

No. 14283

Supreme Court of Illinois

Puterbaugh

vs.

Winchester

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14283

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 224

14283

Puterbaugh
vs
Winchester

State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

URI WINCHESTER.

APPEAL FROM TAZEWELL.

Abstract and Brief.

ABSTRACT.

Page of Record
1

This was an action of assumpsit, brought by Winchester against Puterbaugh, and tried before Harriott, judge, and a jury, at the June term, 1861, Tazewell circuit court.

The declaration was in assumpsit, and contained the usual common counts, and three special counts.

2 The first special count is as follows :

3 And that whereas, heretofore, to-wit, on or about the 7th day of April, A. D., 1859, to-wit, at said Tazewell county, said plaintiff and defendant made a contract of bargain and sale, by which said defendant contracted to sell and deliver to said plaintiff, then and there, six certain mules, for the sum of three hundred dollars, to be then and there paid by the plaintiff; and accordingly said plaintiff did then and there pay to the defendant the said sum of three hundred dollars for the said six mules, and the defendant delivered to the plaintiff five of the said mules, but wholly neglected and refused, and still does neglect and refuse, to deliver the other of said mules; and plaintiff avers that the said mule so not delivered was worth the sum of two hundred dollars, whereby the said defendant became indebted to the plaintiff in the said sum of two hundred dollars, to-wit, at said Tazewell county.

3 The second special count is substantially like the first, and only alleges, in addition, that defendant did not have or own, and was not possessed of said six mules, but only of five of them.

4 The third special count was substantially like the second special count.

6
7 The general issue and several special pleas were filed, but as no question
8 arises upon them, they are not necessary to be set out.

Bill of Exceptions.

The following was the bill of exceptions:

11 Be it remembered, that at the trial of this cause, the plaintiff offered in evidence the following bill and receipt :

12 PEKIN, April 7, 1859.

Uri Winchester bo't of S. D. Puterbaugh,
Six mules,

\$300.

Rec'd payment, by J. Wagenseller's draft on B. S. Prettyman, for that amount.
S. D. PUTERBAUGH.

¹² Plaintiff offered James Milner, who testified that he knew the mules in question; they were sold under several executions in Mason county; one in favor of witness, and two in favor of defendant's clients. T. C. Reeves and witness had claim on mules for expenses. Defendant sold the mules and kept the money. The mules were brought to Pekin and put in lot belonging to T. C. Reeves. They were taken to a stock pasture. The mules afterwards broke out of pasture, and got away. Part of the mules were afterwards got back. Defendant told witness that he had sold them to plaintiff. Witness heard that one of the mules had been taken away by a man named Weed. The mule taken away was worth \$125. Was the best mule in the lot of six. Four of the mules were small. The mule was taken away about the time of sale. Defendant said to witness that he intended to sue Weed for taking the mule. Don't know whether he said he would sue him for himself, or as attorney for plaintiff. Knows of Winchester looking for the mule after he had bought them.

¹² Thomas C. Reeves testified, he knew the mules in question; they were brought to Pekin and put in witness' lot. They were afterwards taken to a pasture on a farm. The mule in question was worth about \$125. Heard defendant say he had sold the mules to plaintiff for \$300. That plaintiff was to get the mules up. He sold the mules at the low price to get rid of the trouble. Heard defendant say he would sue Weed for taking mule away. Witness went with Winchester after he had bought the mules in question. Witness had a writ to serve on Weed favor of defendant in trover. It is admitted that defendant sued Weed in trover, but did not get service.

¹³ John L. Devore testified for plaintiff, that he knew the mules in question. Was employed by the defendant to go after the mules. Witness got five of them, but could not get the mule in question. It had been taken away by a man named Weed, as witness was told. The five mules that I got were kept at my stable for about three weeks afterwards, defendant paying me for keeping the same. Defendant sold the mules to plaintiff, who took them away. Don't know when mule was taken by Weed.

¹³ B. S. Prettyman testified for plaintiff, and testified that he had several mules; they were brought to Pekin same time with mules in question; they were together, and all got out at the same time. Witness sold his mules to Weed, and gave an order to him for same. He went after the mules, and took the mule in question, and took it to Missouri and sold it. Witness had conversation with defendant. He spoke of suing Weed for mule, and got me to try and get pay for same. Thinks he offered witness one-third or one-fourth for his services. Since the commencement of this suit, had a conversation with defendant, and made out a bill for the mule in favor of defendant vs. Weed, and got defendant to sign order in favor of Charles Bacon for same. Defendant said when he signed the order, that he did not claim the mule, as it belonged to Winchester. Defendant asked witness to buy Winchester's claim; said he could get it for about \$50.

This was all the evidence in the case. The court, at the instance of the plaintiff, gave the following instructions, to which defendant then and there excepted.

¹⁴ 1. If the jury believe from the evidence, that the defendant sold six mules to the plaintiff, the fact of selling the same was an implied guarantee on the part of the defendant that he had a good title to the same, and a good right to sell and deliver them.

3. It makes no difference in law what price Winchester gave for the mules, if the jury believe from the evidence, that Puterbaugh sold the same to the plaintiff and agreed to deliver, and did not, or could not deliver

the same to the plaintiff according to the contract, they will find for the plaintiff, so much as mule not delivered was reasonably worth.

The court instructs the jury at the instance of the defendant as follows:

1. The court instructs the jury, that if they believe from the evidence, that Puterbaugh, at the time of the sale of the mules in question, did not have possession of the mule in question, then, unless the jury further believe from the evidence that Puterbaugh agreed to deliver the possession of the mule to the plaintiff, they will find for the defendant.

