

No. 12712

Supreme Court of Illinois

Boilvin et al

vs.

Moore et al

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12712

1859

Prepared

Please before the circuit court, in and
for the county of Peoria, in the state
of Illinois, on the 2^d day of Janu-
ary in the year of our Lord one
thousand eight hundred and fif-
ty eight.

Be it Remembered that heretofore
to-wit: On the 7th day of November
AD 1856, there was filed in clerk's office
of the Peoria County circuit court, a
bond and precipe, in words and figures
following, to-wit:-

Henry Moore,	}	In the circuit court of Peoria county state of Illinois November Term AD 1856.
James C. McKesson		
Joseph Bell		
Frederick D. Norton		
George Norton		
Benjamin Fisher		
Love T. Dean		
Charles Williams		
John W. Butthwell		
William Carnahan		
Thomas Coats		
Jacob Snider		
Adam Ourney		

vs.

William C. Bailon
Amos L. Messiman

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We do hereby enter ourselves security for costs in this cause and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the officers of this court in pursuance of the laws of this state.

Dated this 7th day of November A.D. 1856.
Bryan Stone.

Issue Summons in above cause in assumpsit - damages \$600.

Bryan Stone, plffs. Atty.

And on the day and date of the filing of said bond and pacifice, there was filed in said Clerk's office, a narration, in words and figures following, to wit:-

State of Illinois, Circuit Court,
Peoria County, 1st November Term 1856.

Henry Moore, James C. Acheson, Joseph Bell, Frederick D. Norton, George Norton, Benjamin Fisher, Love T. Bean, Charles Williams, John W. Bothwell, William Carrigan, Thomas Coats, Jacob Guider and Adam Owey, copartners in trade, doing business under the name and firm of Norton, Acheson & Co., complain of William C. Boileau and Amos L. Merriman, partners in business

under the firm of W. C. Boileau & Co., of a plea of trespass on the case upon promises = For that whereas the said defendants on the first day of November in the year of our Lord one thousand eight hundred and fifty-six at the county aforesaid were indebted to the said plaintiffs in the sum of Six hundred dollars of lawful money of the United States of America, for divers goods, wares, and merchandise, by the said plaintiffs before that time sold and delivered to the said defendants and at the special instance and request of the said defendants and being so indebted to the said plaintiffs the said defendants in consideration thereof, afterwards, to wit: - on the same day and year, and at the county aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested. And whereas also, the said defendants afterwards, to wit, on the same day and year, and at the county aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants sold and delivered to the said defendants divers other goods, wares, and mer-

chandise of the said plaintiffs the said defendants then and there undertook and faithfully promised the said plaintiffs that the said defendants would well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandises, at the time of the sale and delivery thereof, were seasonably worth, when the said defendants should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandises last mentioned, at the time of the sale and delivery thereof, were seasonably worth the further sum of Six hundred dollars, of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice. And whereas also, the said defendants afterwards to-wit, on the same day and year, and at the county aforesaid were indebted to the said plaintiffs in the further sum of Six hundred dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendants and at the like request of the said defendants — And for other money by the said

plaintiffs before that time paid, laid out, and expended for the said defendants and at the ~~xxx~~ like request of the said defendants. And for other money by the said defendants before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendants in consideration thereof, afterwards, to-wit, on the same day and year, and at the county aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested. And whereas also the said defendants afterwards, to-wit, on the same day and year, and at the county aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money, before that time due and owing from the said defendants to the said plaintiffs and then and there being in arrears and unpaid, and upon such accounting, the said defendants then and there were found to be ~~xxxxxx~~ in arrears, and indebted to the said plaintiffs in the further sum of Six hundred dollars, of like lawful money as aforesaid. And being

so found in arrears and indebted to the said plaintiffs the said defendants in consideration thereof, afterwards, to-wit, on the same day and year, and at the county aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested. Nevertheless the said defendants (although often requested, &c.) have not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs but to pay the same, or any part thereof, to the said plaintiffs the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs six hundred dollars, and therefore the said plaintiffs bring suit &c.

Bryan Stone, for plffs.

W. C. Bailwin & Co.

To Norton, Acheson & Co. Dr	
For goods sold & delivered	\$6 00
" Money lent	0.00
" Money paid	0.00
" Money received	0.00
" Money due on account stated	0.00

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And on the day and date of the filing of the aforesaid bond, precept and narration, there was issued from the office of the clerk aforesaid, a summons in words and figures following to-wit:-

The People of the state of Illinois, to the sheriff of Peoria County, greeting:- We command you to Summon William C. Boilevin and Amos L. Merriman, if they may be found in your county, to appear before our circuit court on the first day of the term thereof, to be held at Peoria, within and for the said county of Peoria, on the 3^d Monday of November instant then and there, in our said court, to answer unto Henry Morse, James C. Acherson, Joseph Bell, Frederick D. Norton, ^{George Norton}, Benjamin Fisher, Love S. Dean, Charles Williams, John A. Battwell, William Casikane Thomas Coats, Jacob Snider, and Adam Owrey, copartners in trade doing business under the name and firm of Norton, Acherson & Co. of a plea of trespass on the case on promises to their damage six hundred dollars as they say and make return of this writ, with an endorsement of the time and manner of serving the same, on or before the first day of the term of the

said court to be held as aforesaid. Witness
 James S. Barkman, clerk of our said
 court, and the seal thereof, at Peoria,
 this 7th day of November in the
 year of our Lord one thousand
 eight hundred and fifty-six.

Seal

James S. Barkman, clerk

Which said summons was afterwards
 returned to said clerk's office endorsed
 in words and figures following to-wit:

Served on W. C. Boileau and Amos
 L. Merriman by reading to them this
 writ. Nov. 8th 1856.

D. J. Jones, Sheriff.

And afterwards to-wit, at the March
^{Term 1857.}
 term of our said court, the defendants
 plead to plaintiffs' narration in words
 and figures following to-wit:-

Henry Moore & Co	} Peoria Circuit Court
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William C. Boileau & Co	
	} March Term 1857.

Defendants come and defend the wrong
 & injury when &c and say they did not un-
 dertake or promise in manner & form as
 plaintiffs have above declared against
 them & of this they put themselves upon
 the country &c. Manning Merriman, for depts

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To which plea is added the following words to-wit:-

And plffs do the like

Bryan & Stone, for plffs.

Proceedings in the circuit court, at a term thereof began and held at the court house in the city of Peoria, in and for the county of Peoria and state of Illinois, on the second Monday of May in the Year of our Lord one thousand eight hundred and fifty-seven, it being the eleventh day of said month. Present the Honorable Elisha N. Powell, judge of the 16th Judicial Circuit in said state; Francis W. Smith, Sheriff and Enoch McLean, Clerk, to-wit:-

Saturday, May 23rd AD 1857.

Henry Moore & Co

vs. Assumpsit

William C. Boileau &

Mrs L. Merriam

By agreement of parties this cause is continued.

Proceedings in the circuit court at a term thereof began and held at the court house in the city ^{and county} of Peoria, in and for said county, and state of Illinois, on the third Monday

of November in the year of our Lord one thousand eight hundred and fifty-seven, it being the sixteenth day of said month. Present the Honorable Elisha N. Powell, judge of the 16th judicial circuit in the state of Illinois—Francis W. Smith, sheriff, and Enoch T. Hoan, Clerk, &c.

Saturday, January 2^d A.D. 1858.

Henry Moore
James C. Tcheson
Joseph Bell
Frederick D. Norton
George Norton
Benjamin Fisher
Love T. Dean
Charles William
John W. Bothwell
William Carrigan
Thomas Coats
Jacob Snider
Adam Owsen

vs.

Assumpsit

William C. Bailon
Amos L. Merriam

This day came the plaintiffs by Bryan their attorney, and the defendants by the said Merriam, and waives Trial by Jury and agree that all matters of law and fact

arising in this cause shall be tried by the court and the court being satisfied in the premises do find for the plaintiffs and assess their damages at two hundred and ninety one dollars and eighty-three cents. Therefore it is considered by the court that the said Henry Moore, James C. Haskeson, Joseph Bell, Frederick D. Norton, George Norton, Benjamin Fisher, Love J. Dean, Charles William, John W. Bothwell, William Carrihan, Thomas Coats, Jacob Snider, Adam Owey, have and recover of the said William C. Boileau and Amos L. Merriman, the sum of two hundred and ninety one dollars and eighty-three cents, their damages aforesaid, and also their costs and charges, by them about their suit in this behalf expended, and that they have execution therefor. Whereupon the said defendants by the said Amos L. Merriman prayed an appeal to the Supreme Court of this state, which was allowed on their filing a bond in the penal sum of six hundred dollars, conditioned as the law directs with Julius Manning as surety, with the clerk of this court, in thirty days.

