No. 14744

Supreme Court of Illinois

Warner

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vs.

Cushman, et al

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STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 239

J. W. Middleton & Co., Stationers, 196 Lake St.

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Warner
vs
Cushman et als

Depositions

Filed May 5. 1863
S. Selden
Clk

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

FRANCIS WARNER
vs.
CUSHMAN, TRUE & WATERMAN.

BRIEF OF DEFNDANTS IN ERROR.

The facts are these:

March 17th, 1860, defendants filed affidavit in replevin, alleging that they were justly *entitled to the possession* of 7,000 bushels of corn detained by plaintiff, &c.

Fairfield & Weld were warehouse men in Ottawa during November and December 1st, 1859.

In November, 1859, an agreement was made between Cushman, True & Co., the plaintiffs, and Fairfield & Weld, by which Cushman, True & Co. agreed to advance to Fairfield & Weld money to buy corn. The corn, when purchased, was to be the property of Cushman, True & Co., and should be ship-

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That Fairfield & Weld purchased corn under the agreement. Cushman, True & Co. advanced $3,800 for that purpose. That on the 22d day of December, 1859, they had in cribs about 14,000 bushels of corn, being the same corn in controversy, and other corn belonging to Herford, Olmstead, Umlauf, Harding, and others, who had stored corn with them.

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On the 1st day of March, 1860, Fairfield delivered the possession of the corn in the cribs to Cushman, True & Co., as the corn purchased for them, and for the purpose of satisfy-

ing the aforesaid corn receipts. And Cushman, True & Co. took possession of the cribs and corn, and Cushman, True & Co. placed a fence around the cribs.

On the 9th of March, A. D. 1860, Warner, as Sheriff, took all the corn out of the possession of Cushman, True & Co. by breaking down the enclosures and taking the corn. This he did by virtue of an execution issued from the Superior Court of Chicago, in favor of *William Martin* vs. *Fairfield & Weld*, which came to the hands of the Sheriff December 22d, 1859.

The action of replevin is a possessory action, and if Cushman, True & Co. had the right of possession of this corn as against the Sheriff, they can maintain this action.

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longing to them. Their possession was lawful for this purpose.

Had the Sheriff any right to take this corn, or any of it, from the possession of Cushman, True & Co.? We insist that he had not, because; first, the 7,000 bushels was the property of Cushman, True & Co.

Second, The balance of the corn in the cribs belonged to Herford, Umlauf, Olmstead and the others, who had stored it.

There was no lien upon this corn from the time the Sheriff received the execution, because Fairfield and Weld did not own any of the corn, and the lien could only attach to their property.

The only question is, if Warner, without right, took a quantity of corn from the possession of Cushman, True & Co., and of which they were lawfully in possession, and of which the actual ownership was in them, Olmstead, Herford and others, could not Cushman, True & Co. replevy the share belonging to them, because in any event, and as security, the ownership, the possession and the entire control of the corn was in them until sold, and they were in the same position as others holding warehouse receipts.

If the corn of Cushman, True & Co. was mixed with the corn of Olmstead, Herford and others, by the consent of all parties, then the several proprietors had a property in common in the whole, according to their respective portions put in mass.

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In such case Fairfield & Weld had no interest in the corn upon which the lien of the execution could attach. The corn

had been delivered to Cushman, True & Co. for the purpose of having their portion of the corn separated from the mass, and the residue delivered to the owners. The possession of Cushman, True & Co. was a lawful possession. They had the absolute possession and the absolute right to it, except as against Olmstead, Herford, Umlauf and the other storers; and in replevin, absolute possession of property, combined with the absolute right to it, except as against some person other than the defendant, will entitle the plaintiff to maintain his action. This was expressly decided in

Johnson *vs.* Carnly, 10 N. Y. 6 Seld. 520.

The point made by Judge Leland is, that because Cushman, True & Co. had the possession of their own corn, but had it mixed with the corn of Umlauf, Herford, Olmstead and others, all of which was in their possession, that, therefore, when Warner took the whole from them, without any right, that they could not replevy their own share, because it was mixed.

But the corn belonging to Cushman, True & Co. was not mixed with their consent. Their consent was an affirmative fact to be proven by the party alleging it. The only evidence on this point is the testimony of Fairfield, who testified that Cushman told him before the corn was purchased that he wanted it kept separate, and not mixed with other corn. Fairfild said it would be inconvenient, but did not say he would not keep it seperate, and did not give Cushman to understand that he would not do it. It is said that True passed by the warehouse on his way to his meals. What opportunity did that give him to know that the corn was mixed? He did not know of whom Fairfield & Weld were buying for Cushman, True & Co., and seeing corn unloaded, even if he did see it, of which there is only a slight presumption, would afford him no information on the subject.

