Railey, Tarlton; vs. Porter, James 1860 Jackson Co. 6th Cir. 257/3
Moore, George E Smart, Robert G.

Old 91/24

Reversed Recovery

P&S forwarding merchants at Maxwell Landing in Jackson Co.; R&M in Cass Co. sent them hemp seed
with written instructions to ship them to Lexington to have it sold
Shipped it on steamboat A C Goddin & was delivered to wrong person who held on to it
when R&M found out where it was sowing time had passed
Boat is liable for error but P&S also liable b/c didn't contact consignee

Independence Mo Oct 17/60

W. E. Duncomb Esq

Dear Sir

Please send to the Clerk of the Circuit Court of this County, a writ of Error in the Case of Railey & Moore pltffs. vs. Porter & Smart defts. Railey & Moore are pltffs in Error.

Yours truly

Chrisman & Comingo

Railey & Moore

v J Precipe

Porter & Smart

filed October 19th 1869

Wm E Dunscomb

Clerk.

Clackson

Chinman & Conings

The State of Missouri, ss.

The State of Missouri, *To the Judge of the* sixth Judicial Circuit *in said State, Greeting:*

Whereas, *In the Record and Proceedings in a certain cause lately pending in the* Circuit Court of Jackson County, in the Judicial Circuit aforesaid *wherein* Tarlton Railey and George E Moore were plaintiffs and James Porter and Robert G Smart were defendants

in an action of _____ *manifest error hath intervened to the great damage of the said* plaintiffs *as by* their *complaint, we are informed.*

Now, *we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **COMMAND YOU,** *that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole, in said State, on the* second *Monday in* January *next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done, and have then there this writ.*

Witness, WILLIAM E. DUNSCOMB, *Clerk of our said Supreme Court, at office, in the City of Jefferson, the* nineteenth *day of* October *in the year of our Lord one thousand eight hundred and* sixty.

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

State of Missouri } ss
County of Jackson } I Samuel D Lucas Clerk of the Circuit Court within and for the County of Jackson aforesaid do certify that in obedience to the command of the within writ that I append hereto a full true and perfect transcript of all the Record and proceedings in the Cause therein named wherein Tarlton Railey and George E Moore are Plaintiffs and James Porter and Robert G Stuart are Defendants, as fully as the same now remains of Record in said Court.

In witness whereof I hereunto set my hand and affix the seal of said Court this 25th day of October A D 1860. at office in Independence Missouri

Samuel D Lucas Clerk
By C D Lucas. D.C.

Filed 22nd day of October 1860
S D Lucas
Clerk

Rec'd 10 hand send

1 State of Missouri } ss.
Jackson County } Pleas in the Circuit Court
Begun and held at the City of Independence
for the County of Jackson in the Sixth
Judicial Circuit of the State of Missouri
on the Second Monday of March in the year
of our Lord One thousand Eight Hundred and
Fifty Nine before the Honorable Russell
Hicks Judge of said Circuit,

Be it Remembered that heretofore to wit on the 4th day of February in the year Eighteen Hundred and Fifty Nine Fowlton Railey and George E Moore by their Attorneys Chrisman & Conings filed in the office of the Clerk of the Circuit Court for the County aforesaid their petition against James Porter and Robert G Smart, which said Petition is in the words and figures following to wit

Fowlton Railey &
George E Moore } Plaintiffs
Petition Against } In the Circuit Court
James Porter & } Jackson County,
Robert G Smart } Defendants

Plaintiffs State that Defendants heretofore were Commission and forwarding Merchants, doing business as such at Maxwells Landing in Jackson County in the State of

2 Missouri under the name and style of Porter & Smart that in the month of March 1857 while Defendants were doing business as aforesaid at the place aforesaid Plaintiffs who reside in Cass County Missouri sent them Eighteen sacks containing about Twenty Eight Bushels of Chinese Hemp seed the property of Plaintiffs with instructions in writing to ship them with all convenient speed to C Wallace at the City of Lexington in the State aforesaid and that Defendants received said seed at their Ware House in said County of Jackson and on or about the 4th day of April 1857 undertook to ship the same to said C. Wallace as they were by Plaintiff Railey instructed to do Plaintiffs state that Defendants in shipping said seed were guilty of negligence by reason of which the same was wholly lost to Plaintiff, that Defendants shipped it on the Steam Boat A C Goddin, and took from the Clerk of said Boat only one bill of lading which they retained and still do retain. Plaintiffs state further that the bill of lading made out by the Clerk of said Boat and delivered to Defendants as aforesaid, was made in conformity with the instructions given by Plaintiff Railey to Defendants, that by the terms of said Bill said Hemp seed was to have

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been delivered by said Boat to C Wallace of Lexington. But owing to the fact that Defendants failed and neglected to attend and see to the filling up of the other Bills of lading and failed and neglected to inform said C Wallace of the shipment which they attempted to make to him as aforesaid he failed to receive the same or any part thereof, and owing to Defendants said negligence and mismanagement said Hemp seed was delivered to T B Wallace who detained it not knowing to whom it belonged or for what purpose it was sent to him, Plaintiffs State further that said hemp seed was of a sound and valuable kind and was worth at said City of Lexington the sum of Ten Dollars per Bushel, that they had made arrangement with said C Wallace to sell the same and that their object in sending it to him at said City of Lexington was to have it sold, and that it might and would have been sold at the price above stated had it been sent to said C Wallace in accordance with Plaintiffs instructions, Plaintiffs State that they did not nor did said C Wallace ascertain what had become of said seed and were wholly unable to do so, until after the season for sowing the same had passed by, and that owing to

this fact it had become and was at the time plaintiffs found it in the possession of T.B. Wallace in whose possession it had been placed by reason of Defendants negligence as aforesaid of no value for seeing purposes Plaintiffs State that by reason of the negligent and careless manner in which the Defendants attended to the shipping of said seed they have been damaged in the sum of Two Hundred & Seventy Dollars which Defendants though often requested refuse to pay. Plaintiffs therefore ask Judgement against Defendants for Two Hundred & Seventy Dollars with interest thereon since the first day of July 1857.