And on the day and date of the rendition of the aforesaid judgment there was filed with the said Clerk, a bill of exceptions

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in the words and figures following to-wit:-

Henry Moose &als	}	Peoria Circuit Court
vs		Nov. T. 1857.
William C. Boilwin &al	}	

Be it remembered that this cause came on to be tried at said term upon the issues joined. And the plaintiff to maintain the issues on his part, add in evidence the depositions of Edward B. Norton, Philo L. Kimberly, and Edward M. Norton, as follows:-

State of Illinois, Peoria County, Ill.

The People of the State of Illinois, To Edward H. Fitzhugh of the city of Wheeling, in the State of Virginia, Commissioner to take depositions, Greeting:- We, having confidence in your skill and fidelity, have appointed you, and by these presents do authorize and require you, at a certain time and place, to lie by you appointed for that purpose, to cause the witnesses whose names are mentioned in the caption of the annexed interrogatories, to come before you, and then and there diligently and faithfully to examine them on oath upon the said interrogatories, in the order in which they are propounded, and you will cause the answers of the witnesses thereto, to be reduced to writing,

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in the order in which they shall be proposed and answered; and you will then cause the witnesses to sign their names to the same in your presence. You will also annex a certificate, subscribed by yourself at the foot of the depositions stating that they were sworn to and signed by the deponents and the time and place when and where the same were taken. The depositions thus taken and subscribed, and all exhibits produced, or referred to by the witnesses together with this commission and the annexed interrogatories, you will inclose, seal up and direct to the clerk of the circuit court of the county of Peoria, in the State of Illinois, with the names of the parties litigant endorsed thereon. Witness, Enoch P. Sloan, clerk

of the circuit court of the county of Peoria and the seal of said court, this twelfth day of February in the year of our Lord one thousand eight hundred and fifty-seven.

Enoch P. Sloan, Clerk

Interrogatories to be propounded to Edward M. Norton, Edward B. Norton, Philo L. Kimberly, of Wheeling in the state of Virginia, witnesses to be produced, sworn and examined in a certain cause at common law pending in

Seal

the circuit court in and for the county of Peoria, in the state of Illinois, wherein Henry Moore, James C. Acheson, Joseph Bell, Frederick D. Norton, George Norton, Benjamin Fisher, Love L. Dean, Charles Williams, John H. Bathwell, William Carnahan, Thomas Coats, Jacob Snider and Adam Ourey, copartners in trade, doing business under the name and firm of Norton, Acheson & Co. are plaintiffs and William C. Boilvin and Amos L. Merriman, partners in business under the firm of W. C. Boilvin & Co. are defendants; on the part and behalf of the said plaintiff as follows to wit:-

- Question 1 What is your name residence & occupation.
- Question 2 Do you know the parties to this suit & how long & where have you known them respectively.
- Question 3 Where did the plaintiffs reside and do business during the year A.D. 1855, 1856, in what kind of business were they then engaged and under what name or firm (if any) did they transact such business.
- Question 4 Do you know whether the plaintiffs, in the spring of 1855 shipped a lot of nails to John W. King at Peoria Illinois. If so state what you know and if in your power attach a

15 bill of said nails, and also a bill of lading. State all that you know of your own knowledge, in relation to said nails and said King, and also your means of information.

Question 5 If you say that said nails were sold or supposed to be sold by the plaintiffs to any person, state at what time, to whom, at what price, on what terms of payment, and under what circumstances. State fully all that you know of your own knowledge & your means of knowledge.

Question 6 Was there in February and March 1855 a custom among the manufacturers of nails at Wheeling, and had the plaintiffs any custom, as to the time and mode of payment for nails sold and shipped by them to Illinois upon orders. If so state what that custom was, and your means of knowledge.

Question 7 Did John W. King or other person ever pay or offer to pay for said nails or any part of them, or give or offer to give any note, draft or other security for such payment. Did the plaintiffs ever demand payment. If so, state when & in what manner & state your means of knowledge. Attach a copy of any letter written by or under the direction of plaintiffs to said John W. King at Peoria, Illinois & copied & mailed by you, stating what was done with the original.

Question 8, Do you know what became of said nails either of your own knowledge or by admission of dependents?

Question 9 Do you know any other matter in the premises that may be of benefit to plaintiffs. If so state fully?

Cross Interrogatories to be propounded to said witnesses in the above entitled cause.

1. If ~~known~~ in answer to the direct interrogatories you state, that any nails were contracted to be sold to John W. King, state whether said nails were sold for cash or on credit & if on credit upon what time?
2. Did not said King buy for cash & pay for said nails upon the delivery thereof or upon giving the order?
3. Are the said plaintiffs now in business. If not where did they cease business?

Wheeling, Va., March 29, 1855.

Geo. W. King, Esq

Peru, Ills

KW	30	Kegs	8	Nails	3.75	112	50
	25	"	$\frac{1}{10}$	$\frac{1}{12}$	$\frac{1}{20}$	3.50	87 50
	10	"	6	"	4.25	42	50

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10	"	4	"	4 75	47 50
5	"	3	"	5 75	28 75
<u>20</u>	"	8	Fring	3 75	<u>75</u>
100				Ans	393.75

for "Fanny Fern" @ 35¢

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Dr Sir:

We now ship your mails ordered through Mr. E. M. Norton and hand Geo V B Lading of same herewith. We enclose draft for same as customary with us, which please return with acceptance made payable if you conveniently can at some banking house in St. Louis. We have availed ourselves of first good opportunity of shipping through.

Yours very respy

Norton, Acheson & Co.

This is the paper referred to in the deposition of Edward B. Norton, as marked "A"

Edward H. Fitzhugh, Commissioner

11th Oct.

Geo. W. Ring, Esq
Peoria, Ills.

Dr Sir - Herewith appended we beg to hand your a/c. please favor us with a remittance for same by return mail. the a/c being now past due

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Yours very respy

Norton, Acheson & Co

Mr. Jno. W. King

1855

To Norton, Acheson & Co. Dr.

March 30 - To bill nails &c. \$393.75

This is the paper referred to in the deposition of Edward B. Norton as marked BB

Edward H. Fitzhugh, Commissioner

8th Dec.

Jno. W. King Esq
Peoria, Ills

Sr. Sir: We wrote to you under date of 11th Oct in relation to our bill nails 30th March but have no reply Have the goodness to remit us for same. It is now considerably past due

Yours very respy

Norton, Acheson & Co

This is the paper referred to in the deposition of Edward B. Norton as marked C.

Edward H. Fitzhugh, Commissioner.

Shipped in good order and condition, by Norton, Acheson & Co. On board the good steam boat Janny Fern the following articles, marked or numbered as below, which are to be delivered, without delay, in like good order, at the port of

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as annexed (the unavoidable dangers of the river navigation and fire excepted,) unto Respective Consignees or to his or their assigns; he or they to pay freight for the said goods at the rate of 35¢ per Kg with privilege of reshipping on good boat at St. Louis. In witness whereof, The owner, master, or clerk of said boat has affixed to two bills of lading, of this tenor and date; one of which being accomplished, the other to stand void. Dated at Wheeling this 29 day of March 1855.

Marks

M.P To Moses Pettergill Peoria Ills

50 Kgs assorted Nails

L.K To J. L. & A. Knowlton, Peoria Ills.

100 ~~Kgs~~ ^{Kgs} assorted Nails

M To J. C. Moore, Peoria Ills

78 Kgs assorted nails

M.K To Brutherson MacRynolds, Peoria

100 Kgs assorted Nails

R.W To Geo. W. King Peoria

100 Kgs assorted Nails

H.W To J. H. Wilkey Peoria Ills

74 Kgs. Assorted nails

S To Stephen Roney Peoria, Ills.