It is insisted that the 3d, 4th, 5th and 8th instructions given for plaintiffs in the Court below are wrong.

The 3d and 4th instructions are *perhaps* not technically correct, but this is no ground for reversing this judgment.

If substantial justice has been done, even if improper instructions had been given, a judgment will not be disturbed.

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There was not the slightest conflict of testimony upon two points. First, That Cushman, True & Co. had the absolute possession of the corn at the time it was levied upon by defendant, Warner.

Second, That the only right which Warner had to take the corn from them was the execution *vs.* Fairfield & Weld. Hence no injury could have arisen in this case from the giving of these instructions.

But an entirely conclusive answer to the obligation of counsel to the 3d, 4th and 5th instructions is this: The only reason why these instructions are objected to is, that the gist of the 2d plea is not that the corn was the property of defendant, Warner, but that it was not the property of plaintiffs; and that the gist of the 3d plea was not that the corn was the property of Fairfield & Weld, but that it was not the property, and that the plea ought to have been treated simply as a denial of the property, of the plaintiffs in the corn, and that defendant ought to have the benefit of such a construction of the pleas. But he need not have the benefit of three pleas of precisely the same kind. The 4th plea is simply a denial of property in the plaintiffs. Under this plea they had all the benefit of the construction claimed for the 2d and 3d pleas.

In no possible view of the case could defendant below have been prejudiced by the giving of those instructions. These suggestions apply to the 5th instruction, but that instruction is technically correct. The 5th plea was a plea of justification. That the property was the property of Fairfield & Weld, and taken under an execution against them. Replication that the corn was not the property of Fairfield & Weld. This was the issue. Of course, an instruction, that if the jury found that the property was not the property of Fairfield & Weld they must find the issue for plaintiffs, was correctly given.

The 8th instruction was correctly given. That Cushman, True & Co. had possession of the corn when levied upon was not controverted. Now the question was, was their possession accompanied by such an interest in the corn as would entitle them to maintain this action? For that purpose a right to hold the corn as collateral security was sufficient.

This 8th instruction does not tell the jury that if Cushman, True & Co. had a right to hold any part of a mixed mass as security, that in that case they could maintain this action for such proportion of the mass. But it tells them that if they had the right to hold the very corn replevied as collateral security, that is sufficient to maintain this action so far as the question of ownership is concerned. If by reason of the corn replevied being mixed with corn of others, its identity was lost, so that it could not be replevied, that would be just as good a reason why the identical corn could not be held as collateral security. That this was the view of the Court and the understanding of the jury must be manifest from the 1st and 2d instructions given for defendant below.

The case clearly shows that the corn in the cribs was the property of Cushman, True & Co., Olmstead, Herford and other storers; that none of it belonged to Fairfield & Weld; that Fairfield & Weld had delivered the possession of the

corn to Cushman, True & Co., who by receiving it became liable to account to the other owners for their respective portions, and that Warner, by virtue of an execution against Fairfield & Weld, which was no lien on the corn, took forcible possession of the corn. Under these circumstances the right of Cushman, True & Co. to regain possession of the corn as against Warner, in this form of action, seems to us clear and indisputable.

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Certiorari

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Affi- bnif

Filed May 5. 1865
D. Lacaze
Clk

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The point made by Judge Leland is, that because Cushman, True & Co. had the possession of their own corn, but had it mixed with the corn of Umlauf, Herford, Olmstead and others, all of which was in their possession, that, therefore, when Warner took the whole from them, without any right, that they could not replevy their own share, because it was mixed.

But the corn belonging to Cushman, True & Co. was not mixed with their consent. Their consent was an affirmative fact to be proven by the party alleging it. The only evidence on this point is the testimony of Fairfield, who testified that Cushman told him before the corn was purchased that he wanted it kept separate, and not mixed with other corn. Fairfild said it would be inconvenient, but did not say he would not keep it seperate, and did not give Cushman to understand that he would not do it. It is said that True passed by the warehouse on his way to his meals. What opportunity did that give him to know that the corn was mixed? He did not know of whom Fairfield & Weld were buying for Cushman, True & Co., and seeing corn unloaded, even if he did see it, of which there is only a slight presumption, would afford him no information on the subject.

It is insisted that the 3d, 4th, 5th and 8th instructions given for plaintiffs in the Court below are wrong.

The 3d and 4th instructions are *perhaps* not technically correct, but this is no ground for reversing this judgment.