Chrisman & Cannings
Attys for Pltffs

Tarlton Railey one of the Plaintiffs makes oath and says he believes the foregoing petition and the matters as therein stated are true

Tarlton Railey

Sworn to & Subscribed before me this 4th day of February 1859

Saml D Lucas Clerk

And afterwards to wit on the day of the filing of the said Petition our said Clerk endorsed a Writ of Summons thereon, which said Writ is in the words and figures following to wit

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Writ Summons

The State of Missouri To the Sheriff of Jackson County. Greeting

You are hereby commanded to summon James Porter & Robert G Smart if they be found in your County that they be and appear before the Honorable Judge of our Jackson Circuit Court at the Court House in the City of Independence on the Second Monday in March next it being the 14th day of said Month then and there to answer into the Complaint of Farlton Railey & George E Moore as Setforth in the foregoing Petition and that you have then and there this writ and that you Certify how you execute the same

Witness Samuel D Lucas Clerk of our said Jackson Circuit Court with the seal thereof hereto affixed at office in Independence this 4th day of February 1859

Saml D Lucas Clerk

And afterwards to wit on the said Second Monday of March our said Sheriff To wit John W Burrows Sheriff of Jackson County by his Deputy John K. Stark returned said writ as follows to wit.

Return.

I Certify that I executed the within writ by delivering a copy of the within Petition & writ to the within named Robert. G.

6 Smart on the 5th day of February 1859, he being the first Defendant served and by delivering a copy of the within writ to the within named James Porter on the 5th day of February 1859 both in Jackson County Mo

Sheriffs Fee $2.00 John M. Burrus Sheriff

By John R. Stark Deputy

And afterwards to wit on the 6th day of said Term it being the 19th day of March A D 1859 among other proceedings the following were had and made to wit,

Railey & Moore
vs } Petition
Porter & Smart

Now at this day come the Parties aforesaid by their attorneys and on motion leave is given Defendants to file answer to said Petition sixty days after this term and continued,

And afterwards on the 23d day of May A D 1859 in pursuance to said order the said Defendants filed their answer to said Petition in the office of the Clerk of our said Court which said answer is in the words and figures following to wit

Sarltan Railey and
George E Moore Plaintiffs

Answer. Against

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James Foster and } In the Circuit Court
Robert G Smart Defendants } Jackson County

Defendants admit that they were Commission and forwarding Merchants at Maxwells Landing in 1857 and as such received a lot of Hemp such as stated in Plaintiffs Petition to be shipped to C Wallace at Lexington Missouri, Defendants further state that they did as directed by Plaintiffs ship said Hemp said to said C Wallace with all convenient speed after receiving the same at Lexington Missouri on the Steam Boat called the "A. C. Goddin" a boat used in navigating the Waters of this State and have as such from any non performance of any Contract of affreightment entered into on the part of the officers or agent of said Boat while so employed, that they took a bill of Lading from said Boat signed by the Proper Officer binding and making said Boat responsible for the delivery of said hemp said at Lexington to C Wallace as directed by Plaintiffs. Defendants deny that they were guilty of negligence in shipping said hemp said and that said Hemp said in consequence of any negligence on their part was thrown lost to Plaintiffs, Defendants deny that they were bound by the law of the land to take more than one bill of lading from said Boat

for the delivery of the said Hemp seed to the said C. Wallace or that they were guilty of any negligence or malfeasance touching the shipping of said Hemp seed — but state the fact to be that they shipped the seed aforesaid as directed by Plaintiffs to the person & place as directed and took a valid obligation from said Boat whereby the same was legally bound to perform said contract of affreightment and that the same is now in their possession but has at all times been at the service of Plaintiffs if required by them for the purpose of holding said Boat responsible and if said C. Wallace failed to receive said Seed the same was not owing to the neglect or malfeasance of Defendants, Defendants also deny that it was any part of their business or duty to give notice of the shipment of said Seed to said C. Wallace as they were only instructed by Plaintiffs to ship said seed as above stated which they did and they deny that they are guilty of any failure of duty or negligence on account of the want of such notice to said C. Wallace as to the averment in Plaintiffs Petition that said Hemp seed was received by one J. B. Wallace who retained the same not knowing for what purpose they were sent to him or to whom they belonged Defendants have no sufficient knowledge or information to frame

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a belief and demand proof of the same. but if said J. B. Wallace did so become said Hemp seed, Defendants deny that it was on account of any negligence or inattention on their part or that they are in any manner responsible therefor, as to the averments in Plaintiffs Petition, that said Hemp seed was of a Rare and valuable kind and was worth at the said City of Lexington the sum of Ten dollars per bushel" and that Plaintiffs" had made arrangement, with said C. Wallace to sell the same" and that the object of Plaintiffs in sending it to him at said City of Lexington was to have it sold, and that it might and would have been sold at the price above stated, if it had been sent to C. Wallace in accordance with Plaintiffs instructions and each and all of said averments and allegations these Defendants say they have no sufficient knowledge or information to form a belief and demand proof of the same, and as to the averments, that they did not nor did said C. Wallace ascertain what had become of said seed and were wholly unable to do so until after the season for sowing the same had passed by, and that owing to this fact "said seed were" "and has become" of no value for sowing purposes these Defendants have no sufficient knowledge or information to form a belief and demand

