

12776

No. _____

Supreme Court of Illinois

Hathorn et al

vs.

Lewis

71641  7

186

John Hathorn et al
vs
Seth Lewis

166

12710
1859

United States of America }
State of Illinois Kane County }

Pleas before the Honorable Isaac G. Wilson
Judge of the thirteenth Judicial Circuit and
presiding Judge of Kane County Circuit
Court in the State of Illinois at a regular
Term of said Court begun and held at the
Court House in Geneva in said County on the
Eighteenth day of January in the year of
our Lord One thousand Eight hundred
and fifty eight.

Present The Hon Isaac G. Wilson Judge
Edward J. Goshue Esq. Attorney
George E. Corwin Sheriff

Attest
Paul R. Wright Clerk

Be it Remembered That heretofore to wit on the
10th day of December AD 1857 there was filed
in the Office of the Clerk of the Kane County Cir-
cuit Court an affidavit which is in the words
and figures following to wit:

State of Illinois }
Kane County } Seth Lewis of said County
being duly sworn on oath says that
he is justly entitled to the possession of the following
described goods wares merchandize and property

which are unlawfully detained by John Hathorn
& Loren Heath & wit:

12 pr Bingham assorted col^d

20 " Calico assorted "

20 yds yellow flannel old 20 yds white flannel
20 yds of J. diaper. Two hundred pair of shoes
consisting of gaiters boots and shoes one dozen
mens calf boots two dozens mens heavy boots three Bay
State Shawls one black silk shawl two summer Shawls
Saturn stripe three fancy Shawls twelve coats mens one
dozen pair pants one dozen vests - dozen $\frac{1}{2}$ drawers
one dozen $\frac{1}{2}$ undershirts fifty silk handkerchiefs ten black
scarfs $\frac{1}{2}$ dozen stocks four silk bonnets one case of ribbon
lacy and gloves of different kinds book muslin 70 yds
some of cardmull 50 yds dotted mull 12 rolls of paper
Cambric 50 yds common Cambric 60 School books 3 pieces
of Changeable silk one piece of plaid silk one black
silk curtain calico 4 pieces three pieces of deminus
500 yds of Delaines 100 yds ~~black~~ ^{black} price four pieces of
bleached muslin two pieces turkey red Calico 50 cotton
handkerchiefs 100^d Bot Balts 4 doz Wadding 2 pr
Bot flannel 4 Reams wrapping paper 1 Ream Letter
one one of fools cap paper Drugs 1 Jar Agamo-
nia one Spt Nitro one Tinct. Opium one Squills
one Wine Cholera one Tinc Camphor one tinc.
Paragoric Essences one Jar Peppermint one Cinna-
mon one Clove one Fancy one Peruvian bark one
Zincine one Morphine one Epsom Salts one Jar Tartar

one lb Soda one Sulphur one Antimony one
 Vitriol blue one white one S. S. acid 6 doz
 G. Bitters 1 Jar Croscote one Oil Craath one oil
 Origanum one oil Spike one Wintergreen one Jar
 Syrup 1 Case of Pierces Matches 15 gross
 Screws 2 each of 2^{inch} - 1 $\frac{1}{2}$ - 1 $\frac{1}{4}$ - 1 $\frac{1}{2}$ - $\frac{3}{4}$ Inch 2 doz
 Western Locks 6 Mortice Locks 6 Pad Locks 4 doz
 door Latches 10 Brads 25 paper Shoe Trails 4
 pairs of Kegs of nails 10 Finishing & Finishing 12^{do} 20^{do}
 6 pump Reels of fixtures 100 Pump Chain & Hammers
 2 hand Saws 6 Coffee Mills 6 doz Coffin hinges 1
 gross 3 $\frac{1}{2}$ Inch Loose Joints Butts 1 2 $\frac{1}{2}$ Inch Loose Joint
 Boxes 2 gross fast joints 2 inch & 1 Inch 2 doz Japanned
 oil Lamps 1 doz Iron Candelsticks 1 $\frac{1}{2}$ doz Brass Candle
 sticks $\frac{1}{2}$ doz Axes Crockery 4 doz bowls 8 doz Plates
 2 white Tea sets 1 Mulberry do 1 doz glazed mugs
 1 white Mugs 1 doz 3 Pitchers
 $\frac{1}{2}$ doz White Pitchers small size
 $\frac{1}{2}$ " " " Large "
 $\frac{1}{2}$ " blue " " "
 4 doz white Cups & Saucers 2 doz blue 1 doz Cream
 Jugs 3 doz Dribblers 1 doz Perf Cruetts 1 doz Mustard
 one doz Vinegar 2 Castors 4 glass Candelsticks 4
 Spittoons 4 log Chains 4 pr Trace Chains 4 halter Chains
 4 doz Chains 6 doz Collar 4 doz Plush Caps 1 doz
 Cloth Caps 1 doz fur body Hunting Hatts 6 silk Hatts
 6 wire Seers 8 paper Shoe boxes 4 doz glove Storing
 boxes Silk Cords & tassels assorted Collars 6 Hat Boxes

4.

200 lbs Wall Paper assorted Collars & aprons 1 pr
 Gray furs 1 pr white spotted Small 1 doz Buck
 Mitts one doz gloves mens 2 doz wool 1/2 Hrs 1 doz
 Ladies wool Hrs 1 doz Children wool Hrs 2 large looking
 glasses 1 doz Manure forks short handles 1/2 doz Long handle
 manure forks 1/2 doz Shovels 1/2 Spades 1/2 doz Hoes 100
 gal Stone ware 100 Sheet Zinc 4 Molasses Hates 500
 Saleratus in papers 1 Keg Ginger 8 drawing Knives 10
 sets Knives & Forks & 10 doz Table Spoons 6 doz Tea
 40 Ground Cinnamon 2 Spice 2 pepper 8 cans powder
 1/2 Keg powder 1 powder Can 1/4 gross Vial Corks
 4 doz glass jars for Drugs. 4 gold breast pins 4
 set Ear rings 6 pr scissors 4 butter Knives 1 pr Plain
 double width dress goods one Black Alpaca 1 figured
 1 pr blue Merino 1 brown 1 green one Coburg or Lyons

And that the same have not been taken for any tax
 assessment or fine levied by virtue of any law of this state
 nor seized under any execution or attachment against the
 goods and chattels of this affiant liable to execution or
 attachment

Sworn & subscribed before
 me this 10th day of Decr 1857 } Seth Lewis
 R. W. right Clerk

Filed Dec 10th 1857

R. W. right Clerk.

and afterwards wait on the said 10th day of December
 A.D. 1857 there was filed in said Clerk's Office a Plaintiff

which is in the words and figures following to wit:

State of Illinois }
Kane County }

Kane Circuit Court
Jany Term 1858

Seth Lewis complains of John Hathorn and Loren Heath that they at Kane County on the 9th day of December A.D. 1857 took and unlawfully detained the goods wares merchandise and property of the said Seth Lewis to wit: 12 lbs gingham assorted colors 20 lbs Calico assorted colors 20 yds yellow flannel 20 do white do 20 J Diaper 200 lbs shoes assorted consisting of gaiters booties and shoes 12 pr mens calf boots 24 pr heavy Boots 3 bay State Shawls 1 blk silk shawl 2 summer shawls satin stripe three fancy shawls 12 mens coats 18 pr pants 12 vests 18 pr drawers 18 undershirts 50 silk hdkps 10 blk scarfs 6 stocks 4 silk Bonnetts one case of Ribbons hosiery & gloves of different kinds 75 yds Black Muslin Barred Mull 50 yds dotted Mull 12 rolls paper Cambric 50 yds common Cambric 60 school books 3 lbs Changeable silk 1 lbs plaid silk 1 lbs black silk 4 lbs Curtain Calico 3 lbs Denims 500 yds Delaine 100 yds Delaines 4 lbs bleached muslin 2 lbs turkey red calico 50 cotton hdkps 100 lbs cotton batt 4 doz wadding 2 lbs br flannel 4 reams wrapping paper 1 ream letter paper one ream fools cap paper. Drugs & medicines 1 jar aqua ammonia 1 Spt Vitre 1 tinct Opium 1 Squills one Jar Cholera 1 tinct. Camphor 1 tinct Paregoric 1 Jar peppermint Ess. 1 do

Cinnamon 1 clove 1 tawny one 2 quinine one peruvian
 bark one Morphine 1 Epsom salts 1 Cream tartar 1 O
 Soda 1 Sulphur 1 Antimony 1 blue vitriol 1 white
 1 Ss acid 1 doz E. Bitters 1 Jar Croton 1 oil
 Craath 1 oil Origamum 1 oil Spike 1 wintergreen
 1 jar hirc Syrup 1 case Pierces Matches 15 gross
 Screws 2 each of 2 1 1/2 1 1/4 1 1/2 3/4 inch 2 doz
 Western Locks 6 mortice Locks 6 pad locks 4 doz door
 latches 10⁰ Brads 25 lbs shoe nails 4 parts of Kegs
 nails 10⁰ finishing 8⁰ finishing 12⁰ 20⁰ 1 pump
 Reels & fixtures 100⁰ pump chain 8 Hammers 2 handsaws
 6 coffee Mills 6 doz Coffin hinges 1 gross 3 1/2 inch
 loose joints bolts 1 do 2 1/2 inch loose joint 2 gross
 fast joint 2 inch & 1 inch 2 doz japanned oil lamps
 1 doz Iron Candelsticks 6 brass do 6 Axes = Crockery -
 4 doz bowls 8 doz Plates 2 white tea sets 1 mulberry do
 1 doz glazed Mugs 1 doz white Mugs 1 doz C Pitchers
 1 white pitchers small 6 large 1 blue 4 doz white cups
 8 saucers 2 doz blue 1 doz cream jugs 3 doz Trunkers 1 doz
 pepper cruetts 1 doz Mustard do 1 doz Vinegar do
 2 Castors 4 glass candelsticks 4 spittoons 4 log chains
 4 prs trace chains 4 salted chains 4 dog chains 4 doz
 Collars 4 doz Plush caps 2 doz cloth caps 4 doz
 fur body Henry hats 1 silk hats 6 wire sieves 8 paper
 Shoe boxes 4 doz gloves & shoeing boxes silk cord
 tassels assorted Collars 1 hat boxes 20 lbs wall paper
 assorted colors 1 pr grey furs 1 white pr spotted small
 1 doz pr buck mittens 1 doz pr gloves mens 2 doz wool 1/2 doz

7.

1 doz ladies wood hord 1 doz childrens' wood hord 2 large
looking glasses 1 doz mamore forks short handles 1/2 doz
long - do 1 shovels 6 shades 6 hoes 100 gals Stone ware
100[?] sheet Zinc 4 molasses gales 30^{lb} Saleratus in papers
1 Keg Nigger 8 drawing knives 10 sett knives & forks 10 doz
tattle spoons 6 doz tea spoons 11^{lb} ground Cinnamon 2 Spice
2^{lb} pepper 8 cans Powder 1/2 Keg powder 1 powder can 1/4
gross nail corks 4 doz glass jars 4 gold breast pins 4
set Earrings 6 pr scissors 4 butter knives 1 pr Plaid double
width dress goods 1 Black Alpaca 1 figured 1 pr blue
Merino 1 pr brown 1 do green 1 Coburg 1 one Lyons
of the value of one thousand and still detains the
same against Sureties & pledges and the said Lewis
therefore prays that a writ of replevin may issue for
the same &c

Plato atty of Plff.

Filed Dec 10 1859

P. R. Wright Clerk

And afterwards to wit on the said 10th day of Decem-
ber 1857 there was issued out of the Office of the Clerk
of said Court and under the seal thereof a writ of
Replevin which is in the words and figures following to
wit:

State of Illinois } The People of the State
Kane County } of Illinois to the Sheriff of the said
County Greeting.
Whereas Seth Lewis

Plaintiff complains that John Hathorn and Loren
 Heath defendants unlawfully and wrongfully detain
 the following described goods and chattels to wit
 12 Ps Gingham assorted colors 20 Ps Calico assorted
 colors 20 yds yellow flannel also 20 yds white flannel
 20 yds of J. Diaper two hundred pair of Shoes consist-
 ing of gaiters boots & shoes one dozen Men's calf boots
 two dozen Mens heavy boots three Bay State Shawls
 one black silk Shawl two Summer Shawls satin stripe
 three fancy Shawls (twelve coats mens) one $\frac{1}{2}$ dozen pair pants
 one dozen vests dozen $\frac{1}{2}$ drawers one dozen $\frac{1}{2}$ undershirts
 fifty silk handkerchiefs ten black scarfs $\frac{1}{2}$ doz Stocks four
 silk bonnetts one case of Ribbons hosiery and gloves of differ-
 ent kinds two muslin 75 yds some of Bardsmull 50 yds
 dotted mull 12 rolls of paper Cambric 50 yds Common Cambric
 60 School books 3 pieces of Changeable silk one piece of
 Plaid silk one black silk Curtain Calico 4 pieces three pieces
 of denims 500 yds of Delaines 100 yds lower price four
 pieces of bleached muslin two pieces of turkey red Calico
 50 cotton handkerchiefs 100^{lbs} Cott Batts 4 oz Wadding
 2 Ps Cot. flannel 4 reams wrapping paper 1 ream letter
 & one of fools cap paper Drugs 1 Jar agamnia oil
 Spt Nitro one tinct Opium one squills one wine Cholera
 one tinct of Camphor one tinct paragonic. Essences
 one Jar Peppermint one Cinnamon one Cloves one Linzer
 one Peruvia bark one quinine one morphine one Epsom
 Salts one lb Tartar one lb Soda one Sulphur one
 Antimony one Vitriol blue one white one S S acid

9.

Six doz German Bitters one jar Crocoate one oil
 Bernath one oil Origamum one oil Spikes one winter
 Green one jar Hivo Syrup one case of Pierces Matches
 15 gross Screws 2 each of 2 inch $1\frac{1}{2}$ $1\frac{3}{4}$ $\frac{1}{2}$ $\frac{3}{4}$ inch
 2 doz Western Locks 6 mortise Locks 6 Padlocks 4 doz
 door latches 10^{lb} Brads 25 pairs shoe nails 4 parts of
 Keys & nails 10^{lb} finishing 8^{lb} finishing 12^{lb} 20.
 6 Pump Reels fixtures 100^{lb} pump chain 8 Hammers
 2 Hand saws 6 coffee mills 6 doz Coffin hinges 1 gross $3\frac{1}{2}$
 inch loose joint bolts 1 $2\frac{1}{2}$ inch loose joint 2 gross fast
 joints 2 inch & 1 inch 2 doz Japanese oil Lamps 1 doz
 Iron Candlesticks $\frac{1}{2}$ doz brass Candlesticks $\frac{1}{2}$ doz axes.
 Crockery 4 doz bowls 8 doz Plates 2 white Tea Sets 1
 Mulberry do 1 doz glazed Mugs 1 white mugs 1 doz C.
 Pitchers $\frac{1}{2}$ doz white Pitchers small size $\frac{1}{2}$ large $\frac{1}{2}$
 Blue 4 doz white Cups & saucers 2 doz blue 1 doz cream
 jugs 3 doz Tumblers 1 doz pepper Cornett 1 doz Mustard
 1 doz Vinegar 2 Castors 4 glass Candlesticks 4 Spittoons
 4 log chains 4 pair trace chains 4 halter chains 4 dog
 chains 6 doz collars 4 doz plush Caps 1 doz Cloth Caps
 4 doz fur body heavy hats 6 silk hats 6 wire sieves 8
 pair shoe boxes 4 doz glove & hosiery boxes silk cord & Tassels
 assorted colors 6 hat boxes 200 pieces wall paper assorted
 colors & quality 1 pr gray furs 1 white Spotted small 1
 doz buck mitts one doz gloves mens 2 doz wool $\frac{1}{2}$ hose 1 doz
 Ladies wool hose 1 doz. Childrens wool hose 3 large looking
 glasses 1 doz mammoth forks short handles $\frac{1}{2}$ doz long hand
 les mammoth forks $\frac{1}{2}$ doz Shovels $\frac{1}{2}$ shales $\frac{1}{2}$ doz hoes

100 gal stone ware 100 lb sheet zinc 4 Molasses
gates 50 lb Saleratus in papers 1 Keg Ginger 8
drawing Knives 10 sett Knives & forks 10 doz Table spoons
6 doz tea - 4 lb ground Cinnamon 2 spice 2 pepper
8 Cans powder $\frac{1}{2}$ Keg powder 1 Powder Can $\frac{1}{4}$
gross real corks 4 doz glass jars for drugs. 4 gold
breast pins 4 sett Earrings 6 pair Scissors 4 butter
Knives 1 piece plaid double width dress goods - 1 black
Alpaca 1 figured 1 pr blue Merino 1 brown 1
green 1 Coburg 1 Lyons of the value of one thousand
dollars.

Therefore we command you that if the
said plaintiff shall give you bond with good and
sufficient security in double the value of the said goods
and chattels as required by law to prosecute his suit
in this behalf to effect and without delay and to make
return of the said goods and chattels if return thereof
shall be awarded and to save and keep you harmless
in replevying said goods and chattels you caused the said
goods and chattels to be replevied and delivered to the
said plaintiff without delay. and also that you summon
the said defendants to be and appear before the Circuit
Court in and for said County on the first day of the next
term thereof to be holden at the Court House in said
County on the third Monday of January next to answer
said plaintiff in the premises. And you have then
and there this writ with an endorsement thereon in what man-
ner you have executed the same together with the bond which
you shall have taken from the said plaintiff as before

Commanded before executing this writ:

Witness Paul R Wright Clerk of said
Court and the seal thereof at Geneva
in said County the 10th day of December
1857

P. R. Wright
Clerk

Upon said writ appears the following endorsement
to wit:

Executed the within writ this 11th day of Decem-
ber AD 1857 by replevying the following described
property it being a part of the property mentioned in said
writ and delivering the same to the plaintiff he having
given bond which is herewith attached and by reading
the same to John Bathon and Loren Heath defendants
this 11th day of December 1857.

Seven past pieces
gingham one piece gingham twenty pieces of Calico
Three bay state shawls 2 summer shawls satin stripe 2
fancy shawls three silk bonnetts one case Ribbons Hosiery
& gloves of different kinds three pieces dark mull sixty yards
of brook muslin two pieces dotted mull 17 yards J. C. Duper
eight pair buckskin Mitts 10 rolls paper Cambric fifty com-
mon Cambric 14 school Books 2 pieces changeable silk
4 pieces Curtains Calico two pieces turkey red. Calico 200
yards delaine 4 pieces bleached muslin 32 Cotton handker-
chiefs 12 mens coats 3 pair pants 4 vests 1 piece black
allapacka 1 figured allapacka one piece plain double
width dress goods 1 pair blue Merino 1 green 1 Cotary

1 Lyonsed 129 pairs of Shoes 1 pair heavy boots 1 jar
 of tunc paragoni 1 tunc Cinnamon 1 Colchicin 1
 Squills 1 Peruvia bark 1 Ephra salts 1 Cream tartar
 1 Sulphur 1 Antimony 1 blue Vitriol - o white 1
 S. S. Acid 1 Creosote 1 winter green 5 1/2. german bitters
 5 1/4 gross screws 5 mortise locks 3 dozen door latches 24
 papers shoe nails 6 padlocks 5 Hammers 2 handsaws. 3
 Coffee Mills 10 pair butts 11 oil Lamps 6 doz Collars 4
 dog chains 4 halter chains 4 log chains 6 pump reels &
 fixtures 100 lb ~~feather~~ chains 6 hoes 3 shovels 2 shovels
 100 gallons Stoneware 2 2 towels 3 dozen Plates 2
 tea sets white 5 glazed Mugs 1 small white Mug
 10 Cream pitchers 1 white pitchers 4 blue Pitchers
 2 1/2 dozen Cups & Saucers 20 blue cups & saucers three
 Cream jugs one dozen Cruets vinegar 4 Cruets
 pepper 6 wire sieves 6 drawing knives 2 sets knives
 forks 4 dozen table spoons 5 dozen tea spoons 1 1/2 lbs
 Cinnamon ground 2 lb Pepper 2 ~~boxes~~ pieces 5 cans Powder
 11 Plush caps 8 cloth caps 2 silk hats 29 fur hats
 200 wall paper 3 pieces denim 1 case Matches
 The remainder of the property mentioned in said writ not
 found.