2. The court instructs the jury, that the plaintiff cannot recover under the pleadings in this cause, unless he has proved an agreement to deliver the six mules in question, and a refusal on the part of the defendant to deliver.

3. If the jury believe from the evidence, that Winchester was to run the risk of getting the mule in question, they will find for defendant.

The court refused the following instruction, which was asked by defendant; to which defendant then and there excepted:

4. If the jury believe from the evidence, that at the time of the sale of the mule in question to Winchester by Puterbaugh, the mule was in adverse possession of another person claiming it, adversely to Puterbaugh, then the plaintiff cannot recover for the failure or refusal to deliver the mule.

Thereupon, the jury found for Winchester \$125 50, and judgment was entered upon the verdict. Whereupon Puterbaugh moved for a new trial, on the following grounds:

1st. The verdict of the jury was contrary to law, and the instructions of the court.

2d. The damages were excessive.

3d. The court gave improper instructions on the part of plaintiff.

4th. The court refused proper instructions on the part of defendant.

The court overruled said motion, to which defendant then and there excepted, and prayed an appeal, which was allowed.

Errors assigned:

1st. The court erred in giving the instructions marked 1 and 3 on the part of the plaintiff below.

2d. Court erred in not giving the 4th instruction for defendant below.

3d. The court erred in refusing to grant a new trial.

Brief for Appellant.

The sale being absolute and the price paid, and Puterbaugh having done all he agreed to do, the property in the mules and the risk passed to Winchester; for the witness Reeves states that Winchester was to get the mules up. When a specific chattel is sold and the price paid, the property rests in the vendee, and is at his risk without delivery. Chitty on Con-

tracts, 394; Hilliard on Sales, 7; Lansing *vs.* Turner, 2 Johns. Rep., 13; Noy's Maxims, 88. The contract was complete, and if the sixth mule was lost, strayed, or wrongfully taken away by a wrong-doer after the sale, it was the loss of Winchester, and not of Puterbaugh. 2 Blackstone Com., 448.

And if, on the other hand, Puterbaugh was not in possession of the sixth mule, and had no title, the law would not imply a warranty. 1 Parsons on Contracts, 457, 458; Hilliard on Sales, 292, and note.

The evidence strongly tends to show that Puterbaugh had title to the mule, and that Weed was a mere wrong-doer; and if such was the case, and Weed took the mule after the sale, the loss would fall upon Winchester.

If, however, the mule, at the time of sale, was in the adverse possession of Weed, then the contract of sale was void, and Winchester could not recover for the failure of Puterbaugh to deliver the mule. The 4th instruction asked by Puterbaugh should therefore have been given.

Winchester might, if Puterbaugh sold him a mule in the adverse possession of another, recover the money paid as on a failure of consideration, but that is a very different matter from recovering the value of the mule.

It was a question of fact for the jury, whether Winchester was to run the risk of getting the mules up, and whether Weed took the mule before or after the sale; and the case should have been left to the jury in that way. The instructions given by the court for Winchester were therefore wrong, and the judgment should be reversed.

ROBERTS & IRELAND,

Attorneys for Appellees.

224
Sabin D. Tutuanga

vs

Uri Winchester

Abstract & Brief

Filed Apr 23. 1862

L Selama

clerk

1
Pleas.

To a Circuit Court, begun
and held at the Court House in the
City of Pekin, within and for the County
of Tazewell and State of Illinois, on the
first Monday of the month of February
A. D. 1861, (1861)

Be it remembered that on the 22^d day of
January A. D. 1861, a declaration was filed in the
Office of the Clerk of the Circuit Court of Tazewell County
Illinois, which said declaration is in the words and figures
following, To Wit:

" State of Illinois }
" Tazewell County } In the Circuit Court of Tazewell County
To February Term A. D. 1861.

" Uri Winchester }

" ^{vs}
" Gabin D. Paterbaugh }

" Uri Winchester Plaintiff in this
" suit, complain of Gabin D. Paterbaugh, Defendant in this
" suit, in a plea of Treaspass on the case on promises, To wit:
" whereas the said defendant heretofore, to wit: on the 1st
" day of January A. D. 1861, at Pekin in the County of
" Tazewell and State of Illinois, was and is still is indebted
" to the said Plaintiff in the sum of five hundred dollars,
" for the price and value of goods, wares and merchandise,
" there before that time bargained and sold by the said

Plaintiff to the said Defendant at his special instance
 and request, And in the sum of five hundred dollars for
 the price and value of goods, wares and merchandise there
 before that time sold and delivered by the said Plaintiff
 to the said defendant at his special instance and request
 And in the sum of five hundred dollars for money there
 before that time paid, laid out and expended by the said
 Plaintiff in and about the business of the said Defendant
 at his special instance and request, And in the sum of
 five hundred dollars for money there before that time lent
 and advanced to the Defendant, by the said Plaintiff and
 for the use and benefit of the said Defendant, at his special
 instance and request, And in the sum of five hundred
 dollars for money there before that time had and received
 by the said defendant to and for the use of the said Plaintiff.
 And in the sum of five hundred dollars for the price and
 value of work, labor and services there before that time done,
 performed and bestowed, and materials for the same provided
 by the said Plaintiff for the said Defendant, at his special
 instance and request,

And that whereas, heretofore, to wit:
 on or about the 7th day of April AD 1859, at Tekin, to wit: at
 said Tazewell County, said Plaintiff and Defendant made
 a contract of bargain and sale, by which said Defendant
 contracted to sell & deliver to said Plaintiff then & there
 six certain mules for the sum of three hundred dollars
 to be then & there paid by the Plaintiff, and accordingly
 said Plaintiff did then & there pay to the Defendant
 the said sum of three hundred dollars for the said

Six mules & the defendant delivered to the plaintiff
 five of the said mules. but wholly neglected & refused
 & still does neglect & refuse to deliver to the plaintiff
 the other of said mules. And Plaintiff avers that the
 said mule so not delivered was worth the sum of
 two hundred dollars. whereby the said defendant
 became indebted to the Plaintiff in the said sum
 of two hundred dollars, to wit: at said Tazewell County.