If substantial justice has been done, even if improper instructions had been given, a judgment will not be disturbed.

Deshon *vs.* Shorr, 19 Ill. 59.
Newkirk *vs.* Cone, 18 Ill. 454.

There was not the slightest conflict of testimony upon two points. First, That Cushman, True & Co. had the absolute possession of the corn at the time it was levied upon by defendant, Warner.

Second, That the only right which Warner had to take the corn from them was the execution *vs.* Fairfield & Weld. Hence no injury could have arisen in this case from the giving of these instructions.

But an entirely conclusive answer to the obligation of counsel to the 3d, 4th and 5th instructions is this: The only reason why these instructions are objected to is, that the gist of the 2d plea is not that the corn was the property of defendant, Warner, but that it was not the property of plaintiffs; and that the gist of the 3d plea was not that the corn was the property of Fairfield & Weld, but that it was not the property, and that the plea ought to have been treated simply as a denial of the property, of the plaintiffs in the corn, and that defendant ought to have the benefit of such a construction of the pleas. But he need not have the benefit of three pleas of precisely the same kind. The 4th plea is simply a denial of property in the plaintiffs. Under this plea they had all the benefit of the construction claimed for the 2d and 3d pleas.

In no possible view of the case could defendant below have been prejudiced by the giving of those instructions. These suggestions apply to the 5th instruction, but that instruction is technically correct. The 5th plea was a plea of justification. That the property was the property of Fairfield & Weld, and taken under an execution against them. Replication that the corn was not the property of Fairfield & Weld. This was the issue. Of course, an instruction, that if the jury found that the property was not the property of Fairfield & Weld they must find the issue for plaintiffs, was correctly given.

The 8th instruction was correctly given. That Cushman, True & Co. had possession of the corn when levied upon was not controverted. Now the question was, was their possession accompanied by such an interest in the corn as would entitle them to maintain this action? For that purpose a right to hold the corn as collateral security was sufficient.

This 8th instruction does not tell the jury that if Cushman, True & Co. had a right to hold any part of a mixed mass as security, that in that case they could maintain this action for such proportion of the mass. But it tells them that if they had the right to hold the very corn replevied as collateral security, that is sufficient to maintain this action so far as the question of ownership is concerned. If by reason of the corn replevied being mixed with corn of others, its identity was lost, so that it could not be replevied, that would be just as good a reason why the identical corn could not be held as collateral security. That this was the view of the Court and the understanding of the jury must be manifest from the 1st and 2d instructions given for defendant below.

The case clearly shows that the corn in the cribs was the property of Cushman, True & Co., Olmstead, Herford and other storers; that none of it belonged to Fairfield & Weld; that Fairfield & Weld had delivered the possession of the

corn to Cushman, True & Co., who by receiving it became liable to account to the other owners for their respective portions, and that Warner, by virtue of an execution against Fairfield & Weld, which was no lien on the corn, took forcible possession of the corn. Under these circumstances the right of Cushman, True & Co. to regain possession of the corn as against Warner, in this form of action, seems to us clear and indisputable.

GLOVER, COOK & CAMPBELL,
For Defendant in Error.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

FRANCIS WARNER
vs.
WILLIAM H. W. CUSHMAN. } *Brief of Plaintiffs in Error.*

It is not a disputed point in this case, that the corn replevied by the plaintiffs was at the time thereof actually mixed with that of several other persons who had stored with Fairfield & Weld, and that the very corn of these other persons, and which never had been that of the plaintiffs, was actually taken by the coroner on the writ. If our views of the law of this case are correct, it is not material to consider whether this admixture had, in point of fact, been acquiesced in by the plaintiffs before the commencement of this suit. If, however, this, in fact, be so, then in no possible point of view—not even admitting that the ruling of the Court below, at plaintiff's request, was right—can the plaintiffs recover. It seems to us that there is no real question in this case, and that the plaintiffs cannot properly maintain this action, allowing them the benefit of every position they claim the evidence tends to prove. Although there might have been some conversation between Cushman and Fairfield about keeping the corn of plaintiffs separate from that of other storers, it is manifestly apparent that the idea was never seriously entertained by the plaintiffs that Fairfield & Weld should do so. It was rather a speculative inquiry on the part of Cushman whether such a thing was practicable, than a thought to be seriously entertained. There can hardly be said to be a shadow of a doubt, that the plaintiffs did, before this suit was brought, acquiesce in the admixture of the corn; all there is in the record to countenance the contrary idea, is the following statement of Fairfield; "When the arrangement to advance money was made, Cushman requested Fairfield to keep the corn purchased with money furnished by plaintiff separate. Fairfield said it would be inconvenient to do so; made no agreement that he would do so: and did not, in fact, do so, but mixed it." On the contrary (if it can be called the contrary), it appears that the universal custom in Ottawa of doing a grain and produce business, is to mix the corn of different storers: that True, one of the plaintiffs, passed the cribs daily, and knew just what was being done; that the grain receipts mentioned in the receipts dated Dec. 22d, 1859, were not for the real amounts of corn purchased