J. E. Corwin Sheriff
 by E. J. Allen Deputy

Attached to said writ appears a bond which is in the
 words and figures following to wit:

Know all Men by these Presents that We Beth Lewis

James Lewis Jr and Samuel Hawley of the County of Kane & State of Illinois are held and firmly bound unto George E. Convin Sheriff of the County of Kane in the State of Illinois and his successors in office executors administrators and assigns in the penal sum of Two Thousand dollars lawful money of the United States for the payment of which sum we do hereby jointly and severally bind ourselves our heirs executors and administrators

The condition of this obligation is such that whereas on the tenth day of December in the Year of our Lord One Thousand Eight hundred and fifty seven the said Seth Lewis sued out of the Circuit Court of Kane County a writ of Replevin against John Halthorn and Loren Keith defendants for the recovery of the following described goods and chattels property to wit; 12 pieces gingham assorted color 20 pieces calico assorted colors 20 yds yellow flannel 20 yds white flannel 20 yds of Diaper 200 pair Shoes consisting of gaiters booties & shoes one doz men boots calf two mens heavy boots 3 bay State Shawls one Black Silk Shawl 2 Summer Shawls satin stripe 3 fancy Shawls 12 Coats (mens) 1/2 doz pair pants 1 doz Vests 1/2 doz drawers 1/2 doz undershirts 50 silk handkerchiefs 10 Black Scarfs 1/2 doz Stocks 4 silk bonnets 1 case of Ribbons hosiery & gloves of different kinds book muslin 70 yds fine Bardmull 50 yards dotted mull 12 rolls paper Cambric 50 yds Common Cambric 60 School books 3 pieces of Changeable Silk 1 piece of plaid silk one Black silk Curtain Calico 4 pieces 3 pieces of Denims 50 yds of

14
Delaines 100 yards lower price 4 pieces of bleached mus-
-lin 2 pieces of Turkey red Calico 30 Cotton 14 1/2 lbs 100
pounds Cott Batts 4 doz Wadding 2 pieces Cotton
flannell 4 reams wrapping paper 1 ream letter
1 do fools cap paper (Drugs) 1 jar ammoniac one
Spirits Nitro 1 tinct Opium 1 Squills 1 Cholchici
1 tinc Camphor 1 tinc Paregoric (Essences) 1 jar
peppermint 1 Cinnamon 1 Cloves 1 Tansy 1 Peruvian
bark 1 Quinine 1 Morphine 1 Epsom Salts 1 C Tartar
1 C Soda 1 Sulphur 1 Antimony 1 Vitriol Blue 1 white
1 S. S. Acid 6 doz Herman Bitters 1 jar Croscote 1
Oil Cranth 1 Oil Bergamot 1 Oil Spike 1 winter
-green 1 jar Hirc Syrup 1 Case of Pierce's Matches 10
gross screws 2 each of 2 inch 1 1/2 1 1/4 1/2 3/4 inch
2 doz Western Locks 6 mortise locks 6 padlocks 4 doz
door Latches 10th Brads 25 papered Shoe nails 4 pts
Kegs nails 10th finishing 8th finishing 12 20 6 pump
Reels & fixtures 100 pounds pump Chain & hammers 2
hand saws 1 coffee mill 5 1/2 doz coffin hinges 1 gross
3 1/2 Inch loose joints butts 1-2 1/2 Inch loose joints butts
2 gross fast joints 2 inch & 1 inch 2 doz Japan oil lamp
1 doz iron candle sticks 1/2 doz brass candle sticks 1/2 doz
Apes (Crockery) 4 doz bowls 8 doz Plates 2 white
tea sets 1 Mulberry do 1 doz glazed Mugs 1 white mug
1 doz cream Pitchers 1/2 doz white cream pitchers
small size 1/2 large 1/2 blue 4 doz white cups & saucers
2 doz blue 1 doz cream jug 3 doz tumblers 1 doz pepper
Cornets & 1 doz Mustards 1 doz Vinegar 2 Castors 4 glass

Candlesticks 4 Spittoons 4 log chains 6 dog collars
 4 doz Plush caps 1 doz cloth caps 4 doz fur body
 heavy hats 6 silk hats 6 wire sieves 8 Paper shoe
 boxes 4 doz gloves choosing boxes silk cord & Tassels
 assorted colors in hat boxes 200 pieces wall paper
 assorted colors & quality one pair grey furs 1 white
 spotted small 1 doz buck mittens (mens) 1 doz gloves
 (mens) 3 doz wool Hosiery 1 doz ladies wool Hosiery 1 doz
 children's wool Hosiery 2 large looking glasses 1 doz
 manure forks short handles $\frac{1}{2}$ doz long handles manure
 forks $\frac{1}{2}$ doz shovels $\frac{1}{2}$ doz shovels $\frac{1}{2}$ doz Hoes 100 gal-
 lons stone ware 100 pounds Sheet Zinc 4 Molasses gals
 50 pounds Saleratus in papers 1 Keg Ginger 8 drawing
 knives 10 sett knives 10 forks 10 doz table spoons 1 doz tea
 4 pounds ground Cinnamon 2 Spice 2 pepper 8
 Cans powder $\frac{1}{2}$ Keg Powder 1 powder can $\frac{1}{4}$ gross
 trial corks 4 doz glass jars for drugs four gold
 breast pins 4 sett earrings 6 pair scissors 4 butter
 knives 1 piece plaid dress goods double width 1 black
 alpaca 1 figured piece blue Merino 1 brown 1 green
 1 Coburg 1 Lyonew

Now if the said Seth Lewis plaintiff shall
 prosecute his said suit to Effect and without delay
 and make return of the said property if return
 thereof shall be awarded and save and keep harmless
 the said Sheriff in replenishing the said property then
 this obligation to be void otherwise to remain in full
 force and effect

Witness our hands and seals this tenth
day of December AD 1857

Witness

Seth Lewis *Red*

James Lewis Jr *Red*

Samuel Hawley *Red*

Filed Dec 12 1857

P. R. Wright Clerk

And afterwards to wit on the 3rd day of Janu-
ary AD 1858 there was filed in the said office of
the Clerk of said Court a Declaration which is in
the words and figures following to wit:

State of Illinois }
Kane County } ss Kane Circuit Court
January Term 1858

John Hathorne & Loren Heath were summoned
to answer Seth Lewis of a plea wherefore they took
the goods wares merchandize chattels and property of
the said Lewis and unjustly detained the same against
Sureties & pledges until so and therefrom the said plain-
tiff by Plato his attorney complains for that the said
defendants on the 9th day of December AD 1857 at the
County of Kane aforesaid took the goods chattels wares
merchandize & property to wit: 20 ps Calico assorted
colors 12 ps gingham assorted colors 20 yds yellow
flannel 20 yds white do 20 yds S. Diaper 200 ps
Shoes gaiters & booties 12 pr Men's Calf. boots 24 ps heavy
boots 3 bay state Shawls one blue silk Shawl 2

2 Summers Shawls Satin Stripe three fancy shawls
 12 mens coats 18 pr. Pants 12 vests 18 pr drawers
 18 undershirts 50 silk hdkfs 10 blk scarfs 1 stock
 4 silk bonnets one case of ribbons hosiery & gloves
 of different kinds 600 muslin some of barred mull
 50 yds dotted mull 12 rolls paper cambric 50 yds
 common cambrics 60 School books 3 prs changeable
 silk 1 prs plaid silk 1 prs black silk 4 prs curtains
 Calico 3 prs dequins 500 yds delaine 100 yds delaine
 4 prs bleached muslin 2 prs turkey red Calico 50 cotton
 hdkfs 100 lbs Batts 4 doz wadding 2 prs cot flannel
 4 reams wrapping paper one ream letter paper one
 ream fools cap paper Drugs & Medicines 1 jar
 Aqua ammonia 1 Spt Nitric one tinct Opium one
 Sopsills one wine Choleici one tinct Camphor one
 tinct Rappemann's Paregoric one jar peppermint Ess
 one Cinnamon one cloves one Sassa one Peruvia bark
 one quinine one Morphine one Epsom Salts one C
 Tartar one C Soda 1 Sulfur one Antimony one
 Blue Vitriol one white one P. P. Acid 1 doz G. Bottles
 one jar Creosote one oil Craath one Oil Oreganum
 one Oil Spike one wintergreen one jar Hirc Syrup
 one case of Pierce's Matches 15 gross screws 2 each
 of 2 inch $1\frac{1}{2}$ - $1\frac{3}{4}$ - $1\frac{1}{2}$ - $\frac{3}{4}$ inch 2 doz Western locks
 6 Mortise Locks 6 Padlocks 4 doz door latches 10 pr
 Nails 25 prs Shoe nails 4 parts of kegs of nails 10 doz
 finishing & finishing 12 doz 20 doz 6 pump wheels of fix
 ture 100 lb Pump chain & Hammer 2 hand saws 6

doz Coffin hinges, 1 gross $3\frac{1}{2}$ inch loose joint butts
 1 $2\frac{1}{2}$ inch loose joints 2 gross fast joints 2 inch
 & 1 inch 2 doz japanned oil lamps one doz iron
 Candle sticks $\frac{1}{2}$ doz brass candle sticks 6 axes
 Crockery 4 doz bowls 8 doz Plates 2 white tea
 Sets 1 Mulberry do 1 doz glazed Mugs 1 doz white
 Mugs 1 doz 6 Pitchers 6 white Pitchers small 1
 large 6 blue 4 doz white cups & saucers 2 doz blue
 1 doz Cream jugs 3 doz tumblers 1 doz pepper Cruetts
 1 do mustard 1 do vinegar 2 Castors 4 glass
 Candelsticks 4 Spattons 4 log chains 4 pr brace chains
 4 halter chains 4 dog chains 6 doz collars 4 doz
 plush caps 2 doz cloth caps 4 doz fur body hairy
 hats 6 silk hats 6 wire sieves 8 paper shoe boxes 4
 doz gloves & Hosiery boxes 5 db Cork & Bassels assorted
 collars 6 hat boxes 200 pr wall papers assorted
 colors 1 pr grey furs 1 white pr spotted small 1 doz
 pr buck Mittens 1 doz men's gloves 2 doz ~~wool~~ half
 hose 1 doz Ladies wool hose 1 doz childrens do 2
 large looking glasses 1 doz manure forks short handled
 $\frac{1}{2}$ doz long do 6 shovels 6 shades 6 hoes 100 gal
 stoneware 100^d sheet Zinc 4 Molasses Hates 50^{lb}
 Sateratus in papers 1 Keg Ginger & drawing knives
 10 set knives & forks 10 doz Table spoons 6 do tea spoons
 4^{lb} ground Cammon 2^{lb} do Spice 2 do pepper 8
 Cans of powder $\frac{1}{2}$ Keg Powder 1 powder Can $\frac{1}{4}$
 gross crab corks 4 doz glass jars 4 gold breast
 pins 4 set Earrings 6 pr scissors 4 butter knives

19.

1 ps Plaid double width dress goods 1 black
Alpaca 1 figured 1 ps blue Merino 1 ps brown
1 do green 1 Coburg & one Lyons of the said
plaintiff of great value to wit of the value of one
thousand dollars and unjustly detained the same
against justice & until so wherefore the said
plaintiff says he is injured and has sustained
damage to the amount of one thousand dollars and
therefore he brings suit &c

W B Rents

Att'y &c

Filed Jan'y 5 1858

R W Wright Clerk

And afterwards to wit on the 29th day of Janu-
-ary AD 1858 there was filed in the said Clerks
office certain pleas which are in the words and
figures following to wit:

Seth Lewis	}	Kane Co Cir Court
John Hathorn &		January Term for 1858
Loren Heath		

And the said defendants
by Maybome & Smith their attorneys
come and defend the ~~same~~ force &c and say
that they did not take the goods chattels property
of the said plaintiff in the said declaration mentioned
or any or either of them in manner and form as the
plaintiff has hereby complained against them

and of this they put themselves upon the country
 &c. Mayborne & Smith

And the Plff doth the like Defts Attys
Plato Et al

And for a further plea in this behalf the said
 defendants say actio non because they say that the
 goods Chattels & property in the said declaration men-
 -tioned at the said time when &c was the property
 of the said defendants and not the property of the
 said plaintiff and thus they are ready to verify &c
Mayborne & Smith for Defts

And for a further plea in this behalf the said defend-
 -ants say actio non because they say that at the
 said time when &c the said plaintiff was not the
 owner nor entitled to the possession of the said
 property in the said declaration mentioned & of
 this they put themselves upon the country &c
Mayborne & Smith
Attys for Deft

Filed 29th Jan^y 1808

P. R. Wright Clerk

And afterwards & wit on the 9th day of February
 A.D. 1808 there was filed in the said Clerk
 Office a Replisition which is in the words
 & figures following to wit:

21.

Seth Lewis	}	Kane Cir Court Jan
vs		Term A.D.
John Hathorn		Replevin
Loren Heath		

And the said plaintiff as to the said plea of the said defendant secondly & thirdly above pleaded says precludi non because he says that the said goods & chattels at the time when ^{re} were the property of the said plaintiff and out of the said defendant and thus he prays may be enquired of by the Country ^{re}.

Plato et al
for Lewis

Filed Oct 9 1858

P. R. Wright Clerk

And afterwards to wit On the 10th day of February A.D. 1858 the same being one of the days of the February Term of said Court for said year the following among other proceedings were had in said Court and entered of record to wit:

107	Seth Lewis	}	Replevin
	vs		
	John Hathorn		
	Loren Heath		

This day comes the Plaintiff by Herrington his attorney and the defendants by Maybourn their attorney also come and on motion of the Plaintiff it is ordered by the

Court that a Jury come whereupon a Jury of good and lawful men to wit:

Thomas J. Clark George Scott Joseph Whipple
John J. Chambers Simon Kront J. Es. Love Joseph
C. Stephens J. R. Schmoldt Abner Currier
L. P. Dixby John Alepangh John P. Wheeler
who being duly tried elects and sworn also come
and after hearing a portion of the evidence are
allowed to disperse and ordered to meet the Court
tomorrow morning at nine o'clock.

And afterwards to wit on the 11th day of
February AD 1858 the same being one of the days
of the said February Term of said Court the following
among other proceedings were had in said Court
and entered of record to wit:

Seth Lewis

v

Loxon Heath

John Hathorn

} Replevin.

This day come again the said
parties by their attorneys and the Jury
heretofore empannelled herein also come and after hear-
-ing the balance of the evidence arguments of counsel
& instructions of the Court return under charge of a
sworn officer of the Court to consider of their verdict
and by agreement of the parties it is ordered that
when the Jury agree they may reduce their verdict
to writing sign and seal the same and meet the Court

tomorrow morning at nine o'clock.

And afterwards to wit on the 12th day of February AD 1858 the same being one of the days of the said February Term of said Court the following among other proceedings were had in said Court and entered of record to wit:

107
Beth Lewis

John Hathorn
Loren Heath

Replevin

This day came again the said parties together with their attorneys and the jury heretofore empanelled herein also came and for a verdict upon their oaths say we the jury find that the said defendants detained the goods and chattels of the Plaintiff in manner and form as the said plaintiff hath complained against them and assess the damages of the plaintiff by reason of the premises at the sum of four hundred twenty five dollars. Thereupon the defendants by Maybome their attorney came and moved the Court for a new trial herein.

And afterwards to wit on the 17th day of February in the year last aforesaid the same being one of the days of the said February Term of said Court the following among other proceedings was had in said Court and entered of record to wit:

Seth Lewis

v.

Replevin

John Hathorn
Loren Heath

This day come the parties by their respective attorneys whereupon the plaintiff remits the damages assessed by the Jury heretofore entered herein, and the defendants' motion for a new trial coming on to be heard after argument of counsel the Court being fully advised overrules said motion to which ruling of the Court the defendants by their counsel excepts. Therefore it is considered by the Court that the Plaintiff have and recover of the defendants their costs in this behalf expended and have execution therefor.

Afterwards come the defendants by Maybourn their attorney and pray an Appeal to the Supreme Court of the State of Illinois which is allowed by the Court on condition that the defendants file their bill of exceptions and appeal bond within twenty days bond to be in the sum of Two Hundred dollars conditioned as required by Law with Zachariah Hathorn Solomon White and John Hathorn Sen as sureties.

And afterwards to wit on the 23rd day of March AD 1858 there was filed in the said office of the Clerk of said Court a Bill of Exceptions which is in the words and figures following to wit:

Kane County Circuit Court

Seth Lewis	}	of the January Term of
vs		the said Court for AD 1858
John Hathorn	}	Bill of Exceptions
vs Loren Heath		

Be it remembered that at the January Term of the said Court for AD 1858 to wit on the 10th day of February AD 1858. it still being one of the days of the said January Term of the said Kane County Circuit Court, the above entitled cause came on for trial on the issues heretofore framed in said cause, And thereupon on motion of the Plaintiff a Jury was empannelled to try the said cause and after the empannelling of the Jury the said Plaintiff in order to maintain his said cause of action under the issues joined therein offered

in evidence the following evidence and testimony to wit
 The Plaintiff offered in evidence a Chattel
 Mortgage in the words ^{and} figures following to wit:

"This Indenture made the Twenty
 third day of October 1857 Between George W Alexander
 party of the first part of the Town of Virgil County of Kane
^{and} State of Illinois ^{and} Seth Lewis of the Town of Virgil
 same County ^{and} State aforesaid party of the second part.

Witnesseth that the said party of the first part for and in
 consideration of the sum of Ten dollars in hand paid
 received by the said party of the second part do grant
 bargain & sell unto the said party of the second part
 his heirs ^{and} assigns the following Goods ^{and} Chattels to wit:
 All the Goods ^{and} Chattels of every kind ^{and} quality
 Prints clothing Drugs groceries medicines ready made
 clothing dry goods Hardware crockery and all and
 singular every article & articles in said Store formerly
 owned by Seth Lewis ^{and} situated on Block Two
 Lot four in Lodi Kane County Illinois. Also all
 the Goods ^{and} Materials of every kind ^{and} description
 belonging to said Mortgage in said Store during the
 continuance of this Mortgage. Also all accounts and
 notes book accounts ^{and} indebtedness or debt of any
 individual or individuals in favor of said Mortgage
 due & belonging to the party of the second part also
 all the goods which may be in ^{any} Store at the time when
 this Mortgage shall be due ^{and} payable. One Span
 of Winesa Color bay medium size black mane and

tail about eight years old. Also one Henslow &
 planing Machine. tenanting Machine. circular Saw
 upright to Saw and all Machinery belonging to said
 Planing Mill and Machine Shop situate in said Shop
 or attached thereto being in Lodi on the North side of the
 Rail Road track between the Residence of John Pickett
 and the Warehouse owned by Salomon White Keane
 County State of Illinois, I Have ^{Ag} to hold all and
 singular the Goods and Chattels herein before granted
 bargained and sold unto the said party of the second
 part. forever. Said Goods and Chattels now remaining and
 continuing in the possession of the said party of the first
 part. in the said Town of Virgil. Provided always and these
 presents are upon these express conditions that if the party
 of the first part shall and do well and truly pay or
 cause to be paid to the said party of the second part the
 sum of Two thousand Six hundred & thirty seven dollars
 and forty five cents payable as follows. One note due and
 payable on the fifth of November 1857. \$315³⁸/₁₀₀ dollars.
 One of Two hundred and forty six dollars payable 26th day of
 November A.D. 1857. One of one hundred Eighty four
 dollars ⁸⁰/₁₀₀ payable December fifth A.D. 1857. One Hundred
 & fifty two dollars and sixty four cents payable January
 nineteenth A.D. 1858. One Hundred Sixteen dollars
³⁸/₁₀₀ payable January Eighth A.D. 1858. Five hundred and
 forty two dollars ⁵⁰/₁₀₀ payable March 8th A.D. 1858. Five
 hundred forty nine dollars ⁵⁰/₁₀₀ payable March 17th
 1858. Four Hundred & four dollars ²⁴/₁₀₀ payable 21st

day of March AD 1858. One Hundred fourteen dollars
⁸⁸
~~100~~ payable fifth day of April AD 1858. then these presents
 and every matter herein contained shall cease & be null
 & void. But in case default shall be made in the
 payment of the said sum of money above mentioned,
 at the time ~~stipulated~~ limited for the payment of the same
 or any part thereof it shall & may be lawful for the said
 party of the second part to take possession of the said goods
 & Chattels wherever the same shall be, and to sell & dispose
 of the same for the best price which can be obtained
 therefor at public Vendue or otherwise, giving six days
 notice to the said party of the first part of the time and
 place of such sale and out of the money to arise by
 such sale thereof to retain the said sum of money above
 mentioned and all charges for keeping said property
 and if such sale (if so much there shall be) the surplus
 money (if any there shall be) to the said party of the first
 part. And it is hereby agreed by and between the said
 parties that in case the said party of the first part shall
 sell assign or dispose of or attempt to sell assign or dispose
 of any of said goods & Chattels or remove or attempt to
 remove from said County any of said Goods & Chattels
 or if the same shall be levied upon or seized by virtue
 of any Execution writ or attachment or other process
 against the said party of the first part it shall &
 may be lawful for the said party of the second part
 to take possession of the said goods and Chattels and
 sell the same in the payment of the said sum of

money above mentioned in the manner aforesaid.

In Witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written

G. W. Alexander *(Ld)*

State of Illinois

Kane County

} This Mortgage was acknowledged before me by George W. Alexander this 22nd day of October A D 1857.

E. P. Robertson

Filed for Record Oct 24th 1857.
at 4 o'clock P.M.

J. P.

In the offering of which Chattel Mortgage in Evidence the Defendants by their counsel objected. Objections overruled Defendants excepted.

The Plaintiff offered as a Witness E. P. Robertson who testified. Was a Justice of the Peace in Virgil in October last. this Mortgage was acknowledged before me. I have no means of knowing whether it was executed before the acknowledgment. Alexander signed it before me.

Crap examined.

It was filled up at the time I first saw it.