And also for that whereas, hitherto, to wit: at said
 Tazewell County. on or about the 7th day of April A.D.
 1859, said Defendant represented to the Plaintiff, that
 he, defendant, had owned six certain mules of great
 value, to wit: of the value of three hundred dollars, and
 defendant offered to sell & deliver the said six mules
 to the Plaintiff for the said sum of three hundred
 dollars, and said Plaintiff did, then & thereby contract
 of bargain & sale with Defendant, then & there purchase
 said six mules of Defendant for that sum & paid
 Defendant said sum of three hundred dollars in
 full satisfaction for the said six mules, whereas in
 fact, Defendant did not have or own & was not
 possessed of said six mules, but only of five of the
 same, & defendant never did deliver to plaintiff nor
 was Plaintiff ever able to get possession of said six
 mules, but only of five of them, and Plaintiff avers
 that said five mules delivered were not worth more
 than the sum of one hundred dollars & said six
 mules were worth three hundred dollars, wherefore
 said Defendant, became liable to pay Plaintiff the

sum of two hundred dollars,

And that whereas, heretofore
to wit: on or about the Seventh day of April A.D. 1859,
by contract of bargain & sale between Plaintiff and Defen-
dant, Defendant contracted to sell & deliver to
Plaintiff one certain mule for the sum of two hundred
dollars & in pursuance thereof said Plaintiff paid defen-
dant said sum of two hundred dollars which defen-
dant accepted in full payment for said mule, and
defendant then & there neglected & wholly refused & still
does neglect & refuse to deliver to plaintiff, the said
mule so purchased & Plaintiff has never got nor
been able to get possession & ownership of the same, where-
fore Defendant became indebted to Plaintiff in the sum
of two hundred dollars. And whereas the Defendant
afterwards, on the 1st day of January 1861, in consid-
eration of the premises, then and there promised to pay
the several sums of money in this declaration mentioned
to the plaintiff on request; Yet said defendant has
disregarded his promises and has not (though often
requested) paid the several sums of money, nor either
of them, nor any part thereof, to the damage of the said
Plaintiff five hundred dollars, and thereupon he brings
suit &c

By H. B. Hopkins Atty for Plff

Copy of Account sued upon
To Goods Wares and Merchandise bargained and sold \$ 500
To Goods, Wares and Merchandise sold and delivered \$ 500

५-

" To money paid, laid out and expended	\$500
" To money lent and advanced	\$500
" To money had and received	\$500
" To work, labor and services performed and bestowed and materials provided	\$500 \$500
" To money due on an account stated	\$500
" To money due for interest on divers large sums of money	\$500
" Damage on Mule Contract	\$500
" One Mule	\$500

Now afterwards, to wit: on the same day, a summons was issued from the office of the Clerk of the Circuit Court of said County, which said summons was in the words and figures following. To Wit:—

" State of Illinois }
 " Tazewell County } to the Sheriff of said County, Greeting;
 " We command you that you summon Sabin
 " D. Puterbaugh if he shall be found in your County
 " personally to be and appear before the Circuit Court
 " of Tazewell County, on the first day of the next term
 " thereof, to be held at the Court House in Pekin, in
 " said County, on the first Monday of February next,
 " then and there to answer unto Uri Winchester in plea
 " of Assumpsit, to the damage of said plaintiff as he
 " says in the sum of Five hundred dollars. and have you
 " then and there this writ with an endorsement thereon, in what
 " manner you shall have executed the same.



Witness G. H. Harlow Clerk of the said
Court and the seal thereof, at Pekin,
aforesaid, this 22^d day of January 1861.
Geo H. Harlow Clerk Circuit Court

Which said summons, was, on the 25th day of
January A.D. 1861, returned with the following
endorsement, to wit:—

Served by reading the within writ to the within
named G. D. Puterbaugh January 22^d 1861.
C. Williamson C. C.

Now afterwards to wit: on the 18th day of February
A.D. 1861, a plea ^{and replication} was filed in said cause in the words and
figures following, to wit:—

State of Illinois }	Circuit Court
Fazewell County }	February Term 1861.

Uri Winchester }
vs.
G. D. Puterbaugh }

And the said Deft comes & defends
the wrong and injury whereof, & says that he did not
undertake and promise, in manner and form as the
Plff hath above complained against him, and of this
the said Deft puts himself upon the country.

G. D. Puterbaugh Pro Def

And for replication to the above plea, Plaintiff

7, says that Defendant did undertake and promise as
alleged in his declaration, and he also puts himself
on the Country

H. Fullerton
for Jeff

Now afterwards to wit; on the 21st day of February
A. D. 1861, pleas were filed in said cause in the words
and figures following, to wit:—

State of Illinois } Circuit Court
Tazewell County } Term 1861.

