

Gibson Vs. Stevens

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Decided On : 1850

Appeal No. : 49 U.S. 384

Appellant : Gibson

Respondent : Stevens

Judgement :

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Gibson v. Stevens

49 U.S. (8 How.) 384

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF INDIANA

SYLLABUS

Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale or other evidence of title is sufficient to transfer the property and possession to the vendee.

Where articles of commerce were purchased in the State of Indiana, and the vendors in whose warehouses they were lying gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers.

These documents, being endorsed and delivered to a merchant in New York in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property.

Therefore an attachment subsequently issued at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained.

This Court will judicially recognize this branch of trade. It has existed long enough to assume a regular form of dealing, and its ordinary course and usages are now publicly known and understood.

The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession.

A guarantee by the first sellers that the articles should pass inspection did not change the original sale into an executory contract. It was nothing more than the usual warranty of the soundness of the goods sold.

This was an action of replevin brought by Gibson, a citizen of New York, against Stevens, the Sheriff of Allen County, Indiana, who had in his custody sundry articles of property which he had taken by virtue of a writ of foreign attachment issued under the state laws of Indiana.

The facts in the case were agreed upon by the counsel in the circuit court as follows.

"Be it remembered, that at the May term of said court, A.D. 1844, the above cause was submitted to the decision of the court, without the intervention of a jury, upon

the following agreed facts, to-wit:"

"The parties mutually agree that the following are the facts in this case:"

"That McQueen & McKay, citizens of the City of Detroit, State of Michigan, about 20 March, 1844,

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by false pretenses, fraudulently procured the branch of the State Bank of Indiana, at Indianapolis, to loan to them the sum of about eleven thousand dollars. The money thus loaned consisted of notes of the Indianapolis branch of said State Bank of Indiana, payable to bearer, and transferable by delivery. With part of the money thus obtained, McQueen & McKay purchased of Hanna, Hamilton & Co. three hundred and fifty barrels of mess pork for the sum of \$2,908.50, and at the same time paid to the said Hanna, Hamilton & Co. the said purchase money, and thereupon the said Hanna, Hamilton & Co. executed and delivered to the said McQueen & McKay the memorandum of said purchase, receipt, and guarantee thereto appended, which are herewith filed and marked A and made a part of this agreement, and are in the words and figures following, to-wit:"

" *Fort Wayne, April 4, 1844* "

" Messrs. McQueen & McKay"

" Bought of Hanna, Hamilton & Co."

"350 barrels mess pork, to be delivered on board of canal boats soon after the opening of canal navigation, at \$8.31 . . . \$2,908.50."

" Received payment in full,"

"HANNA, HAMILTON & CO."

" We guarantee the inspection of the above pork at Toledo, and the delivery on board of canal boats at this place soon after the opening of canal navigation."

"HANNA, HAMILTON & CO."

" *Fort Wayne, April 4, 1844* "

"The said barrels of pork were, at time of said sale to McQueen & McKay, lying in the warehouse of said Hanna, Hamilton & Co. in the Town of Fort Wayne in the State of Indiana about twenty feet from the Wabash & Erie Canal, marked and branded 'Mess Pork,' together with a large number of other barrels of pork, marked and branded 'Prime Pork' and 'Clear Pork.'"

"Said three hundred and fifty barrels being all the mess pork in said warehouse at that time or at any other time since, and all the barrels marked 'Mess Pork,' but were not seen by McQueen & McKay. Said barrels of prime, clear, and mess pork laid in said warehouse promiscuously, and so remained up to and at the time of the assignment of said writing marked A; but after the assignment and before the levying the attachment hereinafter mentioned, said Hanna, Hamilton & Co. had

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shipped off all of the said barrels of pork marked and branded 'Prime Pork' and 'Clear Pork.'"

"Said McQueen & McKay at the same time purchased of D. & J. A. F. Nichols, of Fort Wayne, Indiana, two hundred barrels of superfine flour, for the sum of \$712.50, and at the same time paid the said D. & J. A. F. Nichols the said purchase money, and thereupon said D. & J. A. F. Nichols executed and delivered to said McQueen & McKay a memorandum of said purchase, receipt, and guarantee, in the words and figures following, to-wit:"

" *Fort Wayne, April 4, 1844* "

" Messrs. McQueen & McKay,"

" Bought of D. & J. A. F. Nichols."