Iacob W. Armstrong — I know the parties to this suit. I have lived in Lodi 2 years. I know the Store and goods mentioned in Mortgage — Am Clerk for Lewis — Lewis sold the goods mentioned

in Mortgage to George W Alexander about the 22^d of October last. — I was present at the time of the repleyn — Saml Goods replied as covered by Mortgage. I heard of the sale by Alexander to the Defendants. I am inclined to think it was about ^{think it was near the 9th of December last} the 9th of November last — I was present when demand was made by Lewis of the Defendants for the Goods. It was about the 6th or 7th of December on Wednesday some three days after the sale to Defendants. James Lewis and myself were with Seth Lewis. Mr Seth Lewis came in and asked John Hathorn if he had bought the goods of Alexander. he said he had. We then asked if he knew that he had a Mortgage he replied that his brother had been to Geneva and his Lawyer Mr Maybourn said the Mortgage was not good. Lewis demanded paper. Hathorn said you will have to get it by Law and the extent of the Law. It was a very short time before that we had heard of it. Heard that Alexander and Defendant Hathorn were going in partners. that Hathorn heard of the Mortgage & took in Heath. also heard that Hathorn's brother had been down to Geneva. The Defendants objected to the last three answers of Withup — objection overruled excepted.
 Crap Examined.

I had been Clerk for Lewis. I owned the Store when the sale was made to Alexander, the sale was made on the 22^d day of October 1857. Alexander

went into immediate possession. Defendant Heath was his Clerk. Alexander commenced selling Goods at once and kept right on selling like any other Store until sale to Defendants. Plaintiff Lewis was in and about all the time — Lewis in Lodging was in about the Store frequently after the sale to Alexander. Alexander bought a bill of New Goods in Chicago ~~in~~ which were put right in Store a general full assortment of Goods to fill up the complete assortment of the Goods in Store.

Lewis sales for week before he sold to Alexander averaged from \$300. to \$350. Alexander kept undisputed possession of Store and Goods from Oct 22nd until sale to Walthorn and Heath. I presume the Goods were in the possession of Walthorn and Heath at the time the demand was made by Lewis which I swore to.

Samuel A Plummer, called —

Know parties to this suit.

Know George W Alexander slightly know him since October last. Know of Alexander being in the Store spoken of. Heard him say that he had sold the Store and Goods to Walthorn & Heath the Defendants. I was present when the invoice was taken — I moved into tenement connected with the Store after the sale on the 12th of December, I was in and out of the Store while they were taking the invoice. I did not take much notice, I am not competent to Judge of the manner of taking the invoice. Walthorn had a Book. While the Clerk called off the articles and also Jenkins I Guess Heath and

Alexander went out & in and didn't keep record.

Alexander is not now in Lodi. He left between two weeks. Was there at his home before his departure after the sale. (Question) State when Alexander was Friday ^{and} Saturday before his leaving? Question objected to, overruled, exception. He was in and out of the store. Inset - State whether you know if he was secreting himself? (Objection by Defendant, overruled, and exception to ruling of the Court.) He asked me to shut the door & said Charley Thrall was after him. The defendants were out and in of the store about the business of the store at the time. (Quest) "State whether either of the Defendants visited Alexander in any other room of the building?" (Objected to by Dft., overruled and exception taken) Ans. I could not state, I think Jenkins ^{and} White saw him. (The Defendants presented their general objection to the admission of any evidence relative to the acts of Alexander subsequent to the sale or conversations of him & the Dft., objection overruled and exception taken). I think that Alexander was not to be generally seen know of some being refused admittance by the Clerks of the Defendants to the part of the store building where Alexanders family lived through the store. Alexanders wife sent me for him and White, the Clerk told me he guessed he was not far off. (Quest) State whether Alexanders wife has received letters from Alexander since he left? (Objected to by Dft. - overruled, exception taken)

Answer, I heard her say that she had. Alexanders wife
 has sent by me for the Defendants. I told them of her
 wish to see them. She told me she had seen them.
 Mr Alexander little girl brought me a letter and said
 her Uncle brought it for me. Saw the man arrive
 (Objection and Exception) Did not see the Defendants go
 into Mrs Alexanders apartments then. Though I
 heard their voices in there afterwards. I did not hear the
 conversation. (Objection and Exception) Alexander claimed
 to own the Store before the Sale and also three horses
 and four Cows. May be he was worth four or five
 thousand Dollars. He might be worth more. Might
 be worth from five to Eight thousand dollars. I
 recollect asking Alexander for boats while the Sale
 was going on. He said they were taken away. Have
 heard Wealth say he bought & paid for the Store. might
 have heard something said about Land Scrip or Land
 Warrants dont remember.

Crap Examined.

Alexander was selling the goods in his Store at retail
 all the time until the Sale to Weather & Wealth.
 The time of the door being closed which I swore to me
 while the inventory was going on. Think I have seen
 Lewis in the Store while in Alexanders possession
 Have seen him there several times. I was at work
 for Alexander building, fixing Slaughter or for Barn.
 Alexander was there when the goods were taken
 by the Officer on the Replevin writ.

Re direct. Alexander said when he wanted me to close the door that Charley Thrall was looking after him.

John Alexander. Have understood my brother was a Merchant in Lodi. I have lived in Iowa City Iowa. I travel around some all the time. during the last three months I stopped longest in Marion County Iowa. The last time I saw my Brother George he was in Iowa City. (Objections to acts and Statements of Alexander Subsequent to Sale, removed overruled Exceptions) I don't know where he is now. I came from Iowa City to Lodi. I brought no letters. Mr Perry stopped at Lodi with me. Perry came to this Village with me. Perry had a Package with him. he did not tell me what was in it. We gave it to George's wife. I ~~don't~~ ^{don't} know the contents. I know my brother was to be in Iowa City. We sent a letter to Marion County for me. I had loaned my brother some money and he told me his wife would pay me the amount. I loaned him money to bear expenses some \$20. or \$30. I came to see his family.

W. J. Brown. I am an Attorney I drew the Mortgage which has been presented. I was not present when it was acknowledged. Alexander & Seth Lewis came to my Office. Said they were going to Chicago. I drew the Mortgage, all this was on

the same day.

Crap Examined.

Lewis came to me and we went down to Mr Plato's, came before the goods were replevined. I had a conversation with Lewis at Sycamore, he was talking about taking a Chattel Mortgage, and I told him I would not take such an one, I advised him to take better security.

Re-direct

Lewis said Alexander was honest and would pay up as soon as the note came due. I told him if he was honest it would be safe enough. I transcribed from book of accounts, the note described in the Mortgage, Lewis and Alexander were present when the Mortgage was drawn up.

The Crap Examined.

I understood the Mortgage was to be given as collateral security on the note and to be void if Alexander took them up of the parties holding them.

Charles Thrall.

I have seen the Stock of Goods that have been spoken of. Talking with Mr Weath about them he said he bought the goods subject to the Mortgage and bought them under value. He said if he could hold the goods he would make a pretty good thing of it. He said he calculated to follow Lewis as long as there was a dollar to his name. We are bound to

follow him as long as he has a dollar". I was Deputy Sheriff last October. I had some executions against Heath. I did not collect them. He had no property that I could find.

Crap Examination.

I worked for Lewis last season. I work for him now when I hear anything I tell Lewis. I am a party in a suit with Lewis in matters connected with this suit. I went to the Store for Cuts at the time Heath told me what I testified to in my direct examination.

Heath asked me about shooting the said Lewis could not frighten him. I said Lewis did not do anything about it, my feelings are enlisted on the side of Lewis. I told Lewis of this a few days after it was told me. This suit is matter of talk among the majority of people of Lodi. Lewis Armstrong and I are together most every night at the Post Office. Armstrong keeps the Post Office. I have not been hired by Lewis to watch only one night. I slept in warehouse several nights. Heath said to me, "I shouldn't use Lewis so if he had not accused me of boxing his warehouse, we ought to be together but Lewis goes the other way". Heath and I have not been very good friends of late neither Lewis and Heath. Heath said Lewis had accused him of breaking into his safe and he had better not do it. He said it was nobody's business when he bought or how he bought.

Re direct examination

I was present when the goods were replevined. Weath said he had had his hands tied up and now he was ready for a grab. I had a Ca. Sa. against Weath last week. Some body had bored up and let the grain out of the warehouses.

John Pickett

I know nothing of the Goods. I have heard talk about them.

I had a talk with Weath. He and I were walking. He said he had got Lewis right where he wanted him ^{and} he means to keep him there. He said he had got the goods and if Lewis could hold them well, if not he should get them back. Nothing was said that I remember about debts in Chicago. That Lewis didn't know of that he would have to pay. Don't know what that referred to.

Crap Examination.

I am not particularly friendly to Weath. don't know that I am very hostile to him. He sued me once on a Mechanic's Lien. I got a little riled I guess I did have not liked him very well since.

W. R. Burdick

I know the parties to the Suit know the Stock of goods. Spoken of. was present at the time of the service of the replevin writ by the Sheriff. I was selected to measure and count the goods. at the time of the service of writ. I had

formerly owned a part of them before sale to Armstrong and sale to Alexander. during the invoice something was said about a case of Calf Skin boots, I searched for them. I should say the boots were not in the store at the time. There was a question raised in regard to some cravats that were missing. There were cravats called for on the Sheriff's Rolls. We all set to looking. Mr Bair said they were there a day or two before.

We could not find them. Bair and I talked about the boots. Heath and I had some words about another case of boots, a new and full case. Heath said they were new goods and not of the old stock. We had considerable words. Heath said I took too much interest it was none of my business. he said if I took such a stand against him I should suffer for it. I told him that he and his party had tried to rob Lewis and I was going to stand by Lewis.

Cross Examined.

My business has been selling goods. I came back to Lodi from Como Station, been there selling goods since I went out of trade in Lodi. When I am in Lodi I make it my home at Esq Robertsons. E. P. Robertson Esq. is now selling the goods that were replevied. Lewis does his business and makes it his office at Robertsons. I stayed at Lodi until the last two weeks. I never was in the store as Clerk. I did not know what goods were in it. I happened in the store just before dinner at the

time of the Repley. We commenced a little before
 dinner time to take the inventory. I had heard the
 Sheriff was in Town before I went over to the Store.
 Seems to me Lewis had spoken to me about coming
 over and helping. I can't tell certain whether I had
 seen Lewis that morning. I knew the Sheriff had
 come with the papers. The Sheriff told me I
 could help measure the goods and count them.
 He did not tell me to keep tally. The Sheriff
 did not tell me to look up the goods. Suppose
 I did so because I wanted to. I made myself
 pretty familiar about the Store. I presume I
 took down some goods. Yes I did tell Heasts
 "I had his damaged nose on the ground and I
 would grind it for him." This was when we were
 talking about ^{I did not find the case of boots} the case of boots ^{of boots} on the Sheriff's
 roll. Know of its being there by hearing the
 Clerk talking about it. Knew the goods were the
 same by the list in the Sheriff's hands. I don't
 know whether the list was correct or not. Can't
 say whether it called only for old goods. I know
 I measured and passed some that looked new.
 I recognised some as ^a part of the stock I had
 formerly owned. I sold out to Lewis some time
 in July previous. my invoice to him about
 \$1200. or \$1500. The way I knew Lewis goods was by
 the Coat mark. I told by the letters. I can't tell
 the letters of either mark his or theirs. The Clerk's

told me the letters. I knew of Alexanders
selling goods there some two months. Lewis
knew of it I presume. he ought to be was right
there.

Benjamin Stewart I had a conversation with
Heath soon after the Replevin
writ was served. I met him on the Street he said
"Are you one of Lewis standing Army?" I said
No. He said did you lay in the Store Room the
other night? He said I understood ~~you~~ ^I was one
of Lewis hired men to watch his property. He
said Lewis, no need to have a standing Army
he had got most of his property.

Cropper Examined.

Nobody was present when this conversation took place
I am a Blacksmith by trade. I don't do much now
I spend most of my time at the grocery. I have
talked these matters over. it is general talk thro' our
part of the country. I believe Lewis had somebody
watching in the warehouse one or two nights. knew of
firing of guns one night didn't know of its "being"
to take place. At the time of this conversation I met
Heath near the Depot. He said his standing Army
was of no use to Lewis. he had got part of his
property, and he would have the rest as soon
as he could bring it around. I never told of this

conversation until last Monday. Talked about it with Lewis something about this matter. One of the Defendants is not a very good friend of mine. I don't know as they have any Judgments against me, have sued me once or twice.

John Simmons

I heard the conversation spoken of by last witness. I was just behind Heath at the time. Heath commenced at Stewart about the Standing Army. Stewart seemed to stick up for Lewis. Heath said folks say I have a part of his property, but if I have I'll be damned if I don't have the rest.

Ethan Allen

I was the Officer who Replevied the goods. I don't recollect having ~~seen~~^{received} any Executions against Heath for some time past. Have had Executions against him. I have some now. I tried to find property. I found none. Was present when the goods were taken under the writ of Replevin. I don't know much about the matter of the Boats. Spoken of. I know there was some inquiry made for them.

J. H. Maybourn

I was at Lodi the night or two before the Sale to Defendant. I will not be certain that I ever saw the Mortgages. Were the Mortgages heretofore set out was shunned

witness) before, I saw the Record. I was not present at the time of the Sale, I saw none but my Clients when in Lodi.

~~Witness declined~~

John A. Oliver Jr. I knew the Plaintiff Lewis
 know of his buying Goods of
 Smith Pabard & Co of Chicago. I am Book Keeper
 of that House. At the time Lewis sold to Alexander
 the firm would not take Alexanders notes alone
 for what Lewis was owing on former deal and so
 Lewis signed with him. I gave Lewis and Alexander
 both notes when the notes were due. They have not
 been paid. We have a Judgment against Lewis
 for \$460⁰⁰ the Judgment rendered in the Chicago Court
 of Common Pleas. (the notes above spoken of shown by witness)
 (Crap Examination,

Alexander made the payments of whatever has
 been paid on these notes there are two Endorse-
 -ments. These notes were given on Lewis
 original indebtedness. At the time Lewis sold
 to Alexander as I understood it Alexander
 was to assume Lewis indebtedness. I started to
 draw them for Alexander. but one of the firm
 spoke to me and I drew them as they are.
 The endorsement which is erased I made
 at the time we received a remittance from
 Alexander. I endorsed it immediately upon

receipt of the money but by order of the firm Erased it and the amount was applied on Alexanders Book Account. a letter accompanied the remittance, I dont know what the directions were. It is our custom when we receive money if we have a Book account as well as notes to apply remittances on the Book account instead of the notes.

Wiram H. Bair I know of something being ~~being~~ missing at the time of the rapline. I had been Clerk for Alexander. I said there is something wrong about these Boats and I will find them. I first knew of the Mortgage at the time the inventory was being taken when John Heathorn talked of going in partner. at that time I overheard John Heathorn say if there is a Mortgage I will not burthen myself with the matter. Mr Heath John W. Jenkins Salmon White. Heathorn and myself took the inventory. The Sale to Heathorn & Heath was after the inventory was taken a day or two. The Store was closed while the inventory was being taken but not at other times.

Crossed Examined.

I helped take the inventory at the time of the Sale to Heathorn & Heath it was a very fair inventory. I do not recollect the exact amount of the findings. J. K. Armstrong and I owned the Store

over was bought of Lewis. After Alexander bought
 the stock he put in some \$1200 or \$1500^{worth} of new goods.
 We kept up the stock better than I ever knew it
 before. The average sales would overrun I should
 judge \$40 or \$75 per day while Alexander was in the
 store. Alexander took Hathorn & Heath's notes in
 part payment. We told me he had received all
 of his pay. I knew the stock of goods well I had
 been Clerk there all the while. Hathorn & Heath
 gave me their note for \$594. in place of a Note I held
 against Alexander and what Alexander owed me.
 The debt was partly for goods that had formerly
 belonged to me and partly for services & labor as
 Clerk. I consider them amply good for the amount.
 I released Alexander on his notes & my claim
 for this note. They paid Alexander it must have
 been ^{some where about} \$3500. I saw Alexander take the notes which
 they gave and put them in his pocket book and the
 Defendants took possession. I was present when the
 writ of Replevin was served. Heath told us we
 must not take new Goods. The Sheriff only called
 for old goods and we Clerks selected those as
 well as we could. There were no Silk Neck-
 kerchiefs in the inventory from Alexander to the
 Defendants. The Clothing & Furniture Goods
 had been laid away to keep them from the dust.
 W. R. Burdick was there at the time of the

Replevy he assisted in measuring goods: he was quite
afficious quarrelled with Mr Heath a good deal
and used a good many hard names.

S. A. Plummer recalled - It was on Saturday
that I moved to Alexan-
-ders tenement. Alexander lived there too. Alexan-
-der was not in the Streets as much after his
Sale to Hathorn & Heath as usual. (Defendants
again object to the admission of Evidence in regard
to acts ^{and} words of Alexander subsequent to sale
objection overruled ^{and} (exception taken) Alexander
was there in the back room most of the time. I
presume various ^{persons} had accep to him the Defendants
and others. I know they did. Hawley came to buy
Stoves. Alexander went to the window opening into
Store & looked before he went out of his room. I
thought from his manner he was looking out
for breakins. I have heard Heath say he was
hard up. I think I saw Mr Maybourn in Court
about the time of Sale, but can not say whom
or with whom. I thought I saw him with some
of these parties on the Rail Road track

Crap Examined.

I thought it was Mr Maybourn. I might be
mistaken. thought it was him or Mr Burdick.
it may have been Burdick. Other persons besides
the Defendants had accep to Alexander in the back

Room. Esq Robinson - Hawley - Jenkins - and
others I don't remember.

Wm H. Robinson. I am a Justice of the Peace
I live in the Town of Virgil
but not in the Village of Lodi - I took the
acknowledgment of a Deed from Alexander
about the time of the sale on Saturday. I think
I am in the Village generally on Saturday.
(Defendants objected to admission of evidence of Alexan-
ders acts or statements as before objection overruled &
exception taken) Alexander met me in the street
said he had been looking for me. Wanted I should
take the acknowledgment of a Deed. I went in
with him and made the Deed to one John
W. Bicknell, Bicknell was not present. Yes
I think there was something said about not
speaking about the Deeds having been made
Lodi is a Village in Virgil of some 300 or
400 inhabitants.

J. W. Bignall. I know Alexander I am
a brother in law of Geo.
W. Alexander (Objection to testimony in regard
to acts & statements of Alexander as before renewed
overruled & exception taken) They say there was a Deed
made out to me by Alexander of the place where

I live, I did not see the Deed, the understanding was when Alexander bought the place that it was for me and I was to pay for it in work as soon as I could - I think Alexander may have owed me \$500. The place was called worth \$700, or 800. Alexander owed me mostly for work I had loaned him some money loaned him \$41. I have his note still for \$41. besides what he owed me on book acct.

He owed me on Book account some \$8, or \$10.
 x I commenced working for Alexander latter part of last winter & worked until the 1st of November. I worked at \$2. per day. I have received very little from him he has paid me \$100. perhaps a little more perhaps a little less. He had a store account against me too. for family groceries & such like. Somewhere about \$60. may have been more may have been ^{less} less.

. Craft Examined.

I was sick when the Deed was made have been very sick - This is the first time. I have been out since my sickness. I worked for Alexander some last winter we have had no settlement, don't know exactly how much he owes me. I am a Mechanic I work at the Sash and Blind business.

E. J. Allen recalled - Burdick was

Suggested by Weather & Weather at the time of the
 inquiry to measure the goods. The Defendants
 themselves did not know all the old goods
 from the new. Burdick was called on by
 Armstrong and Bair to look up the goods.

, Plaintiff rested.

Evidence offered by the Defendants.

E. P. Robertson - This is my Docket. (here
 witness produced a Justice
 Docket) I am a Justice of the Peace for the town
 of Virgil. live in Lodi Village. I have no other
 docket. This is the entry & record in my Docket
 of a Chattel Mortgage from George W. Alexander
 to the Plaintiff Lewis and of which I took the
 acknowledgments: as I testified in my previous
 Examination by the Plaintiff and is in the words
 and figures following (here witness read from his
 Docket)

Geo. W. Alexander }
 to } Chattel Mortgage
 Seth Lewis }

"Mortgage of all the goods
 of every kind and quality fruits clothing Drugs
 groceries medicines ready made clothing dry goods hardware
 crockery and all and singular every article
 and articles in the store formerly occupied by

" Seth Lewis and situated in Block 2 Lot 4 in Lodi
 " also one span of Horses color bay medium size black
 " mare and foals about Eight years old. one Horse
 " power planing Machine, tenmuntary Machine. Circle Saw
 " and all Machinery belonging to and attached to the
 " Shop for planing purposes and all other purposes
 " said Shop situate between John Pickett dwelling
 " ^{and Salmon White Warehouse} ~~Houses~~ on the North side of the R.R. acknowledged
 " this 22^d day of October A.D. 1857 before me

E. P. Robertson

J. P.

This is the only entry & Receipt in my docket
 of a Chattel Mortgage from George W. Alexander
 to Seth Lewis.

Crap Examined.

I don't remember when the Defendants looked
 at my Docket. Think it was after the sale by
 Alexander to them.

(The Defendants by their Counsel then made
 a motion to suppress the Chattel Mortgage
 offered by the Plaintiff from going to the Jury as
 Evidence. Motion overruled Defendants except to
 ruling)

A. S. Babcock. — I was living in Lodi last
 December. recollect the day
 of the Replevy I know Alexander was in Lodi
 all of the week. spoken of by witnesses for Plaintiff

Except Wednesday, I did not see him that day that I recollect. I saw Alexander in and about the Store during that week, on Saturday forenoon the day spoken of by witness. Plummer. I saw Alexander writing at the counting Desk in the Store. People were passing in and out all the time. I noticed no difficulty. Alexander was around as usual for all I saw. I had been at work for Alexander. Had had charge of the Lumber yard belonging to Alexander. I saw Solomon White Sen & others looking at the Lumber &c, and went to Alexander to see why they were there as they did not call on me. I went to him also about some other matters. Alexander told me he had sold the Lumber Yard, told me he had sold ~~the Lumber~~ out all his own in Lodi except the Store building and the Lot it stood on

Crap Examined.