Uri Winchester }
vs
J. D. Puterbaugh }

And now comes said defendant
and defends the wrong and injury &c when &c and says actio
non, because he says that the supposed sale of the Mules
in the said declaration mentioned, was made on condition
that said Deft was to deliver five of said mules to Jeff
and that the obtaining of the possession of the other of
said mules was to be at the risk of said plaintiff, said
mule at the time of said sale being out of the possession
of the Deft, and that said defendant was not bound to
deliver the same, by the terms of said sale, and this the
defendant is ready to verify, wherefore he prays Judgment
&c

J. D. Puterbaugh

And for further plea in this behalf, defendant says
 actio non. because he says that the said Plaintiff
 was at the time and before the commencement of this
 suit, indebted to defendant in the sum of fifty dollars
 for services rendered before that time by Deft for Plff at
 the Plffs request, and in the sum of fifty dollars for
 advice and counsel given by Deft to Plff at the request
 of Plff, and this said deft is ready to verify, wherefore
 the said defendant prays Judgment &c

E. D. Puterbaugh

And for further plea in this behalf defendant
 says actio non. because he says that the Plaintiff
 was at the time of the commencement of this suit,
 indebted to Deft in the sum of One hundred dollars
 for services rendered, and counsel given by Deft to Plff
 at Plffs request - and Deft now offers to set off the
 same or so much thereof as may be necessary to pay
 & satisfy said Plffs claim, and this he is ready to verify
 wherefore he prays Judgment &c

Puterbaugh

Now afterwards, to wit: at a Term of the Circuit
~~Circuit~~ Court, begun and held at the Court House in
 the City of Pekin, within and for the County of Tazewell
 and State of Illinois, on the first Monday of the
 month of February A.D. 1861, Present Hon James
 Harriott Judge of the 2nd Judicial Circuit of
 the State of Illinois, composed of the Counties of Mason
 Tazewell. &c. Hugh Fullerton States Attorney, Chapman

9 Williamson Sheriff, and George A. Harlow Clerk,
the following proceedings were had, to wit:-

3^d Day

Wednesday February 6, 1861.

Uri Winchester }
Sabin D. Puterbaugh } Assumpsit

Now on this day comes the Defendant
and files his motion and affidavit, for a rule on Plaintiff
to give security for costs

4th Day

Thursday February 7, 1861.

Uri Winchester }
Sabin D. Puterbaugh } Assumpsit

Now on this day come the parties
by their attorneys, and the Court doth order that the Plaintiff
give security for costs by tomorrow morning or show cause

14th Day

Friday February 22^d 1861.

Uri Winchester }
Sabin D. Puterbaugh } Assumpsit

Now on this day come the parties by
their attorneys, whereupon came a Jury of 12 good and lawful
men, to wit: T. J. Ballins and eleven others, duly elected, tried

and sworn, who having heard the allegations and proofs of parties and argument of counsel thereon, and being unable to agree upon their verdict, were thereupon discharged, and this cause is ordered to be continued, with leave to Plaintiff to amend his declaration.

Now afterwards, to wit: at a Term of the Circuit Court, begun and held at the Court House in the City of Pekin within and for the County of Tazewell and State of Illinois, on the First Monday of the month of June A.D. 1861. Present Hon James Harriott Judge of the 21st Judicial Circuit of the State of Illinois, composed of the Counties of Mason, Tazewell &c. Hugh Fullerton State Attorney, Chapman Williamson Sheriff, and George H. Harlow Clerk the following proceedings were had. To Wit:-

4th Day

Friday June 4. 1861.

Uri Winchester

Sabin D. Puterbaugh

Defendant

Now on this day comes ^{as well} the Plaintiff by his attorney Fullerton, as the said defendant by his attorney Roberts, whereupon came a Jury of 12 good and lawful men, to wit: B. Woodrow, J. Tragee, F. R. Keefe, F. Ail, E. Quinn, H. Eagleson, J. Bowsby &c., J. Smalley, C. Ambary, J. Lumpf, C. R. Brandall & J. Ramsey duly elected, tried and sworn, who having heard the allegations and proofs of parties

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and argument of counsel thereon. for verdict say: The
 the Jury find for the Plaintiff in the sum of One Hundred
 and twenty five dollars damages. whereupon the Defendant
 entered his motion for a new trial. which motion the
 Court overruled. It is therefore ordered and adjudged
 by the Court, that the Plaintiff have and recover of the
 said defendant the damages aforesaid, in manner and
 form found as aforesaid, likewise the costs and charges
 by him about his suit expended, and that execution issue
 therefor. Thereupon the Defendant files his Bill of Exceptions
 and prays an appeal, which is granted by the Court with
 Bond to be filed in 30 days, in the sum of \$250. with
 Chas. Turner as Security

State of Illinois } Circuit Court
 Tazewell County } June Term 1861,

Uri Winchester }
 S. D. Puterbaugh } Bill of Exceptions

Be it remembered that at the
 trial of this cause, the plaintiff offered in evidence the
 following bill & receipt

Pekin April 7, 1859.

" Uri Winchester Bot of

" S. D. Puterbaugh

" Six Mules

" Recd payment by J. Hagunellers draft on B. \$300

" C. Puttymann for that amt S. D. Puterbaugh

Plaintiff offered James Milner, who testified that he knew the mules in question, they were sold under several executions in Mason Co., one favor nitwits, & two favor Defendants clients, J. C. Reeves & nitwits had claim on mules for expenses. Deft sold the mules & kept the money. The mules were brought to Pekin, and put in lot belonging to J. C. Reeves, they were taken to a stock pasture, the mules afterwards broke out of pasture and got away. Part of the mules were afterwards gotten back - Deft told nitwits that he had sold them to Peff. Nitwits heard that one of the mules had been taken away by a man named Weed. The mule taken away was worth \$125 - Was the best mule in the lot of six - 4 of the mules were small - The mule was taken away about time of sale - Deft said to Nitwits that he intended to sue Weed for taking ~~away~~ the mule - Don't know whether he said he would sue him for himself or as atty for Plaintiff - Knows of Winchester looking for the mule after he had bought them.