Proof of the same. these Defendants deny that by any negligent and careless manner in which they attended to the shipping of said Seed Plaintiffs have sustained damage in the sum of Two Hundred and Twenty Dollars or any other sum and deny that plaintiffs have any legal or just cause of action against them

Porter & Smart

This Affiant R G Smart one of the above defendants makes oath and says he believes the above answer & the matters therein as stated are true

R. G. Smart

Sworn to & Subscribed before me this 23rd day of May 1859

Saml. D. Lucas Clerk

And afterwards to wit At a Term of the Circuit Court begun and held at the Court House in the City of Independence for the County of Jackson in the State of Missouri on the second Monday of September A D 1859 it being the 12th day of said month, Court met pursuant to adjournment Present the Honorable Onslow Hicks Judge of said Court John W Bryant Circuit Attorney, Samuel D. Lucas Clerk and John. W. Burris Sheriff.

And afterwards to wit on the 9th day of said Term it being the 21st day of September A D 1859 among other proceedings the following

11 were had and made to wit.

Railey & Moore
vs. } Petition
Porter & Smart

Now at this day come the parties aforesaid by their attorneys and this cause is continued,

And afterwards to wit At a Term of the Circuit Court begun and held at the Court House in the City of Independence for the County of Jackson in the State of Missouri on the Second Monday of March A D 1860 it being the 12th day of said Month, Court met pursuant to adjournment Present the Honorable Robert G Smart Judge John W Bryant Circuit Attorney Samuel D Lucas Clerk and John W. Burrus Sheriff,

And afterwards to wit on the 5th day of said Term it being the 16th day of March A D 1860 among other proceedings the following were had and made to wit,

Railey & Moore
vs } Petition
Porter & Smart

Now at this day come the Parties aforesaid by their attorneys and by consent of said parties this cause is continued to the June Adjourned Term,

And afterwards to wit At a Special Adjourned Term of the Jackson Circuit Court Begun and held at the Court House in the City of Independence for the County of Jackson in the State of Missouri on the third Monday of June A.D. 1860 It being the 18th day of said Month and being adjourned from the Regular March Term 1860 under the order of the Judge of this Court entered of Record. Present the Honorable George W. Dunn Judge of the 5th Judicial Circuit of this State Presiding in pursuance of said Order and at the request of the Judge of this Court. Samuel D. Lucas Clerk and John W. Burrus Sheriff.

And afterwards to wit on the 4th day of said Term it being the 21st day of June A.D. 1860 among other proceedings the following were had and made to wit,

Judgement

Tarlton Railey &
George E. Moore
vs.
James Porter and
Robert G. Smart

Petition

Now at this day came the Parties aforesaid by their attorneys and neither party requiring a Jury to try the Issue herein all and singular the premises are by them Submitted to the Court. which being by

the Court here seen and heard and fully understood the Court doth find the issue for the Defendants,

It is therefore considered by the Court here that said Plaintiffs take nothing by their said writ and that the said Defendants be discharged thereof and go hence without day. and that said Defendants Recover against the said Plaintiffs their costs and charges in and about their defence in this behalf laid out and expended and that they have thereof Executions,

And Afterwards to wit on the 5th day of said Term it being the 28th day of June A D 1860 among other proceedings the following were had and made to wit,

Kailey & Moore }
vs. } Petition
Porter & Smart }

Now at this day come the Parties aforesaid by their attorneys and Plaintiffs file Motion for a new trial which said motion is taken up by consent, and the same being by the Court seen and heard is by the Court overruled to the opinion of the Court in so overruling said motion the Plaintiffs Except,

And afterwards to wit at the 6th day of said Term it being the 23rd day of June A D 1860 among other proceedings the following were had and made to wit

Kailey & Moore }
vs. } Petition
Porter & Smart }

Now at this day come the Parties aforesaid by their attorneys and said Defendants tender their bill of exceptions to the opinion of the Court in overruling their motion for a new trial, which said bill of exceptions is signed sealed and made a part of the Record in this Cause,

Which said Bill of Exceptions is in the words and figures following to wit

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Bill of Exceptions

Bailey & Moore
vs
Porter & Smart

Be it Remembered that on the trial of this cause which was submitted to the Court Setting as a Jury the following proceedings were had

Plaintiffs read in evidence the depositions of A G Williams C. O. Wallace W B Waddell A H Logan & John N Carter together with the Exhibit attached to the deposition of said Williams

Archibald G Williams of lawful age being Sworn and examined on the part of the Plaintiffs deposeth and saith: About the 5th day of April 1857 the Steamer A. C. Goddin delivered to Smock & Williams the Bill of Lading (which is here produced and hereto annexed marked Exhibit A) calling for Eighteen sack of Hemp Seed consigned to T. B Wallace of Lexington by Porter & Smart of Maxwells Independence Landing, the Hemp seed called for in said Bill of Lading were delivered by the Boat to said Smock & Williams at the same time the said Bill of Lading was delivered as aforesaid. Deponent immediately notified said Wallace of the Receipt of the Hemp seed consigned to him. but he declined