and received in store by Fairfield & Weld, but receipts for assumed amounts, as security for a loan. There were no 5000 bushels of corn in the cribs before December 1st, 1859. Fairfield says there was only a small amount placed in the cribs in the latter part of November, 1859; and Olmstead says his corn was the first put into the cribs. The corn receipts given the plaintiffs, for 5000 bushels, dated November 23 and 28, were fictitious—that is, the corn was not yet purchased: but they were given in advance, to secure money at the time it was purchased. Whenever a sum of money was borrowed, a warehouse receipt was issued for corn in store before the corn was bought with the money, as collateral security for it. The notes, if they had been introduced in evidence, would undoubtedly have corresponded in date with the warehouse receipts. The striking out of the receipts, by True, the words "at the owners' risk," shows that there was no particular 7000 bushels of corn in the cribs owned by plaintiffs, which, if destroyed by casualty, would have entitled Fairfield & Weld to a credit for its value on the notes they had given for the money borrowed of the plaintiffs, or would have injured the value of the receipts as security, except *pro tanto*, by reason of an apportionment of the loss among all the storers. The giving of the notes, including more corn in the grain receipts than the money loaned paid for, the taking other notes, also, as collateral security for the indebtedness, the payment of insurance, and all other expenses, by Fairfield & Weld, the erasure of the words "at owners' risk" from the grain receipts, the payment of one and one-half per cent a month for the use of the money, all shew that the grain receipts were issued as security for the loaned money, and that the corn mentioned in them was not intended to be kept separate, but was understood to be so much corn mixed with that of others. The corn mentioned in the receipts could not have been all delivered without a delivery of some of the corn of other storers. Whatever, therefore, may have been the conjectured inquiries made by Cushman of Fairfield about keeping separate the corn purchased with the money borrowed at the banking house of Cushman, True & Co., or whatever may at first have been the understanding, the idea, if ever seriously entertained at all, was abandoned long before this suit was commenced, and the plaintiffs had merely, what is so clearly apparent by an examination of the receipt of December 22, 1859, certain warehouse receipts for corn mixed by the warehouseman with that of others, and certain promissory notes, as collateral security for the notes which Fairfield & Weld had given them for money borrowed. It is not a question of conflicting evidence passed upon by the jury. There is no conflict. If this be so, then, by the law, as settled in the case of *Low* vs. *Martin*, (18 *Ill.*) the plaintiffs cannot recover. But a distinction is sought to be taken between the case of *Low* vs. *Martin* and the one at bar, in this, that if the plaintiffs did not acquiesce in the mixing of the corn purchased with the money loaned by them (and which they were to have as security for the money) with that of other storers with Fairfield & Weld, they had the legal right to replevy out of the mixed mass as much corn as was purchased by Fairfield & Weld with the money they borrowed of the plaintiffs. The doctrine that one who had left corn to be stored with a warehouseman, under an agreement that it should be kept separate, might maintain replevin against the warehouseman for an equal

quantity of corn that was mixed, might seem to a casual observer to be sustained in the case of *Low* vs. *Martin* (18 Ill) Such might seem to be the idea intended to be conveyed by the Judge who delivered the opinion, and it was this construction of the dictum which is in some instances introduced in the rulings of the Court below; but the idea of there being other persons besides the warehouseman Low and the storer Martin, whose rights might have been affected, did not probably occur to the Judge who wrote the opinion, and the idea of the dictum undoubtedly was, that the wrongful admixture should be one which would make the whole property, the property of the plaintiffs in replevin, because that is the principle of the authorities cited as to the effect of what is called the wrongful admixture. The position assumed, that the parties storing with a warehouseman are tenants in common, with a proportion, continually shifting every time one removes his deposit, or as the warehouseman sells a portion of the amount he owns himself, is necessarily inconsistent with the idea that the action can be maintained for the undivided share or interest. All authorities agree that an action of replevin can only be maintained for property capable of identification, and delivery by the Sheriff to the plaintiff, and never by a tenant in common for an undivided share or interest in chattels, and this principle is settled in the above case of *Low* vs. *Martin*. It is, then, only an admixture which destroys the relation of tenants in common between the plaintiff in the replevin and the warehouseman, which may make it *otherwise*, as mentioned by Judge Skinner, and this of course can only be done by such an admixture as destroys this relation, by making the plaintiffs in replevin the owner of the whole, and this can only be so where the plaintiff in replevin and the warehouseman were the only owners of the mixed grain. It is not necessary to argue that if Olmstead, Herford, Harding and others were really the owners of an undivided interest in the corn in the three cribs, as mentioned in *Low* vs. *Martin*, that Cushman and Fairfield could not make any arrangement to deprive them of said interest without their consent, or without their fault, so that the plaintiffs could become the owners of the whole mixed mass, or so that they could take out of the warehouse, by replevin. part of the identical corn which the other storers had stored therein.