Thomas C. Reeves, testified, he knew the mules in question, they were brought to Pekin and put in nitwits lot, they were afterwards taken to a pasture on a farm, The mule in question was worth about \$125 - Heard Deft say he had sold the mules to Peff for \$300 - that plaintiff was to get the mules up - He sold the mules at the low price to get rid of the trouble. Heard Deft say he would sue Weed for taking mule away Nitwits went with Winchester after he had bought the mules in question. Nitwits had a writ to serve on Weed

favor Deft in trover -

It is admitted that Deft sued Weed in trover for the mule but did not get service.

John L. Devore testified for Peff. that he knew the mules in question. was employed by Deft to go after the mules. Witness got five of them, but could not get the mule in question, it had been taken away by a man named Weed as witness was told. The five mules that I got were kept at my stable for about 3 weeks afterwards. Deft paying me for keeping the same. Deft sold the mules to Peff, who took them away, don't know when mule was taken by Weed.

B. E. Pettyman testified for Peff, and testified that he had several mules. they were brought to Pekin same time with mules in question, they were together, and all got out at same time. Witness sold his mules to Weed and gave an order to him for same, he went after the mules and took the mule in question and took it to Missouri and sold it. Witness had conversation with Deft, he spoke of suing Weed for mule & got me to try and get pay for same. Thinks he offered witness $\frac{1}{3}$ or $\frac{1}{4}$ for his services - Since the commencement of this suit had a conversation with Deft, and made out a bill for the mule favor Deft vs Weed and got Deft to sign order favor Charles Bacon for same. Deft said when he signed the order that he did not claim the mule, as it belonged to Winchester Deft asked witness to buy Winchester's claim, said he could get it for about \$500.

This was all the evidence in the case, The Court at the

14 instance of the Plaintiff gave the following instructions to which Deft then & there excepted

" 1. If the Jury believe from the evidence that the
" Defendant sold 6 mules to the Plaintiff, the fact of
" selling the same was an implied guarantee on the part
" of the defendant that he had a good title to the same
" & good right to sell and deliver them -

" 3. It makes no difference in law, what price Winchester
" gave for the mules, if the Jury believe from the evidence
" Puterbaugh sold the same to the Plaintiff, and agreed to
" deliver, and did not, or could not deliver the same to the
" Plaintiff according to the contract, they will find for the
" Plaintiff, so much as mules not delivered was reasonably
" worth.

The Court instructed the Jury at the instance of
Deft as follows -

" Winchester }
" " } Instructions for Deft
" Puterbaugh }

" 1. The Court instructs the Jury that if they believe
" from the evidence that Puterbaugh at the time of the
" sale of the mules in question, did not have possession of
" the mule in question, then, unless the Jury further believe
" from the evidence, that Puterbaugh agreed to deliver the
" possession of the mule to the plaintiff they will find for
" the defendant

2. The Court instructs the jury that the Plaintiff cannot recover under the pleadings in this cause unless he has proved an agreement to deliver the six mules in question, and a refusal on the part of the defendant to deliver

3. If the jury believe from the evidence that Winchester was to run the risk of getting the mule in question, they will find for defendant.

The Court refused the following instruction which was asked by Deft. to which Deft then & there excepted.

4. If the jury believe from the evidence that at the time of the sale of the mule in question to Winchester by Puterbaugh the mule was in the adverse possession of another person claiming it adversely to Puterbaugh, then the plaintiff cannot recover for the failure or refusal to deliver the mule.

The jury found \$125, verdict for Plff.
Deft then moved for a new trial. as follows:

State of Illinois }
Tazewell County }

Circuit Court
June Term 1861,

Uri Winchester }
S. D. Puterbaugh }

sp. Motion for new trial

And now comes the defendant and moves for a trial
on the following grounds.

- 1st The verdict of the jury was contrary to law and
the instructions of the Court.
- 2^d The damages were excessive
- 3^d The Court gave improper instructions on the part of Plaintiff
- 4th The Court refused proper instructions on part of Defendant

Roberts & Bohrs for Plaintiff

The Court overruled said motion, to which Defendant then
and then excepted - Defendant then presented this Bill of
Exceptions, and asks that the same be signed and sealed
by the Court and made a part of the record which is
accordingly done

James Harriett Esq

Now afterwards, to wit: on the 1st day of July 1861, an appeal bond was filed in said cause, as follows, to wit:-

Know all men by these presents that we Sabin D.
Puterbaugh as principal, and Charles Turner as security
are held and firmly bound unto Uri Winchester in the
penal sum of Two hundred and fifty dollars lawful
money of the United States, for the payment of which
we bind ourselves jointly and severally by these presents
Given under our hands & seals this 26th day of June 1861

The condition of the above obligation is such, that
whereas, the said Uri Winchester did, on the 7th day of
June A. D. 1861 in the Circuit Court of Tazewell County
Illinois recover a Judgment against the above bounden
Sabin D. Puterbaugh for the sum of One hundred and
twenty five dollars and costs of suit, from which said

17 Judgment said Puterbaugh has taken an appeal to the
Supreme Court of the State of Illinois. Now if the said
Puterbaugh shall pay whatever judgment and costs
interest and damages, that may be awarded, in case
said judgment shall be affirmed, and shall duly
prosecute said appeal, then this obligation to be void,

S. D. Puterbaugh and
Chas. Turner and

State of Illinois }
Fazewell County } p.