" Two hundred barrels of superfine flour at \$3.56 1/4 . . . \$712.50"

" Received, Fort Wayne, April 4, 1844, payment in full."

"D. & J. A. F. NICHOLS"

" Received the above flour in store, at Fort Wayne, April 4, 1844, which we agree to deliver on board of canal boats here soon after the opening of the navigation, subject to the order of McQueen & McKay."

"D. & J. A. F. NICHOLS"

" We guarantee the inspection of the above flour in New York as superfine flour."

"D. & J. A. F. NICHOLS"

"Which are herewith filed and marked B, and are part of this agreement. Said barrels of flour were, at the time of said sale, lying in the warehouse of said D. & J. A. F. Nichols, in the Town of Fort Wayne, Indiana, on the bank of the Wabash & Erie Canal, and there remained until they were seized and taken under the attachment hereinafter mentioned. Said purchases were both made in the Town of Fort Wayne, in the County of Allen in the said State of Indiana, on 4 April, 1844."

"On 17 April, 1844, said McQueen & McKay presented the said memorandums of purchase, receipts, and guarantees thereto appended as above set forth and marked A and B to the said Gibson in the City of New York and requested of said Gibson an advancement upon the flour and pork therein mentioned, whereupon the said Gibson did advance to the said McQueen & McKay, on the faith of said flour and pork and the evidences of title thereto, the sum of \$2,787.50, and took from said McQueen & McKay an assignment of said

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memorandums of purchase, receipts, and guarantees, respectively, endorsed on the back of each in the words and figures following, to-wit:"

" Deliver the within two hundred barrels of flour to E. T. H. Gibson, or order."

"Mc QUEEN & Mc KAY"

" *New York, April 17, 1844* "

" Deliver the within 350 barrels of pork to E. T. H. Gibson, or order."

"Mc QUEEN & Mc KAY"

"Which are also part of this agreement."

"Said McQueen & McKay at the same time delivered to the said Gibson the original memorandums of purchase, receipts, and guarantees above set forth and marked A and B, in whose possession they now remain."

"At the same time, McQueen & McKay wrote, signed, and delivered to said Gibson the letter which is herewith filed, marked C, and made a part of this agreement, and is in the words and figures following, to-wit:"

" *New York, 17 April, 1844* "

" MESSRS. LUDLOW & BABCOCK, Toledo:"

" Gentlemen -- We have this day received an advance from E. T. H. Gibson, Esq., on the following lots of pork, which you will have the goodness to deliver to his order, and to comply with his instructions relative to the shipment, to-wit:"

"365 bbls. mess pork"

" from warehouse of Walker, Roger & Co."

"225 do. prime do."

" 11 do. mess do. from warehouse of Benbridge & Mix."

"300 do. do. do. do. do. Hamilton & Williams."

"350 do. do. do. do. do. Hanna, Hamilton & Co."

"200 do. flour, from warehouse of D. & J. A. F. Nichols."

" Respectfully, Gentlemen, your obedient servants."

"Mc QUEEN & Mc KAY"

"On 18 April, 1844, Gibson enclosed the letter above referred to in another letter written by himself, directed to Mott & Co., at Toledo, Ohio, and mailed the same on said 18 April, 1844, in the post office in the City of New York, which said letter, with the enclosure, said Mott & Co. received by due course of mail and handed said enclosed letter, as requested by said Gibson, to Ludlow & Babcock at Toledo, Ohio."

"Said Gibson also, on said 18 April, 1844,

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mailed in the post office in the City of New York a letter written by himself and directed to said Ludlow & Babcock at Toledo, Ohio, which said Ludlow & Babcock received by due course of mail, which letter is herewith filed, marked D, and made a part of this agreement, and is in the words and figures following, to-wit:"

" *New York, April 17, 1844* "

" MESSRS. LUDLOW & BABCOCK, Toledo, Ohio:"

" Gentlemen -- I have this day made McQueen & McKay, of Detroit, an advance on twelve hundred and fifty-one barrels of pork, and two hundred barrels of flour, which is stored at different points on the line of the Wabash Canal and which they state is to be shipped to your care and held by you at Toledo until you receive instructions from them respecting it. They have given me an order on you for it, which I have sent to Mott & Co. I wish you to ship the pork and flour to me immediately on its arrival at Toledo, at the lowest possible rates of freight, and send me a bill of lading of the same. There is one lot of three hundred barrels of pork in Hamilton & Williams' warehouse on which there is due from McQueen & McKay, on its arrival at your place, \$550.00. This amount you may draw on me for so soon as I receive bill of lading of the pork. Let me hear from you by return mail respecting it."