The case of *Gardner* vs. *Dutch*, which is one of doubtful authority, and which places the right to recover on a right of selection by the plaintiff of his 76 bags of coffee (a right which did not exist any more than that of the officer who made the attachment to select by taking all but 76 bags) has no application when their are others to be affected. Selecting one's bags of coffee might be easier, too, than selecting ones own ~~pounds~~ Kennels and fractions of ~~pounds~~ Kennels of corn. The selection doctrine will not answer for mixed corn, if it will for coffee bags. By measuring out the quantity the property of other storers is inevitably taken, without their consent, and to their serious injury where there is a deficiency, Suppose there had been several persons who had the same right to 76 bags of the coffee that the plaintiffs had, and suppose, by the sale and removal of bags of coffee by Wellman & Ropes, or by creditors for them, on execution, the number of bags had been so reduced that there were not 76 bags for each of the parties having the right to so much each remaining in the mass, could these respective owners legally snatch, by replevin, under this doctrine of selec-

tion, upon the principle of the devil take the hindmost, till the hindmost might be left, at best, with only a bag to hold? If so, the doctrine of selection would be of no more use to the last one in saving his coffee, than the doctrine of election. His coffee might thus be lost without any fault on his part. Perhaps brother Cook, who knows more about these things, can read his title clear to the replevied corn; if so, it must be by faith alone in something that is incomprehensible to us.

Let us see, now, what were the erroneous rulings, if we are right in our position. The jury must have been somewhat perplexed to know exactly what the law was from the instructions. They would seem to be somewhat in conflict. This is sometimes unavoidable, owing to the want of time necessary for reflection by the Court below. Although the propositions in accordance with our view of the law, requested to be given, were in many instances refused, or their effect neutralized by other instructions containing the converse of the proposition, it is perhaps enough to call the attention of the Court to a few of them only. This Court having once reproved one of our firm for writing too many instructions, we desire briefly to apologize for there being so many in this case. We did not know but the jury might apply the republican doctrine, that the majority should govern; and we hoped to have the weight of authority on our side; and as fast as one was neutralized by an opposite one from brother Cook, we endeavored to supply its place. Again, we did not write them all, and in the hurry of a trial at *nisi prius*, too many instructions will thus get in, for want of time to compare and digest them properly. The 4th instruction of the plaintiffs is not the law, as applicable to the facts of this case, nor is it the law as applicable to any possible state of facts in any replevin suit. The issue in replevin on a plea of property in a third person is never whether the property is in such third person, but on that part of the plea which alleges that the property is not the plaintiffs—and such is the issue on the third plea. (1 Gilman, 365.) The 3d and 5th instructions are not the law. The issue is the same on the 2d and 5th pleas. The jury, then, are instructed that on a denial of property in the plaintiffs, it is not necessary for them to introduce any proof whatever, and that consequently it is entirely immaterial whether the plaintiffs in this case were tenants in common or sole owners of the replevied property, or whether they own any interest at all in it. Now, as the jury are instructed, in the 3d 4th, and 5th instructions, as to the very pith and marrow of the controversy, we think it is not necessary to press any other points to entitle us to a reversal. However, as we desire an expression of an opinion, which will end the controversy, if we are right in our views that the plaintiff cannot properly recover, in this action, we claim that the eighth instruction given at the request of the plaintiffs is not the law, and that the 5th instruction asked by the defendant is the law. By the eighth instruction for plaintiff the jury are directed that if the plaintiffs had a pledge of the replevied corn, as security for a debt, it is a sufficient ownership to enable them to maintain this action. We claim that this would not be so if they were really the owners, having stored the 7000 bushels, and that before this suit was brought, it was with their acquiescence mixed, or if without their consent, it was mixed with