I had been in the employ of Alexander four months. I should judge the value of Alexander's property to be about \$24000.

Chas B. Wells I am an Attorney living in Geneva think I have seen the Chattel Mortgage offered in Evidence before. It was some time in the latter part of October or the first of November last. I don't recollect who handed it to me. We said Seth Lewis had sent him

with it to me and wanted my opinion whether it was good security. I gave my opinion and handed it back to the man. (Quest) What opinion did you give? Obj: to by Rlf. objection sustained Defendants Exceptions.

Salomon White Jr. I know the parties to this Suit. Know George W Alexander. I was a Clerk for Alexander. while he owned the Store, I Clerked for him 26 days. was his Clerk when he sold to Hathorn, Helped to take the inventory. It was taken as all inventories are taken. The goods amounted to \$2700. Some Notes passed over to Alexander. I know that Hathorn had a note against Alexander of some \$300. I know of a few pair of thin Boots belonging to the Stock they were hanging over the writing desk. Mr Hathorn told me there would be no sale for them until Spring. And I must take them down and put them where they would be out of the way and safe, I took them down and put them in a box under the counter. I was not present when they were enquired for at the Replevy. I took down and put away some ^{thin} Summer Goods also to keep them from dust until there should be a sale for them.

Alexander was absent at the time the goods were Replevied. I saw Alexander the Thursday Friday ^{and} Saturday spoken of by former

with me. He was in and out of the Store Friday.
I saw him on the Street on Saturday sometimes, I
saw him sometimes at the writing desk. I have seen
Lewis in the Store while Alexander had the Store.
We sold anything people wanted like any retail Store
if we had it while Alexander had the Store.

Crop Examination.

I live with my father Salomon White Sen. I was
in the Store when Nathorn ^{and} Heath talked of buying
in. I only know of our inventory. I never saw Mr
Maybroom there at that time, I heard reported around
town that he had been there. At the time the inven-
- tory was taken. I helped Mr Bair ^{and} Mr Jenkins
count. I saw Mr Heath write ^{and} give one note
to Alexander & saw Nathorn write some. I don't
know where Alexander slept Friday and Saturday
nights. He slept at my Father's I think on Tuesday
^{and} Wednesday nights, I think he slept alone.
Mr Nathorn I think was there that evening. he
came for his wife and stayed perhaps 15 minutes
I don't think he talked with Alexander 5 minutes
There was about \$3000. of Book accounts
I think perhaps \$2000. of them good.

Re direct Examination.

Mr Alexander was up at my father's to straighten
up his Lumber book. It had been very badly
kept and needed straightening. Some of them were
pretty hard debts. They will be old before they

they ever are collected. This Book accounts were worth maybe \$1500. Witness identified Alexanders handwriting.

W. H. Bair. I was present when Alexander made the Sale to Hathorn & Heath of the Goods. I was called upon by all of them to witness the Sale. There were more goods in the Store at the time of the Sale by Alexander to Hathorn and Heath than when sold to Alexander by Lewis. At the time Lewis sold to Alexander the Store was in the name of Armstrong and myself. we had bought of Lewis some short time before we had not made the payments Lewis sold to Alexander and was aperted to the sale.

Alexander added maybe to the Stock while in his possession some eight or ten Hundred dollars. Palethorpe and I have bought from Hathorn and Heath. the Stock was valued at \$2200 when we went in. The note given by Hathorn & Heath to Alexander must have overran \$3000. They assumed liability of Alexander to me. and have before testified to.

, Crap Examined.

I hold Hathorns & Heaths note state - their invoice to me amounted to a little more than \$2100. The goods replevied by the Sheriff amounted to about \$800. I cant be far out of the way in regard to the value of the goods Replevied Hathorn & Heath

had possession of the Store some four weeks. Their Sales averaged some \$300 per week. I may be mistaken in regard to the amount I should think that not far from the average amount of Sales per week.

I was Clerk for Alexander and sold Goods for him. I should think the majority of his Book accounts collectable. I think I would undertake to collect them for 25 per cent. The debts were made by farmers generally.

Re direct Examination.

Walthorn & Heath calculated to do a Cash business they did some Credit business. Walthorn & Heath Sales would average about \$25. a day.

The service of the Replevin writ was \$500. damage to the Store and its business besides the property taken.

Salomon White Jr. recalled. I was Clerk also for Walthorn and Heath until they sold out to Bair and Palethorpe. I was there three weeks Walthorn & Heath did a Cash business. I don't recollect ever selling more than \$25. dollar in the till as result of one days sale. I drove off the days Sale one or two nights. I should think they would average \$10.

Defendants rec'd.

The following Stipulation between the parties

hereto was then Read by the Counsel for the Plaintiff

Kane Co Cir Court.

Seth Lewis

vs

John Hathorn

Loren Heath

January Term of the said
Court for 1858.

Replevin

Kane Co Cir Court

John Hathorn

vs

Seth Lewis &

Charles Thrall

January Term 1858

Replevin

It is stipulated and agreed
that the notes mentioned in the Exhibit Mortgage
from G. W. Alexander to said Lewis dated Oct 23 1857
were notes given by said Lewis and said Alexander
for Goods purchased by said Lewis before he sold out
to said Alexander. And were the same as Mortgage and
in the store at Lodi at time of the making said
Mortgage and that said Lewis was held as security
on the same and that Alexander has not paid said
notes and are the same notes, are the notes described
in the Mortgage and are given to pay the indebtedness
originally contracted for said goods mentioned
in the Mortgage.

This Stipulation to be read in Each of the cases above entitled.

Geneva February 8th 1858.

Herring to Plato & Parks
for Ref.

Maybourn & Smith Atty for
Heath & Heathorn

Were both parties present and this was all the Evidence given on the trial of the above cases by either of the parties to the above entitled Suits.

And after argument of Counsel for the respective parties the Court gave the following instructions on the part of and in behalf of the Plaintiff.

No 3. That any Sale made for the purpose of hindering delaying or defrauding Creditors is Void as to bona fide Creditors.

4 — That while fraud cannot be presumed yet it is capable of being proved by facts and circumstances and if from all the facts and circumstances in proof the Jury believe from the evidence that Heath & Heathorn purchased goods of Alexander for the purpose of cheating or defrauding Lewis such Sale was void if Lewis was creditor of Alexander
4 1/2 — That if the Jury believe from the evidence

that Weath and Hathorn bought the goods in question subject to the Mortgage then Lewis had the same right to take the Goods of Weath and Hathorn that he would have had to take the goods from Alexander, &c. — If the Jury believe from the evidence that Lewis had a Mortgage from Alexander on the property in question and that by the Terms of the Mortgage and that Weath & Hathorn bought the Goods with a full knowledge of the Execution of said Mortgage and that they Weath & Hathorn made such purchase for the purpose of depriving Lewis out of his Security then such Sale was fraudulent & void.

To the giving of which instructions on the part of and in behalf of the Plaintiff by the Court the Defendants by their counsel then and there excepted.

The Court then gave the following instructions on the part of the Defendants.

First — All conveyances of Goods and Chattels where the paper is allowed to remain, with the donor, or Vendor, are fraudulent per se and void as to Creditors and purchasers, unless the retaining of paper be consistent with the terms of the Deed or conveyance, and unless the Mortgage from Alexander to Lewis authorized Alexander to retain paper of the goods mentioned in the Mortgage, such paper was inconsistent with the terms of the Mortgage, and rendered

Thornlow
vs
Davenport
1 Sam 296

void as to ^{as} subsequent purchasers.

Second— That a Mortgage of Personal property where the possession is allowed to remain with the Mortgagor, although binding between the parties, is nevertheless, fraudulent and void as to subsequent purchasers, unless by its terms, the Mortgagor is allowed to retain possession of the goods.

Seventh— That fraud is never to be inferred but must be proved.

Eighth, If the Jury believe from the evidence in the case that there was no such mistaking existing between Alexander & the Plaintiff Lewis as that mentioned in the Mortgage but that it was other & different from that stated in said Mortgage then that is a fact that they ought to consider in arriving at the fact whether it was a fair & bona fide transaction between Lewis and Alexander.

The Court refused to give the following instructions asked for on behalf of the Defendants, to wit,

Request to the Court.

That from the facts that appear upon inspection of the Chattel Mortgage offered in evidence in the case and the Docket of the Justice of the Peace who took the acknowledgments of the same and other evidence offered, that the said Mortgage is invalid, and inoperative, and therefore should not be permitted to go to the Jury as evidence. The Court is

therefore requested suppress the same from the said Jury.

Third — If the Jury believe from the evidence that Alexander continued to sell the goods in question, with the knowledge and consent of Lewis after the execution of the Mortgage in question, and if such sales were inconsistent with or not allowed by the terms of the Mortgage, such selling and consent, will render the Mortgage inoperative and void as to the Defendants in this case, provided they purchased the Goods in good faith and for a bona fide consideration

Fourth — That a Mortgage of personal property which provides that the possession may remain with the Vendor coupled with an implied right to sell is of its self, fraudulent in law, and void as to purchasers. And if the Jury believe from the evidence that the Mortgage from Alexander to Lewis contained an implied authority in Alexander to sell the goods mentioned in the Mortgage, such implied authority would render the Mortgage void as to these defendants. And if the Jury believe from the evidence that Alexander sold said goods from day to day with the knowledge & consent of Lewis after the execution of the Mortgage such sales and consent are circumstances which the Jury may take into consideration in construing the question of fraud.

— If the Jury believe from the evidence that

the Mortgage in question was given to secure the payment of certain notes executed by Alexander and Lewis. then in that case. Lewis has no claim against Alexander by virtue of said notes & Mortgage unless the Lewis. has paid said notes or some portion of them - and the Lewis had no right to take the property in question in consequence of this liability on the notes.

Sixth — If the Jury believe from the evidence that the Chattel Mortgage offered in Evidence does not contain the same description of Goods &c. as the one described on the Docket of the Justice of the Peace who took the acknowledgment of the said Mortgage, and that the said Mortgage was dated the 23^d day of October A.D. 1857, and the Acknowledgment was on the 22nd day of said October. then the said Mortgage so offered in Evidence is invalid and has no binding effect as against subsequent purchasers, and therefore the Jury should find a Verdict for the Defendants.

Seventh — If the Jury should find the issues in this case in favor of the Defendants. they will assess their Damages. which will be the Value of the goods at the time they were replevied & such further damages as the Defendants have sustained in consequence of the removal of said Goods.

To which refusal to give the instructions asked by the Defendants they then and there excepted. The Jury then retired in charge of an officer to consider of their Verdict and subsequently

returned into Court. with the following Verdict.

We the Jury find the issues joined for the Plaintiff and award the damages at \$425-

Abner Carrier

for and

Thereupon the Defendants then and there made a motion for a new trial and in arrest of Judgment.

Afterwards to wit on the 17th day of February A.D. 1858 it still being one of the days of the said January Term of said Court. the said motion of the Defendants for a new trial and arrest of Judgment coming on for a hearing after argument of counsel the Court being then and there fully advised and the Plaintiff remitting the damages of \$425. the Court overruled the said Defendants motion for a new trial and in arrest of Judgment. To the refusal of the Court to grant a new trial in this cause and in overruling the Defendants then and there excepted.) to wit on the 17th day of February 1858. And then and there prayed an appeal to the Supreme Court of the State of Illinois and then & there presented the their bill of Exception in the said cause and asked the said Court to then and there sign & seal the same and make it a part and portion of the Records in this case which is accordingly then and there done on this 17th day of February A.D. 1858.

Isaac G. Wilson Secy

And afterwards to wit on the 5th day of March A.D. 1858, there was filed in the said Office of the Clerk of said Court, an Appeal Bond which is in the words & figures following to wit:

Know all men by these presents that we John Hathorn Loren Heath Sachariah Heatham Salomon White and John Hathorn Sen in all of the County of Kane and State of Illinois are held and firmly bound unto Seth Lewis in the special sum of Two hundred dollars lawful money of the United States for the payment of which said sum of money well and truly to be made unto the said Seth Lewis his heirs executors administrators and assigns we bind our heirs executors administrators and assigns Jointly severally and firmly by these Presents. Witness our hands and seals this first day of March A.D. 1858.

The condition of the above obligation is such that whereas the above named Seth Lewis did at the January Term of the said Court against the above named John Hathorn and Loren Heath an Action of Replevin then pending in said Court. And whereas the said Defendants in said suit, the said John Hathorn & said Loren Heath hath prayed & taken an appeal in the said suit, from the Judgment then obtained against them

to the Supreme Court of the State of Illinois to the Third Grand Division thereof according to the form of the Statute in such case made & provided and in conformity of the order of the said Court made in said case. Now then if the said John Heathorn & Loren Heath shall duly prosecute their said appeal in said Supreme Court of the State of Illinois in the said division thereof and in case the Judgment shall be affirmed the said Supreme Court so obtained against them in the said Kane County Circuit Court. and shall also pay the said Judgment & all costs interest and damages arising from the offering or dismissing of the said appeal then in that case this obligation shall be void & of no effect otherwise to be and remain in full force & effect

John Heathorn *Geo*

Loren Heath *Geo*

Bacharino Heathorn *Geo*

Salomon White *Geo*

John Heathorn *Geo*

State of Illinois }
 Hancock County }
 I, Paul R. Wright Clerk
 of the Circuit Court of said
 County, do hereby certify, that the foregoing is a
 true perfect and complete transcript of the Record
 in a certain cause in said Court wherein Seth
 Lewis was Plaintiff and John Hathorn and Loren
 Heath were defendants in an action of Replevin including
 the writ of Replevin & Return thereon Bonds taken by the Sheriff
 all the pleadings in the cause Bill of Exceptions and
 appeal bond and all the orders made by said Court
 and entered of record therein as appears from the
 records of said Court and the files in my office
 Witness my hand and the seal of said
 Court at Geneva in said County this
 26th day of March A.D. 1859
 P. R. Wright
 Clerk

Chas \$16.00.

John Hathorn &
Loren Heath
vs
Leth Lewis

In the Supreme Court
of Illinois in the Third
Grand Division

Error to Kane County Circuit Court.
And now come the said John Hathorn
and Loren Heath by their attorneys
and say that in the record of the said
proceedings and in the rendition of the said
judgment manifest error hath inter-
vened to their prejudice in this to wit
1st The Court below erred in admitting
improper evidence on behalf of the Defend-
ant in Error

2^d The Court erred in excluding proper
evidence offered on the part of the Plaintiffs
in Error.

3^d The Court erred in allowing the de-
clarations and acts of George W. Alexander
or subsequent to the sale by him to the Plain-
tiffs in Error to be admitted in evidence.

4th The Court erred in allowing the
Chattel Mortgage to be admitted in
evidence

5th The Court erred in overruling the
motion made by the Plaintiffs in Error
to suppress the Chattel Mortgage offered by

the Defendant in Error and in not withholding it from the jury as evidence
6th The Court erred in giving the instructions asked for by the Defendant in Error.

7th The Court erred in not giving the instructions asked for by the Plaintiffs in Error.

8th ^{the evidence in the case} The verdict is contrary to law and

9th The Court erred in overruling the motion for a new trial.

10th The Court erred in rendering judgment for the Defendant in Error when by the law of the land the said judgment ought to have been for the said Plaintiffs in Error.

And this the said Plaintiffs in Error are ready to verify by the said record wherefor they pray judgment of record as

Mayhew & Smith
Atty^s for Plffs. in Error.

Kane Co. Cir Court

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Etha Lewis

vs

John Barton
& Loren Heath

Transcript
ap^d of Errors

Filed April 12 1859
Leland
Clerk

Supreme Court of the State of Illinois,

IN THIRD GRAND DIVISION.

JOHN HATHORN & LOREN HEATH, }
vs : } APRIL TERM FOR A. D. 1859.
SETH LEWIS.

POINTS AND BRIEF.

This Suit was commenced by Writ of Replevin, by the Defendant Seth Lewis, in December, A. D. 1857, in the Kane County Circuit Court, and was tried at the January Term of the said Court for 1858, before I. G. Wilson, Presiding, and a Jury, and resulted in a verdict for Defendant in Error.

The Property replevied was a part of a Stock of Goods of a Retail Country Store; and the value of the Goods replevied amounted in all to some \$800 or \$900 at the cost price. A full description of Goods replevied is set out on the first page of the printed Abstract in this case—to which the Court is referred. The Defendant in Error, Seth Lewis, was engaged as a country merchant or storekeeper, in the Fall of 1857, at Lodi, in Kane County, and had been for some years before; and on the 22d day of October, A. D. 1857, he sold the Store and Stock of Goods at Lodi, to one George W. Alexander, who up to that time had been a farmer by occupation, and owned a large and valuable Farm in De Kalb County, some five or six miles from Lodi. This he exchanged for the Stock of Goods in the Store of Lewis, and for his Store in Lodi in which the Goods were, and for his Book Accounts then outstanding and unpaid. The Stock of Goods in the Store, the Store, and the Book Accounts, sold by Lewis to Alexander, at the prices agreed on between them, amounted to some twenty-seven hundred dollars more than what they called the Farm worth, in the exchange. At the time of the sale of the Goods to Alexander, Lewis was largely in debt in Chicago, for goods purchased by him, and put into this Store at Lodi. These debts, to the amount of some twenty-seven hundred dollars, Alexander was to pay, or agreed to pay; and to secure the payment of these, Alexander on the 22d day of October, executed to Lewis a Chattel Mortgage on the entire Stock of Goods purchased by him of Lewis, on some other property which he owned in Lodi, and also on the Book Accounts. This Mortgage was recorded in the Recorder's Office of Kane County—a copy of which Mortgage, the acknowledgment of the same, and the entry made thereof on the docket of the Justice by whom the acknowledgment was taken, are fully set forth in the printed Abstract, on the first, second, and sixth pages thereof, to which the attention of the Court is directed, as this Mortgage is the source by and under which the Defendant Lewis claims title to the Goods replevied, and bases his right to the possession thereof. Alexander after making the purchase of Lewis took immediate possession of the Store, and at once commenced selling at retail the Stock of Goods therein to customers and purchasers in the usual way, and as is customary for merchants to do, without any regard to the Mortgage to Lewis, and with the full knowledge of Lewis, up to the time he made sale of his entire Stock to the Plaintiffs Hathorn and Heath, which was on or about the ninth day of December, A. D. 1857, and for the same he received full payment from them, at the time of sale. The Stock of Goods sold to the Plaintiffs in Error by said Alexander was such part of the Goods bought of the Defendant in Error as were then in the Store and unsold, with such Goods and Groceries as he had bought from time to time to keep up the assortment in the Store, and which had been mingled with those bought of said Lewis.

First Point. The Chattel Mortgage offered and admitted in evidence by the Court below, was void on its face—

1st. Because the Instrument purports to have been made, and is dated on the 23d day of October, A. D. 1857, when the acknowledgment before the Justice is dated October 22d, one day before the making and execution of the Mortgage by Alexander. Instruments of the character of this Mortgage are to be tested by themselves, and as they appear on their face, without the aid of explanatory evidence. Vide Record, p. 27-30.

2d. It is void on its face, and was not evidence for any purpose, because it does not describe the Goods mortgaged with sufficient distinctness, as it should have done—giving the quantity and description of each article included in the Mortgage, so that it could be readily ascertained what was and what was not embraced within it.

3d. It is void on its face, and it cannot be made or set up as the foundation of a title in any case, by the mortgagee, because it not only includes the Goods then in the Store, but all that the mortgagor might buy during the continuance of the Mortgage; a provision as unheard of, as it is fraudulent and destructive to the best interests and good faith of commercial dealing. By this provision the mortgagee held not only the property in existence, and in the possession of the mortgagor, at the time of the execution of said Mortgage, but all that he may subsequently acquire, whether he makes payment for it or not; and the mortgagor holds it against the just claims of the individuals who furnished it, thereby creating a lien that is to cut off and exclude all persons who may deal with or trust him with their property from collecting their claims, till such terms as the exacting demands of a heartless mortgagee are fully met and satisfied. Such unfair and unjust Contracts and Instruments have never met with favor from Courts, and we trust never will.

4th. This Mortgage is void, and cannot be used as evidence for any purpose, because it not only covers and includes the account books sold by the mortgagee to the mortgagor, but all debts, accounts, and notes, that he may hold or have at the time said Mortgage becomes due, without regard or reference to how made, or when, or what the consideration of them might be. Vide Record page 27. Book Accounts and Notes are not and cannot be the subject of a Mortgage, for the simple reason that Accounts and Notes are not property for such a purpose.

5th. This Mortgage is void in law, because it does not make any provisions for the property to remain in the possession of the mortgagor, yet he was allowed to retain and keep possession of it. The only provision in the Mortgage touching the possession of the property, is in these words—"To have and to hold, all and singular, the Goods and Chattels hereinbefore granted, bargained and sold unto the said party of the second part forever, said Goods and Chattels now remaining and continuing in possession of the party of the first part, in the said town of Virgil." Vide Record page 28. This is only descriptive of the place where the Goods were at the time of the making and executing of the Mortgage, but does not give the possession or provide for the possession to remain in the mortgagor, according to the provisions of the Statute, and Mortgages not containing such provision this Court has time and again pronounced void. Vide 3 Gill R., page 455; Rhines vs. Phelps; 11 Illinois 617; 1 Scam. 296.