" I remain truly and respectfully yours."

"E. T. H. GIBSON"

"At the time of the assignment of said memorandums of purchases, receipts, and guarantees, said Gibson was a commission merchant in said City of New York in the State of New York, and it was usual and customary for commission merchants residing and doing business in the City of New York to make advances on Western produce upon the assignment of the proper evidences of title thereto."

"On 23 April, 1844, said Gibson, having on that day learned that McQueen & McKay had suffered some of their bills to be protested for nonpayment, dispatched one William Hoyt to the Town of Fort Wayne aforesaid to see to the shipping of said pork and flour, and the said Hoyt arrived at said Town of Fort Wayne on 29 April, 1844, for that purpose, having in his possession the said writings marked A and B."

"At the time of the assignment of said writings marked A and B, the said Wabash & Erie Canal was navigable at and from the said Town of Fort Wayne to the said Town of Toledo."

"On 27 April, 1844, a writ of attachment issued

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from the Allen Circuit Court in the State of Indiana, in due form of law, at the instance and in the name of the State Bank of Indiana, against the goods and chattels, lands and tenements, of the said McQueen & McKay (William McQueen and James McKay), which said writ of attachment, and all the proceedings in and about the issuing of the same, are admitted to have been regular, and the production of the same, and of the record thereof, is hereby waived."

"This said writ was directed to the defendant in this suit, who then was and still is Sheriff of said County of Allen and came to his possession as such sheriff on said 27 April, 1844, on which said 27 April, 1844, the sheriff aforesaid, by virtue of said writ of attachment, levied upon, seized, and took into his possession the said pork

and flour described in said writings, marked A and B, the return day of which said writ has not yet elapsed. And it is also agreed that the proceedings of the said sheriff in executing the writ of attachment were in all respects, regular. It is not, however, admitted by the plaintiff that the property levied on was, at the time levied on or at any time since, the property of the said McQueen & McKay or that McQueen & McKay had an attachable interest therein. And that the defendant shall have the full benefit of all the proceedings in the said attachment, in the same manner as though the record thereof was produced before this court. And it is further agreed that the said sheriff kept and retained the possession of the said flour and pork, so levied on by said writ of attachment, until the same was replevied out of his possession by virtue of the writ of replevin in this case. The said writ of attachment was issued and sued out for the purpose of coercing the payment of the said money obtained by the said McQueen & McKay as above stated."

"It is further admitted by the parties that the said pork and flour are of the value mentioned in the affidavit of William Hoyt, now on file in this court, on which said writ of replevin was issued."

"The said Ludlow & Babcock were, on 17 April, 1844, the forwarding merchants of the said McQueen & McKay, at Toledo, Ohio, one hundred and four miles from Fort Wayne, and that Mott & Co. were on the same day the forwarding merchants of said Gibson at same place, Toledo."

"It was understood between the said Gibson and the said McQueen & McKay at the time of said assignment of said writings marked A and B that the said Gibson should sell the said pork and flour, and after retaining his said advancement and his legal commission, and interest and outlays, pay the remainder of the

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proceeds of said pork and flour to said McQueen & McKay according to the usage and custom of commission merchants. The pork and flour mentioned in said writings marked A and B, and that levied upon by virtue of said attachment, and

that replevied by virtue of said writ of replevin, in this cause issued, and purchased by McQueen & McKay with the money obtained from said bank, as aforesaid, are the same pork and flour, and not other or different. The said levy, seizure, or detention of said pork and flour happened at and within the County of Allen in the State of Indiana; a legal demand was made before the commencement of this suit, and after the said levy, upon the defendant, by said Hoyt as the agent of said Gibson, for the said pork and flour, and the said defendant refused to surrender the same. The said Gibson was at the time of the commencement of this suit and still is a citizen of the State of New York, and the defendant a citizen of the State of Indiana."

"The said advancement, so made by said Gibson, corresponds with the usual advancing rates of commission merchants in the said City of New York at the time of said advancement."