the corn left in store by the other storers, the latter not being aware of the supposed agreement between Cushman and Fairfield, and having, in ignorance of it, consented to the admixture of their corn with other corn in the cribs. It may be said that the idea intended to be conveyed in the 8th instruction was, that the property of one who holds by pledge as security is just as good as though he was the actual owner. Such is not the fair construction of the language of the instruction. The gist of the controversy is perhaps as well set forth in the 5th instruction asked by the defendant and refused by the Court, as anywhere in the record; and we claim, for the reason heretofore given, that it should not have been refused. The Court will perceive that the erroneous rulings complained of will be found in many other places in the record. We therefore claim a reversal because the evidence proves no case by which the plaintiff is entitled to a verdict, and that the views which the Court below took of the law were inaccurate. The supposed difficulty alluded to in relation to there not being coffee bags enough is the real trouble in this case. After the 7000 bushels were taken out of the cribs, there was not enough left to go round. C. S. Dole & Co. are the real parties in interest, and the Martin judgment was really theirs. On the 22d of Dec., 1859, Fairfield & Weld assigned their interest to them, and they took all the corn, and after the 7000 bushels were replevied out, they divided what was left, (being fifty-five per cent. only,) belonging to Olmstead, Harding, Herford and others, among them, and the controversy is as to which of the creditors, C. S. Dole & Co. or Cushman, True & Co., both of whom have advanced money, shall hold the Fairfield & Weld corn, not the corn of the storers. We desire to be understood as speaking only for Dole & Co. We have no authority to speak for the plaintiffs. We can merely hope they will do right to those who have actually stored corn with Fairfield & Weld.— There was a deficiency of some three or four thousand bushels. Fairfield & Weld had no 7000 bushels over the amount for which other storers had receipts, although this part of the case cannot be seen by your honors. ~~Judicially, it~~ may be taken only as a supposed state of facts to illustrate that the principle of allowing replevin to be maintained upon the facts in proof is not sound If the form of action was trover, justice could be done by the jury by fixing a proper sum in the verdict. Justice cannot be done in replevin, and the action ought not to be sustained, the interest of the plaintiffs being, in every point of view, only an undivided one.

LELAND & BLANCHARD,
For Plaintiff in Error.

Warren
vs
Cochman et al
Brief

Filed A/c 21. 1863
L Leland Clk

State of Illinois. Sup. Court April Term 1864

William H Workman
William H Shue and
Isaac V Workman
als
Francis Wamsley

Error to La Salle
Motion for a rehearing

In support of the motion
we desire to make the suggestion only.
Our arguments at the last term have no appli-
cation to the case stated in the opinion but do,
we think, apply to the case presented in the record
We are placed in the attitude of being in the
[redacted] Court a case so plainly argued on
that its appearance in the report is a reflection
upon us. The oversight of Judge Caton is
one which might happen to the most learned
man under the pressure of much business with
a limited time within which it is to be done
We do not complain. Such accidents will hap-
pen in the best regulated families.
The lien of the execution attaches on the 22d
day of December AD 1859 (Decree 58 + 13) long before the de-
livery by Hamilton & Wells to the plaintiffs below
of the cross writs. (57) March 1 1860 The right of priority in the
officer relates back to the inception of the lien of
the execution i.e when the execution is placed
in the hands of the officer. We do not desire to
reargue the case. We only desire to make the
argument
the ~~case~~ plain. Leland & Bryan and
for appellees

No. 14744

Supreme Court of Illinois

Warner

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vs.

Cushman, et al

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STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 239

J. W. Middleton & Co., Stationers, 196 Lake St.

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Warner
vs
Cushman et als

Depositions

Filed May 5. 1863
S. Selden
Clk

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

FRANCIS WARNER
vs.
CUSHMAN, TRUE & WATERMAN.

BRIEF OF DEFNDANTS IN ERROR.

The facts are these:

March 17th, 1860, defendants filed affidavit in replevin, alleging that they were justly *entitled to the possession* of 7,000 bushels of corn detained by plaintiff, &c.

Fairfield & Weld were warehouse men in Ottawa during November and December 1st, 1859.

In November, 1859, an agreement was made between Cushman, True & Co., the plaintiffs, and Fairfield & Weld, by which Cushman, True & Co. agreed to advance to Fairfield & Weld money to buy corn. The corn, when purchased, was to be the property of Cushman, True & Co., and should be ship-

ped to such persons as Cushman, True & Co. should direct, and when they should direct. That Fairfield & Weld should store the corn, and after it should be sold they were to receive as compensation for buying and storing, all the corn should be sold for over the amount advanced by True & Co. to buy the same, and 12 per cent. interest on the same.