6th. This Mortgage was void in law, because it purports upon its face to be given to secure the payment of certain Promissory Notes, or of the sum of money therein specified, to the mortgagee, when the evidence shows—(see stipulation set forth on page 56 of Record, and witness Oliver, page 43, to which the Court is referred)—that these were debts that the mortgagee owed, or was holden for, and were due to third parties, but by arrangement made between the mortgagor and mortgagee, the mortgagor was to pay. Yet the Mortgage does not so state, or define the mortgagor's liability, but describes them as notes payable to the mortgagee, when in truth and in fact not a dollar was to be paid to him. Under the Mortgage, the mortgagee could claim the payment himself, if the mortgagor had made payment to the creditors of Lewis, as by their agreement he had promised to do; and in this manner Lewis held a Mortgage to secure to him the payment of certain sums of money, and also had him held with him as one of the makers of the notes given to third persons to pay these notes; and he might at any time assign the Mortgage, or fail, or die. It also had the effect to hinder and delay creditors, as it assumed and asserted a debt to Lewis, when he did not owe Lewis individually a dollar, thereby apparently doubling up his indebtedness, and multiplying his liability twofold; it was also another and different debt than that set out in the Mortgage, and therefore made it void.

7th. This Mortgage was void in law, because it was understood, impliedly at least, by the parties to it, if not expressed, that the mortgagor should continue to sell the goods mortgaged contrary to the express terms of the Mortgage; if this cannot be gathered from the face of the Mortgage itself, still the goods were left in his possession, and he was allowed to deal with them, and sell and dispose of them, as a merchant to his customers, down to the time he sold to the Plaintiffs in Error. Such transactions always have been pronounced a fraud upon creditors and purchasers, and always will be. Vide 18 Ill., page 401-4; Comstock's R., page 588.

8th. The Defendant in Error is estopped by his own act from setting up the Mortgage and claiming title under and by virtue of it, to the Goods therein described, from the fact, that when he sold the store, and the stock of goods therein, to the mortgagor, and allowed him for nearly two months to go on and sell goods to his customers, and in the presence of the mortgagee, at the rate of \$40 to \$70 per day, (vide testimony

of Hiram H. Bair, p. 44 of Record,) the Plaintiffs in Error had a right to assume and believe that the mortgagee did not rely on his Mortgage, or claim any title by virtue of it, for he allowed the mortgagor daily to sell and dispose of the property mortgaged, as if it was his own; and if he assented and allowed him to sell to customers the property mortgaged, he had the same right to sell and they to purchase all the property in a bulk, as they had to purchase it by individual articles, or in small quantities. Lewis could not allow Alexander to have possession of the property, and deal with it as though it was his own property, and then assert title to it by virtue of his Mortgage; such acts and conduct will not stand against creditors or purchasers. Vide 4 Comstock, page 588; 18 Illinois, page 401.

9th. This Mortgage was not evidence for any purpose, from the fact that the entry made in the Justice's docket, was not such an entry as is required to be made by the Statute, (Vide R. S. of Scates, Treat and Blackwell, page 813, sec. 2,) in this,—it does not describe the property mentioned in the Mortgage, it being in the words and figures following, to wit:—

“GEORGE W. ALEXANDER, }
TO } *Chattel Mortgage.*
SETH LEWIS. }

“Mortgage of all the Goods of every kind and quality—Prints, Clothing, Drugs, Groceries, Medicines, Ready-made Clothing, Dry Goods, Hardware, Crockery, and all and singular, every article and articles, in the store formerly occupied by Seth Lewis, and situated on Block 2, Lot 4, in Lodi; also, one span of horses, color bay, medium size, black mane and tails, about eight years old; one horse power, planing machine, tenanting machine, circle saw, and all machinery belonging to and attached to the shop for planing and purposes, and all other purposes. Said shop situated between John Pickett's dwellinghouse and Solomon White's warehouse, on the north side of R. R. Acknowledged this 22d day of October, A. D. 1857, before me.
“E. P. ROBERTSON, J. P.”

Vide Record, page 50, and Abstract pages 6 & 7. The entry made in the Justice's docket would show another and different Mortgage, for it entirely omits this part of the Mortgage, to wit:—“Also, all the goods and materials of every kind and description belonging to said mortgagor in said store, during the continuance of this Mortgage. Also, all accounts and notes, book accounts, and indebtedness or debt of any individual or individuals, in favor of said mortgagor, sole and belonging to the party of the second part; also, all the goods which may be in said store at the time when this Mortgage shall be due and payable.” (Vide Record, page 28.) The entry made in the Justice's docket should be in the precise terms, and should agree in description in every respect with the Mortgage, describing the same property in the same terms, and just as full and no fuller than they are described in the Mortgage; and unless it does this, the Mortgage is void, and is not evidence for any purpose, and gives and conveys no rights to the mortgagee. (Vide R. S., page 813, sec. 1.) And in this case this is not done, but one-half of the descriptive part of the Mortgage is omitted. This provision of the Statute must be strictly complied with, and fully conformed to, before it can give any validity to the Mortgage. If such looseness is to be tolerated and sanctioned, the Statute becomes a dead letter, and the entry is of no use, as it gives no correct information of the property mortgaged, as it was intended it should. Vide 18 Illinois, page 400-2.

10th. The necessary tendency and effect of this Mortgage was to hinder and delay creditors, and it is therefore void as to creditors and purchasers. It was intended by the parties to it at the time it was made, that the property mortgaged should be exposed for sale and sold. The property was bought for that purpose and that only, as the mortgagee was fully advised; and it was intended that the mortgagor should treat and use it as his own property, and sell it, and when sold, the avails to be his own. Vide 17 Wendell R., page 492; 2 Pickering, page 129.

Second Point. The Court erred in admitting the declarations and acts of Alexander, after he had sold to the Plaintiffs in Error, to be given in evidence to the Jury. His statements and acts were not evidence for any purpose against them, after he had sold to them—and their rights and interests should not have been prejudiced or jeopardized by them; and the Court should have excluded them, he having received his pay for his goods, and given full possession to the Plaintiffs in Error, he had no longer any interest in common with them, but it was then his interest to do all in his power to prejudice their rights to them, to avoid the penalties of the Statute for selling mortgaged property. He also might have another and additional reason for so doing, which might be to aid Lewis in holding them, and thereby have them applied in payment of his liabilities on Lewis' notes; he might be a witness for Plaintiffs in Error, but not for Defendant in Error. And furthermore, all the acts and statements of Alexander tending to show fraud, which were admitted as evidence under the protest of the Plaintiffs in Error, were acts and statements made by him, after the commence-

ment of this suit by the Defendant in Error. See return of Sheriff, R., page 11; Plummer's testimony, R., page 32; White's testimony, R., page 52.

Third Point. The evidence shows no fraud on the part of the Plaintiffs in Error for they paid Alexander all that the goods were worth, to wit: some \$3,500 or \$4,000 for them, as Bair testifies, and he was one of the witnesses for the Defendant in Error, called and sworn by him, and one to whom Lewis had sold the goods before he made sale of them to Alexander—and fraud is not to be presumed but must be proven, and it requires the same amount of evidence to establish fraud as it does to establish the act of obtaining goods under false pretences in a criminal prosecution for that offence. (Vide 4; Scam. 97. The Court also erred in admitting the hearsay evidence presented in answers of witness Armstrong in regard to acts of Plaintiffs in Error. Vide Record page 31.

Fourth Point. The Defendant Lewis had no right or claim under the Mortgage, or power to take the goods, for the reason that the Mortgage was given to secure him against notes and claims that he was holden for, and had signed with Alexander as surety for him, as John N. Oliver testified, (Vide Record, page 43 & 44; and stipulation, page 56,) and which notes he had not taken up or paid, though Alexander had paid a part of them, and until this was done, Lewis had no claim on him or the property mortgaged; for no principle of law is better or more fully settled, than that a surety cannot maintain an action against his principal, till he has paid or taken up the debt. Vide Bonham vs. Galloway, 13 Ills., 68; Shepard vs. Ogden, 2 Scam. 257; Davis vs. The People, 1 Gill, 409.

Fifth Point. Alexander was a man of considerable property, besides these goods, as was testified to by A. S. Babcock and others, and not contradicted. (Vide Record page 51 and 52.) He estimated him to be worth some \$4,000, so that Lewis' debt was not endangered, or he injured by the Plaintiffs in Error buying the goods, and Alexander held the notes of Hathorn and Heath to the amount of some \$3,000. (Vide Record, page 54.) And there is no pretence that Hathorn was not perfectly responsible, and a man of property.

Sixth Point. The testimony of Stewart, Thrall, and Burdick, show that they had a great deal of feeling, and entertained strong and bitter feelings against the Plaintiffs in Error, and had taken sides and become partisans, and as such they testified, and so manifest was this on the trial, that it ought and doubtless would have weakened, if it had not had the effect to lead the Jury to wholly disregard their evidence, had not the Court allowed the statements and conduct of Alexander to have been given and received as evidence, and thereby occasioned the Plaintiffs a great wrong and injury.

Seventh Point. The Court should have sustained the motion which was made by the Plaintiffs in Error, to suppress the Chattel Mortgage and withhold it from the Jury, (See Record, page 50,) for the reasons above stated, and had the Court done this, then the Jury must have found their verdict for the Plaintiffs in Error under the issue formed, for the Defendant in Error could no longer legally claim any rights, powers, or privileges by virtue of the Mortgage, and it was not such an instrument as the Plaintiffs in Error or any other person was required to respect or regard, as it made no provisions for the property mortgaged, remaining in the possession of the mortgagor, and it was not properly entered on the Justice's docket, or properly and sufficiently described in the docket, or Mortgage, and it was the design and intention of the mortgagor and mortgagee that the property should be sold by the mortgagor, and he had been doing so as fast as he could ever since the making of it, with the knowledge and assent of the mortgagee, and he purchased with this object, as the Defendant in Error well knew.

Eighth Point. There is no evidence to warrant the verdict of the Jury, and the Court should have granted a new trial. By no testimony can it be said that the purchase of the Goods in the Store was made by the Plaintiffs in Error, for the purpose of defrauding the Defendant Lewis, nor did it place him in any worse condition than he was in before, as the goods were sold for all they were worth, and he had received in exchange for them, good paper, that his creditors would gladly and willingly have taken; paper that was much better than Lewis', and that his creditors would have cheerfully accepted and taken in exchange for his, dollar for dollar. Then how was he wronged or injured? Alexander had been induced by Lewis to buy a stock of old goods, and pay a big price for them, much more than they were worth, as Lewis knew at the time, but Alexander knew very little about mercantile business or trans-

actions, and Lewis took advantage of his ignorance. But he soon learnt that he had entered on a branch of business that he knew but little about, and he was anxious to get out of it as soon as he could, and the best way he could, and therefore sold as he did to the Plaintiffs in Error; and because he did so, and did not allow Lewis to strip him of all he had left, and prevent his creditors from getting their just claims and demands against him; for the Court will bear in mind that he had added to the stock purchased by him of Lewis some twelve or fifteen hundred dollars worth of new goods, (see the testimony of H. H. Bair, page 45 of Record.) Lewis flares up and makes a great cry about the sale, and seeks to regain the possession of the goods, and claims that the acts and conduct of the Plaintiffs are fraudulent, because they have purchased and given their obligations to the full amount of the property bought, which are good and collectible, and by doing so, have given to Alexander an opportunity to sell by wholesale to responsible parties, the property that the Defendant was allowing him to sell by retail, (and often to irresponsible parties.) He stood by and saw the goods being sold at retail, and made no objections, though this was contrary to the letter of the instrument, and the intentions of the parties—if the Defendant in Error can claim any rights under it—but all this time he never utter one word of complaint, or even made an objection. If the purchase was made by the Plaintiffs in Error for the purpose of defrauding Alexander's creditors, it is a little surprising that his creditors have not endeavored to hold the goods, by asserting their claims, for they certainly could lay a far better claim to them, and one that would meet with a more ready recognition in a Court of Justice, than that of the Defendant Lewis.

Ninth Point. The instruction marked No. 3 given by the Court, for Defendant in Error, should not have been given, for he had not shown himself a creditor of Alexander's, or at least such a one as could claim any rights by virtue of the Mortgage.

The Court erred in giving the instruction marked No. 4, asked by Defendant in Error, and it was not law in this case, for Lewis did not lay a claim as creditor of Alexander except by virtue of his Mortgage, and by that only.

The Court erred in giving the instruction marked No. 4½, asked by the Defendant in Error, and it was not law, for the reason that Lewis had no right to the goods until such times as he had paid the debts that he had become surety for with Alexander.

The Court should not have given the instruction marked No. 6, asked by the Defendant in Error, because it is so drawn that its meaning is not clear, from its words; and secondly, Lewis had no rights under his Mortgage, it being void. By this instruction the Court impliedly asserted and instructed the Jury, that it was a valid Mortgage, and in fact took the case from the Jury, and pronounced the verdict for them in the case.

The Court should have given the "third" instruction asked by the Plaintiffs in Error, for it correctly states the law in this case, and if this instruction had been given the Jury must have found a verdict for the Plaintiffs in Error.

The "fourth" instruction asked by Plaintiffs in Error was law, and should have been given by the Court.

The other instructions asked by the Plaintiffs in Error should have been given by the Court, as they correctly state the law, and had they been given by the Court, the Jury must have found a verdict for the Plaintiffs in Error, if they had paid any regard to the said instructions, and if they had not, then the Court would have granted a new trial.

The verdict of the Jury was against the law in the case, and against the evidence, and should have been set aside by the Court, and a new trial granted to the Plaintiffs in Error. And the Court erred in not granting a new trial, because he had allowed improper evidence to go to the Jury, on the part and in the behalf of the Defendants in Error, and had excluded proper evidence offered on the part of the Plaintiffs in Error; and also because he had erred in giving improper instructions on the part of the Defendant in Error, and had refused to give instructions on the part of the Plaintiffs in Error that were proper, and stated correctly the principles of law governing this class of cases; and because the verdict was against the law and evidence in the case, and by this act would have restored to the Plaintiffs in Error to some extent the rights that they had been deprived of by the wrongful ruling of the Court on the trial of this case; for if this Mortgage, in view of all the evidence in the case, and circumstances surrounding it, is such an instrument as will be enforced and respected by Courts of Justice, then a door will be thrown open wide enough to admit of transactions that must have a direct tendency to deceive and defraud creditors and purchasers, and indirectly sanction acts and conduct that will lead to the most deplorable results, and ultimately unsettle and undermine the well-established and approved principles of the law in this class of cases.

MAYBORNE & SMITH,

Attorneys for Plaintiffs in Error.

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Keaton & Heath

Seth Lewis

Point-Brief

Filed April 19. 1859

H. Sedgwick
Clerk

Hathorn & Heath

vs

Lewis

} Appeal from Name

In this case the three first errors assigned are disposed of with a single remark that the questions presented thereby are not ~~saved~~ in the record. No proper exception was taken by defendant on the trial due to the decisions of the Court admitting or excluding testimony unless it be in the single instance of the admission of a Chattel Mortgage and in that instance it is doubtful whether the exception is properly saved. The bill of exceptions is literally copied in the abstract and the Court will see upon inspection that the manner of taking the exceptions is as follows "Question objected to, overruled, exception, or in many cases simply objection and exception" In none of these exceptions does it appear by whom the exception was taken whether by plaintiff or defendant, nor does it appear whether the question or the objection was overruled. None of these exceptions can be sustained without overruling the principle of the following cases

Gibbons vs Johnson 3rd Scammon 63

Buckmaster vs Branes 4th Lilman 448

Baker vs Bond 12 Ell 89

The bill of exceptions is the pleading of the party and should be taken most strongly against him.

We submit that this Court cannot inquire into the questions raised in the three first assignments of error.

The first error assigned which it is necessary to discuss is that the Court erred in allowing the Chattle Mortgage to be read in evidence.

It was insisted that the Mortgage was void because first. It is dated on the 33rd of October and the acknowledgment is dated on the 22nd. I suppose that a mistake in the date of the deed Mortgage or a mistake in the date of the acknowledgment will neither ~~render it~~ of them render the Mortgage void.

It is objected that the Mortgage is void because it does not describe the goods with sufficient distinctness and certainty. I answer that some part of the articles named in the Mortgage are described with the utmost possible certainty and at least for such portion the Mortgage would be good.

The goods which were in the store were sufficiently described and these are the goods which were replevied.

It has required an inventory of these goods in the Mortgage and to be spread upon the justice's docket would make it unnecessarily prolix and cumbersome.

It is said the Mortgage was void because it not only includes the goods then in the store but also that the Mortgagor might buy during the continuance of the Mortgage. I answer. I do not think this is a true construction of the Mortgage.

The Mortgage grants first the goods in said store which formally belonged to said Lewis.

2nd The goods in said store belonging to said Mortgagor during the continuance of this Mortgage. The last words limit the time for which they are to be held and are not discriptive of the goods sold.

But if there was a portion of the goods named in the mortgage not belonging to the Mortgagor and consequently that did not pass by the Mortgage, That would not vitiate the mortgage as to the portion of the property which was in the hands of the Mortgagor is concerned as between the parties to the Mortgage.

As to the 4th objection I say, If the Mortgage included Notes and book accounts which could not be thus transferred that would not make it void as to goods and Chattles which were the proper subjects of such transfer.

As to the 3th Objection made to the Mortgage, I answer.
1st The Mortgage contemplated that the property should continue in the possession of the Mortgagor otherwise no effect whatever will be given to the words "now remaining and continuing in possession of the party of the first part in the said town of Virgil" Under the view taken by defendants Cannot the words "and continuing" are wholly inoperative.
2nd

The Mortgage would be good between the parties if

there were no such provision in it.

The 6th objection is, That the Mortgage should not have been received in evidence because it is alleged to have been contradicted by other evidence.

But the objection is untenable in any event, for a payment to the creditors of Lewis for him and at his request is a payment to him.

The 7th & 8th objections to the mortgage I do not think it necessary to discuss for they resolve themselves into this That the continuing in possession by Alexander rendered the Mortgage fraudulent and void, That might be so as to judgment creditors or to bona fide purchasers Whether the defendants were in that position was the question to be tried. It was proper to admit the Mortgage in evidence as one of the facts necessary to determine that question.

But it is said that there was no such entry made in the docket of the justice & who took the acknowledgment of the Mortgage as is required of the statute. All the property which was in dispute in this suit was correctly entered upon the justice's docket.

If other articles were omitted it would not vitiate the Mortgage ~~which was~~ as to those articles which were properly entered.

2nd. If no such entry was made the Mortgage would

shall be good between the parties -

II

But there is a point of view in which this Mortgage was properly received in evidence and which disposes of all the objections which were made to it at once and which is the point upon which the case was tried in the court below

If this Mortgage was not properly acknowledged and a proper entry made in the justices docket. If it does not provide for the possession of the property to remain with the Mortgagor And if such possession did remain with him contrary to the provisions of the Mortgage still it would be good as between the parties to the Mortgage and would be good against all persons except creditors and bona fide purchasers

If when these defendants purchased the goods of Alexander he told them that they were subject to this Mortgage And only sold them the goods subject to the Mortgage then these defendants by their purchase only acquired the right of redemption which Alexander had And the Mortgage as between Lewis and them was good

This was the precise state of the case. Charles Smith testifies that Heath told him that he bought the goods subject to the Mortgage and bought them under value He also said if he could hold the goods he should make a good thing of it. That he shouldn't use Lewis so if

he had not accused him of boring his barn. (Abstract page 4) (See also Beir's testimony page 5)

Only the old goods which had been Lewis's were replenished (see Abstract page 6) Beir's testimony

Now we had a right to have that Mortgage go to the jury and to insist that these defendants were not bona fide purchasers or creditors. That they had purchased these goods subject to this Mortgage and stood precisely in place of Alexander. The jury having found that fact for us upon sufficient evidence there is an end to all the questions in the case except those arising from instructions -

As to all the points made by the plaintiff in his brief, from the first to the ninth, I answer, The questions are not preserved in the record. No proper exceptions having been taken.

As to the ninth point which is covered by the 6th + 7th assignments of error.

In relation to instructions given to the plaintiff marked 3, 4 + 4 1/2 I have only to say, That there was evidence tending to show that Lewis was a creditor of Alexander for the purchase money of these very goods And if this sale from Alexander to defendants was made by the parties to it with the intent to hinder Lewis in the collection of his debt with by sale under his Mortgage or in any other legal way it was void -

It is said that the 3rd instruction asked by defendants below should have been given. That instruction was not the law of this case. The theory of the plaintiff was that the defendants had purchased the goods subject to his Mortgage, and that they stood precisely in the place of Alexander. The evidence supported this position and we had a right to have it passed upon by the jury.

To have given this instruction would have taken away from the jury the very point upon which the plaintiff relied and had a right to rely.

So far as this instruction contains any principle of law it had been repeated twice in the first and second instructions asked by plaintiff which had been given by the court.