"The said writ of attachment was levied on the said property at the instance of the said branch of said State Bank of Indiana, and it was known to the State Bank of Indiana at the time of and before the levy of said writ of attachment that the said loan had been procured from her said branch at Indianapolis fraudulently by said McQueen & McKay and that the said McQueen & McKay had invested the said money so obtained in the purchase of said pork and flour, and that said attachment is still pending, and that the original bills on which said money was obtained fell due after the levy under said attachment, and that none of said bills on which said money was obtained or any part thereof have ever been paid, but were at maturity protested for nonpayment."

"It is also admitted, if the court should consider the circumstance legitimate or material, which the defendant denies, that in 1843 the said McQueen & McKay and said Gibson had a similar transaction in New York in which the said McQueen & McKay acted with integrity, but with which the bank or the other parties had no connection."

Upon this case stated, the circuit court gave judgment for the defendant in replevin. The counsel for the plaintiff took an exception, and brought the case up

to this Court.

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MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

This case is one of much interest and has been very fully argued. There is, however, but a single question in it, and that is whether the property in dispute was transferred to the plaintiff in error and vested in him by the endorsement and delivery of the warehouse documents in the manner stated in the record.

The fact that McQueen & McKay by fraudulent means obtained the money from the bank with which they purchased the pork and flour is not material in the decision of this question. The bank in these proceedings does not claim the property as its own upon the ground that it was purchased with money fraudulently obtained from it. If it had intended to assert its title as owner, it should have proceeded by some appropriate action to recover the property itself or the value of it in damages. But the bank presents itself in the character of a creditor, seeking to collect its debt by an attachment against the property of its debtor. And the claims of both parties, plaintiff and defendant, rest upon the admission that the pork and flour were the property of McQueen and McKay, and had been left by them in the custody of the warehousemen as their bailees.

We are not, therefore, called upon to decide whether the owner of money fraudulently obtained from him can follow the proceeds in the hands of a *bona fide* purchaser without notice and in the usual course of trade. As this question is not in the case, we forbear to examine it, although it was discussed in the argument at the bar. We must not, however, be understood as intimating that if this point had arisen the judgment of the Court would have been different from that which we are about to give.

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The case as it comes before us in substance is this:

The pork and flour were purchased by McQueen & McKay at Fort Wayne in the State of Indiana on 4 April, 1844. The articles were in the warehouses of the respective vendors at the time of sale, and the purchasers took from each of them a written memorandum of the sale, with a receipt for the money and an engagement to deliver them on board of canal boats soon after the opening of canal navigation. There was also a written guarantee from the respective vendors that the articles sold should pass inspection. By the order of McQueen & McKay, they were to be sent by canal boats to Ludlow & Babcock, their agents at Toledo, in the State of Ohio, to be held by them until they received orders from McQueen & McKay.

The documents executed by the warehousemen, hereinbefore mentioned, transferred the property and the possession of the pork and flour to McQueen & McKay, and the vendors from that time held it for them and as their bailees.

Being thus in possession, McQueen & McKay afterwards, on 17 April, in the City of New York, in consideration of the advance of money mentioned in the statement of the case, delivered to Gibson, the plaintiff in error, the evidences of title which they had received from the vendors, endorsing thereon an order upon them to deliver the property to Gibson. They at the same time delivered to Gibson a letter to Ludlow & Babcock, their agents at Toledo, stating that they had received an advance from Gibson upon this property, and directing them to deliver it to him and to comply with his orders.

Gibson was a commission merchant residing in New York, and it is admitted that this transaction with McQueen & McKay was in the usual course of his business. On 27 April, ten days after this transfer, the property was seized by the defendant in error, as sheriff, under an attachment issued on the same day at the suit of the bank, to obtain satisfaction for the debt due to it from McQueen & McKay. At the time of the attachment, the pork and flour still remained in the warehouses at Fort Wayne, and neither the warehousemen nor the attaching creditor had notice of the transfer to Gibson. The agent dispatched by him arrived two days afterwards and claimed the property. The sheriff refused to deliver it up, and this action of replevin was thereupon brought to recover it.

In examining the question between these parties, it is proper to say that if the fact had not been admitted that the dealing between McQueen & McKay and the plaintiff was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it. Apart from the fraud imputed to

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McQueen & McKay, of which Gibson had no knowledge, the statement of facts in this case describes the usual course of the great inland commerce by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood, and it is the duty of the Court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if by any decision of this Court doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it, and would certainly be not less injurious to the agriculturist and producer than to the merchant and trader.