That Fairfield & Weld purchased corn under the agreement. Cushman, True & Co. advanced $3,800 for that purpose. That on the 22d day of December, 1859, they had in cribs about 14,000 bushels of corn, being the same corn in controversy, and other corn belonging to Herford, Olmstead, Umlauf, Harding, and others, who had stored corn with them.

The abstract is wrong here. It states that the 14,000 bushels consisted of the corn in controversy and corn belonging to *Fairfield & Weld*, and the others named. There is no such proof. Fairfield & Weld are not shown to have had an ear of corn of their own in the cribs. The amount of corn purchased by Fairfield & Weld with money furnished by Cushman, True & Co., was 7,000 bushels. The other corn stored by Olmstead and others was mixed with the other corn purchased with the money advanced by Cushman, True & Co., with the consent of Olmstead, Herford, and the others storing, except Cushman, True & Co. In the latter part of November, a small amount of corn was placed in the cribs, but the larger part was placed there between December 1st and 22d. Fairfield & Weld from time to time executed and delivered to Cushman, True & Co. warehouse receipts for the corn purchased with money advanced by them, and also issued warehouse receipts to Olmstead, Herford, Umlauf, and the others who stored corn with them. The arrangement between Cushman, True & Co. and Fairfield & Weld was made before any corn was placed in the cribs.

On the 1st day of March, 1860, Fairfield delivered the possession of the corn in the cribs to Cushman, True & Co., as the corn purchased for them, and for the purpose of satisfy-

ing the aforesaid corn receipts. And Cushman, True & Co. took possession of the cribs and corn, and Cushman, True & Co. placed a fence around the cribs.

On the 9th of March, A. D. 1860, Warner, as Sheriff, took all the corn out of the possession of Cushman, True & Co. by breaking down the enclosures and taking the corn. This he did by virtue of an execution issued from the Superior Court of Chicago, in favor of *William Martin* vs. *Fairfield & Weld*, which came to the hands of the Sheriff December 22d, 1859.

The action of replevin is a possessory action, and if Cushman, True & Co. had the right of possession of this corn as against the Sheriff, they can maintain this action.

Warner *vs.* Malthus, 18 Ill. 86.
Anderson *vs.* Talcott, 1 Gil. R. 265.
King *vs.* Ramsey, 13 Ill. 619.
1 Greenleaf Ev. sec. 532.
Wallace *vs.* Clark, 7 Ind. 298.

Replevin lies were trespass might be brought: possession by the plaintiff and an actual wrongful taking by the defendant are sufficient to support the action.

Pangbern *vs.* Partridge, 7 Johns. R. 140.
Marshall *vs.* Davis, 1 Wend. 109.
Bogers *vs.* Arnold, 12 Wend. 30.
Blue *vs.* Leathers, 15 Ill. 32.

Cushman, True & Co. were lawfully in possession of the corn at the time it was levied upon. The whole corn had been lawfully in the custody of Fairfield & Weld, and was by them turned out to Cushman, True & Co., who became thereby lawfully in possession of the corn. It is true that Olmstead, Herford, Umlauf, and others, who stored corn with Fairfield & Weld, had a claim upon the mass of corn for their respective portions, and when they took possession of the corn from Fairfield & Weld they had the right to retain their 7,000 bushels, and deliver to the other storers the amount be-

longing to them. Their possession was lawful for this purpose.

Had the Sheriff any right to take this corn, or any of it, from the possession of Cushman, True & Co.? We insist that he had not, because; first, the 7,000 bushels was the property of Cushman, True & Co.

Second, The balance of the corn in the cribs belonged to Herford, Umlauf, Olmstead and the others, who had stored it.

There was no lien upon this corn from the time the Sheriff received the execution, because Fairfield and Weld did not own any of the corn, and the lien could only attach to their property.

The only question is, if Warner, without right, took a quantity of corn from the possession of Cushman, True & Co., and of which they were lawfully in possession, and of which the actual ownership was in them, Olmstead, Herford and others, could not Cushman, True & Co. replevy the share belonging to them, because in any event, and as security, the ownership, the possession and the entire control of the corn was in them until sold, and they were in the same position as others holding warehouse receipts.

If the corn of Cushman, True & Co. was mixed with the corn of Olmstead, Herford and others, by the consent of all parties, then the several proprietors had a property in common in the whole, according to their respective portions put in mass.

Low *vs.* Martin, 18 Ill. 286.
Story on Bailments, sec. 40.
2 Blackstone's Com. 405.