I, George H. Harlow Clerk of the Circuit
Court in and for said County, do certify that the foregoing
16 1/4 pages contain a full, true and complete transcript of
the record of proceedings had in the cause therein named
as fully as the same appears of record in my office.

Witness my hand and the Seal of said
Circuit Court, here affixed at Pekin this
4th day of April A. D. 1862.

Geo. H. Harlow, Clerk
per A. P. Griswold, deputy

Assignment of Errors

over

State of Illinois } 3^d Grand Division
Supreme Court } 4th April Term 1862

Sabin D. Puterbaugh

vs. } Appeal from
Mr Winchester } Loswell

And now comes the appellant
and says that in the record and
proceedings aforesaid and in the
recitation of the judgment
aforesaid there is manifest
error in this to wit:

1st The Court erred in giving the
instructions marked one and three

on the part of plaintiff below.

2^d The Court erred in refusing to give
the ~~second~~ ^{fourth} instruction asked for
by the defendant below.

The Court erred in refusing to grant
a new trial.

and for said errors prays that the
said judgment may be reversed.

James R. Smith
att'y for appellant

And the said Defendant by Proffman
his attorney comes and says that in the
foregoing case as appears by the Record the
Court did not ^{is alleged} err, and he therefore says
that the judgment is affirmed

R. B. Proffman

Atty Gen. Dist

63 224

Sabin & Putnam
vs.

Mrs Winchester

Transcript—

Filed Apr. 23^d 1862
L. Deland
Clerk.

Fee \$4⁵⁰

State of Illinois } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

URI WINCHESTER.

ERROR TO TAZEWELL.

Brief and Argument of Defendant.

In this case, the plaintiff in error sold the mule in controversy and got his pay, and he there impliedly warranted his title to it. Sec. 2 Blackstone, 451; Chitty's Cont., 390; 6 Johns., *Hennover vs. Venoy*, page 8; Sweet *vs. Colgot*, 20 Johns., page 204; *Raw vs. Barlee*, 3 Cowan, 280.

A warrantee of title will be presumed, whether the goods sold be at the time of the sale, in the possession of vendor or a third person, unless the contrary be expressed. Story on Contracts, sec. 833. *Morley vs. Attenborough*, 18 L. J. Exch., 148; Chitty's Cont., 390.

All of the mules being purchased in a lot for \$300, the defendant had a right to prove what the one not obtained was then reasonably worth, and that is what the law presumes to be the amount he paid for it, and that is to regulate his right in amount to recover against plaintiff, who got the money, and should respond in this form of action.

The 4th instruction of plaintiff should not have been given, because defendant had a right to recover back his money in any event, and the proof showed the reasonable price probably paid for him; and therefore, in any point of view, the instruction, being calculated to mislead the jury, was properly refused.

The right to recover the money paid for the mule in this form of action is admitted by the plaintiff, and the only objection is as to the form and amount. The evidence shows the amount to be probably correct, and there is no question but taking all of the case, evidence, instructions and verdict, that substantial justice has been done, and the verdict should not therefore be disturbed, or the judgment effected here. And the evidence also shows that Puterbaugh is now pursuing Weed with a process to recover the value of the mule in question. See record, pages 12 and 13, evidence of Reeves and Milner and Prettyman. The judgment, therefore, should be affirmed.

B. S. PRETTYMAN,

For Defendant in Error.

83 224

J.D. Pictetbaugh
168

Wm Winchester

Deft. Buss & Argyle

Filed May 9, 1842
S. Leland
Clerk

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State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

URI WINCHESTER.

APPEAL FROM TAZEWELL.

Abstract and Brief.

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The first special count is as follows :

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And that whereas, heretofore, to-wit, on or about the 7th day of April, A. D., 1859, to-wit, at said Tazewell county, said plaintiff and defendant made a contract of bargain and sale, by which said defendant contracted to sell and deliver to said plaintiff, then and there, six certain mules, for the sum of three hundred dollars, to be then and there paid by the plaintiff; and accordingly said plaintiff did then and there pay to the defendant the said sum of three hundred dollars for the said six mules, and the defendant delivered to the plaintiff five of the said mules, but wholly neglected and refused, and still does neglect and refuse, to deliver the other of said mules; and plaintiff avers that the said mule so not delivered was worth the sum of two hundred dollars, whereby the said defendant became indebted to the plaintiff in the said sum of two hundred dollars, to-wit, at said Tazewell county.

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The second special count is substantially like the first, and only alleges, in addition, that defendant did not have or own, and was not possessed of said six mules, but only of five of them.

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The third special count was substantially like the second special count.

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Six mules,

PEKIN, April 7, 1859.

\$300.

Rec'd payment, by J. Wagenseller's draft on B. S. Prettyman, for that amount.
S. D. PUTERBAUGH.

¹² Plaintiff offered James Milner, who testified that he knew the mules in question; they were sold under several executions in Mason county; one in favor of witness, and two in favor of defendant's clients. T. C. Reeves and witness had claim on mules for expenses. Defendant sold the mules and kept the money. The mules were brought to Pekin and put in lot belonging to T. C. Reeves. They were taken to a stock pasture. The mules afterwards broke out of pasture, and got away. Part of the mules were afterwards got back. Defendant told witness that he had sold them to plaintiff. Witness heard that one of the mules had been taken away by a man named Weed. The mule taken away was worth \$125. Was the best mule in the lot of six. Four of the mules were small. The mule was taken away about the time of sale. Defendant said to witness that he intended to sue Weed for taking the mule. Don't know whether he said he would sue him for himself, or as attorney for plaintiff. Knows of Winchester looking for the mule after he had bought them.