The transaction, therefore, being in the usual course of trade and free from all suspicion of bad faith on the part of the plaintiff, the question to be decided is what was the legal effect of the endorsement and delivery of the warehouse documents in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the Court it transferred to him the legal title and constructive possession of the property, and the warehousemen from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidences of title and the orders endorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself.

This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce. A ship at sea may be transferred to a purchaser by the

delivery of a bill of sale. So also as to the cargo, by the endorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. But the subject came before this Court in the case of [Conard v. Atlantic Insurance Co.](#), in 1 Pet. 445, where this symbolical delivery was fully considered and sustained. The same principle was decided in the case of *Brown v. Heathcote*, 1 Atk. 160; *Greaves v. Hepke*, 2 Barn. & Ald. 131; *Atkinson v. Maling*, 2 T.R. 465; *Wilkes and Fontaine v. Ferris*, 5 Johns. 335; *Pleasants v. Pendleton*, 6 Rand. 473; *Ingraham v. Wheeler*, 6 Wend. 277; *Ricker v. Cross*, 5 N.H. 571; *Gardner v. Howland*, 2 Pick. 599;

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2 Kent Com. 499; Story on Sales 311. The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery. The contract between the plaintiff and McQueen & McKay having been made in New York, the articles in the warehouses at Fort Wayne were incapable of actual delivery; consequently the delivery of the evidences of title, with the order to the bailees endorsed on them, passed the title and possession to the plaintiff.

It is true there is no formal assignment endorsed on the warehouse document. But the technical rules of common law conveyances and transfers of property had never been applied to mercantile contracts made in the usual course and forms of business. The endorsement of the delivery order upon these evidences of his title, like the endorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson. And when that intention is evident from the language of the written instruments and the nature and character of the contract, it is the duty of the court to carry it into execution without embarrassing it with needless formalities. A contrary rule would most commonly defeat the object which both parties designed to accomplish, and believed they had accomplished, by the instruments they executed.

Nor, as respects the legal title, can there be any distinction between the advance made by Gibson and the case of an actual purchaser. To the extent of his

advances, he is a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor, who makes advances for his principal upon goods in his possession. But even in that case, the property cannot be withdrawn from his hands until his advances are repaid. But in the case before us, the title of Gibson is not a mere lien. The legal title, the right of property, passed to him, and McQueen & McKay retained nothing but an equitable interest in the surplus, if any remained after satisfying the claims of Gibson. The case of *Conard v. Atlantic Insurance Company*, before referred to, was the case of a loan of money upon a respondentia bond upon a cargo at sea, secured by an assignment on the bill of lading, and in that case the Court said --

"It is true that in discussions in a court of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more -- it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law."

[26 U. S. 1](#) Pet. 441.

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The guarantee that the articles should pass inspection does not affect the character of the transaction nor convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken by the purchaser in every sale of personal property when he does not choose to take the risk upon himself.

It appears that the attachment was laid before the warehousemen received notice of the transfer to Gibson. Undoubtedly it was his duty to use reasonable diligence in giving notice both to them and the agent at Toledo. And negligence in this respect on his part would be regarded as evidence of fraud, and might moreover put in jeopardy his right of property if it passed into the hands of a *bona fide* purchaser without notice and in the usual course of trade. But in this case, there has been no unreasonable delay. The notice was promptly given, and the receipt of it by the bailees was not necessary to complete his title. As between him and

the creditors of McQueen & McKay, the property and possession vested in him at the time of the transfer and delivery of the documents. The cases before referred to establish this principle.

Neither is the equitable interest of McQueen & McKay in the surplus (if any remain) material to the decision. This equitable interest is no doubt liable to attachment by the laws of Indiana. But that liability will not authorize the attaching creditor to take the property out of the hands of the legal owner before his claims upon it are discharged. The equity of redemption upon a mortgage of real property is liable to attachment. But it will scarcely be contended that the attaching creditor, or a purchaser under the attachment, or the officer levying it, could maintain an ejectment against a mortgagee in possession or in any other way interfere with his possession when holding it as security for money due him. The same rule applies to a mortgagee of personal property holding the legal title and possession to secure his advances.

Upon the whole, therefore, we think there is error in the judgment of the circuit court, and that it must be

Reversed.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said circuit

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court for further proceedings to be had therein in conformity to the opinion of this Court.