124 Kgs assorted nails

[D] To C. J. D. Rupert & Co. Peoria, Ill

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240 Kegs assorted nails

20 " " "

260

②

To wagon seller & chain Pekin, Ills

146 Kegs assorted nails

M. Blake, clk

This is the paper referred to in the deposition of Phil-
ls L Kimberly as marked III

Edward H. Fitzhugh, Commissioner

30 Kegs nails 8^d20 " do 8^d Fence10 " 10^d10 " 12^d10 " 6^d10 " 4^d

5 " 20

5 " 3^d

100 Kegs nails assd

Jas. W. King

Pekin

E. M. Norton agt.

This is the paper referred to in the deposition of Ed-
ward M. Norton as marked III

Edward H. Fitzhugh, Commissioner

Shipped in good order and condition, by Norton,
Pekeon Ho. - On board the good steamboat
City of Wheeling the following articles, mark-
ed or numbered ~~as~~ ~~xxxxxxx~~ as below, which

are to be delivered, without delay, in like good order, at the port of Cincinnati (the unavoidable dangers of the river navigation and fire excepted) unto respective consignees or to his or their assigns, he or they to pay freight for said goods at the rate of 10¢ per Kg. In witness whereof, The owner, Master or Clerk of said boat has affirmed to two bills of lading, of this tenor and date, one of which being accomplished, the other to stand void. Dated at Wheeling, this 28 day of March 1855.

Marks

P & D To Pappenhimer & Dryfoose, Cin. O.
70 Kgs. assorted nails

J. L. W. To J. L. Wayne Cin. O.
126 Kgs. assorted nails

J. W. To Jos. L. Wayne Cin. O.
25 Kgs. assorted nails

S To Spining & Brown, Cin. O.
30 Kgs. assorted nails

257 DuBois G. H.

Depositions of Edward B. Norton, Phis. L. Kimbush and Edward M. Norton, residents of the city of Wheeling in the county of Ohio in the state of Virginia, witnesses produced, sworn and examined before

me Edward H. Fitzhugh, Commissioner named in the Commission hereto annexed, issued out of and under the seal of the circuit Court in and for the County of Peoria in the State of Illinois and to be read in evidence in a certain cause now pending in said Court wherein Henry Moore, James C. Acheson, Joseph Bell, Frederick D. Norton, George H. Norton, Benjamin Fisher, Louis T. Dean, Charles Williams, John H. Bothwell, William Barnahan, Thomas Coats, Jacob Snyder, and Adam Cosey, copartners in trade doing business under the name and firm of Norton, Acheson & Co. are plaintiffs and William C. Bailvin and Amos Lee Merriam partners in business under the firm of W. C. Bailvin & Co. are defendants.

Edward D. Norton having been sworn deposes and says in answer to the interrogatories hereto annexed.

1. To the first interrogatory on behalf of said plaintiffs he answers.

My name is Edward B. Norton, my residence is Wheeling, Virginia, and my occupation is that of a clerk for Norton, Acheson & Co.

2 In answer to the plaintiffs second interrogatory, he says, I know the plaintiffs Norton, Acheson & Co. I do not know W. C. Bailvin & Co.

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I went into the employment of Norton, Acheson & Co. in November 1853, and I have known them ever since that time - I have known Norton, Acheson & Co. in Wheeling, Virginia.

3 In answer to the plaintiffs third interrogatory he says:

The Plaintiffs all reside in Wheeling and as a firm or Company have continually done business in Wheeling from the year 1853 to the present time, embracing the years 1853, 1854, 1855, 1856, and all of 1857 to this date. During all this period the plaintiffs have been engaged in the manufacture of nails. And during all of this time they have transacted their business under the name of Norton, Acheson & Co.

4 In answer to the plaintiffs interrogatory four he says:

On the 29th of March 1855, the plaintiffs shipped at Wheeling a lot of nails to John W. King, Peoria, Illinois. I made the original invoice of the lot of nails shipped to Mr. King. This paper is a copy of the invoice and letter sent to Mr. King on the 29 of March 1855. [The witness refers to the paper hereto annexed marked "A" Edward H. Fitzhugh, Commissioner.] I did not attend to the bill of lading. Mr. Philo L. Kimberly who was then in the employment of Norton, Acheson & Co. attended to it. All that I know of this part of this transaction is that the nails of the quantity, size and price as stated in the paper A.

I have just referred to, were shipped as I have stated above. I know this because it was my duty to attend to that particular branch of the business of Norton, Acheson & Co. I mean invoicing their sales. I know nothing about Mr. King.

5 In answer to the plaintiff's fifth interrogatory, he says:

I know nothing about the sale to Mr. King. I was not present at any ~~time~~ such sale and never saw Mr. King that I know of.

6 In answer to the plaintiff's sixth interrogatory he says:—
Ever since I have been with Norton, Acheson & Co. it has been their custom to sell nails on six months time, the purchaser giving an accepted draft of the date of shipment. This is the general custom of the nail manufacturers of Wheeling and applies to Illinois and all other places to which shipments are made. I wish to be understood as speaking of the general custom, there may have been occasionally special contracts in which they may have deviated from this. But this is the general and invariable rule in the absence of a special contract & where there is a sale on credit.

7 In answer to the plaintiff's seventh interrogatory he says:—

John W. King never offered to pay for the nails in any way so far as I know, nor did any one else so far as I ever knew or heard of. I paid

a thing had have been done I would I think have heard of it. It was my habit to examine such things. Norton, Acheson & Co. did write to John W. King and demand payment of their claim against him. They first requested him to accept a draft which was sent with the letter of March 29, 1855 above referred to as exhibit A. They again wrote to Mr. King making a demand of payment on the 11th of October 1855. This is a copy of the letter. [Witness here refers to the paper hereto annexed marked "B. Edward N. Fitzhugh, Commissioner."] Norton, Acheson & Co. received no reply to that letter and they again wrote to Mr. King on the 8th of December 1855 making another demand. This is a copy of the letter of that date. [The witness here refers to the paper hereto annexed marked "C. Edward N. Fitzhugh, Commissioner."] These letters were all directed to John W. King, Peoria Illinois. No reply was ever received to any of these letters. I know that Norton, Acheson & Co. wrote & mailed these letters to John W. King, because I copied them. The original letters were mailed here in Wheeling directed to John W. King at Peoria Illinois.

- 8 In answer to the plaintiff's eighth interrogatory he says:
I do not know what became of the nails sent to King. I never saw the defendants and

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never heard any admission made by them about
nails or any thing else.

9 In answer to plaintiffs ninth interrogatory he says:-
I believe I have stated all that I know about
the matter.

1 In answer to defendants first cross-interrogatory, he says:
I have already stated that I know nothing
about a sale of nails by Norton, Acheson & Co. to
King. I do not know how the sale if any
was, or upon what terms it was made. All
I know about the subject that I can now
remember I have already stated.

2 In answer to defendants second cross interrogatory he says:
I know said King did not pay for the nails
when they were shipped here as I have stated. I
do not know whether he bought for cash or
paid for the nails upon giving the order, or
upon delivery. Of my own knowledge I know
nothing of his giving an order, or whether they
were ever delivered to him or the terms of sale.

3 In answer to defendants third cross interrogatory, he says:-

Norton, Acheson & Co., are still in business in Wheeling,
Virginia.

And further the deponent saith not.

Edward B. Norton.

The said Philo L. Kimberly having been duly

sworn deposes and says.

- 1 In answer to plaintiffs first interrogatory he says:—
My name is Philo L. Kimberly. My residence is Wheeling, Virginia, and my occupation has been a shipping clerk, though I am out of business now.
- 2 In answer to the plaintiffs second interrogatory, he says:—
I know the plaintiffs—I don't know the defendants—I have known Norton, Acheson & Co. a good number of years, but for the last four years intimately—I knew them in Wheeling.
- 3 In answer to the plaintiffs third interrogatory, he says:—
The plaintiffs did business in Wheeling in the years 1855 and 1856 and for several years previous to those years—They have been engaged all the time in manufacturing nails—and they have always done business under the name of Norton, Acheson & Co.
- 4 In answer to the plaintiffs fourth interrogatory, he says:—
I knew that Norton, Acheson & Co on the 29th of March 1855 shipped a lot of nails to John W. King at Peoria, Illinois. I was their shipping clerk for Norton, Acheson & Co. I shipped this lot of nails myself on the steamboat Ferry Ferry—This is the original Bill of Lading made out by me at the time signed by Mr. Blake the clerk of the boat. A copy

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was furnished to the boat and another copy forwarded by mail to King at Peoria. The paper above referred to by the witness is hereto annexed marked D. Edw. H. Fitzburgh, Commissioner. I know nothing of the bill of the nails. I have already stated my means of information. I shipped the nails in person.

5 In answer to plaintiff's fifth interrogatory, he says: Of my own knowledge I know nothing of the sale of nails, terms, prices or circumstances. I know nothing about them except shipping them.

6 In answer to plaintiff's sixth interrogatory, he says: I know ~~when~~ that plaintiff when they sold on a credit, generally sold on six months time. And so far as I know this was it is the custom of other manufacturers of nails in Wheeling. There are several other establishments in this place, and I believe this custom is general among them.

7 In answer to the plaintiff's seventh interrogatory, he says: I know nothing about the matters contained in this question.