to receive them. The Hemp seed remained in the possession of Deponent and said Smock for about twelve months without any person calling for them. In July after said seed was received and after the season for their sale was over, Plaintiff Railey called upon Deponent and inquired about said Seed But gave no directions as what disposition should be made of them, Previous to the time Plaintiff Railey called to inquire about said seed - about a month before, and after the season for the sale of the seed was over, Mr. C. C. Wallace of Lexington met me on the Street and inquired if any Hemp seed had been shipped to Smock & Williams for him said C. C. Wallace, Deponent informed him that there had not, but that some Hemp seed had been received consigned to said T. B. Wallace. Deponent think there was about a Bushel and a half of Hemp seed in each sack. And that some of the sacks after they came in to the House of Smock & Williams were cut by rats, causing some waste of the seed there was about twenty three Bushels of seed remaining when deponent sold them in the Spring of 1858 they were sold to Joseph C. Anderson for China Hemp seed at one Dollar per Bushel which

was the highest price they would command at that time. In shipping produce of all kinds it is the invariable custom of Shippers on the Missouri River to take three Bills of Lading from the Boat one of which is delivered to the officers of the Boat one Retained by the Shipper and the other is forwarded to the Consignee, I am well acquainted with the Handwriting of William W Atter who was at the time said Hemp seed were received as aforesaid the Clerk on the Steamer A. C. Goddin and the signature to the said Bill of Lading hereto annexed is in the Hand Writing of said William W. Atter, Deponent, says that China Hemp seed were in Great demand in the Spring of 1857 and commanded not less than five dollars per Bushels but Deponent had none for sale and they may have commanded a much higher price.

Exhibit "A."

Shipped in Good order and Condition By Porter & Smart on account and risk of whom it may concern on Board the Good Steam Boat Called the A. C. Goddin whereof Tracy is Master for the Present voyage now lying at Maxwells — the following Articles marked as below which are to be delivered

17 without delay in like good order at Lexington unavoidable dangers of the River and Fire only, excepted unto T.B. Wallace or assigns he or they paying freight for said Goods at the rate of 20c per sack, and Charges $2.00
For witness whereof the Owner Master or Clerk of said Steam Boat, hath affirmed to three bills of Lading all of this tenor and date one of which being accomplished the others to stand void. Dated at Maxwell This 4 day of April 1857

18 Sacks Hemp Seed
Wm M. Allen,

Curtis C. Wallace of lawful age being produced and sworn and examined deposeth & saith, In the Spring of 1857. Plaintiff Railey wrote to Deponent, that he shipped to him a quantity of China Hemp seed and desired deponent to sell them at the highest price he could get for them, China Hemp seed at that time were in great demand. Several weeks afterwards Plaintiff Railey wrote to Deponent a second time inquiring about said seed, and afterwards upon learning that Deponent had not received them he Plaintiff Railey came down himself — Deponent says he never did receive said seed when Plaintiff came down Deponent and said Railey found the seed at the Warehouse of

Smoot & Williams consigned to T B Wallace
Deponent after receiving the first letter from
Plaintiff Railey inquired of C & C Williams of
the firm of Smoot & Williams, if any Hemp
seed had been received by them consigned to
him; and was informed that no seed had
been received for Deponent, but that some
hemp seed had been received by said firm
consigned to T. B. Wallace this was after the
season for the sale of Hemp seed was over
and Deponent further saith not,
Williams B Wallace of lawful age being
produced sworn & examined deposeth and
saith — Deponent purchased Hemp seed
in the Spring of 1857 they were very scarce
he bought from ten to fifteen Bushels and paid
ten Dollars per bushel which was as low as such
seed could be had for at that time, Deponent
bought his seed in Lexington Missouri, Deponent
says he has been a Shipper on the Missouri River
for the last twenty four years and that it is
the universal Custom of Shippers to take three
Bills of lading one of which is delivered
to the officers of the Boat one retained by the
Shipper and one is sent to the Consignee
and further deponent saith not,
Alexander H Logan of lawful age being produced
Sworn and examined deposeth and saith

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Deponent says that in the Spring of 1857 China Hemp seed were in great demand in Lexington Missouri. Ten Dollars per Bushel was the lowest price for such seed at that time, and that he sold a quantity of such seed at that price. Deponent says he has been a Hemp raiser for about fifteen years, and that Hemp seed are of little value for sowing when kept over one season and deponent further saith not,

John A Carter of lawful age being sworn and examined deposeth and saith, In the Spring of 1858 Deponent applied to A G Williams of the firm of Smock & Williams to purchase some China Hemp seed which he understood said firm had for sale. Deponent says he has been engaged in raising Hemp for about 18 years and he says he is acquainted with China Hemp seed and knows it where he sees it. Deponent examined several sacks of the Hemp seed in Store at Smock & Williams at the time above mentioned (Spring of 1858) and says said seed was China Hemp seed he says that while he was examining said seed Mr Joseph C Anderson came in and purchased said seed from said Williams. he (Deponent) having learned that said Anderson had previously bargained for said seed. the price of China Hemp seed in Lexington in the

20. Spring of 1857 was ten dollars per Bushel & further deponent saith not,
Archibald G Williams re-examined on the part of the Plaintiffs deposeth and saith deponent says he heard the deposition of John N Carter above read and Stales that the hemp seed spoken of by said Carter in his said deposition are the same Hemp seed mentioned by him said Williams in his testimony of yesterday which seed were sold to said Joseph C Anderson to pay freight and charges on the same and further he saith not,
Plaintiffs here closed,
Defendants then called as a witness Willis Bledsoe who testified that he was in the employ of Defendants in the Spring of 1857 as one of their Clerks at their Commission and Forwarding House at Maxwells Landing in Jackson County Missouri, that the Hemp seed in Controversy in this Cause was shipped by him on the 4th of April 1857 on Board the Steam Boat A C Goddin to W. O. Wallace of Lexington Missouri to whom plaintiff had instructed him to ship it that he took from said Boat a bill of Lading for said seed signed by her Clerk that the bill of lading here exhibited is the same which he took from said Boat, that at the time he made said