Instructions which present the same propositions of law need not all be given and courts may refuse to repeat a principle of law which has been previously fairly stated to the jury -

May vs Talman 30th Ills 443

Curtis vs Martin 30th Ills 537

The 4th Instruction asked by defendants was not law because it referred the question of the construction of the Mortgage to the jury. What powers were contained in the Mortgage was a question of law

2nd There was nothing in the Mortgage from which either Court or jury could say that there was an implied authority to Alexander to sell the goods

The 5th Instruction is not the law because if Alexander had agreed with Lewis to pay certain debts which were owing by Lewis and to secure his performance of this agreement the mortgage was taken that is a sufficient consideration to support the Mortgage

The Court will see from the whole evidence that the debt was owing by defendants to Lewis for the goods in question and that they had agreed to pay that debt by paying the money to Lewis creditors, this certainly could make no difference. The debt to Lewis could not be discharged without payment to somebody

The 6th Instruction asked by defendants is not the law. If defendants bought of Alexander subject to that Mortgage as Thrall testifies plaintiffs might have a right to recover notwithstanding facts as stated in the instruction

By The 7th Instruction the defendants asked the Court to instruct the jury that if they found for the defendants they should find 1st that the property was defendants 2nd they should give defendant damages to the full value of the goods and thirdly such other damages as they were a mind to

If the defendants bought the goods subject to the mortgage and under value as they said they did and then could hold the goods without paying the mortgage and also collect the full value of the goods from Lewis and also other damages to be assessed by a jury doubtless they would make a pretty good thing of it

I shall not discuss the point that the verdict was against the weight of evidence because it is so apparent that the great weight of testimony is with the plaintiffs and the gross and manifest injustice which would result from any other verdict is so evident

B. L. Cook
For Appellee

Mathews & Heath
vs
Lewis

Appeal from same

166 = 2

Argument for Appellee

Supreme Court of the State of Illinois,

IN THIRD GRAND DIVISION.

JOHN HATHORN & LOREN HEATH,
Plaintiffs in Error,
 vs :
 SETH LEWIS,
Defendant in Error.

APRIL TERM FOR A. D. 1859.

ABSTRACT OF RECORD.

First. This suit was commenced by Defendant in Error, by writ of Replevin, in December, 1857, and tried at the January Term of the Kane County Circuit Court for 1858, Isaac G. Wilson, Judge presiding, and a Jury, and resulted in a verdict for the Defendant in Error. The property replevied was as follows, as appears by the

p. 11. return of the officer, which was as follows: "Executed the within writ, this 11th day of December, A. D. 1857, by replevying the following described property, it being a part of the Property mentioned in said writ, and delivering the same to the Plaintiff, he having given bond which is hereunto attached, and by reading the same to John Hathorn and Loren Heath, Defendants, this 11th day of December, 1857; 10 part pieces gingham, 1 piece gingham, 20 pieces of calico, 3 Bay State shawls, 2 summer shawls, satin stripe, 2 fancy shawls, 3 silk bonnets, 1 case ribbons, hosiery, and gloves of different kinds, 3 pieces barred mulle, 60 yards of book muslin, 2 pieces dotted mulle, 17 yards J. C. diaper, 8 pair buck skin mitts, 10 rolls paper cambric, 50 pieces common cambric, 14 school books, 2 pieces changeable silk, 4 pieces curtain calico, 2 pieces turkey red calico, 205 yards delaine, 4 pieces bleached muslin, 32 cotton handkerchiefs, 12 men's coats, 5 pair pants, 4 vests, 1 piece black alpaca, 1 figured alpaca, 1 piece plaid, double width dress goods, 1 piece blue merino, 1 green, 1 coburg,

p. 12. 1 lyonese, 129 pairs shoes, 1 pair heavy boots, 1 jar of tinct. paregoric, 1 tinct. cinnamon, 1 cochechu, 1 squills, 1 peruvian bark, 1 epsom salts, 1 cream tartar, 1 sulphur, 1 antimony, 1 blue vitriol, 1 white, 1 T. T. acid, 1 creosote, 1 wintergreen, 5 10-12 German bitters, 5½ gross screws, 5 mortice locks, 3 dozen door latches, 24 papers shoe nails, 6 padlocks, 5 hammers, 2 hand saws, 3 coffee mills, 10 pair butts, 11 oil lamps, 6 dozen collars, 4 dog chains, 4 halter chains, 4 log chains, 6 pump reels and fixtures, 100 lbs. pump chains, 6 hoes, 3 spades, 2 shovels, 100 gallons stone ware, 22 bowls, 3 doz. plates, 2 tea setts, white, 5 glazed mugs, 1 small white mug, 10 cream pitchers, 6 white pitchers, 4 blue pitchers, 2½ setts cups and saucers, 20 blue cups and saucers, 3 cream jugs, 1 doz. cruets, vinegar, 4 cruets, pepper, 6 wire sieves, 6 drawing knives, 2 setts knives and forks, 4 doz. table spoons, 5 doz. tea spoons, 1½ lbs. ground cinnamon, 2 lbs. pepper, 2 lbs. spice, 5 cans powder, 11 plush caps, 8 cloth caps, 2 silk hats, 29 fur hats, 200 wall paper, 3 pieces denims, 1 case matches." The remainder of the remainder of the property mentioned in said writ, not found.

Second. The Defendant in Error alleges in his declaration, that the Plaintiffs in Error unlawfully took and unlawfully withholds the property replevied, vide Record, page 16; to which the Plaintiffs in Error filed their pleas,—First, "Non Cepit;" Secondly, that the property replevied was the property of the Plaintiffs in Error; and Thirdly, that Defendant in Error was not entitled to the possession of the property replevied, on which pleas issues were joined. Vide Record, pages 20 & 21.

p. 26. The Bill of Exceptions is printed at length, and is as follows:—

SETH LEWIS vs. JOHN HATHORN & LOREN HEATH.	} Kane County Circuit Court of the January Term of the said Court, for A. D. 1858.
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BILL OF EXCEPTIONS.

Be it remembered, that at the January Term of the said Court, for A. D. 1858, to wit, on the tenth day of February, 1858, it still being one of the days of the said January Term of the said Kane County Circuit Court, the above entitled cause came on for trial on the issues heretofore formed in said cause. And thereupon on motion of the Plaintiff, a Jury was empaneled to try the said cause, and after the empanneling of the Jury, the said Plaintiff, in order to maintain his cause of action under the issues

p. 27. joined therein, offered in evidence the following evidence and testimony, to wit:—

The Plaintiff offered in evidence a Chattel Mortgage, in the words and figures following, to wit: This Indenture made this twenty-third day of October, 1857, Between George W. Alexander, party of the first part, of the town of Virgil, County of Kane, and State of Illinois, and Seth Lewis, of the town of Virgil, same County, and State aforesaid, party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of ten dollars in hand paid, received by the said party of the second part, do grant, bargain, and sell unto the said party of the second part, his heirs and assigns, the following Goods and Chattels, to wit: All the Goods of every kind and quality, Prints, Clothing, Drugs, Groceries, Medicines, Ready-Made Clothing, Dry Goods, Hardware, Crockery, and all and singular, every article and articles in said Store, formerly owned by Seth Lewis, and situated on Block two, and Lot four, in Lodi, Kane County, Illinois.

- Also, all the Goods and Materials of every kind and description, belonging to said mortgagor in said Store, during the continuance of this Mortgage. Also, all accounts and notes, book accounts, and indebtedness or debt of any individual or individuals in favor of said Mortgagor, sole and belonging to the party of the second part; also, all the Goods which may be in said Store at the time when this Mortgage shall be due
- p. 28. and payable:—One span of horses, color bay, medium size, black mane and tail, about eight years old. Also, one horse power, and planing machine, tenanting machine, circular saw, upright to saw, and all machinery, belonging to said planing mill, and machine shop, situate in said shops, or attached thereto, being in Lodi, on the north side of the Rail-road track, between the residence of John Pickett, and the warehouse, owned by Solomon White, Kane County, State of Illinois. To have and to hold, all and singular, the Goods and Chattels, herein-before granted, bargained, and sold unto the said party of the second part forever, said Goods and Chattels, now remaining and continuing in the possession of the said party of the first part, in the said town of Virgil. Provided always, and these presents are upon these express conditions, that if the party of the first part, shall and do, well and truly, pay or cause to be paid to the said party of the second part, the sum of two thousand six hundred and thirty-seven dollars and forty-five cents, payable as follows: one Note due and payable on the ninth of November, 1857, \$315 38-100 dollars; one of two hundred and forty-six dollars, payable 26th day of November, A. D. 1857; one of one hundred eighty-four dollars 81-100, payable December fifth, A. D. 1857: one hundred and fifty-two dollars and sixty-four cents, payable January nineteenth, A. D. 1858; one hundred sixteen dollars 38-100, payable January eighth, A. D. 1858; five hundred and forty-two dollars 50-100, payable March 8th, A. D. 1858; five hundred forty-nine dollars 29-100, payable March 17th, 1858; Four hundred and four dollars 24-100, payable 21st day of March, A. D. 1858;
- p. 29. One hundred fourteen dollars 88-100, payable fifth day of April, A. D. 1858; then, these presents, and every matter herein contained, shall cease and be null and void. But in case default shall be made in the payment of said sum of money, above mentioned at the time above limited for the payment of the same, or any part thereof, it shall and may be lawful for the said party of the second part, to take possession of the said Goods and Chattels, wherever the same shall be, and to sell, and dispose of the same for the best price which can be obtained therefor, at public vendue, or otherwise, (giving six days' notice to the said party of the first part, of the time and place of such sale,) and out of the money to arise by such sale, thereof to retain the said sum of money above mentioned, and all charges for keeping said property, and if such sale (if so much there shall be) rendering the surplus money (if any there shall be) to the said party of the first part. And it is hereby agreed by, and between, the said parties, that in case the said party of the first part, shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of any of said Goods and Chattels, or remove, or attempt to remove, from said county, any of said Goods and Chattels, or if the same shall be levied upon, or seized by virtue of any execution, writ, or attachment, or other process, against the said party of the first part, it shall and may be lawful for the said party of the second part, to take possession of the said Goods and Chattels, and sell the same, in the payment of the said sum of money, above mentioned, in the manner aforesaid.
- p. 30.

In witness whereof, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

G. W. ALEXANDER. [L. S.]

STATE OF ILLINOIS,)
KANE COUNTY.)

This Mortgage was acknowledged before me, by George W. Alexander, this 22nd day of October, A. D. 1857.

E. P. ROBERTSON, J. P.

Filed for Record, October 24th, A. D. 1857, at 4 o'clock P. M.

To the offering of which Chattel Mortgage, in evidence, the Defendants by their counsel objected. Objection over ruled, Defendants excepted.

The Plaintiff offered as a witness, E. P. Robertson, who testified—

Was a Justice of the Peace, in Virgil in October last. This Mortgage was acknowledged before me. I have no means of knowing whether it was executed before the acknowledgement. Alexander signed it before me.

Cross Examined—It was filled up at the time I first saw it.

- p. 31. Jacob M. Armstrong. I know the parties to this suit. I have lived in Lodi two years. I know the Store and Goods mentioned in Mortgage. Am Clerk for Lewis. Lewis sold the Goods mentioned in Mortgage to George W. Alexander about the 22nd of October last. I was present at the time of the replevy. Same goods replevied as covered by Mortgage. I heard of the sale by Alexander to the Defendants. I am inclined to think it was about the first of November. Think it was nearer the ninth of December last. I was present when demand was made by Lewis of the Defendants for the goods. It was about the 6th or 7th of December, on Wednesday, some three days after the sale to Defendants. James Lewis and myself were with Seth Lewis. Mr. Seth Lewis came in and asked John Hathorn if he had bought the goods of Alexander. He said he had. He then asked if he knew that he had a Mortgage. He replied that his brother had been to Geneva, and his lawyer, Mr. Mayborne, said the Mortgage was not good. Lewis demanded possession. Hathorn said, you will have to get it by law, and the extent of the law. It was a very short time before that he had heard of it. Heard that Alexander and Defendant Hathorn were going in partners—that Hathorn heard of the Mortgage and took in Heath—also heard that Hathorn's brother

had been down to Geneva. (The Defendants objected to the last three answers of witness. Objection overruled—exception.)

p. 32. Cross-Examined. I *had been* Clerk for Lewis. I owned the Store when the sale was made to Alexander. The sale was on the 22d day of October 1857. Alexander went into immediate possession. Defendant Heath was his clerk. Alexander commenced selling Goods at once, and kept right on selling like any other store, until sale to Defendants. Plaintiff Lewis was in and about all the time; lives in Lodi; and was in and about the store frequently, after the sale to Alexander.

Alexander bought a bill of new Goods in Chicago, which were put right in store; a general, full assortment of Goods to fill up the complete assortment of the Goods in store. Lewis' sales per week before he sold to Alexander, averaged from \$300 to \$350. Alexander kept undisputed possession of store and Goods, from October 22d until sale to Hathorn and Heath. I presume the Goods were in the possession of Hathorn and Heath at the time the demand was made by Lewis, which I swore to.

p. 33. Sanford A. Plummer—called. Know parties to this suit. Know George W. Alexander slightly. Known him since October last. Know of Alexander being in the store spoken of. Heard him say that he had sold the store and Goods to Hathorn and Heath, the Defendants. I was present when the invoice was taken. I moved into a tenement connected with the store, after the sale on the 12th of December. I was in and out of the store, while they were taking the invoice. I did not take much notice. I am not competent to judge of the *manner* of taking the invoice. Hathorn had a book. White, the clerk, called off the articles, and also Jenkins. I guess Heath and Alexander were out and in, and didn't keep record. Alexander is not now in Lodi. He left between two weeks: was there at his house before his departure after the sale. (Question.) "State where Alexander was Friday and Saturday before his leaving?" (Question objected to—overruled—exception.) He was in and out of the store. (Question.) "State whether you know if he was secreting himself?" (Objection by Defendants overruled, and exceptions to the ruling of the Court.) He asked me to shut the door, and said Charley Thrall was after him. The Defendants were out and in of the store, about the business of the store at the time. (Question.) "State whether either of the Defendants visited Alexander in any other room of the building?" (Objected to by Defendants—overruled and exceptions taken.) Answer. I could not state. I think Jenkins and White saw him. (The Defendants presented their general objection to the admission of any evidence relative to the acts of Alexander, subsequent to the sale, or conversations of him and the Defendants—objection overruled, and exception taken.) Think that Alexander was not to be generally seen; know of some being refused admittance by the Clerks of the Defendants, to the part of the store building where Alexander's family lived, through the store. Alexander's wife sent me for him, and White, the Clerk, told me he guessed he was not far off. (Question.) "State whether Alexander's wife has received letters from Alexander since he left?"

p. 34. (Objected to by Defendants—overruled—exceptions taken.) Answer. I heard her say that she had. Alexander's wife has sent by me for Defendants. I told them of her wish to see them. She told me she had seen them. Mr. Alexander's little girl brought me a letter, and said her uncle brought it for me. Saw the man arrive. (Objection and exception.) I did not see the Defendants go into Mrs. Alexander's apartments then—thought I heard their voices in there afterwards. I did not hear the conversation. (Objection and exception.) Alexander claimed to own the store before the sale, and also three horses and four cows. Maybe he was worth four or five thousand dollars. He might be worth more—might be worth from five to eight thousand dollars. I recollect asking Alexander for boots while the sale was going on; he said they were taken away. Have heard Heath say he bought and paid for the store; might have heard something said about land scrip or land warrants. Don't remember.

Cross-Examined.—Alexander was selling the goods in his store, at retail, all the time until the sale to Hathorn and Heath. The time of the door being closed, which I swore to, was while the inventory was going on. Think I have seen Lewis in the store while in Alexander's possession. Have seen him there several times. I was at work for Alexander, building, fixing lumber, &c., for barn. Alexander was there when the goods were taken by the officer on the replevin writ.

p. 35. Re Direct. Alexander said, when he wanted me to close the door, that Charley Thrall was looking after him.

John Alexander. Have understood that my brother was a merchant in Lodi. I have lived in Iowa City, Iowa. I travel around some all the time. During the last three months I stopped longest in Marion County, Iowa. The last time I saw my brother George he was in Iowa City. (Objection to acts and statements of Alexander subsequent to sale renewed—overruled—exceptions.) I don't know where he is now. I came from Iowa City to Lodi. I brought no letters. Mr. Perry stopped at Lodi with me. Perry came to this village with me. Perry had a package with him; he did not tell me what was in it. He gave it to George's wife. I don't know the contents. I knew my brother was to be in Iowa City. He sent a letter to Marion County for me. I had loaned my brother some money, and he told me his wife would pay me the amount. I loaned him money to bear expenses—some \$20 or \$30. I came to see his family.

W. J. Brown.—I am an attorney. I drew the Mortgage which has been presented. I was not present when it was acknowledged. Alexander and Seth Lewis came to my office; said they were going to Chicago. I drew the Mortgage. All this was on the same day.

p. 36. Cross-Examined.—Lewis came to me, and we went down to Mr. Plato's. Came before the Goods were replevied. I had a conversation with Lewis at Sycamore. He was talking about taking a Chattel Mortgage, and I told him I would not take such an one. I advised him to take better security.

Re-Direct.—Lewis said Alexander was honest, and would pay up as the Notes became due. I told him if he was honest it would be safe enough. I transcribed from book of accounts the Notes described in the Mortgage. Lewis and Alexander were present when the Mortgage was drawn up.

Re-Cross Examined.—I understood the Mortgage was to be given as collateral security on the Notes, and to be void if Alexander took them up of the parties holding them.

Charles Thrall.—I have seen the stock of Goods that has been spoken of. Talking with Mr. Heath about them, he said, he bought the Goods subject to the Mortgage, and bought them under value. He said if he could hold the Goods he would make a pretty good thing of it. He said he calculated to follow Lewis as long as there was a dollar to his name. "We are bound to follow him as long as he has a dollar." I was Deputy Sheriff last October. I had some executions against Heath. I did not collect them. He had no property that I could find.

Cross-Examined.—I worked for Lewis last season. I work for him now. When I hear anything I tell Lewis. I am a party in a suit with Lewis, in matters connected with this suit. I went to the store for costs at the time; Heath told me what I testified to in my direct examination. Heath asked me about shooting; he said Lewis could not frighten him. I said Lewis did not do anything about it. My feelings are enlisted on the side of Lewis. I told him of this a few days after it was told me. This suit is matter of talk among the majority of people in Lodi. Lewis, Armstrong and I are together almost every night at the Post Office: Armstrong keeps the Post Office. I have not been hired by Lewis to watch, only one night. I slept in Warehouse several nights. Heath said to me, "I shouldn't use Lewis so, if he had not accused me of boring his warehouse; we ought to be together; but Lewis goes the other way." Heath and I have not been very good friends of late; neither Lewis and Heath. Heath said Lewis had accused him of breaking into his safe, and he had better not do it. He said that it was nobody's business when he bought, or how he bought.

p. 38. Re-Direct Examination.—I was present when the Goods were replevied. Heath said he had had his hands tied up and now he was ready for a grab. I had a Ca. Sa. against Heath last week. Somebody had bored up and let the grain out of the warehouse.

John Pickett.—I know nothing of the Goods. I have heard talk about them. I had a talk with Heath. He and I were walking. He said he had got Lewis right where he wanted him, and he meant to keep him there. He said he had got the Goods, and if Lewis could hold them, well: if not, he should get them back. Nothing was said that I remember about debts in Chicago, that Lewis didn't know of, that he would have to pay. Don't know what that referred to.

Cross-Examined.—I am not particularly friendly to Heath. Don't know that I am very hostile to him. He sued me once on a Mechanic's Lien. I got a little riled; I guess I did —haven't liked him very well since.

p. 39. W. R. Burdick.—I know the parties to this suit. Knew the stock of Goods spoken of. Was present at the time of the service of the replevin writ by the Sheriff. I was selected to measure and count the Goods at the time of the service of the writ. I had formerly owned a part of them before sale to Armstrong, and sale to Alexander. During the service something was said about a case of calf skin boots. I searched for them. I should say that the boots were not in the store at the time. There was a question raised in regard to some cravats that were missing. There were cravats called for on the Sheriff's roll. We all set to looking. Mr. Bair said they were there a day or two before. We could not find them. Bair and I talked about the boots. Heath and I had some words about another case of boots—a new and full case. Heath said they were new goods, and not of the old stock. We had considerable words. Heath said I took too much interest; it was none of my business; he said if I took such a stand against him, I should suffer for it. I told him that he and his party had tried to rob Lewis, and I was going to stand by Lewis.

p. 40. Cross-Examined.—My business has been selling goods. I came back to Lodi from Como Station; been there selling goods since I went out of trade in Lodi. When I am in Lodi I make it my home at Esq. Robertson's. E. P. Robertson, Esq., is now selling the goods that were replevied. Lewis does his business and makes it his office at Robertson's. I stayed at Lodi until the last two weeks. I never was in the store as clerk. I did not know what goods were in it. I happened in the store just before dinner, at the time of the replevy. We commenced a little before dinner time to take the inventory. I had heard the Sheriff was in town before I went over to the store. Seems to me Lewis had spoken to me about coming over and helping. I can't tell certain whether I had seen Lewis that morning. I knew the Sheriff had come with the papers. The Sheriff told me I could help measure the goods, and count them; he did not tell me to keep tally. The Sheriff did not tell me to look up the Goods. Suppose I did so because I wanted to. I made myself pretty familiar about the Store. I presume I took down some goods. Yes, I did tell Heath, "I had his damned nose on the ground, and I would grind it for him." This was when we were talking about the case of boots. I did not find the case of boots on the Sheriff's roll. Knew of its being there by hearing the Clerks talking about it. Knew the Goods were the same by the

list in the Sheriff's hands. I don't know whether the list was correct or not, Can't say whether the list was correct or not. Can't say whether it called for old goods. I know I measured and passed some that looked new. I recognized some as a part of the stock I had formerly owned. I sold out to Lewis sometime in July previous. My invoice to him about \$1200 or \$1500. The way I knew Lewis' Goods, was by the cost mark. I told by the letters. I cannot tell the letters of either mark, his or theirs.