8 In answer to plaintiff's eighth interrogatory, he says: Of my own knowledge I do not know what became of the nails I shipped on the Fanny Fern. On answer to plaintiff's ninth interrogatory, he says: I know nothing further than I have stated already.

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- 1 In answer to defendants first cross interrogatory he says:
I know nothing about the subject matter of this question.
- 2 In answer to defendants second cross interrogatory, he says.
I do not know
- 3 In answer to defendants third cross interrogatory he says:
Yes sir - they are now in business.
And further deponent says not.
P. L. Kimberly

The said Edward M. Norton having been sworn deposes and says

- 1 In answer to plaintiffs first interrogatory
My name is Edward M. Norton, my residence is Wheeling, Virginia and my occupation is agent for Norton, Acheson & Co.
- 2 In answer to plaintiffs second interrogatory, he says:
I know Norton, Acheson & Co. I have known them for many years, all the time at Wheeling, Virginia. I do not know the defendants.
- 3 In answer to plaintiffs third interrogatory he says:
The plaintiffs have resided and done business in Wheeling all the time since the year 1852. Their business is manufacturing nails - They have always done business under the firm name of Norton, Acheson & Co.
- 4 In answer to plaintiffs fourth interrogatory he says.
As the agent of Norton, Acheson & Co, I

personally sold a lot of nails in Peoria, Illinois one hundred Kegs of assorted sizes as specified in this order, [witness here refers to the paper boxes annexed marked "H. Edward N. Fitzhugh, Commissioner" - to a man named as I supposed from from the manner in which his name was written John W. King - I had no personal acquaintance with him and relied upon his signature for the name - I took orders from all sorts of persons without any personal acquaintance confining myself to enquiries as to their ability to pay and looking to the orders I receive for the name of the party and the place of shipment. I presented the order afterwards to the plaintiff at Wheeling. The order was afterwards filled and the goods shipped to John W. King at Peoria. An inspection of the order and of the signature at the bottom will show how a misapprehension of the name originated. The order was given about the 1st of February 1855 - was delivered by me to the plaintiff - February 14 1855 immediately on my return from Peoria, and the nails were shipped March 29, 1855 - It could not be shipped earlier on account of navigation being closed. The signature at the bottom of the order marked H is in the hand writing of the party who ac-

trally gave the order. Whether it is King or King or some other name I cannot say - As I have remarked I have no personal acquaintance with the party - I was traveling for the purpose of selling nails - I received numerous orders, from a great many different parties and relied upon the orders I received for the names of parties and places - I know that the party was a dealer in Peoria and I took the order from himself personally in his own store.

- 5 In answer to plaintiff's interrogatory five he says:- I have already stated what I know about the sale, the parties & the time. The paper marked A referred to in the deposition of Edward B. Norton, shows the correct prices at which the nails were sold. The terms of payment were six months time. A draft of the date of the shipment was to have been accepted - payable six months after date. I have already stated what I know about the matter - My means of knowledge are a recollection of what I did personally in the matter.
- 6 In Answer to the plaintiff's sixth interrogatory he says:- The general custom of the plaintiffs & all the other nail manufactures of Wheeling (and there are several such manufactures here) has been to sell nails or orders from Ill -

invoice or else or elsewhere, at six months time, the purchaser giving his acceptance of date of shipment - or if cash was paid, five per cent was taken from the bill.

7 In answer to questions seven of plaintiffs, he says: - There never was payment or an offer to pay for said mails. No note or other obligation was ever received for said mails from any party. Several letters were addressed to John Welling at Peoria demanding payment. This is the only demand I know of. There may have been a correspondence on the subject between the plaintiffs and defendant, of which I have no personal knowledge.

8 In answer to plaintiffs eighth interrogatory, he says: - Of my own knowledge I do not know what became of said mails.

9 In answer to plaintiffs ninth interrogatory, he says: I have stated above all I know on the subject.

1 In answer to defendant's first cross interrogatory, he says: I have already said above, all I know in relation to the sale of said mails. I know that they were sold on six months time & no cash was paid when the ~~order~~ order was given, nor at any other time.

2 In answer to defendant's second cross interrogatory, he says: No.

33

B. Mansuer to defendant, third cross interrogatory to say
The plaintiffs are still doing business as for-
merly in the city of Wheeling.

And further this deponent saith not

E. M. Norton

State of Virginia
County of Ohio, ss.

I, Edward M. Fitzhugh, com-
missioner named in the commission hereto an-
nexed certify that the foregoing deposition
of Edward B. Norton was taken before me
at my office in the city of Wheeling, County
of Ohio and state of Virginia on the 3^d day of
September 1857, and that the depositions of the
said Philo L. Kimberly and Edward M. Norton
were taken before me at the same place
on the 4th day of September 1857. That previous
to their examination the said witnesses were
severally duly sworn by the undersigned
to testify the truth in relation to the matter
in controversy in said cause so far as
they should respectively interrogated thereto.
That said witnesses were thereupon severally ex-
amined by the undersigned upon all said inter-
atories attached to said commission. That the
answers of said witnesses respectively thereto
were reduced to writing by the undersigned

in the order in which said interrogatories were pro-
posed and answered, and that said witnesses
thereupon respectively signed their name
at the foot of the deposition given by such
witness - And that said depositions were each
duly sworn to and signed by deponents at
the time and place last above mentioned.

Given under my hand at Wheeling in
said county this fourth day of September
AD eighteen Hundred & fifty seven

Edw. H. Fitzhugh,
Commissioner

Fee of $7\frac{30}{100}$ pd by plaintiffs.

Also the agreed statement of facts as follows:-

Moose Falls 3

As

Bailwin Hals

Moose Falls
as
Boilwin Falls

It is admitted that plaintiffs sent to Matthew McReynolds an order upon defendants for the said nails in the spring of 1856 & that said McReynolds presented said order to defendants, but that said order was not accepted, nor were the nails delivered to said McReynolds upon said order. That no such person as John W. King has been known to reside in Peoria, either at the date of the order from John W. King for the nails or since - that said nails were ^{never} received by

John W King - that said nails were received by said defendants, who were warehousemen in Peoria, Illinois from the Steamboat Tiber in the month of April 1855 in store for the consignee - that the charges on the same were paid by said defendants at the time of receiving the same, and were kept in store by the said defendants until the spring of 1856, when the said nails were sold by defendants to pay charges - that the said nails were sold for four hundred & twenty-five dollars & that the charges on the same were \$133.17 - that said defendants were not authorized by said John W. King to receive said nails & that the defendants never saw or knew said King & that the only authority defendants had to receive said nails was from the Captain of said Steamboat Tiber from whom they received the said nails together with the bill of lading hereto attached, marked "A". That neither said nails nor the proceeds of the sale of the same have ever been demanded of defendants by any person except plaintiffs as aforesaid.

Manning Merriman
for depts
Bryan & Stone
for Plffs.

Shipped, in good order, and well conditioned, by Steamer Hannu Fern, for account and risk of whom it may concern, on board the good boat called the Tiber, whereof is Master for the present voyage now lying at the port of St. Louis the following articles marked or numbered as below, which are to be delivered without delay, in like good order, at the port of Peoria, (all the dangers of navigation, fire and unavoidable accidents excepted,) unto John W. King or assigns; he or they paying freight, at the rate of thirty-five cents per Keg. In witness whereof, The owner, Master, or Clerk of said boat, hath affirmed to 2 bills of lading, of this tenor and date, one of which being accomplished, the other to stand void. Dated at St. Louis this day of April 1855.

Marks	Articles	Weight
K W	100 Kegs apd Nails	
	Ent ^d	

OK H.C.K.

This was all the evidence offered in evidence. The court rendered a judgment for plaintiffs for \$291.83. To the rendition of which judgment the defendants then & there excepted, and prayed the court to sign & seal this his bill of exceptions which is done,
E. N. Powell, Clerk

State of Illinois }
Peoria County }

I, Mack H. Sloan Clerk of the
circuit court, in and for said county and
state, do certify that the foregoing is a
full and complete transcript of papers filed, and
of the proceedings of our said court, in the cause,
wherein Henry Moore James S. Dehaven, Joseph Bell,
Frederick D. Norton, Benjamin Fisher, Love T. Dean,
Charles Williams, John A. Butthwell, William
Carrigan, Thomas Coats, Jacob Linder
& Adam Owey are plaintiffs and William
C. Bailwin and Amos L. Merriman are de-
fendants, as the same appears on file and
of record in my office.

Given under my hand and the
seal of said court at Peoria
this 4th day of February AD
1858.