21 Shipment the officers of the Boat were in a great hurry and after one bill of lading had been made out and signed or perhaps before it was completed the Bell of the Boat was rung and the Clerk took up two Blank bills of lading and Started to the Boat refusing to wait until they were filled up. remarking that he would fill them up on the Boat as she went down Witness also Stated that he had been engaged in the Commission & Forwarding business some five or six years that it was not his Custom nor was it a general Custom to take more than one bill of lading that he scarcely ever took more than one. and that he always Considered when he had taken one that he had done all that was necessary to bind the Boat and all that he could be required to do as a forwarding Merchant that after taking one bill of lading he ordinarily left it to the officers of the Boat to fill up the others after they left the landing

On Cross examination Witness Stated that at the time the C & C Goddin landed & took the Hempseed in controversy on Board there was no other Boat at said Landing. that Witness generally took but one bill of lading from a Boat but that in this case the Clerk

took up the two Blanks and hurried back to the Boat as soon as he heard the Bell
Witness stated that he never knew a Boat to go off and leave her clerk,
Said Boat was a Regular Mississippi River Packet was a good Boat was as good as any in that trade, Defendants Thos Read in ordered the Bill of Lading taken by the witness at the time of the Shipment was made,
"Shipped in Good order and Condition by Poles & Smart on account and Risk of whom it may Concern on Board the Good Steam Boat Called The "E & C Goddin" whereof Tracy is Master for the Present Voyage now lying at Maxwell, the following Articles marked as below which are to be delivered without delay in like good order at Lexington (the unavoidable Dangers of the River and Fire only excepted) unto C. B. Wallace or to Assigns he or they paying freight for said Goods at the rate of 20¢ per sack & Charges $2.00
In witness whereof the Owner Master or Clerk of said Steam Boat, hath affirmed to three Bills of lading all of this tenor and date one of which being accomplished the others to stand void. Dated at Maxwell this 4 day of April 1857
18 Sacks Hemp Seed

Wm. W. Allen,

Defendants then called as a Witness John H Ryland who stated that he was a Farmer a few years ago as late perhaps as 1848 that he was a Hemp Grower to some extent while a Farmer & that he thought the usual time of sowing Hemp seed was from the 10th of April to the 20th of May

This was all the testimony in the Cause.

Plaintiffs then asked the following instructions

Ruley & Moore
vs.
Porter & Stuart

Plaintiffs ask the Court to declare the Law in this Cause as follows.

1st. The Law makes it the duty of forwarding and Commission Merchants to take triplicate Bills of Lading from Vessels on which they may make Shipments for others and to forward one of said Bills of Lading to the Consignee of the Shipment, to retain one, and to deliver one to the Vessel

2d It is admitted by the Answer that Defendants were forwarding and Commission Merchants and that as such they undertook to ship for Plaintiffs from Maxwells Landing in Jackson County to C. O. Wallace in Lexington Missouri a quantity of Hemp seed and took but one bill of lading

3d That in shipping said seed for Plaintiffs to said C.O. Wallace it was the duty of Defendants to have exercised ordinary care. and if the Court should find from the evidence that Defendants in making said shipment failed to exercise ordinary care or were guilty of ordinary negligence then Defendants are liable to Plaintiffs in this action and Plaintiffs are entitled to Recover of Defendants such damages as the evidence may show they have sustained by reason of such neglect in regard to said shipment

4th, Ordinary neglect is the omission of that degree of care which every man of common prudence and capable of governing a family takes of his own concerns.

5th The measure of damages in this Cause is the difference between the price for which the hemp seed in controversy might have been sold in the Spring of 1857. and the price for which it was sold in the Spring of 1858 after deducting from the former cost of transportation and a reasonable commission for selling and from the latter the cost of storing during such time as the Court may believe it remained in store on account of Defendants neglect,

To all of which except the 2d Defendants objection which objection was by the Court overruled

25 + And said instructions were given to the giving of which Defendants excepted,
Defendants then asked the following instructions
The Defendants move the Court to declare the law in this case to be as follows
That if the Court believe from the evidence that Defendants received the Hemp seed in controversy to be shipped to Lexington to C Wallace and that Defendants did within a reasonable time after receiving said Hemp seed ship the same and took from the Boat on which the same was shipped a Bill of lading of said Boat signed by the proper officer whereby said Boat was bound to deliver, said Hemp seed to said C Wallace at Lexington and the Boat refused to wait until triplicate bills of lading could be signed. then the said Steam Boat was liable to Plaintiffs for any non performance of said Contract of Affreightment, and that from the time, the liability of said Boat commenced the liability of Defendants ceased
To which Plaintiffs objected which objection was by the Court overruled and said instruction was given to which opinion of the Court in overruling said objection and giving said instruction Plaintiffs excepted,
The Court found for the Defendants upon issues. Plaintiffs filed in this cause their

motion for a new trial which said motion is in words and figures as follows,

Railey & Moore
vs.
Porter & Smart

motion for new trial

Plaintiffs come and move the Court to set aside the Judgement and grant a new trial in this Cause for the following Reasons
1st Because the finding of the Court is against the law of the case
2d Because the finding of the Court is against the Evidence,
3d Because the Court Erred in finding for the Defendants,
4th Because the Court Erred in giving the instruction asked for by the Defendants

Chrisman & Cummings
Attys for Pltffs.