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¹³ John L. Devore testified for plaintiff, that he knew the mules in question. Was employed by the defendant to go after the mules. Witness got five of them, but could not get the mule in question. It had been taken away by a man named Weed, as witness was told. The five mules that I got were kept at my stable for about three weeks afterwards, defendant paying me for keeping the same. Defendant sold the mules to plaintiff, who took them away. Don't know when mule was taken by Weed.

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This was all the evidence in the case. The court, at the instance of the plaintiff, gave the following instructions, to which defendant then and there excepted.

¹⁴ 1. If the jury believe from the evidence, that the defendant sold six mules to the plaintiff, the fact of selling the same was an implied guarantee on the part of the defendant that he had a good title to the same, and a good right to sell and deliver them.

3. It makes no difference in law what price Winchester gave for the mules, if the jury believe from the evidence, that Puterbaugh sold the same to the plaintiff and agreed to deliver, and did not, or could not deliver

the same to the plaintiff according to the contract, they will find for the plaintiff, so much as mule not delivered was reasonably worth.

The court instructs the jury at the instance of the defendant as follows:

1. The court instructs the jury, that if they believe from the evidence, that Puterbaugh, at the time of the sale of the mules in question, did not have possession of the mule in question, then, unless the jury further believe from the evidence that Puterbaugh agreed to deliver the possession of the mule to the plaintiff, they will find for the defendant.

2. The court instructs the jury, that the plaintiff cannot recover under the pleadings in this cause, unless he has proved an agreement to deliver the six mules in question, and a refusal on the part of the defendant to deliver.

3. If the jury believe from the evidence, that Winchester was to run the risk of getting the mule in question, they will find for defendant.

The court refused the following instruction, which was asked by defendant; to which defendant then and there excepted:

4. If the jury believe from the evidence, that at the time of the sale of the mule in question to Winchester by Puterbaugh, the mule was in adverse possession of another person claiming it, adversely to Puterbaugh, then the plaintiff cannot recover for the failure or refusal to deliver the mule.

Thereupon, the jury found for Winchester \$125 50, and judgment was entered upon the verdict. Whereupon Puterbaugh moved for a new trial, on the following grounds:

1st. The verdict of the jury was contrary to law, and the instructions of the court.

2d. The damages were excessive.

3d. The court gave improper instructions on the part of plaintiff.

4th. The court refused proper instructions on the part of defendant.

The court overruled said motion, to which defendant then and there excepted, and prayed an appeal, which was allowed.

Errors assigned:

1st. The court erred in giving the instructions marked 1 and 3 on the part of the plaintiff below.

2d. Court erred in not giving the 4th instruction for defendant below.

3d. The court erred in refusing to grant a new trial.

Brief for Appellant.

The sale being absolute and the price paid, and Puterbaugh having done all he agreed to do, the property in the mules and the risk passed to Winchester; for the witness Reeves states that Winchester was to get the mules up. When a specific chattel is sold and the price paid, the property rests in the vendee, and is at his risk without delivery. Chitty on Con-

tracts, 394; Hilliard on Sales, 7; Lansing *vs.* Turner, 2 Johns. Rep., 13; Noy's Maxims, 88. The contract was complete, and if the sixth mule was lost, strayed, or wrongfully taken away by a wrong-doer after the sale, it was the loss of Winchester, and not of Puterbaugh. 2 Blackstone Com., 448.

And if, on the other hand, Puterbaugh was not in possession of the sixth mule, and had no title, the law would not imply a warranty. 1 Parsons on Contracts, 457, 458; Hilliard on Sales, 292, and note.

The evidence strongly tends to show that Puterbaugh had title to the mule, and that Weed was a mere wrong-doer; and if such was the case, and Weed took the mule after the sale, the loss would fall upon Winchester.

If, however, the mule, at the time of sale, was in the adverse possession of Weed, then the contract of sale was void, and Winchester could not recover for the failure of Puterbaugh to deliver the mule. The 4th instruction asked by Puterbaugh should therefore have been given.

Winchester might, if Puterbaugh sold him a mule in the adverse possession of another, recover the money paid as on a failure of consideration, but that is a very different matter from recovering the value of the mule.

It was a question of fact for the jury, whether Winchester was to run the risk of getting the mules up, and whether Weed took the mule before or after the sale; and the case should have been left to the jury in that way. The instructions given by the court for Winchester were therefore wrong, and the judgment should be reversed.

ROBERTS & IRELAND,
Attorneys for Appellees.

Sabin D Putnam

vs

Wm Winchester

Filed Apr. 23. 1842

L Selma

clerk

State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

URI WINCHESTER.

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Abstract and Brief.

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224
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vs
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Abstract & Brief

Filed April 23, 1862

J. Leland
Clerk

State of Illinois, } In Third Grand Division,
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3. If the jury believe from the evidence, that Winchester was to run the risk of getting the mule in question, they will find for defendant.

The court refused the following instruction, which was asked by defendant; to which defendant then and there excepted:

4. If the jury believe from the evidence, that at the time of the sale of the mule in question to Winchester by Puterbaugh, the mule was in adverse possession of another person claiming it, adversely to Puterbaugh, then the plaintiff cannot recover for the failure or refusal to deliver the mule.