Mack H. Sloan, Clerk

William C. Barlow

and

Appellants

Henry Moore and
Appellees

Superior Court

of Illinois

3rd Grand Division

The Appellants desire upon the
within Record the following Errors
and say that there is manifest
error in the same in this Court
1st The Court erred in finding
for the plaintiffs below upon the
pleadings and Evidence in the
case before him -

2nd The Court erred in rendering
judgment against Appellants
The Court below upon the
pleadings & Evidence before
said Court - whereupon Appellants
pray that the said judgment be reversed and the
Cause remanded to the Appellate
Court for Appellate

And the ^{Appellants} Defendants in Error by
J. F. Bryan their Attorney, as to the
said assignment of Errors by said
Appellants, say that there is no
Error in the said record nor in the
judgment and proceedings of
said Court in said Cause, and
pray this Court that the said
judgment and proceedings
may in all things be affirmed
in

J. F. Bryan
Atty for ~~Defendants~~ in Error
Appellants

Recd of A. L. Merriam, Esq. the sum
 of Eight dollars for making this
 record. Euseb H. Brown, clk

William C. B. B. \$ 8.00
 11/10 2/1
 Money more
 app. 11/10

4

Record & copy
 of record

Filed April 26, 1888
 of record
 back.

William C. Bailwin } In Supreme Court
Amos L. Merriman } of Illinois.
vs } April Term 1859.
Henry Moore et al }

This was a suit brought to recover the value of certain mails shipped by the plaintiff below to one John W. King at Peoria & which came into the hands of defendants below as warehousemen and by them sold to pay freight & charges. The transaction between the plaintiff and King seems to have been one of ordinary sale of goods upon credit, plaintiff agreeing to ship the goods to Peoria and King to giving his ^{acceptance} ~~notes~~ at six months for the payment. The principle is well established that in cases of sales upon credit the property in the subject matter of the contract passes immediately to the purchaser, and the right of possession as well as the right of property vests in him at once.

2. Kent's Com. 493. & cases there cited

This right of property in the purchaser becomes so nearly absolute that it is

liable to defeat only by his becoming insolvent after the time of purchase and ^{before} the time of actual delivery.

2. Kent's Com. 493.

The right of property in King was still farther confirmed by the delivery of the mails in question to the carrier to be conveyed to Ploma. Delivery of goods to a carrier is equivalent to a delivery to the purchaser, and the property, with the correspondent risks and rights of action against the carrier for loss or damage rests in the purchaser subject only to the right of stoppage in transitu ~~only~~ in case of his insolvency.

2. Kent's Com. 499. & Cases Cited

1. Johns.

216. Potter v Lansing

8. Tenn Rep.

330. Davis v Beck

The question as to whether the plaintiff had a right to rescind the sale on account of the non-payment of the purchase money ~~rescues~~ has not been definitely determined

even in cases where the goods sold remained in the hands of the vendor. But in this case the goods had passed out of the hands of the vendor and come into the hands of defendants below as bailees for the purchaser long before the expiration of the credit and so remained in the hands of defendants subject to the order of King upon payment of freight & charges. To make the delivery still more complete, plaintiffs sent by mail the invoice and bill of lading ^{to King}, so that he might be able to claim them as his own property upon their arrival at Peoria, and might have a right of action against the carrier or warehouseman by whose negligence the same might be lost or damaged. The plaintiffs below therefore had no right to claim the property of Boilevin & Co unless they had the right of stoppage in Transitu.

In case of the insolvency of King the plaintiffs below had a right at any time during their transit to repossess themselves of the goods by any means not criminal. This right exists however only whilst the goods are in its strictest sense in transitu. In this case the transit was entirely at an end - the goods had reached their destination. It has been uniformly held that goods in the hands of a carrier, warehouseman, lighterman or other person for the purpose of facilitating their transit to the point of destination may be stopped, but so soon as they have reached such a point that some new act or order of the consignee is required to put them again in motion the right of stoppage has ceased.

Campbell vs Carben 5 Amer. Law Reg 683.

Same case in Sup. Ct. 6. " " 563

Frazier vs Hilliard 2. Strobbs. 309.

9. U. S. Reg. 7. 392

Lawyer vs Foster 20 Mt. 172

Dixon vs Baldwin 5. East 157.

Some cases are reported where the transit was considered not at- an end where the goods had been landed from the vessel and placed in the custom house store and registered in the custom house office. It will be found on examination that these cases are all of that particular class in which the goods are not considered as actually under the control of the purchaser on account of the governments lien for duties. The importation of the goods has not been fully completed until the duties are paid.

See Sawyer vs Joslin 20 71. 172

already cited

But supposing the transit to have been not ended, the proof in this case does not show that the vendors of the goods had a right to stoppage in transitu. There must have been insolvency of the consignee, evinced by some overt act before this right can be established

1. Parsons on Contracts 476-7

& cases there cited

Rogers vs Thomas 20 Conn. 33.

His neglect or inability to pay in this particular instance is not sufficient to establish his insolvency - A general reputation of inability to pay, without some overt-act of insolvency is not-sufficient.

At all events the plaintiffs had no right to the possession of the goods in question without first paying or offering to pay the freight and charges consequent upon their shipment and storage as aforesaid.

In the absence of fraud on the part of Thig in the purchase of the nails, the defendants were clearly liable to Thig for the value of the goods over and above their charges. The property in the goods was clearly in him and defendants would have rendered themselves liable to an action by delivering them to plaintiffs.

In the absence of any proof of fraud,
none can be presumed to have
existed; but on the contrary the
proof is that King was a regular
dealer in Provia at the time
the war was made, and the
transaction was conducted in the
usual way.

J M Culloch,
for appellants

41 - 10
William C. Boiling
Amos L. Merriam

^{vs}
Henry Moore et al

Argument for
Appellants

Filed May 13. 1839
L. Lealand
Clerk

WILLIAM C. BOILVIN AND AMOS L. MERRIMAN, <i>Appellants,</i> vs. HENRY MOORE AND OTHERS, <i>Appellees.</i>	}	SUPREME COURT, THIRD GRAND DIVISION OF ILLINOIS. APRIL TERM, 1858.
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APPEAL FROM PEORIA.

Action of Assumpsit. Declaration contained common counts. Plea general issue. Cause tried Nov. term, 1857, before E. N. Powell, Judge, without jury, and judgment for appellees of \$291 83. Edward B. Norton testified that he was clerk for plaintiffs, who were manufacturers of nails at Wheeling, Va., and that on 29th March, 1855, plaintiffs shipped a lot of nails to John W. King, Peoria, by steamboat, enclosed invoice in letter and sent per mail; to the invoice a bill of lading and draft upon King for his acceptance at six months; which letter was as follows: Dear Sir—We now ship your nails, ordered through E. M. Norton, and hand invoice and bill of lading of same herewith. We enclose draft for same as customary with us, which please return with acceptance made payable if you conveniently can at some banking house in St. Louis, &c. That it was the custom of plaintiffs to sell at six months, the purchaser giving an acceptance of date of shipment, which custom applied to Illinois and all other places to which shipments were made. John W. King nor any one else ever offered to pay for the nails that I know of. Think I would have known it if he had. Plaintiffs again wrote King, demanding payment Oct. 11, 1855. They received no reply, and wrote to King again Dec. 8, 1855, all directed to John W. King, Peoria, Ill. No reply was ever received to any of these letters.

Philo L. Kimberly testified to the shipping of the nails on Fanny Fern for Peoria.

Edward M. Norton testified that as agent of plaintiffs he personally sold

the nails specified in order in Peoria, Illinois, (which order was signed Jno. W. King,) to a man as I supposed from the manner in which his name was written John W. King. I had no personal acquaintance with him. I took orders from all sorts of persons without personal acquaintance, confining myself to enquiries as to their ability to pay, and looking to the orders I receive for the name of the party and place of shipment. I presented the order to plaintiffs, who filled it and shipped to Peoria. The order was given Feb. 1, 1855, delivered to plaintiff Feb. 14, 1855, and the nails were shipped March 29, 1855—not shipped earlier on account of close of navigation. The signature at bottom of order is in the handwriting of the party who gave the order; whether it is Hing, or Sting, or some other name I cannot say. I know the party was a dealer in Peoria, and I took the order from himself personally at his own store. The terms of payment were six months time. A draft of the date of shipment was to have been accepted, payable six months after date. No payment for the nails was ever made, nor no note or other obligation received.

The above evidence was contained in depositions.