Which said motion was by the Court overruled to which opinion of the Court in overruling said motion Plaintiffs excepted and tender to the Court this their Bill of Exceptions and pray that the same may be signed sealed and made a part of the Record in this Cause which is accordingly done

George W. Dunn Judge (Seal)

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State of Missouri }ss
County of Jackson } I Samuel D Lucas Clerk of the Circuit Court within and for the County aforesaid do hereby certify that the preceding 26 pages contain a full true and perfect transcript of all the Record & proceedings in the Cause therein named wherein Kelley & Moore are Plaintiffs and Porter & Smart are Defendants as the same now remains of Record in said Court

In Witness whereof I have hereunto set my hand and affixed the Seal of said Court at office in Independence this 25th day of October A D 1860

Samuel D Lucas Clerk
By C. D. Lucas D C,

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Tarlton Railey and Geo.
E Moore - pltffs in error

vs

Record
James Porter and
Robert G Smart

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filed Nov. 5th 1860
(Clerk's fee $10. paid)
Wm E Drummond
Clerk

Jackson
6th

Tarlton Railey &
George E Moore
vs
James Porter &
Robert G. Smart

In the Circuit Court
Jackson County

To the above named defendants

You are hereby notified that we have sued out a writ of Error in the above cause, and that the same is returnable to the next term of the Supreme Court of the State of Missouri, to be begun and held at the City of Jefferson in the County of Cole in said State, on the 2d Monday in January 1861.

Tarlton Railey &
Geo. E Moore, Pltffs.
By Chrisman & Comingo
their attys. of record

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Karley & Moore

Notice of writ

Vs

of Error

Porter & Smart

Filed Nov 5th 1860

Wm L Drumcomb

Clerk

I Certify that I executed the within notice by leaving a true copy of the same at the usual place of abode of the within named James Porter and Robert G. Smart, for the said James Porter and Robert G Smart, with a white person of their respective families over the age of fifteen Years on the 2nd day of November 1860, each in Jackson County Mo

John W Burrus Sheriff
Jackson County Mo
By Joseph B Glover, D S

Shffs fee $1.00
Paid G Plaintiff atty
Chrisman & Cornwgo
J W B Shff
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Tarlton Bailey &
George E Moore Plaintiffs in Error
Against
James Poster &
Robert G Smart Defendants in Error

In the Supreme Court
January Term AD 1861
Error to Jackson County

And the said Plaintiffs in error come & to the Court show that in the record and proceedings of the said Jackson Circuit Court manifest error hath intervened to the great damage of the Plaintiffs in Error, And for a more specific assignment of Error he states that the Court below erred in this to wit
1st That the Court below erred in declaring the Law as asked for by defendants
2nd That the Court below erred in refusing to grant a new trial to Plaintiffs.
And for these errors the Plaintiffs in Error pray that the judgment of the Court below be reversed &c

Chrisman & Cameron
R C Peyton of Counsel
for Plaintiffs in Error

21.

Jarvis Railroad
George E Moore Affiliation
Vs }
James Porter
R. G. Smart. Dift in Error

Assignment &
Errors

filed Jan. 21st 1861
Wm E Dunscomb
Clerk

Tarlton Bailey &
George E. Moore, plaintiffs in Error
vs
James Porter &
Robert G. Smart, defendants in Error

In the Supreme Court
State of Missouri
January Term 1860

Error to the Jackson Circuit Court

Statement of the Case

This was an action to recover the value of a lot of China Hemp said which, it is alledged, by plaintiffs, was wholly lost to them through the negligence, carelessness and inattention of defendants as commission and forwarding merchants.

Defendants were commission and forwarding merchants at Maxwell's Landing, on the Missouri River, in Jackson County. In the month of March 1857 plaintiffs sent the hempseed in controversy in this cause to defendants, with instructions to them to ship it to C. Wallace at the city of Lexington. Defendants undertook to make the shipment, and on the 4th day of April 1857 made it on the Steam Boat A. C. Goddin. Defendants took but one bill of loding. By this the boat obligated herself to deliver the seed to C Wallace at Lexington. Plaintiffs had made arrangements with C. Wallace to sell the hempseed, and it could have been sold, had he received it, at ten dollars per bushel. The boat did not deliver it to C Wallace, but delivered it to J. B. Wallace, who not

knowing for whom it was designed, or to whom it belonged retained it until the season for sowing had passed. There was testimony tending to show that plaintiffs had endeavored to ascertain what had become of the seed but could not do so. It was after words sold for freights & charges.

Bledsoe, a witness for defendants, stated that he was their clerk & made the shipment on the A. C. Goddin for them, that at the time he did so the officers of the boat were in a hurry, and after the clerk had signed the bill of lading, or about the time it was done, he gathered up a couple of blanks, remarking that he would fill them up on the boat as she went down, and refusing to wait until they could be filled up. This witness also stated that he had been several years engaged in the forwarding business, and that it was not his custom to take more than one bill of lading, that he scarcely ever took more than one, which was all he considered necessary.

The defendants in their answer admit that they took but one bill of lading, and insist that in doing this they ~~[illegible]~~ did all that could be required of them as forwarding merchants. It is not pretended that defendants gave any notice whatever to C Wallace of the shipment of the seed.

The cause was submitted to the court without the intervention of a jury.

The court declared the law as follows, on the motion of plaintiffs

1st The law makes it the duty of forwarding and Commission Merchants to take triplicate bills of lading from vessels on which they may make shipments for others, and to forward one of these to the consignee of the shipment, to retain one, and to deliver one to the vessel

2d It is admitted by the answer that defendants were forwarding and Commission Merchants, and that as such they undertook to ship for plaintiffs from Maxwell's Landing in Jackson County to C. O. Wallace in Lexington Missouri a quantity of hempseed, & took but one bill of lading

The court also further declared the law as to the measure of damages &c in the cause, but it does not require stating here.