Thereupon, the jury found for Winchester \$125 50, and judgment was entered upon the verdict. Whereupon Puterbaugh moved for a new trial, on the following grounds:

1st. The verdict of the jury was contrary to law, and the instructions of the court.

2d. The damages were excessive.

3d. The court gave improper instructions on the part of plaintiff.

4th. The court refused proper instructions on the part of defendant.

The court overruled said motion, to which defendant then and there excepted, and prayed an appeal, which was allowed.

Errors assigned:

1st. The court erred in giving the instructions marked 1 and 3 on the part of the plaintiff below.

2d. Court erred in not giving the 4th instruction for defendant below.

3d. The court erred in refusing to grant a new trial.

Brief for Appellant.

The sale being absolute and the price paid, and Puterbaugh having done all he agreed to do, the property in the mules and the risk passed to Winchester; for the witness Reeves states that Winchester was to get the mules up. When a specific chattel is sold and the price paid, the property rests in the vendee, and is at his risk without delivery. Chitty on Con-

tracts, 394; Hilliard on Sales, 7; Lansing *vs.* Turner, 2 Johns. Rep., 13; Noy's Maxims, 88. The contract was complete, and if the sixth mule was lost, strayed, or wrongfully taken away by a wrong-doer after the sale, it was the loss of Winchester, and not of Puterbaugh. 2 Blackstone Com., 448.

And if, on the other hand, Puterbaugh was not in possession of the sixth mule, and had no title, the law would not imply a warranty. 1 Parsons on Contracts, 457, 458; Hilliard on Sales, 292, and note.

The evidence strongly tends to show that Puterbaugh had title to the mule, and that Weed was a mere wrong-doer; and if such was the case, and Weed took the mule after the sale, the loss would fall upon Winchester.

If, however, the mule, at the time of sale, was in the adverse possession of Weed, then the contract of sale was void, and Winchester could not recover for the failure of Puterbaugh to deliver the mule. The 4th instruction asked by Puterbaugh should therefore have been given.

Winchester might, if Puterbaugh sold him a mule in the adverse possession of another, recover the money paid as on a failure of consideration, but that is a very different matter from recovering the value of the mule.

It was a question of fact for the jury, whether Winchester was to run the risk of getting the mules up, and whether Weed took the mule before or after the sale; and the case should have been left to the jury in that way. The instructions given by the court for Winchester were therefore wrong, and the judgment should be reversed.

ROBERTS & IRELAND,
Attorneys for Appellees.

John P. Putnam

vs

Uri Winchester

Abstract & Brief

Filed Apr 23, 1862

J. Selman
clerk

State of Illinois } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

URI WINCHESTER.

ERROR TO TAZEWELL.

Brief and Argument of Defendant.

In this case, the plaintiff in error sold the mule in controversy and got his pay, and he there impliedly warranted his title to it. Sec. 2 Blackstone, 451; Chitty's Cont., 390; 6 Johns., *Hennover vs. Venoy*, page 8; Sweet vs. Colgot, 20 Johns., page 204; Raw vs. Barlee, 3 Cowan, 280.

A warrantee of title will be presumed, whether the goods sold be at the time of the sale, in the possession of vendor or a third person, unless the contrary be expressed. Story on Contracts, sec. 833. *Morley vs. Attenborough*, 18 L. J. Exch., 148; Chitty's Cont., 390.

All of the mules being purchased in a lot for \$300, the defendant had a right to prove what the one not obtained was then reasonably worth, and that is what the law presumes to be the amount he paid for it, and that is to regulate his right in amount to recover against plaintiff, who got the money, and should respond in this form of action.

The 4th instruction of plaintiff should not have been given, because defendant had a right to recover back his money in any event, and the proof showed the reasonable price probably paid for him; and therefore, in any point of view, the instruction, being calculated to mislead the jury, was properly refused.

The right to recover the money paid for the mule in this form of action is admitted by the plaintiff, and the only objection is as to the form and amount. The evidence shows the amount to be probably correct, and there is no question but taking all of the case, evidence, instructions and verdict, that substantial justice has been done, and the verdict should not therefore be disturbed, or the judgment effected here. And the evidence also shows that Puterbaugh is now pursuing Weed with a process to recover the value of the mule in question. See record, pages 12 and 13, evidence of Reeves and Milner and Prettyman. The judgment, therefore, should be affirmed.

B. S. PRETTYMAN,

For Defendant in Error.

S. D. Puterbaugh
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Def. Bredt + Anst.

Filed May 9, 1842
J Leach
clerk

The first of these is the fact that the
 Government has been unable to secure
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State of Illinois } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

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B. S. PRETTYMAN,

For Defendant in Error.

S. D. Peterbaugh
vs.
Wm. Wmchester

Deft. Beef & Ag^t

Since May 9, 1862
S. L. Lanza
C. W.

State of Illinois } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

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B. S. PRETTYMAN,

For Defendant in Error.

J. D. Puterbaugh

Univ. ²⁸ Winchester

Deft. Brief Aug.

Filed May 9, 1842

J. L. Lumber
clerk

State of Illinois } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

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B. S. PRETTYMAN,

For Defendant in Error.

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 J. D. Puterbaugh
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 Wm. Wmchester
 Depts. Brief Ass.

Justice Henry G. (Wm)
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State of Illinois } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

SABIN D. PUTERBAUGH

vs.

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B. S. PRETTYMAN,

For Defendant in Error.

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J. D. Peterbaugh

Res.
Worcester

Defr. Brief + Arg.

Filed May 9. 1842

J. Selanda
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