The following facts were admitted: That plaintiffs sent an order upon defendants to M. McReynolds for the nails in spring of 1856, which order was not accepted. That no such person as John W. King has been known to *reside* in Peoria either at date of the order or since. That the nails were never received by King, but were received by defendants, who were warehousemen in Peoria, from the steamboat Tiber, in April, 1855, in store for the consignee, and charges paid by defendants at time of receiving them. That the nails remained in store until spring of 1856, when the nails were sold to pay charges—sold for \$425, and charges on them \$133 17. That defendants had no authority from or ever saw or knew John W. King, but the nails were left with them by steamboat Tiber, together with bill of lading. That no persons except plaintiffs have ever demanded the nails or the proceeds thereof.

MANNING & MERRIMAN,

Attorneys for Appellants.

~~79~~ 41

Boilins

183

Moore Boals

Filed April 23. 1838

To Leland
Clerk

RECEIVED

ARGUMENT FOR APPELLEES.

Who of all the owners of monosyllabic names in Peoria resembling King or Hing or Sting, 'or some other' name was the purchaser of these nails? To this question the record furnishes no answer. It is clear, however, that 'John W. King, Peoria, Illinois', is the only party with whom the plaintiff contracted:

Filed May 13, 1899.
L. Leland
Clark

the party to whom the nails were shipped; to whom the invoice, bill of lading and draft were inclosed in their letter of March 29, 1855; and to whom the subsequent letters of Oct. 11 and Dec. 8, 1855, were addressed by plaintiffs. No other person than John W. King was known to plaintiffs in connection with the purchase of these nails. To no other person did they ever make any attempt to *sell* or *deliver* the nails. And as it is admitted that no such person has lived [or been] in Peoria at or since the date of the alleged sale, and that neither he nor any other person (except the plaintiffs) has ever demanded the nails or the proceeds thereof from the defendants, it would seem to follow that this 'transaction' between plaintiffs and the shadowy individual subscribing himself King, Hing, Sting, 'or some other' name, differed from an 'ordinary sale' in the important particular of lacking a definite and tangible *purchaser to receive the goods, accept the draft and pay it when due.*

[The word '*reside*' is for the first time *emphasized by italics* in the Abstract. No importance was given to this word in the Court below. That part of the '*facts admitted*' was construed and treated as though the admission had been, 'that no such person as J. W. K. has been known to be in Peoria', etc. This would be the manifest construction of the admission with reference to the whole context.]

2. Another point of difference between the sale in this case and 'an ordinary sale on credit', is conceived to lie in the fact that a *condition* of this sale was that the purchaser should give the plaintiffs his 'acceptance, payable in six months'. If not a condition *precedent*, it was at all events *concurrent*: and had the nails even been *delivered to the purchaser*, he would have held them merely *in trust* for the plaintiffs.—See *Brief*, pl. 1, 2, 12, 13.

II. This is not a contest between the vendor and creditors of the vendee, to determine which has the better right to the goods; nor is it even a contest between vendor and vendee. It is simply a contest between the acknowledged vendors and *bailors* of the goods and *their bailees*, not for the goods *in specie*, but merely for the *excess* of the proceeds of the same beyond the expenses and charges of bailment. Clearly, whatever might be the rights of attaching or execution creditors, or the vendee himself, the defendants, having no other interest or claim in the

goods than *bailors for hire*, cannot, ought not to be permitted to dispute the title of their *bailors*.— See *Brief*, pl. 15.

III. The exact point at which the right of property in goods commences and terminates in the vendor and vendee respectively varies according to the position from which viewed. The appellants have chosen to discuss it as though they were clothed with the combined rights of *vendee* and *attaching creditors*.

As between *vendor* and *vendee* it is true that the right of property, so far as the *risk* and *liability for its price* is concerned, commences at the moment of *delivery* to a *general carrier*— (*Chitty on Cont.*, 382, citing *Wait vs. Baker*, 2 Exch., 1, 7, etc.), and in certain cases without any delivery. (2 *Bl. Com.*, 446–447; *Brief*, pl. 8.) Yet the vendor may retake them so long as they are *in transitu*, as against all the world. (See *Brief*, pl. 6, 7, 8, 9.) And even after they have been in actual possession of vendee, the vendor may reclaim them if the conditions of sale be not complied with. (*Brief*, pl. 5, 13.) The mere fact, therefore, that the property in the nails passed from the plaintiffs to ‘John W. King’ (assuming him to be a real person) by the contract of sale and the shipping of them, does not preclude the plaintiffs from reasserting their claim. Even the transmission by letter of the bill of lading and the invoice does not diminish or vary their rights—(*Brief*, pl. 10). Their *lien* as vendors still attached to and followed the nails, notwithstanding this technical and *quasi* or even actual *delivery*.

In *Jackson vs. Nichol* (5 Bing. N. C., 508), the goods had been delivered to an *agent of the buyer*; and in *Edwards vs. Brewer* (3 Mason & Wells, 375), they had *reached the port of delivery*, and had been *landed*, and were *in the hands of the wharfinger*; and yet, in both cases, the vendors successfully reclaimed them even against creditors.

In the cases cited by appellee where it was held that the lien of the vendor was lost by delivery to a *carrier* or to a *warehouseman*, or on the wharf, it was so held because, as in *Daves vs. Peck* (8 Term. R., 330), the carrier had been *designated by* and was therefore the *actual agent of the purchaser*; or because, as in *Campbell vs. Cabeen* (5 Amer. Law Reg., 683), the *warehouseman actually and expressly* held the goods *subject to the order of the purchaser*; or because, as in *Sawyer vs. Joslin* (20 Verm., 175),

it had been *proved* that the *wharf* where the goods had been delivered was the *customary place of delivery*. The difference between these cases and *Covell vs. Hitchcock* (23 Wend., 611), *Edwards vs. Brewer*, and *Jackson vs. Nichol*, is simply a *difference of facts*. In the former the termination of the transit and the possession of the purchaser *were made out by proof*; in the latter it was held that these facts were not proved,—and yet the proof was in the case in Wendell almost identical with, and in the two other cases much stronger than; in the case at the bar. In all of these cases, too, the contesting parties were *creditors* of the purchaser.

IV. It is true that the technical right of *stoppage in transitu* is given only in case of insolvency of purchaser. The decisions on that subject are only cited here for the purpose of showing that, even had the sale of the nails been complete, and had an *actual* purchaser been ready to receive them at their point of destination, the plaintiffs might, under certain circumstances, reclaim them against all other persons. But if this right is reserved to the vendor in case of the insolvency of the purchaser, *a fortiori* should he have an analogous right when the purchaser utterly fails to claim the goods at the point of destination, and they remain, unclaimed by any adverse party, in the hands of a mere 'middle-man' long after the period of credit has expired? In the case of stoppage in transitu, the contract of sale is not disaffirmed, nor is the right of property in the purchaser denied; it is a simple assertion of the *vendor's lien* as a means of securing the payment of the price. (*Chitty on Cont.*, 378—note 1, citing *Newhall vs. Vargas*, 13 Mainé, 93.) In that proceeding the action of the vendor is adverse to the vendee; but in this case the non-claim of the latter implies either that there is a mutual agreement that the goods shall be reclaimed by the former, or a virtual repudiation by the purchaser and an absolute *rescission* of the contract of sale by the plaintiffs in consequence of such repudiation. Upon either supposition, the *reclamation* by the vendor would be by consent of the vendee.—*Ibid.*, citing *Ash vs. Putnam*, 1 Hill, 302; see *Brief*, pl. 11, 13.

The plaintiffs had fully performed their part of the contract of sale; but the purchaser wholly failed to perform any part of his undertaking, and recklessly abandoned the goods to the

mercy of the public. Why may not the plaintiffs *rescind* and reclaim their property? *Who* contests their claim? No person. The defendants are mere *bailees* of the plaintiffs and *can not dispute their title*. (*Brief, pl. 15.*) If, by reason of their occupation as warehousemen, they are liable to the consignee also, it is a position of their own choice, and they must abide the consequences. (*Ibid.*) But this liability is nominal only. The facts proved and admitted in this case show conclusively that no person other than the plaintiffs can establish a legal claim to the goods in controversy. The defendants acted upon the conviction that the nails had been abandoned by the purchaser when they assumed the responsibility of selling them 'to pay charges'. Whence did they derive this right? Did they not thereby render themselves 'liable to an action' or actions by purchaser and seller? This '*liability*' is an inevitable incident to the position of every *stakeholder*, trustee, or '*middleman*'.