On motion of defendant the court declared the law as follows

If the court believe from the evidence that defendants received the hempseed in controversy to be shipped to Lexington to C. Wallace and that defendants did within a reasonable time after receiving said Hempseed ship the same, and took from the boat on which the same was shipped, a bill of lading of said

*3d That in shipping said seed for plaintiffs to said C O Wallace, it was the duty of defendants to have exercised ordinary care, and if the Court should find from the evidence that defendants in making said shipment failed to exercise ordinary care or were guilty of ordinary negligence, then defendants are liable to plaintiffs in this action and plaintiffs are entitled to recover of defendants such damages as the evidence may show they have sustained by reason of such neglect in regard to said shipment.

boat signed by the proper officer, whereby said boat was bound to deliver said hempseed to said C. Wallace at Lexington, and the boat refused to wait until triplicate bills of lading could be signed, then the said steam boat was liable to plaintiffs for any non performance of said contract of affreightment, and that from the time the liability of said boat commenced, the liability of defendants ceased

To this declaration of the law plaintiffs duly excepted.

Chrisman & Comingo,
& R. L. Y. Payton for plaintiffs in Error

1st It was the duty of defendants to take triplicate bills of lading. Adison on Contracts 471 top paging. Abbott on Shipping 271. Bouvier's Law Dictionary — title Bills of Lading 4th Denio 4311. Flanders on Shipping 476 See

In failing to do this defendants were guilty of negligence, and are liable to plaintiffs, for damages resulting 2d Kent 591 side paging.

2d The court erred in declaring the law as asked by the defendants. They admit that they took but one bill of lading, and insist that having done this they are not liable &c. The law as declared by the court is wholly incompatible with the theory of the defense as contained in the answer. Furthermore it does not appear that defendants intended taking more than one bill of lading. It is true the witness Bledsoe, who made the shipment, states that the clerk of the boat refused to wait &c. but he at the same time states that it was not his habit to take more than one bill of lading, & it is scarcely inferable from his testimony that he intended to take more than one in this case.

But be this as it may, it is suggested that even if it was owing to the conduct of the officers of the boat that triplicate bills were not signed, it at once became the duty of defendants to notify the consignee, C. Wallace, of the shipment by writing to him, or to notify the plaintiffs of the fact that the officers of the boat had refused to sign the requisite number of bills of Lading. And not

having done this, they are chargable with negligence and are liable for all resulting consequences.

The motion for a new trial should have prevailed. The instruction given for defdts. is in conflict with those given for plaintiff, and is not the law of the land. ~~in case let~~ Even had the answer contained nothing inconsistent with it, it should not have been given, as the evidence shows gross negligence on the part of the defendants.

Rachel & Moore
Statement of
Vs Case &c

Porter & Smart

filed Jan. 21st 1861
Wm E Duncomb
Clerk

In the Supreme Court of
the State of Missouri at
Jefferson City.
January Term 1861

Earlton Railey & George E Moore } Plaintiffs in Error ~~Appellants~~
against
James Porter & Robert G Smart } Defts in Error

The plaintiffs in Error who were plaintiffs below, commenced their suit in Jackson Circuit Court against defendants, charging the defendants ~~with~~ being Commission & forwarding Merchants doing business at Maxwells' Landing in Jackson County, with having received from plaintiffs with instructions in writing to forward that certain stack of Hemp Seed, containing about twenty eight bushels, with all convenient speed to C. Wallace at the City of Lexington in the State of Missouri - Plaintiffs State, that defendants received said Hemp Seed at their Warehouse in Jackson County, about the 4th day of April 1857 and undertook to ship the same to C. Wallace as

directed by plaintiff Bailey to do.
Plaintiff charges that defendants in
shipping said Hemp seed were guilty
of negligence by reason of which
the same was wholly lost to plaintiff
that defendants shipped the Hemp
seed on board the Steam Boat, A. C.
Goddin and took from the Clerk of
said Boat only one Bill of Lading, which
they defendants retained & still retain.
Plaintiff state, that the Bill of
Lading made out by the Clerk of
said Boat and delivered to Defendants
was made in conformity with the
instructions given to Defendants
that by its terms said Hemp seed
was to be delivered by said Boat
to C. Wallace Lexington, but
owing to the fact that Defendants
failed & neglected to attend to the
filling up of other Bills of Lading
and failed & neglected to inform
C. Wallace of the shipment which
they attempted to make to him, he
Wallace failed to receive the same
or any part of it; and owing to
defendants negligence & inattention
said Hemp seed was delivered to

J. B. Wallace who retained it, not knowing to whom it belonged; or for what purpose it was sent to him; Plaintiffs state that the Hemp seed were of rare & valuable kind & were worth ten Dollars per bushel; that they had made arrangements with C Wallace to sell the same, that being their object in sending it to Lexington; that it would have been sold for that price, had it been sent to C. Wallace in accordance with plaintiffs instructions — Plaintiffs nor Wallace, did not ascertain what had become of said seed; and were wholly unable to do so until it was too late in the season to sow same — and when Plaintiffs found it in possession of J. B. Wallace, where it had been placed by the negligence of Defendants, it was worth nothing — and that by the careless & negligent manner in which defendants attended to the shipping said Hemp seed plaintiffs have been damaged to the sum of Two hundred & seventy Dollars — & for that sum ask judgment —