- p. 41. The Clerks told me the letters. I knew of Alexander selling Goods there, some two months; Lewis knew of it, I presume; he ought to, he was right there.

Benjamin Stewart.—I had a conversation with Heath soon after the replevin writ was served. I met him on the street. He said, "Are you one of Lewis' standing army?" I said, No. He said, "Did you lay in the store house, the other night?" He said, he understood I was one of Lewis' hired men, to watch his property. He said, Lewis had no need to have a standing army; he had got most of his property.

- Cross Examined.—Nobody was present when this conversation took place. I am a blacksmith, by trade. I don't do much now. I spend most of my time at the grocery. I have talked these matters over. It is general talk through our part of the country. I believe Lewis had somebody watching in the warehouse one or two nights. Know of firing of guns one night; didn't know of its being to take place. At the time of this conversation, I met Heath near the depot. He said, "his standing army was of no use to Lewis; he had got part of his property, and he would have the rest as soon as he could bring it around." I never told of this conversation until last Monday. Talked about it with Lewis; something about this matter. One of the Defendants is not a very good friend of mine. I don't know as they have any judgments against me; have sued me once or twice.
- p. 42.

John Simmons.—I heard the conversation spoken of by last witness. I was just behind Heath at the time. Heath commenced at Stewart about the standing army. Stewart seemed to stick up for Lewis. Heath said, "folks say I have a part of his property; but if I have, I'll be damned, if I don't have the rest."

Ethan J. Allen.—I was the officer who replevied the goods. I don't recollect having received any executions against Heath, for some time past. Have had executions against him. I have some now. I tried to find property; I found none. Was present when the goods were taken under the writ of replevin. I don't know much about the matter of the boots spoken of. I know there was some inquiry made for them.

- J. H. Mayborne.—I was at Lodi, the night or two before the sale to Defendants. I will not be certain that I ever saw this mortgage (here the mortgage heretofore set out, was handed witness) before. I saw the record. I was not present at the time of the sale. I saw none but my clients, when in Lodi.
- p. 43.

John N. Oliver.—I know the Plaintiff Lewis. Know of his buying goods of Smith, Pollard and Co., of Chicago. I am bookkeeper of that house. At the time Lewis sold to Alexander, the firm would not take Alexander's notes alone, for what Lewis was owing on former deal, and so Lewis signed with him. I gave Lewis and Alexander both notice when the notes were due. They have not been paid. We have a judgment against Lewis, for \$460 53-100; the judgment rendered in the Chicago Court of Common Pleas. (The notes above spoken of shown by witness.)

- Cross Examination.—Alexander made the payments of whatever has been paid on these notes. There are two endorsements. These notes were given on Lewis' original indebtedness. At the time Lewis sold to Alexander as I understood it. Alexander was to assume Lewis' indebtedness. I started to draw them for Alexander, but one of the firm spoke to me, and I drew them as they are. The endorsement which is erased, I made at the time we received a remittance from Alexander. I endorsed it immediately upon receipt of the money, but by order of the firm erased it, and the amount was applied on Alexander's book account. A letter accompanied the remittance; I don't know what the directions were. It is our custom when we receive money, if we have a book account, as well as notes, to apply remittances on the book account, instead of the notes.
- p. 44.

Hiram H. Bair.—I know of something being missing at the time of the replevin. I had been Clerk for Alexander. I said, "there is something wrong about those boots, and I will find them." I first knew of the Mortgage at the time the inventory was being taken, when John Hathorn talked of going in partner. At that time I overheard John Hathorn say, "If there is a Mortgage, I will not burden myself with the matter." Mr. Heath, John W. Jenkins, Solomon White, Hathorn, and myself, took the inventory. The sale to Hathorn and Heath was after the inventory was taken, a day or two. The store was closed while the inventory was being taken, but not at other times.

- Cross-Examined.—I helped to take the inventory at the time of the sale to Hathorn and Heath. It was a very fair inventory. I do not recollect the exact amount of the footings. J. K. Armstrong and I owned the store once. We bought of Lewis. After Alexander bought the stock he put in some \$1200 or \$1500 worth of new Goods. He kept up the stock better than I ever knew it before. The average sales would overrun I should judge \$40 or \$75 per day, while Alexander was in the store. Alexander took Hathorn's and Heath's notes in part payment. He told me he had received all of his pay. I know the stock of Goods well. I had been Clerk there all the while. Hathorn and Heath gave me their note for \$594, in place of a note I held against Alexander, and what Alexander owed me. The debt was partly for goods that had formerly belonged to me, and partly for services and labor as Clerk. I consider them
- p. 45.

amply good for the amount. I released Alexander on his note and my claim for this note. They paid Alexander; it must have been somewhere about \$3,500. I saw Alexander take the notes which they gave, and put them in his pocket book, and the Defendants took possession. I was present when the writ of replevin was served. Heath told us we must not take new goods. The Sheriff only called for old goods, and we clerks selected these as well as we could. There were no silk neck-kerchiefs in the inventory from Alexander to the Defendants. The clothing and summer goods had been laid away to keep them from the dust. W. R. Burdick was there p. 45. at the time of the replevy; he assisted in measuring goods; he was quite officious, quarrelled with Mr. Heath a good deal, and used a good many hard names.

S. A. Plummer, re-called.—It was on Saturday that I moved to Alexander's tenement. Alexander lived there too. Alexander was not in the streets as much, after his sale to Hathorn and Heath, as usual. (Defendants again object to the admission of evidence in regard to the acts and words of Alexander, subsequent to sale—objection overruled, and exception taken.) Alexander was there in the back room most of the time. I presume various persons had access to him, the Defendants and others. I know they did. Hawley came to buy stoves, Alexander went to the window opening into the store, and looked before he went out of his room. I thought from his manner he was looking out for breakers. I have heard Heath say he was hard up. I think I saw Mr. Mayborne in Lodi about the time of sale, but cannot say when or with whom. I thought I saw him with some of these parties on the Railroad track.

Cross-Examined.—I thought it was Mr. Mayborne; I might be mistaken; thought it was him or Mr. Burdick. It may have been Burdick. Other persons besides the p. 47. Defendants had access to Alexander in the back room—Esq. Robinson, Hawley. Jenkins, and others I don't remember.

Wm. H. Robinson.—I am a Justice of the Peace. I live in the town of Virgil, but not in the village of Lodi. I took the acknowledgment of a Deed from Alexander about the time of the sale; on Saturday, I think. I am in the village generally on Saturdays. (Defendants objected to admission of evidence, of Alexander's acts or statements, as before—objection overruled, and exception taken.) Alexander met me in the street; said he had been looking for me; wanted I should take the acknowledgment of a Deed. I went in with him, and made the Deed to one John W. Bicknell. Bicknell was not present. Yes, I think there was something said about not speaking about the Deed having been made. Lodi is a village in Virgil, of some 300 or 400 inhabitants.

J. W. Bignall.—I know Alexander. I am a brother-in-law of Geo. W. Alexander. (Objection to testimony in regard to acts and statements of Alexander, as before renewed—overruled and exception.) They say there was a Deed made out to me by p. 48. Alexander, of the place where I live. I did not see the Deed. The understanding was when Alexander bought the place, that it was for me, and I was to pay for it in work as soon as I could. Think Alexander may have owed me \$500. The place was called worth \$700 or \$800. Alexander owed me mostly for work. I had loaned him some money—loaned him \$41. I have his note still for \$41, besides what he owed me on book account. He owed me on book account some \$8 or \$10. I commenced working for Alexander the latter part of last winter, and worked until the 1st of November. I worked at two dollars per day. I have received very little from him. He has paid me \$100—perhaps a little more; perhaps a little less. He had a store account against me too for family groceries, and such like—somewhere about \$60—may have been more, may be less.

Cross-Examined.—I was sick when the Deed was made. Have been very sick. This is the first time I have been out since my sickness. I worked for Alexander some last winter. We have had no settlement. Don't know exactly how much he does owe me. I am a mechanic. I work at the sash and blind business.

p. 49. E. J. Allen, re-called.—Burdick was suggested by Hathorn and Heath, at the time of the replevy, to measure the goods. The Defendants themselves did not know all the old goods from the new. Burdick was called on by Armstrong and Bair to look up the goods.

PLAINTIFF RESTED.

EVIDENCE OFFERED BY THE DEFENDANTS.

E. P. Robertson.—This is my Docket. (Here witness produced a Justice's Docket.) I am a Justice of the Peace for the town of Virgil. I live in Lodi village. I have no other Docket. This is the entry and record in my Docket of a Chattel Mortgage from George W. Alexander to the Plaintiff Lewis, and of which I took the acknowledgment, as I testified in my previous examination by the Plaintiff, and is in the words and figures following:—

"GEORGE W. ALEXANDER }
TO } *Chattel Mortgage.*
"SETH LEWIS.

"Mortgage of all the Goods of every kind and quality—Prints, Clothing, Drugs, p. 50. "Groceries, Medicines, Ready-made Clothing, Dry Goods, Hardware, Crockery, and "all and singular, every article and articles, in the store formerly occupied by Seth "Lewis, and situated on Block 2, Lot 4, in Lodi; also, one span of horses, color bay, "medium size, black mane and tails, about eight years old; one horse power, planing "machine, tenanting machine, circle saw, and all machinery belonging to and at-

"tached to the shop for planing and purposes, and all other purposes. Said shop situate between John Pickett's dwellinghouse and Solomon White's warehouse, on the north side of R. R. Acknowledged this 22nd day of October, A. D. 1857, before me.

"E. P. ROBERTSON, J. P."

This is the only entry and record in my docket of a Chattel Mortgage from George W. Alexander to Seth Lewis.

Cross-Examined.—I don't remember when the Defendants looked at my docket. Think it was after the sale by Alexander to them. (The Defendants by their Counsel then made a motion to suppress the Chattel Mortgage offered by the Plaintiff from going to the Jury as evidence—motion overruled—Defendants except to ruling.)

p. 51. A. S. Babcock.—I was living in Lodi last December; recollect the day of the replevy. I know Alexander was in Lodi all of the week spoken of by witness for Plaintiff, except Wednesday. I did not see him that day that I recollect. I saw Alexander in and about the store during that week. On Saturday forenoon, the day spoken of by witness Plummer, I saw Alexander writing at the counting desk in the store. People were passing in and out all the time. I noticed no difficulty. Alexander was around as usual for all I saw. I had been at work for Alexander. Had had charge of the Lumber Yard belonging to Alexander. I saw Solomon White, Senr., and others, looking at the lumber, &c., and went to Alexander, to see why they were there, as they did not call on me. I went to him also about some other matters. Alexander told me he had sold the Lumber Yard—told me he had sold out all that he owned in Lodi, except the store building and the lot it stood on.

Cross-Examined.—I had been in the employ of Alexander four months. I should judge the value of Alexander's property to be about \$4,000.

p. 52. Charles B. Wells.—I am an attorney living in Geneva. Think I have seen the Chattel Mortgage, offered in evidence, before. It was some time in the latter part of October, or the first of November last. I don't recollect who handed it to me. He said Seth Lewis had sent him with it to me, and wanted my opinion whether it was good security. I gave my opinion, and handed it back to the man. (Quest.) "What opinion did you give?" (Objected to by Plaintiff—objection sustained—Defendants excepted.)

p. 53. Solomon White, Junr.—I know the parties to this suit. Know George W. Alexander. I was a clerk for Alexander while he owned the store. I clerked for him 26 days. Was his clerk when he sold to Hathorn. Helped to take the inventory. It was taken as all inventories are taken. The goods amounted to \$2,700. I saw notes passed over to Alexander. I know that Hathorn had a note against Alexander of some \$300. I know of a few pairs of thin boots belonging to the stock; they were hanging over the writing desk. Mr. Hathorn told me there would be no sale for them until next Spring, and I must take them down, and put them where they would be out of the way and safe. I took them down, and put them in a box under the counter. I was not present when they were inquired for at the replevy. I took down and put away some thin summer goods also, to keep them from dust, until there should be a sale for them. Alexander was about all the time the Goods were replevied. I saw Alexander the Thursday, Friday, and Saturday spoken of by former witnesses. He was in and out of the store, Friday. I saw him on the street on Saturday sometime. I saw him sometimes at the writing desk. I have seen Lewis in the store while Alexander had the store. We sold anything people wanted, like any retail store, if we had it, while Alexander had the store.

Cross-Examined.—I live with my father, Solomon White, Senr. I was in the store when Hathorn and Heath talked of buying in. I only know of one inventory. I never saw Mr. Mayborne there at that time. I heard reported around town that he had been there. At the time the inventory was taken, I helped Mr. Bair and Mr. Jenkins count. I saw Mr. Heath write and give one note to Alexander, and saw Hathorn write some. I don't know where Alexander slept Friday and Saturday nights. He slept at my father's I think, on Tuesday and Wednesday nights. I think he slept alone. Mr. Hathorn, I think was there that evening. He came for his wife, and stayed perhaps 15 minutes. I don't think he talked with Alexander five minutes. There were about \$3,000 of book accounts. I think perhaps \$2,000 of them good.

p. 54. Re-Direct Examination.—Mr. Alexander was up at my father's to straighten up his lumber book. It had been very badly kept, and needed straightening. Some of them were pretty hard debts. They will be old before they ever are collected. The book accounts were worth maybe \$1500. (Witness identified Alexander's handwriting.)

H. H. Bair.—I was present when Alexander made the sale to Hathorn and Heath, of the Goods. I was called upon by all of them to witness the sale. There were more Goods in the store at the time of the sale by Alexander to Hathorn and Heath, than when sold to Alexander by Lewis. At the time Lewis sold to Alexander, the store was in the name of Armstrong and myself. We had bought of Lewis some short time before; we had not made the payments, and Lewis sold to Alexander, and we assented to the sale. Alexander added maybe to the Stock while in his possession, some eight or ten hundred dollars. Palethorpe and I have bought from Hathorn and Heath. The Stock was valued at \$2,200, when we went in. The notes given by Hathorn and Heath to Alexander, must have overrun \$3,000. They assumed the liability of Alexander to me, as I have before testified to.

Cross-Examination.—I hold Hathorn and Heath's note still. Their invoice to me amounted to a little more than \$2,100. The goods replevied by the Sheriff amounted to about \$800. I can't be far out of the way in regard to the value of the goods reple-

- p. 55. vied. Hathorn and Heath had possession of the store some four weeks. Their sales averaged some \$300 per week. I may be mistaken in regard to the amount, should think that not far from the average amount of sales per week. I was clerk for Alexander, and sold goods for him. I should think the majority of his book accounts collectible; think I would undertake to collect them for 25 per cent. The debts were made by farmers generally.

Re-Direct Examination.—Hathorn and Heath calculated to do a cash business. They did some credit business. Hathorn and Heath's sales would average about \$25 a day. The service of the replevin writ, was \$500 damage to the store and its business, besides the property taken.

Solomon White, Junr., re-called.—I was clerk also for Hathorn and Heath until they sold out to Bair and Palethorp. I was there three weeks. Hathorn and Heath did a cash business. I don't recollect ever seeing more than \$25 in the till, as result of one day's sales. I drew off the day's sale one or two nights. I should think they would average \$10.

DEFENDANTS RESTED.

- p. 56. Stipulation between the parties hereto, read by the Counsel for the Plaintiff.

KANE COUNTY CIRCUIT COURT.

SETH LEWIS,

vs.

JOHN HATHORN & LOREN HEATH.

} *January Term of said Court for 1858.*

- p. 57. It is stipulated and agreed, that the Notes mentioned in the Chattel Mortgage from G. W. Alexander to said Lewis, dated October 23, 1857, were Notes given by said Lewis and said Alexander for Goods, purchased by said Lewis before he sold out to said Alexander, and were the same as mortgaged and in the store at Lodi, at time of the making said Mortgage, and that said Lewis was held as security on the same, and that Alexander has not paid said Notes, and are the same Notes as the Notes described in the Mortgage, and are given to pay the indebtedness originally contracted for said Goods, mentioned in the Mortgage. This stipulation to be used in each of the cases above entitled.

Geneva, February 8th, 1858.

HERRINGTON, PLATO, & PARKS, *for Plaintiff.*
MAYBORNE & SMITH, *Atty's for Hathorn & Heath.*

Here both parties rested; and this was all the evidence given on the trial of the above cause by either of the parties to the above entitled suit. And after argument of Counsel for the respective parties, the Court gave the following instructions on the part of, and in behalf of the Plaintiff.

No. 3. That any sale made for the purpose of hindering, delaying, or defrauding Creditors is void as to bona fide creditors.

No. 4. That while fraud cannot be presumed, yet it is capable of being proved by facts and circumstances, and if from all the facts and the circumstances in proof, the Jury believe from the evidence, that Heath and Hathorn purchased goods of Alexander for the purpose of cheating or defrauding Lewis, such sale was void, if Lewis was creditor of Alexander.

- p. 58. No. 4½. That if the Jury believe from the evidence, that Heath and Hathorn bought the goods in question subject to the Mortgage, then Lewis had the same right to take the goods of Heath and Hathorn that he would have had to take the goods from Alexander.

No. 6. If the Jury believe from the evidence that Lewis had a Mortgage from Alexander on the property in question, and that by the terms of the Mortgage, and that Heath and Hathorn bought the goods with a full knowledge of the execution of said Mortgage, and that they, Heath and Hathorn, made such purchase for the purpose of defrauding Lewis out of his security, then such sale was fraudulent and void.

(To the giving of which instructions on the part of and in behalf of the Plaintiff by the Court, the Defendants by their Counsel then and there excepted.) The Court then gave the following instructions on the part of the Defendants.

- p. 59. First. All conveyances of Goods and Chattels, where the possession is allowed to remain with the donor or vender, are *fraudulent per se*, and void, as to creditors and purchasers, unless the retaining of possession be consistent with the terms of the Deed or Conveyance, and unless the Mortgage from Alexander to Lewis authorized Alexander to retain possession of the Goods mentioned in the Mortgage, such possession was inconsistent with the terms of the Mortgage, and rendered void as to subsequent purchasers.

Second. That a Mortgage of Personal Property where the possession is allowed to remain with the Mortgagor, although binding between the parties, is nevertheless fraudulent and void as to subsequent purchasers, unless by its terms the mortgagor is allowed to retain possession of the Goods.

Seventh. That fraud is never to be inferred, but must be proved.

Eighth. If the Jury believe from the evidence in the case, that there was no such indebtedness existing between Alexander and the Plaintiff Lewis, as that mentioned in the Mortgage, but that it was other and different from that stated in said Mortgage, then that is a fact they ought to consider in arriving at the fact whether it was a fair and bona fide transaction between Lewis and Alexander.

The Court refused to give the following instructions asked for on behalf of the Defendants.

- p. 60. Third. If the Jury believe from the evidence, that Alexander continued to sell the goods with the knowledge and consent of Lewis after the execution of the Mortgage in question, and if such sales were inconsistent with, or not allowed by the terms of the Mortgage, such selling and consent will render the Mortgage inoperative and void as to the Defendants in this case, provided they purchased the Goods in good faith, and for a bona fide consideration.

Fourth. That a Mortgage of Personal Property which provides that the possession may remain with the vender, coupled with an implied right to sell, is of itself fraudulent in law, and void as to purchasers. And if the Jury believe from the evidence, that the Mortgage from Alexander to Lewis contained an *implied* authority in Alexander to sell the Goods mentioned in the Mortgage, such implied authority would under the Mortgage be void as to these Defendants; and if the Jury believe from the evidence, that Alexander sold said Goods from day to day with the knowledge and consent of Lewis after the execution of the Mortgage, such sales and consent are circumstances which the Jury may take into consideration, in construing the question of fraud.

- p. 61. If the Jury believe from the evidence, that the Mortgage in question was given to secure the payment of certain Notes executed by Alexander and Lewis, then in that case Lewis has no claim against Alexander by virtue of said Notes and Mortgage, unless he Lewis has paid said Notes, or some portion of them, and he Lewis had no right to take the property in question in consequence of his liability on the Notes.

If the Jury believe from the evidence, that the Chattel Mortgage offered in evidence does not contain the same description of goods, &c., as the one described on the docket of the Justice of the Peace who took the acknowledgment of the Mortgage, and that the said Mortgage was dated the 23rd day of October, A. D. 1857, and the acknowledgment was on the 22nd day of said October, then the said Mortgage so offered in evidence is invalid, and has no binding effect as against subsequent purchasers, and the Jury should find a verdict for the Defendants.

Seventh. If the Jury should find the issues in this case in favor of the Defendants, they will assess their damages, which will be the value of the Goods at the time they were replevied, and such further damages as the Defendants have sustained in consequence of the removal of their Goods.

To which refusal to give the instructions asked for by them, the Defendants excepted.

- p. 62. The Jury rendered a verdict for the Plaintiff for \$425.
Plaintiff remitted the \$425 damages. Court overruled motion of Defendants for a new trial; to which ruling of the Court the Defendants excepted; and pray this their Bill of Exceptions be signed, &c., which is done.

The following errors are assigned:—

The Court below erred in admitting improper evidence on behalf of the Defendant in Error.

The Court erred in excluding proper evidence offered on the part of the Plaintiffs in Error.

The Court erred in allowing the declarations and acts of Alexander subsequent to the sale by him to the Plaintiffs in Error to be admitted as evidence.

