendant remitting the damages which he did

The plaintiff then excepted to the ruling a decision of the court in not granting a new trial And there upon made a motion in arrest of judgment which the court also overruled and, ^{to} the decisions and ruling of the court in refusing to grant a new trial and arresting the said judgments the plaintiff then and there executed to and then there proposed this his bill of exceptions and prayed the court to sign & seal the same and make it a part of the record in the cause which is accordingly done

Isaac S. Wilson ²⁰⁰⁰
2000

State of Illinois
Rand County

I Luther Dearborn Clerk of the Rand
County Circuit Court do hereby certify that the
above and foregoing are true copies of the affidavits
Writ. Tarr. Demurrer. Joinder. Replication, affi-
davits for continuance, Instructions. Copy of Testimony
and Bill of Exceptions, together with all of the orders
of court in the above entitled cause.

Witness Luther Dearborn Clerk of
said court and the seal thereof
at Genoa in said county this 16
day of March A.D. 1853

Luther Dearborn
Clerk

And the plaintiff in the above
bill of Exceptions assigns the fol-
lowing errors viz

First

The Court erred in overruling
the plaintiff's motion for continuance
of the said case at the November Term
1852 on the two affidavits filed
by the plaintiff at that time of
the Court

Second

The Court erred in not con-
tinuing the case at the said Novem-
ber Term of said Court on the af-
fidavits made by him

Third

The Court erred as to join in -
the case in giving the said In-
structions

Fourth

The Court erred in refusing
to give the third instruction -
asked by the plaintiff

Fifth

The Court erred in ~~not~~ -
not giving the first & second in-
structions as asked by the plaintiff
and in incorporating in them with-
out the assent or knowledge of
the plaintiff the words

Sixth

The Verdict was contrary to
the evidence in the case

Seventh

The Court Erred in refusing to
grant a New trial in the case

Eighth

The Court Erred in directing the
defendant that he must either
omit his damages or that he
should grant a New trial

Ninth

The Court Should either have
given the first and second in
struction as asked by the plain-
tiff or refused to give them at
all.

J G Mayhew
Atty for Plff in
Error.

And now comes the said defendant
in error by Harrington & Cook his
attys & says thus in the record & proceed-
ings aforesaid & in the rendition of the
Judgment aforesaid there is no error
& he prays said Judgment be affirmed
with Costs

Harrington & Cook
attys for deft in error

State of Illinois
Kane County Sh.

J. Alden Gilbert of the
Town of Compton County of Kane & State
aforesaid being first duly sworn doth-
depose and say on oath That he is the
owner in fee simple of 80. acres of land
situated in said Town & County and that
it is worth in his opinion twelve
hundred dollars and that he ~~owns~~^{owns} nothing
for the same and that there is no
lien on it, and that he is the owner
of personal property to the value of
Three hundred dollars and that he
does not owe one fifty dollars in
all and that his business is for
merry & blacksmithing and that
this is spent with not
sworn & subscribed to
before me this 26 day-
of February 1853.

Alden Gilbert

Thos A Scott 
Justice of the Peace

State of Illinois
Kane County- 183

Levi Updike of
the County of Kane and State of Illinois being
duly sworn doth depose and say on oath—
that he is the owner of one hundred
& fifty acres of land at buy in Kane Co
State of Illinois and it is worth from
fifty to twenty dollars per acre—
with the improvement on it—
and a home personal property—
Enough to cover all my liabilities
That no man is standing against
me
Sworn & subscribed to Levi Updike
This month day of
March 1853

Wm A Scott L.S.
Justice of the Peace

State of Illinois
Supreme Court

Let a supersedeas issue in the above suit and
the plaintiff in error filing a bond with the
Clerk of this Court in the usual form with Adam
Gilbert surety in the penal sum of two hundred
dollars

J D Carson

No. 32. Kane Co.
Randolph Updike
George W. Henry.
Record & asst. Secy.

Filed April 27th 1853.
L. Leland Clk.
By P. K. Leland Depy.