Defendants in their answer

admit, that they were commission and forwarding Merchants as charged in plaintiffs petition; and that they received a lot of Hemp seed as stated by plaintiffs to be shipped to C. Wallace at Lexington Missouri: Defendants say that they did as directed by plaintiffs ship said Hemp seed to said C. Wallace, with all convenient speed after receiving it at Lexington Missouri on the Steam Boat A. C. Goddin a Boat used in navigating the waters of this State, and liable as such, for any non performance of any contract of affreightment, entered into by its officers, or agent; that they took a bill of lading from said Boat signed by the proper officer, binding & making said Boat responsible for the delivery of said Hemp seed to C. Wallace at Lexington Missouri as directed by plaintiffs. - Defendants deny that they were guilty of any negligence in shipping said Hemp seed; and deny that said Hemp seed in consequence of any negligence on their part was wholly lost to plaintiff - Defendants deny that they were bound by the law of the land to take more than the Bill of lading from said Boat for the delivery of said Hemp seed to said C. Wallace at Lexington and deny all negligence or malfeasance

touching the shipping of said Hemp seed. Defendants state, that they shipped the seed as directed by Plaintiffs to the person + place as directed and took a valid (Bill of Lading, or) obligation from said Boat, whereby the Boat was legally bound to perform said contract of a transportation, and that the same, (that is the Bill of Lading) is now in their possession but has at all times been at the service of Plaintiffs. They allege, that if said C. Wallace failed to receive said Hemp seed, it was not owing to the neglect or inattention of the defendants. They deny, that it was any part of their business to give notice to C. Wallace of the said shipment of the Hemp seed to him - as they were only instructed to ship the seed to him; they deny that they are guilty of any failure of duty or negligence on account of the want of such notice to said C. Wallace - They know nothing about the Hemp seed being received by T. B. Wallace; nor have they any information or knowing as to that circumstance in Plaintiffs petition, sufficient to form a belief. They state, that if said Thos B. Wallace did so receive said Hemp seed, they deny that it was on account of any negligence or inattention on their part; or that they are responsible therefor. Defendants, deny

any knowledge or information sufficient to form a belief, as to the rare quality & value of the Hemp seed; & as to any arrangement made by plaintiff with C. Wallace to sell the same - They deny specially all the averments as to the value of the Hemp seed, the arrangement with C. Wallace to sell it for plaintiffs and that he could have sold the same for ten dollars per bushel; and that said seed are wholly worthless &c -

The case was tried by the Jackson Circuit Court at an adjourned term in June 1860, held by the Hon. G. W. Dunn Circuit Judge of the 5th Judicial Circuit - was tried by the Court without a jury and the Court found for the defendants - plaintiffs moved for a new trial; it was overruled - and the plaintiffs sued out their writ of Error, and the case is now before this Court on Error -

The testimony as saved by the Bill of Exceptions, being mostly depositions, will be found at page 14 of the Record -

The Court gave all the instructions asked for, by both parties - see page 23 of the Record -

1st Point -

The plaintiffs allege that defendants are guilty of negligence & inattention in shipping their Hemp seed; and place this negligence & inattention in the mere fact alone, that defendants failed to take 3 Bills of Lading - This omission is not such, negligence or inattention as will render the defendants liable

2nd - One Bill of Lading is sufficient and enough to make the Vessel liable; and if that one ~~[illegible]~~ contain an acknowledgement of the reception of the goods for transportation, sufficiently designated as to marks & numbers and the place where to be delivered; and the person to whom - & the price of freight - & be signed by an officer of the Vessel, the Boat is bound to perform this contract of affreightment - & the Shipper is not liable for the misconduct of the Boat -

3rd - The plaintiffs have not alleged any

facts in their petition shewing a liability on the part of Defendants and they have utterly failed to prove any facts making them liable -

4th Point - What is a Bill of Lading?

It is the written evidence of a contract for the carriage and delivery of goods sent by Water, for a certain freight.

This ~~is~~ Bill of Lading taken by the Shippers the Defendants in this case, is as good & binding on the Boat as if there had been a dozen counterparts or copies - It became the duty of the Boat to perform the contract - and if there be loss or damage to the owner of the goods shipped he must seek redress. from the Boat -

See Abbott on Shipping top page 212 - 214 side page -

See Covill vs Hill 4 Denio 330 -

Mason vs. Lickbarrow 1 Henry Black. 360 -

3. Kents Com - 268 top page - (207 side)

When did ~~not~~ the injury accrue to plain

tiffs in this case & by whom was it caused? Certainly not by the Shippers Commission Merchants - nor when they took the Bill of Lading -

The Steam Boat, the common Carrier is liable, because the Boat failed to deliver according to the Bill of Lading - All injury to plaintiffs accrued after the Boat got to Lexington; and the defendants had no hand in causing the injury there or at any time -

The judgment below should not therefore be reversed.

Ryland Son
Attys for Defts
in Error

Tarlton Railey &
als -
vs
James Porter &
Robt. G. Smart

Statement
& Points for
Defts in Error
Rigland & Son
attys

filed Jan. 21st 1861
Wm E Duncomb
Clerk

Railey & Moore

vs

Porter & Smart

The instruction given for defendant was wrong.

Notwithstanding that the forwarding merchants may have been prevented by the misconduct of the officers of the boat, from getting three bills of lading in the usual manner, they yet were bound to give advice to the consignee, of the shipment made to him, and the liability of the boat does not discharge them from liability.

Judgment reversed & cause remanded.

Barton Bates

Judges Bay & Dryden concur.

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Pauley & Moore

vs

Porter & Smart

Opinion

Bates

Reversed & Remanded

Filed July 29, 1862