The Court erred in allowing the Chattel Mortgage to be admitted as evidence.

The Court erred in overruling the motion made by the Plaintiffs in Error to suppress the Chattel Mortgage, offered by Defendant in Error, and in not withholding it from the Jury as evidence.

The Court erred in giving the instructions asked for by the Defendant in Error.

The Court erred in not giving the instructions asked by the Plaintiffs in Error.

The verdict is contrary to Law, and the evidence in the case.

The Court erred in overruling the motion for a new trial.

The Court erred in rendering judgment for the Defendant in Error, when by the law of the land, the said judgment ought to have been for the said Plaintiffs in Error.

MAYBORNE & SMITH,

Attorneys for Plaintiffs in Error.

John Hathorn ^{vs}
Lorn Brath

Seth Lewis

Abstract of Record

Filed April 19, 1839

L. Deland
Clerk

Supreme Court of the State of Illinois, IN THIRD GRAND DIVISION.

JOHN HATHORN & LOREN HEATH, }
vs. } APRIL TERM FOR A. D. 1859.
SETH LEWIS.

POINTS AND BRIEF.

This Suit was commenced by Writ of Replevin, by the Defendant Seth Lewis, in December, A. D. 1857, in the Kane County Circuit Court, and was tried at the January Term of the said Court for 1858, before I. G. Wilson, Presiding, and a Jury, and resulted in a verdict for Defendant in Error.

The Property replevied was a part of a Stock of Goods of a Retail Country Store; and the value of the Goods replevied amounted in all to some \$800 or \$900 at the cost price. A full description of Goods replevied is set out on the first page of the printed Abstract in this case—to which the Court is referred. The Defendant in Error, Seth Lewis, was engaged as a country merchant or storekeeper, in the Fall of 1857, at Lodi, in Kane County, and had been for some years before; and on the 22d day of October, A. D. 1857, he sold the Store and Stock of Goods at Lodi, to one George W. Alexander, who up to that time had been a farmer by occupation, and owned a large and valuable Farm in De Kalb County, some five or six miles from Lodi. This he exchanged for the Stock of Goods in the Store of Lewis, and for his Store in Lodi in which the Goods were, and for his Book Accounts then outstanding and unpaid. The Stock of Goods in the Store, the Store, and the Book Accounts, sold by Lewis to Alexander, at the prices agreed on between them, amounted to some twenty-seven hundred dollars more than what they called the Farm worth, in the exchange. At the time of the sale of the Goods to Alexander, Lewis was largely in debt in Chicago, for goods purchased by him, and put into this Store at Lodi. These debts, to the amount of some twenty-seven hundred dollars, Alexander was to pay, or agreed to pay; and to secure the payment of these, Alexander on the 22d day of October, executed to Lewis a Chattel Mortgage on the entire Stock of Goods purchased by him of Lewis, on some other property which he owned in Lodi, and also on the Book Accounts. This Mortgage was recorded in the Recorder's Office of Kane County—a copy of which Mortgage, the acknowledgment of the same, and the entry made thereof on the docket of the Justice by whom the acknowledgment was taken, are fully set forth in the printed Abstract, on the first, second, and sixth pages thereof, to which the attention of the Court is directed, as this Mortgage is the source by and under which the Defendant Lewis claims title to the Goods replevied, and bases his right to the possession thereof. Alexander after making the purchase of Lewis took immediate possession of the Store, and at once commenced selling at retail the Stock of Goods therein to customers and purchasers in the usual way, and as is customary for merchants to do, without any regard to the Mortgage to Lewis, and with the full knowledge of Lewis, up to the time he made sale of his entire Stock to the Plaintiffs Hathorn and Heath, which was on or about the ninth day of December, A. D. 1857, and for the same he received full payment from them, at the time of sale. The Stock of Goods sold to the Plaintiffs in Error by said Alexander was such part of the Goods bought of the Defendant in Error as were then in the Store and unsold, with such Goods and Groceries as he had bought from time to time to keep up the assortment in the Store, and which had been mingled with those bought of said Lewis.

First Point. The Chattel Mortgage offered and admitted in evidence by the Court below, was void on its face—

1st. Because the Instrument purports to have been made, and is dated on the 23d day of October, A. D. 1857, when the acknowledgment before the Justice is dated October 22d, one day before the making and execution of the Mortgage by Alexander. Instruments of the character of this Mortgage are to be tested by themselves, and as they appear on their face, without the aid of explanatory evidence. Vide Record, p. 27-30.

2d. It is void on its face, and was not evidence for any purpose, because it does not describe the Goods mortgaged with sufficient distinctness, as it should have done—giving the quantity and description of each article included in the Mortgage, so that it could be readily ascertained what was and what was not embraced within it.

3d. It is void on its face, and it cannot be made or set up as the foundation of a title in any case, by the mortgagee, because it not only includes the Goods then in the Store, but all that the mortgagor might buy during the continuance of the Mortgage; a provision as unheard of, as it is fraudulent and destructive to the best interests and good faith of commercial dealing. By this provision the mortgagee held not only the property in existence, and in the possession of the mortgagor, at the time of the execution of said Mortgage, but all that he may subsequently acquire, whether he makes payment for it or not; and the mortgagor holds it against the just claims of the individuals who furnished it, thereby creating a lien that is to cut off and exclude all persons who may deal with or trust him with their property from collecting their claims, till such terms as the exacting demands of a heartless mortgagee are fully met and satisfied. Such unfair and unjust Contracts and Instruments have never met with favor from Courts, and we trust never will.

4th. This Mortgage is void, and cannot be used as evidence for any purpose, because it not only covers and includes the account books sold by the mortgagee to the mortgagor, but all debts, accounts, and notes, that he may hold or have at the time said Mortgage becomes due, without regard or reference to how made, or when, or what the consideration of them might be. Vide Record page 27. Book Accounts and Notes are not and cannot be the subject of a Mortgage, for the simple reason that Accounts and Notes are not property for such a purpose.

5th. This Mortgage is void in law, because it does not make any provisions for the property to remain in the possession of the mortgagor, yet he was allowed to retain and keep possession of it. The only provision in the Mortgage touching the possession of the property, is in these words—"To have and to hold, all and singular, the Goods and Chattels hereinbefore granted, bargained and sold unto the said party of the second part forever, said Goods and Chattels now remaining and continuing in possession of the party of the first part, in the said town of Virgil." Vide Record page 28. This is only descriptive of the place where the Goods were at the time of the making and executing of the Mortgage, but does not give the possession or provide for the possession to remain in the mortgagor, according to the provisions of the Statute, and Mortgages not containing such provision this Court has time and again pronounced void. Vide 3 Gill R., page 455; Rhines vs. Phelps; 11 Illinois 617; 1 Scam. 296.

6th. This Mortgage was void in law, because it purports upon its face to be given to secure the payment of certain Promissory Notes, or of the sum of money therein specified, to the mortgagee, when the evidence shows—(see stipulation set forth on page 56 of Record, and witness Oliver, page 43, to which the Court is referred)—that these were debts that the mortgagee owed, or was holden for, and were due to third parties, but by arrangement made between the mortgagor and mortgagee, the mortgagor was to pay. Yet the Mortgage does not so state, or define the mortgagor's liability, but describes them as notes payable to the mortgagee, when in truth and in fact not a dollar was to be paid to him. Under the Mortgage, the mortgagee could claim the payment himself, if the mortgagor had made payment to the creditors of Lewis, as by their agreement he had promised to do; and in this manner Lewis held a Mortgage to secure to him the payment of certain sums of money, and also had him held with him as one of the makers of the notes given to third persons to pay these notes; and he might at any time assign the Mortgage, or fail, or die. It also had the effect to hinder and delay creditors, as it assumed and asserted a debt to Lewis, when he did not owe Lewis individually a dollar, thereby apparently doubling up his indebtedness, and multiplying his liability twofold; it was also another and different debt than that set out in the Mortgage, and therefore made it void.

7th. This Mortgage was void in law, because it was understood, impliedly at least, by the parties to it, if not expressed, that the mortgagor should continue to sell the goods mortgaged contrary to the express terms of the Mortgage; if this cannot be gathered from the face of the Mortgage itself, still the goods were left in his possession, and he was allowed to deal with them, and sell and dispose of them, as a merchant to his customers, down to the time he sold to the Plaintiffs in Error. Such transactions always have been pronounced a fraud upon creditors and purchasers, and always will be. Vide 18 Ill., page 401-4; Comstock's R., page 588.

8th. The Defendant in Error is estopped by his own act from setting up the Mortgage and claiming title under and by virtue of it, to the Goods therein described, from the fact, that when he sold the store, and the stock of goods therein, to the mortgagor, and allowed him for nearly two months to go on and sell goods to his customers, and in the presence of the mortgagee, at the rate of \$40 to \$70 per day, (vide testimony

of Hiram H. Bair, p. 44 of Record,) the Plaintiffs in Error had a right to assume and believe that the mortgagee did not rely on his Mortgage, or claim any title by virtue of it, for he allowed the mortgagor daily to sell and dispose of the property mortgaged, as if it was his own; and if he assented and allowed him to sell to customers the property mortgaged, he had the same right to sell and they to purchase all the property in a bulk, as they had to purchase it by individual articles, or in small quantities. Lewis could not allow Alexander to have possession of the property, and deal with it as though it was his own property, and then assert title to it by virtue of his Mortgage; such acts and conduct will not stand against creditors or purchasers. Vide 4 Comstock, page 588; 18 Illinois, page 401.

9th. This Mortgage was not evidence for any purpose, from the fact that the entry made in the Justice's docket, was not such an entry as is required to be made by the Statute, (Vide R. S. of Scates, Treat and Blackwell, page 813, sec. 2,) in this,—it does not describe the property mentioned in the Mortgage, it being in the words and figures following, to wit:—

“GEORGE W. ALEXANDER, }
TO } *Chattel Mortgage.*
SETH LEWIS.

“Mortgage of all the Goods of every kind and quality—Prints, Clothing, Drugs, Groceries, Medicines, Ready-made Clothing, Dry Goods, Hardware, Crockery, and all and singular, every article and articles, in the store formerly occupied by Seth Lewis, and situated on Block 2, Lot 4, in Lodi; also, one span of horses, color bay, medium size, black mane and tails, about eight years old; one horse power, planing machine, tenanting machine, circle saw, and all machinery belonging to and attached to the shop for planing and purposes, and all other purposes. Said shop situated between John Pickett's dwellinghouse and Solomon White's warehouse, on the north side of R. R. Acknowledged this 22d day of October, A. D. 1857, before me.

“E. P. ROBERTSON, J. P.”

Vide Record, page 50, and Abstract pages 6 & 7. The entry made in the Justice's docket would show another and different Mortgage, for it entirely omits this part of the Mortgage, to wit:—“Also, all the goods and materials of every kind and description belonging to said mortgagor in said store, during the continuance of this Mortgage. Also, all accounts and notes, book accounts, and indebtedness or debt of any individual or individuals, in favor of said mortgagor, sole and belonging to the party of the second part; also, all the goods which may be in said store at the time when this Mortgage shall be due and payable.” (Vide Record, page 28.) The entry made in the Justice's docket should be in the precise terms, and should agree in description in every respect with the Mortgage, describing the same property in the same terms, and just as full and no fuller than they are described in the Mortgage; and unless it does this, the Mortgage is void, and is not evidence for any purpose, and gives and conveys no rights to the mortgagee. (Vide R. S., page 813, sec. 1.) And in this case this is not done, but one-half of the descriptive part of the Mortgage is omitted. This provision of the Statute must be strictly complied with, and fully conformed to, before it can give any validity to the Mortgage. If such looseness is to be tolerated and sanctioned, the Statute becomes a dead letter, and the entry is of no use, as it gives no correct information of the property mortgaged, as it was intended it should. Vide 18 Illinois, page 400-2.

10th. The necessary tendency and effect of this Mortgage was to hinder and delay creditors, and it is therefore void as to creditors and purchasers. It was intended by the parties to it at the time it was made, that the property mortgaged should be exposed for sale and sold. The property was bought for that purpose and that only, as the mortgagee was fully advised; and it was intended that the mortgagor should treat and use it as his own property, and sell it, and when sold, the avails to be his own. Vide 17 Wendell R., page 492; 2 Pickering, page 129.

Second Point. The Court erred in admitting the declarations and acts of Alexander, after he had sold to the Plaintiffs in Error, to be given in evidence to the Jury. His statements and acts were not evidence for any purpose against them, after he had sold to them—and their rights and interests should not have been prejudiced or jeopardized by them; and the Court should have excluded them, he having received his pay for his goods, and given full possession to the Plaintiffs in Error, he had no longer any interest in common with them, but it was then his interest to do all in his power to prejudice their rights to them, to avoid the penalties of the Statute for selling mortgaged property. He also might have another and additional reason for so doing, which might be to aid Lewis in holding them, and thereby have them applied in payment of his liabilities on Lewis' notes; he might be a witness for Plaintiffs in Error, but not for Defendant in Error. And furthermore, all the acts and statements of Alexander tending to show fraud, which were admitted as evidence under the protest of the Plaintiffs in Error, were acts and statements made by him, after the commence-

ment of this suit by the Defendant in Error. See return of Sheriff, R., page 11; Plummer's testimony, R., page 32; White's testimony, R., page 52.

Third Point. The evidence shows no fraud on the part of the Plaintiffs in Error for they paid Alexander all that the goods were worth, to wit: some \$3,500 or \$4,000 for them, as Bair testifies, and he was one of the witnesses for the Defendant in Error, called and sworn by him, and one to whom Lewis had sold the goods before he made sale of them to Alexander—and fraud is not to be presumed but must be proven, and it requires the same amount of evidence to establish fraud as it does to establish the act of obtaining goods under false pretences in a criminal prosecution for that offence. (Vide 4; Scam. 97. The Court also erred in admitting the hearsay evidence presented in answers of witness Armstrong in regard to acts of Plaintiffs in Error. Vide Record page 31.

Fourth Point. The Defendant Lewis had no right or claim under the Mortgage, or power to take the goods, for the reason that the Mortgage was given to secure him against notes and claims that he was holden for, and had signed with Alexander as surety for him, as John N. Oliver testified, (Vide Record, page 43 & 44; and stipulation, page 56,) and which notes he had not taken up or paid, though Alexander had paid a part of them, and until this was done, Lewis had no claim on him or the property mortgaged; for no principle of law is better or more fully settled, than that a surety cannot maintain an action against his principal, till he has paid or taken up the debt. Vide Bonham vs. Galloway, 13 Ills., 68; Shepard vs. Ogden, 2 Scam. 257; Davis vs. The People, 1 Gill, 409.

Fifth Point. Alexander was a man of considerable property, besides these goods, as was testified to by A. S. Babcock and others, and not contradicted. (Vide Record page 51 and 52.) He estimated him to be worth some \$4,000, so that Lewis' debt was not endangered, or he injured by the Plaintiffs in Error buying the goods, and Alexander held the notes of Hathorn and Heath to the amount of some \$3,000. (Vide Record, page 54.) And there is no pretence that Hathorn was not perfectly responsible, and a man of property.

Sixth Point. The testimony of Stewart, Thrall, and Burdick, show that they had a great deal of feeling, and entertained strong and bitter feelings against the Plaintiffs in Error, and had taken sides and become partisans, and as such they testified, and so manifest was this on the trial, that it ought and doubtless would have weakened, if it had not had the effect to lead the Jury to wholly disregard their evidence, had not the Court allowed the statements and conduct of Alexander to have been given and received as evidence, and thereby occasioned the Plaintiffs a great wrong and injury.

Seventh Point. The Court should have sustained the motion which was made by the Plaintiffs in Error, to suppress the Chattel Mortgage and withhold it from the Jury, (See Record, page 50,) for the reasons above stated, and had the Court done this, then the Jury must have found their verdict for the Plaintiffs in Error under the issue formed, for the Defendant in Error could no longer legally claim any rights, powers, or privileges by virtue of the Mortgage, and it was not such an instrument as the Plaintiffs in Error or any other person was required to respect or regard, as it made no provisions for the property mortgaged, remaining in the possession of the mortgagor, and it was not properly entered on the Justice's docket, or properly and sufficiently described in the docket, or Mortgage, and it was the design and intention of the mortgagor and mortgagee that the property should be sold by the mortgagor, and he had been doing so as fast as he could ever since the making of it, with the knowledge and assent of the mortgagee, and he purchased with this object, as the Defendant in Error well knew.

Eighth Point. There is no evidence to warrant the verdict of the Jury, and the Court should have granted a new trial. By no testimony can it be said that the purchase of the Goods in the Store was made by the Plaintiffs in Error, for the purpose of defrauding the Defendant Lewis, nor did it place him in any worse condition than he was in before, as the goods were sold for all they were worth, and he had received in exchange for them, good paper, that his creditors would gladly and willingly have taken; paper that was much better than Lewis', and that his creditors would have cheerfully accepted and taken in exchange for his, dollar for dollar. Then how was he wronged or injured? Alexander had been induced by Lewis to buy a stock of old goods, and pay a big price for them, much more than they were worth, as Lewis knew at the time, but Alexander knew very little about mercantile business or trans-

actions, and Lewis took advantage of his ignorance. But he soon learnt that he had entered on a branch of business that he knew but little about, and he was anxious to get out of it as soon as he could, and the best way he could, and therefore sold as he did to the Plaintiffs in Error; and because he did so, and did not allow Lewis to strip him of all he had left, and prevent his creditors from getting their just claims and demands against him; for the Court will bear in mind that he had added to the stock purchased by him of Lewis some twelve or fifteen hundred dollars worth of new goods, (see the testimony of H. H. Bair, page 45 of Record.) Lewis flares up and makes a great cry about the sale, and seeks to regain the possession of the goods, and claims that the acts and conduct of the Plaintiffs are fraudulent, because they have purchased and given their obligations to the full amount of the property bought, which are good and collectible, and by doing so, have given to Alexander an opportunity to sell by wholesale to responsible parties, the property that the Defendant was allowing him to sell by retail, (and often to irresponsible parties.) He stood by and saw the goods being sold at retail, and made no objections, though this was contrary to the letter of the instrument, and the intentions of the parties—if the Defendant in Error can claim any rights under it—but all this time he never utter one word of complaint, or even made an objection. If the purchase was made by the Plaintiffs in Error for the purpose of defrauding Alexander's creditors, it is a little surprising that his creditors have not endeavored to hold the goods, by asserting their claims, for they certainly could lay a far better claim to them, and one that would meet with a more ready recognition in a Court of Justice, than that of the Defendant Lewis.

Ninth Point. The instruction marked No. 3 given by the Court, for Defendant in Error, should not have been given, for he had not shown himself a creditor of Alexander's, or at least such a one as could claim any rights by virtue of the Mortgage.

The Court erred in giving the instruction marked No. 4, asked by Defendant in Error, and it was not law in this case, for Lewis did not lay a claim as creditor of Alexander except by virtue of his Mortgage, and by that only.

The Court erred in giving the instruction marked No. 4½, asked by the Defendant in Error, and it was not law, for the reason that Lewis had no right to the goods until such times as he had paid the debts that he had become surety for with Alexander.

The Court should not have given the instruction marked No. 6, asked by the Defendant in Error, because it is so drawn that its meaning is not clear, from its words; and secondly, Lewis had no rights under his Mortgage, it being void. By this instruction the Court impliedly asserted and instructed the Jury, that it was a valid Mortgage, and in fact took the case from the Jury, and pronounced the verdict for them in the case.

The Court should have given the "third" instruction asked by the Plaintiffs in Error, for it correctly states the law in this case, and if this instruction had been given the Jury must have found a verdict for the Plaintiffs in Error.

The "fourth" instruction asked by Plaintiffs in Error was law, and should have been given by the Court.

The other instructions asked by the Plaintiffs in Error should have been given by the Court, as they correctly state the law, and had they been given by the Court, the Jury must have found a verdict for the Plaintiffs in Error, if they had paid any regard to the said instructions, and if they had not, then the Court would have granted a new trial.

The verdict of the Jury was against the law in the case, and against the evidence, and should have been set aside by the Court, and a new trial granted to the Plaintiffs in Error. And the Court erred in not granting a new trial, because he had allowed improper evidence to go to the Jury, on the part and in the behalf of the Defendants in Error, and had excluded proper evidence offered on the part of the Plaintiffs in Error; and also because he had erred in giving improper instructions on the part of the Defendant in Error, and had refused to give instructions on the part of the Plaintiffs in Error that were proper, and stated correctly the principles of law governing this class of cases; and because the verdict was against the law and evidence in the case, and by this act would have restored to the Plaintiffs in Error to some extent the rights that they had been deprived of by the wrongful ruling of the Court on the trial of this case; for if this Mortgage, in view of all the evidence in the case, and circumstances surrounding it, is such an instrument as will be enforced and respected by Courts of Justice, then a door will be thrown open wide enough to admit of transactions that must have a direct tendency to deceive and defraud creditors and purchasers, and indirectly sanction acts and conduct that will lead to the most deplorable results, and ultimately unsettle and undermine the well-established and approved principles of the law in this class of cases.

MAYBORNE & SMITH,

Attorneys for Plaintiffs in Error.

Paver curd

- 1st Joint or Several
- 2^d The sum mentioned in the affidavit is greater than the amount of the note
- 3^d The appellant did not offer to pay what was due
- 4th The sitting aside a Judge is a matter of discretion

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John Watson and
Ann Heath

Seth Lewis

Prin & Brief

Disposed