32 *Wpedita as Henry*

The continuance was properly refused
1st Because there was no diligence used
the pleas on which the case was tried were
filed in May, the affidavits were filed
in November, the affidavit made
before issue joined shows that in that
state of of case ptiff knew that the testimony
was material *McConnel vs Johnson*
2 Gil 529

2^d The affidavit does not show the materiality
of the proof sought 12 Ill. 459

3^d The instructions given were correct, the court
say the delivery must be ~~actual~~ either
actual or constructive, and that to
constitute actual delivery the property
must be designative or pointed out

~~add to~~ 4th Error The ~~was~~ refusal to give the
instruction was not excepted to in the
court below, besides the parties had
agreed the instructions should be given
orally

The 5th error assigned has no foundation
in fact, B. C. Cook

for deft in Error

Updike's Army

Brief of dispatches

1st. The Army of the Potomac, under the command of General McDowell, was defeated by the Army of Northern Virginia, under the command of General Lee, at the Battle of Bull Run, on July 21, 1861. The result of this battle was the evacuation of Washington, D. C., and the flight of the Union Army to the North. This battle was a significant victory for the Confederacy, as it demonstrated that the Union Army was not invincible and that the Confederacy was capable of standing up to the Union in a conventional battle. The battle also had a major impact on the morale of the Union, as it showed that the Confederacy was a serious threat to the Union's survival. The Union's defeat at Bull Run led to a series of military setbacks, including the fall of Fort Mifflin and the evacuation of Fort Mifflin. The Union's defeat at Bull Run also led to a loss of confidence in the Union's military leadership, which was replaced by General Burnside. The Union's defeat at Bull Run was a major turning point in the war, as it showed that the Confederacy was a serious threat to the Union's survival. The Union's defeat at Bull Run led to a series of military setbacks, including the fall of Fort Mifflin and the evacuation of Fort Mifflin. The Union's defeat at Bull Run also led to a loss of confidence in the Union's military leadership, which was replaced by General Burnside. The Union's defeat at Bull Run was a major turning point in the war, as it showed that the Confederacy was a serious threat to the Union's survival.

General April 23. 1853

Dr Sir

Enclosed please find the bond
in the case of uptake as Herby and
three dollars please send the Supersedeas
immediately to the Sheriff of your County

Yours with

Respect

J. H. Weyham

To the Sealed
Clerk of the
Superior Court of
Illinois

State of Illinois, set.

WRIT OF ERROR—FREE TRADER PRINT.

The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of *Keane* — GREETING :

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

Randolph Updike plaintiff, and *George W. Henry*

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

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice of our said
Court, and the seal thereof, at Ottawa, this *27th*
day of *April* in the year of our Lord one thousand eight
hundred and fifty *three*.

S. Leland Clerk of the Supreme Court.
By *P. K. Leland* dep. Clk.

No. 32. Kane Co.
Randolph Updike
vs.
George W. Henry
Writ of error.

Filed April 27th 1853,
L. Leland Clk.,
By P. H. Leland Esq.,

This writ of error is made
a supersedeas & as such is
to be obeyed accordingly by
all concerned.

L. Leland Clk.,
By P. H. Leland Esq.,

Know all men by these presents that we
Randolph Updeke and Alder Gilbert of
the County of Boone and State of Illinois are
held and firmly bound unto George W.
Berry in the penal sum of two hun-
dred dollars lawful money of the United
States for the payment of which said
sum of money will and truly to be-
made we bind ourselves and heirs and
administrators jointly ~~severally~~ and
separately by these presents setting our
hands and seals this Eleventh day of
April AD 1853.

The conditions of the above ob-
ligation is such, that whereas the
said George W. Berry did at the
November term of the Boone County
Circuit Court, ~~by~~ 1852. held in and
for said County by the Hon. J. G. Wil-
son Judge of the 13th Judicial Circuit.
Receive and judgment against the
said Updeke in an action of
assumpsit, wherein the said Updeke was
plaintiff & said Berry defendant
for loss of suit & return of the prop-
erty so received, from which
said judgment the said Updeke
has taken an appeal to the Superi-
or Court of the State of Illinois by
a bill of exceptions, and upon
filing of his said bill of excep-
tion with the clerk of the Third
division of the said last mention-
ed court, on Supersedeas has-

here order by the Hon J. D. Catron, ^{one}
 the Justices thereof, in the said cause
 upon the application of the said
 Appellee. Now therefore if the said
 Appellee shall prosecute his said
 appeal with effect and shall pay
 whatever judgment may be render-
 ed by the said Court upon dismis-
 sal or trial of said appeal before
 the said Court, and all costs ^{therein} that then
 the above obligation is to be paid -
 otherwise to be and remain in
 full force & effect.