V. This action is not for the nails, but for the net proceeds—it being admitted that they had been sold and converted into cash by the defendants 'to pay charges' (which charges included all freight and storage) before suit commenced. By the very form and nature of the action the plaintiffs are precluded from recovering more than they are *equitably entitled to*. The defendants are only *indebted* to the plaintiffs in the amount of money which remained in their hands 'for the use of plaintiffs' *after paying charges*. This amount they did *set off*. It was allowed and admitted by plaintiffs, and judgment rendered against defendants for the balance *only*. This balance only is now in controversy. The plaintiffs have paid all the 'freight and charges consequent upon their shipment of the nails, and also the storage' of the same by defendants. How would it have benefited defendants if plaintiffs had offered to pay them for 'charges and freight' which had already been more than paid by the sale of the nails? And especially when by suing them in *indebitatus assumpsit* the plaintiffs recognized and affirmed that sale, and invited them to 'set off' their bill of 'freight and charges'?

VI. No other mode of action would have settled the liability of defendants more than this. The plaintiffs could not have sued

the purchaser, because the proof shows that they did not know his name or his residence. Their traveling agent would be more likely to be mistaken as to the name and residence than the defendants, who are residents of Peoria. The plaintiffs living in Virginia, the purchaser may have lived in any one of the Western States, and, by mistake of their agent, located in Peoria. If a resident of *Indiana*, a suit brought against him in Illinois, by attachment or in equity (if the proper affidavit could have been made), would certainly not have concluded him and settled defendants' liability. There is no possible mode of suit, with the proof in reference to the matter *in the control of defendants*, by which the plaintiffs could have relieved the defendants from 'liability' to an *action* by some other person claiming to be the owner of these nails, if this suit will not have that effect. But the proof which they have here furnished shows that no other person can successfully *sustain* such action.

But *it was in the power of the defendants*, if by any means they could have got the alleged purchaser into Court, to have settled the question of their liability to another person by filing a *Bill of Interpleader*! If they could not bring 'Jno. W. King' into Court, they can not complain that plaintiffs have not done so. Their failure to use the means of defense which the law has given to them is conclusive of their conviction that they could not defend successfully—for the reason that plaintiffs alone were owners of the nails, and that they had done wrong in selling them to pay charges, after being notified that plaintiffs claimed them.

Who is entitled to the proceeds of these nails, after paying defendants' charges for freight and storage, if plaintiffs are not? Are defendants to keep the money an indefinite time, for fear that John W. King may some time turn up and claim his purchase? If until the statute of limitations bars his claim, will not the same statute bar the plaintiffs. If *one year of patient waiting* for the consignee to come forward and *pay charges* was long enough for the defendants, why are not nearly *two years'* endurance long enough for the plaintiffs? The goods were received by the former in April, 1855, and sold by them in February, 1856. They were shipped by plaintiffs in March, 1855, and suit brought for the proceeds in November, 1856.

Plaintiffs had a clear right to rescind upon failure of King to

send his 'acceptance' for the price of the goods. Their failure to do so may have been construed a waiver had King afterward taken them into possession. But as he has not done so, and has 'unreasonably neglected', for a period of two years, either to comply with his contract or to receive the goods, plaintiffs have no other recourse or remedy now, than to retake possession, or to abandon them to persons who, like defendants, have no legal claim to or interest in them.

BRYAN & STONE,
Attorneys for Appellees.

SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

WILLIAM C. BOILVIN,
AMOS L. MERRIMAN,

versus

HENRY MOORE, and others.

APRIL TERM, A. D. 1859.

BRIEF OF APPELLEE.

1. In every sale of goods, there is an implied condition that the price shall be paid before vendee shall have right of possession — this is condition precedent.
Parsons on Cont., 448.
2. If the sale has been *complete* the property passes to vendee, not otherwise.
Ibid, 440-1.
3. If on credit, and the credit expires before delivery, vendor's lien revives.
Story on Cont., sec. 796,
(citing Dixon *vs.* Yates, 2 N. & M., 177.)
Parsons on Cont., 440.
2 Kent Com., 493.
4. If vendee unreasonably neglect to receive goods on delivery, vendor may resell and hold buyer responsible for deficit in price.
Parsons on Cont., 446.
Addison on Cont., 47,
(citing Langford *vs.* Filer, 1 Salk., 113.
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BRYAN & STONE, Attorneys for Appellee.

William B. Boivin
vs

Henry Moore

Appelles Brief

Filed May 13. 1889
L. Leland
Clerk

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SUPREME COURT.

APRIL TERM, 1859.

WILLIAM C. BOILVIN, *et al.*,
vs.
HENRY MOORE, *et al.*

ARGUMENT FOR APPELLEES.

I. The argument of the appellants in this case assumes that the transaction between the plaintiff's and the purchaser of the nails was 'one of ordinary sale of goods on credit'. This is not exactly true. There are at least two particulars in which it differs perhaps from 'an ordinary sale on credit'.

1. It is *conceded* that there is and was no *vendee*—no *second* party to the contract of sale—no such person as the alleged *purchaser* living in Peoria at the time of the alleged sale of the nails, nor at any time since.—(*See Record, p. 34.*)

This, it is submitted, is a somewhat important difference." It is material that there should be at least two parties to every contract. The plaintiffs contracted with 'John W. King, of Peoria'; no such person has been known to live [or be] in Peoria either at the date of that contract or since. The agent who made the contract says he can not say whether the purchaser was 'King', or 'Hing', or 'Sting', or 'some other person'; all that he knows about him is that he was a 'dealer in Peoria', and that he signed his name to a written order for the nails, which name he supposed was 'Jno. W. King'.

Who of all the owners of monosyllabic names in Peoria resembling King or Hing or Sting, 'or some other' name was the purchaser of these nails? To this question the record furnishes no answer. It is clear, however, that 'John W. King, Peoria, Illinois', is the only party with whom the plaintiff contracted:

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the party to whom the nails were shipped; to whom the invoice, bill of lading and draft were inclosed in their letter of March 29, 1855; and to whom the subsequent letters of Oct. 11 and Dec. 8, 1855, were addressed by plaintiffs. No other person than John W. King was known to plaintiffs in connection with the purchase of these nails. To no other person did they ever make any attempt to *sell* or *deliver* the nails. And as it is admitted that no such person has lived [or been] in Peoria at or since the date of the alleged sale, and that neither he nor any other person (except the plaintiffs) has ever demanded the nails or the proceeds thereof from the defendants, it would seem to follow that this 'transaction' between plaintiffs and the shadowy individual subscribing himself King, Hing, Sting, 'or some other' name, differed from an 'ordinary sale' in the important particular of lacking a definite and tangible purchaser to receive the goods, accept the draft and pay it when due.

[The word '*reside*' is for the first time *emphasized by italics* in the Abstract. No importance was given to this word in the Court below. That part of the '*facts admitted*' was construed and treated as though the admission had been, 'that no such person as J. W. K. has been known to be in Peoria', etc. This would be the manifest construction of the admission with reference to the whole context.]

2. Another point of difference between the sale in this case and 'an ordinary sale on credit', is conceived to lie in the fact that a *condition* of this sale was that the purchaser should give the plaintiffs his 'acceptance, payable in six months'. If not a *condition precedent*, it was at all events *concurrent*: and had the nails even been *delivered to the purchaser*, he would have held them merely *in trust* for the plaintiffs.—See *Brief*, pl. 1, 2, 12, 13.

II. This is not a contest between the vendor and creditors of the vendee, to determine which has the better right to the goods; nor is it even a contest between vendor and vendee. It is simply a contest between the acknowledged vendors and *bailors* of the goods and *their bailees*, not for the goods *in specie*, but merely for the *excess* of the proceeds of the same beyond the expenses and charges of bailment. Clearly, whatever might be the rights of attaching or execution creditors, or the vendee himself, the defendants, having no other interest or claim in the

goods than *bailors for hire*, cannot, ought not to be permitted to dispute the title of their *bailors*.—See *Brief*, pl. 15.

III. The exact point at which the right of property in goods commences and terminates in the vendor and vendee respectively varies according to the position from which viewed. The appellants have chosen to discuss it as though they were clothed with the combined rights of *vendee* and *attaching creditors*.

As between *vendor* and *vendee* it is true that the right of property, so far as the *risk* and *liability for its price* is concerned, commences at the moment of *delivery* to a *general carrier*—(*Chitty on Cont.*, 382, citing *Wait vs. Baker*, 2 Exch., 1, 7, etc.), and in certain cases without any delivery. (2 *Bl. Com.*, 446–447; *Brief*, pl. 8.) Yet the vendor may retake them so long as they are *in transitu*, as against all the world. (See *Brief*, pl. 6, 7, 8, 9.) And even after they have been in actual possession of vendee, the vendor may reclaim them if the conditions of sale be not complied with. (*Brief*, pl. 5, 13.) The mere fact, therefore, that the property in the nails passed from the plaintiffs to ‘John W. King’ (assuming him to be a real person) by the contract of sale and the shipping of them, does not preclude the plaintiffs from reasserting their claim. Even the transmission by letter of the bill of lading and the invoice does not diminish or vary their rights—(*Brief*, pl. 10). Their *lien* as vendors still attached to and followed the nails, notwithstanding this technical and *quasi* or even actual *delivery*.