Randolph Appellee
 Oliver Gillett

No. 32.
 Supreme Court
 3d Session
 To Appellee
 H. W. Giering
 Appellee (Bond)

Filed April 27th 1853
 L. Leland Clerk
 By P. H. Leland depy.

Supreme Court
Randolph Hepdike
Plaintiff in Error
vs
G M Henry

Of June Term -
For 1853.

First

The Court ended in refusing to
continue. the case on the opposite -
filed and the 13 Ill. R Page 17-2 Ill
637

Rogers was a material witness
for the plaintiff -
One deliquant had been ruled, and
§ 2nd Ill 637-8, 7 Mend 513 Graham P
Second

The Court ended in giving oral
instruction

Third No 6.

The Court ended in refusing to give
the ~~first~~ ^{third} instruction as asked

Fourth No 7

The Court ended in not giving the
first instruction asked with out in-
serting the word specifically.

Fifth No 8-

The Court ended in not giving
the second instruction as asked
with out inserting the words spec-
ifically dissipated and in striking
out the words, And the purchaser
has complied with his contract of
purchase or sale

No 9 The contract was not resumed long on Feb 24/2
Sixth) 244

No 10 The verdict is against the Defendant

Seventh No 11.

The verdict is against the Lord and
the Evidence in the case

Eighth No 12

The Court came in refusing to grant a
new trial

No 1

Oral instructions given by court
The instructed the jury, that this is an action
of Replevin in which the plaintiff claims
that the Defendant withholds from him two
Lumber wagons to the possession of
which plaintiff avers that he is entitled
under the proof in the case his right of
possession depends up the question whether
at the time of serving out of the writ -
he was the owner of the property replevin
To substantiate the title to the wag-
ons he relies upon an alleged purchase
of the same from the defendant, To -
establish a sale of personal property
three things must concur, there must
be parties competent to contract, an
agreement or meeting of mind of
the contracting parties as to the terms of
sale or ~~contract~~ of the thing sold
and a delivery either actual or con-
struction of the thing sold

In order to constitute an actual de-
livery, the purchaser must either take
the same into his possession or the

some must be specifically designated or pointed out at the time of the purchase or sale, if the jury believe from the evidence that there was a sale and a delivery of the waggon in question by the defendant to the plaintiff, they will find the issue in favor of the plaintiff if not they will for the defendant.

Point No 2.

The Court said in giving this instruction and it was not the same, because this action is brought to get the possession of the property and the plaintiff only alleges that he is entitled to the possession thereof but Long on sales 260, 262, 274

A. 3. 282, 285

The court said in instructing the jury in this case that before the plaintiff could maintain his action either on actual or constructive delivery must have been made.

And Long on sales, 188.

Third

No 11 It is not absolutely necessary in order to constitute an actual delivery, that the purchaser should take the same in to his actual possession at the time of the sale or that the same be specifically designated. Long on sales 264 267

No 5

Fourth And Long on sales 288.

No delivery is necessary to constitute a perfect ^{& full} sale of property, where the property purchased is ^{to be} ~~by~~ made or manufactured at the time of sale and the purchase price is paid in advance by the

purchase to the vendor or maker at the
time of purchasing, but on the contrary
the materials that are necessary to make
the article purchased become absolutely the
property of the purchaser or made into
or put into ^{and incorporated with} the article purchased ~~and~~
and no delivery is necessary.

Refused
If the jury believe from the evidence that
the defendant sold certain waggons to
the plaintiff and, and that he had
paid him ^{for} the same and that they had
been designated or pointed out by
the parties as the property sold or pur-
chased and that the terms of the con-
tract has been performed this is a delivery.

If the property sold is (specifically des-
ignated &) pointed out to the purchaser
by the seller at the time of the sale as the
property purchased & sold this is a suf-
ficient delivery although the seller should
afterwards refuse to deliver it to the pur-
chaser (and it is the property of the pur-
chaser).

No 13-

It is a general rule of ^{the common law} Law relative to the
sale of property that by the mere contract of
sale the property in the thing sold passes to
the vendee and Long on Sales 42-

No. 32. Kane Co.

Randolph Lipdike

vs.
George W. Henry

32

12/18

1853