In *Jackson vs. Nichol* (5 Bing. N. C., 508), the goods had been delivered to an *agent of the buyer*; and in *Edwards vs. Brewer* (3 Mason & Wells, 375), they had *reached the port of delivery*, and had been *landed*, and were *in the hands of the wharfinger*; and yet, in both cases, the vendors successfully reclaimed them even against creditors.

In the cases cited by appellee where it was held that the lien of the vendor was lost by delivery to a *carrier* or to a *warehouseman*, or on the wharf, it was so held because, as in *Daves vs. Peek* (8 Term. R., 330), the carrier had been *designated by* and was therefore the *actual agent of the purchaser*; or because, as in *Campbell vs. Cabeen* (5 Amer. Law Reg., 683), the *warehouseman* *actually and expressly* held the goods *subject to the order of the purchaser*; or because, as in *Sawyer vs. Joslin* (20 Verm., 175),

it had been proved that the *wharf* where the goods had been delivered was the *customary place of delivery*. The difference between these cases and *Covell vs. Hitchcock* (23 Wend., 611), *Edwards vs. Brewer*, and *Jackson vs. Nichol*, is simply a *difference of facts*. In the former the termination of the transit and the possession of the purchaser *were made out by proof*; in the latter it was held that these facts were not proved,—and yet the proof was in the case in *Wendell* almost identical with, and in the two other cases much stronger than, in the case at the bar. In all of these cases, too, the contesting parties were *creditors* of the purchaser.

IV. It is true that the technical right of *stoppage in transitu* is given only in case of insolvency of purchaser. The decisions on that subject are only cited here for the purpose of showing that, even had the sale of the nails been complete, and had an *actual* purchaser been ready to receive them at their point of destination, the plaintiffs might, under certain circumstances, reclaim them against all other persons. But if this right is reserved to the vendor in case of the insolvency of the purchaser, *a fortiori* should he have an analogous right when the purchaser utterly fails to claim the goods at the point of destination, and they remain, unclaimed by any adverse party, in the hands of a mere ‘middle-man’ long after the period of credit has expired? In the case of stoppage in transitu, the contract of sale is not disaffirmed, nor is the right of property in the purchaser denied; it is a simple assertion of the *vendor’s lien* as a means of securing the payment of the price. (*Chitty on Cont.*, 378—note 1, citing *Newhall vs. Vargas*, 13 Maine, 93.) In that proceeding the action of the vendor is adverse to the vendee; but in this case the non-claim of the latter implies either that there is a mutual agreement that the goods shall be reclaimed by the former, or a virtual repudiation by the purchaser and an absolute *rescission* of the contract of sale by the plaintiffs in consequence of such repudiation. Upon either supposition, the *reclamation* by the vendor would be by consent of the vendee.—*Ibid.*, citing *Ash vs. Putnam*, 1 Hill, 302; see *Brief*, pl. 11, 13.

The plaintiffs had fully performed their part of the contract of sale; but the purchaser wholly failed to perform any part of his undertaking, and recklessly abandoned the goods to the

mercy of the public. Why may not the plaintiffs *rescind* and reclaim their property? *Who* contests their claim? No person. The defendants are mere *bailees* of the plaintiffs and *can not dispute their title*. (*Brief*, pl. 15.) If, by reason of their occupation as warehousemen, they are liable to the consignee also, it is a position of their own choice, and they must abide the consequences. (*Ibid.*) But this liability is nominal only. The facts proved and admitted in this case show conclusively that no person other than the plaintiffs can establish a legal claim to the goods in controversy. The defendants acted upon the conviction that the nails had been abandoned by the purchaser when they assumed the responsibility of selling them 'to pay charges'. Whence did they derive this right? Did they not thereby render themselves 'liable to an action' or actions by purchaser and seller? This '*liability*' is an inevitable incident to the position of every *stakeholder*, trustee, or '*middleman*'.

V. This action is not for the nails, but for the net proceeds—it being admitted that they had been sold and converted into cash by the defendants 'to pay charges' (which charges included all freight and storage) before suit commenced. By the very form and nature of the action the plaintiffs are precluded from recovering more than they are *equitably entitled to*. The defendants are only *indebted* to the plaintiffs in the amount of money which remained in their hands 'for the use of plaintiffs' *after paying charges*. This amount they did *set off*. It was allowed and admitted by plaintiffs, and judgment rendered against defendants for the balance *only*. This balance only is now in controversy. The plaintiffs have paid all the 'freight and charges consequent upon their shipment of the nails, and also the storage' of the same by defendants. How would it have benefited defendants if plaintiffs had offered to pay them for 'charges and freight' which had already been more than paid by the sale of the nails? And especially when by suing them in *indebitatus assumpsit* the plaintiffs recognized and affirmed that sale, and invited them to 'set off' their bill of 'freight and charges'?

VI. No other mode of action would have settled the liability of defendants more than this. The plaintiffs could not have sued

the purchaser, because the proof shows that they did not know his name or his residence. Their traveling agent would be more likely to be mistaken as to the name and residence than the defendants, who are residents of Peoria. The plaintiffs living in Virginia, the purchaser may have lived in any one of the Western States, and, by mistake of their agent, located in Peoria. If a resident of *Indiana*, a suit brought against him in Illinois, by attachment or in equity (if the proper affidavit could have been made), would certainly not have concluded him and settled defendants' liability. There is no possible mode of suit, with the proof in reference to the matter *in the control of defendants*, by which the plaintiffs could have relieved the defendants from 'liability' to *an action* by some other person claiming to be the owner of these nails, if this suit will not have that effect. But the proof which they have here furnished shows that no other person can successfully *sustain* such action.

But *it was in the power of the defendants*, if by any means they could have got the alleged purchaser into Court, to have settled the question of their liability to another person by filing a *Bill of Interpleader*! If they could not bring 'Jno. W. King' into Court, they can not complain that plaintiffs have not done so. Their failure to use the means of defense which the law has given to them is conclusive of their conviction that they could not defend successfully—for the reason that plaintiffs alone were owners of the nails, and that they had done wrong in selling them to pay charges, after being notified that plaintiffs claimed them.

Who is entitled to the proceeds of these nails, after paying defendants' charges for freight and storage, if plaintiffs are not? Are defendants to keep the money an indefinite time, for fear that John W. King may some time turn up and claim his purchase? If until the statute of limitations bars his claim, will not the same statute bar the plaintiffs. If *one year of patient* waiting for the consignee to come forward and *pay charges* was long enough for the defendants, why are not nearly *two years'* endurance long enough for the plaintiffs? The goods were received by the former in April, 1855, and sold by them in February, 1856. They were shipped by plaintiffs in March, 1855, and suit brought for the proceeds in November, 1856.

Plaintiffs had a clear right to rescind upon failure of King to

send his 'acceptance' for the price of the goods. Their failure to do so may have been construed a waiver had King afterward taken them into possession. But as he has not done so, and has 'unreasonably neglected', for a period of two years, either to comply with his contract or to receive the goods, plaintiffs have no other recourse or remedy now, than to retake possession, or to abandon them to persons who, like defendants, have no legal claim to or interest in them.

BRYAN & STONE,
Attorneys for Appellees.

SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

WILLIAM C. BOILVIN,
AMOS L. MERRIMAN,

versus

HENRY MOORE, and others. }

APRIL TERM, A. D. 1859.

BRIEF OF APPELLEE.

1. In every sale of goods, there is an implied condition that the price shall be paid before vendee shall have right of possession — this is condition precedent.
Parsons on Cont., 448.
2. If the sale has been *complete* the property passes to vendee, not otherwise.
Ibid, 440-1.
3. If on credit, and the credit expires before delivery, vendor's lien revives.
Story on Cont., sec. 796,
(citing Dixon vs. Yates, 2 N. & M., 177.)
Parsons on Cont., 440.
2 Kent Com., 493.
4. If vendee unreasonably neglect to receive goods on delivery, vendor may resell and hold buyer responsible for deficit in price.
Parsons on Cont., 446.
Addison on Cont., 47,
(citing Langford vs. Filer, 1 Salk., 113.
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