In such case Fairfield & Weld had no interest in the corn upon which the lien of the execution could attach. The corn

had been delivered to Cushman, True & Co. for the purpose of having their portion of the corn separated from the mass, and the residue delivered to the owners. The possession of Cushman, True & Co. was a lawful possession. They had the absolute possession and the absolute right to it, except as against Olmstead, Herford, Umlauf and the other storers; and in replevin, absolute possession of property, combined with the absolute right to it, except as against some person other than the defendant, will entitle the plaintiff to maintain his action. This was expressly decided in

Johnson *vs.* Carnly, 10 N. Y. 6 Seld. 520.

The point made by Judge Leland is, that because Cushman, True & Co. had the possession of their own corn, but had it mixed with the corn of Umlauf, Herford, Olmstead and others, all of which was in their possession, that, therefore, when Warner took the whole from them, without any right, that they could not replevy their own share, because it was mixed.

But the corn belonging to Cushman, True & Co. was not mixed with their consent. Their consent was an affirmative fact to be proven by the party alleging it. The only evidence on this point is the testimony of Fairfield, who testified that Cushman told him before the corn was purchased that he wanted it kept separate, and not mixed with other corn. Fairfild said it would be inconvenient, but did not say he would not keep it seperate, and did not give Cushman to understand that he would not do it. It is said that True passed by the warehouse on his way to his meals. What opportunity did that give him to know that the corn was mixed? He did not know of whom Fairfield & Weld were buying for Cushman, True & Co., and seeing corn unloaded, even if he did see it, of which there is only a slight presumption, would afford him no information on the subject.

It is insisted that the 3d, 4th, 5th and 8th instructions given for plaintiffs in the Court below are wrong.

The 3d and 4th instructions are *perhaps* not technically correct, but this is no ground for reversing this judgment.

If substantial justice has been done, even if improper instructions had been given, a judgment will not be disturbed.

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There was not the slightest conflict of testimony upon two points. First, That Cushman, True & Co. had the absolute possession of the corn at the time it was levied upon by defendant, Warner.

Second, That the only right which Warner had to take the corn from them was the execution *vs.* Fairfield & Weld. Hence no injury could have arisen in this case from the giving of these instructions.

But an entirely conclusive answer to the obligation of counsel to the 3d, 4th and 5th instructions is this: The only reason why these instructions are objected to is, that the gist of the 2d plea is not that the corn was the property of defendant, Warner, but that it was not the property of plaintiffs; and that the gist of the 3d plea was not that the corn was the property of Fairfield & Weld, but that it was not the property, and that the plea ought to have been treated simply as a denial of the property, of the plaintiffs in the corn, and that defendant ought to have the benefit of such a construction of the pleas. But he need not have the benefit of three pleas of precisely the same kind. The 4th plea is simply a denial of property in the plaintiffs. Under this plea they had all the benefit of the construction claimed for the 2d and 3d pleas.

In no possible view of the case could defendant below have been prejudiced by the giving of those instructions. These suggestions apply to the 5th instruction, but that instruction is technically correct. The 5th plea was a plea of justification. That the property was the property of Fairfield & Weld, and taken under an execution against them. Replication that the corn was not the property of Fairfield & Weld. This was the issue. Of course, an instruction, that if the jury found that the property was not the property of Fairfield & Weld they must find the issue for plaintiffs, was correctly given.

The 8th instruction was correctly given. That Cushman, True & Co. had possession of the corn when levied upon was not controverted. Now the question was, was their possession accompanied by such an interest in the corn as would entitle them to maintain this action? For that purpose a right to hold the corn as collateral security was sufficient.

This 8th instruction does not tell the jury that if Cushman, True & Co. had a right to hold any part of a mixed mass as security, that in that case they could maintain this action for such proportion of the mass. But it tells them that if they had the right to hold the very corn replevied as collateral security, that is sufficient to maintain this action so far as the question of ownership is concerned. If by reason of the corn replevied being mixed with corn of others, its identity was lost, so that it could not be replevied, that would be just as good a reason why the identical corn could not be held as collateral security. That this was the view of the Court and the understanding of the jury must be manifest from the 1st and 2d instructions given for defendant below.

The case clearly shows that the corn in the cribs was the property of Cushman, True & Co., Olmstead, Herford and other storers; that none of it belonged to Fairfield & Weld; that Fairfield & Weld had delivered the possession of the

corn to Cushman, True & Co., who by receiving it became liable to account to the other owners for their respective portions, and that Warner, by virtue of an execution against Fairfield & Weld, which was no lien on the corn, took forcible possession of the corn. Under these circumstances the right of Cushman, True & Co. to regain possession of the corn as against Warner, in this form of action, seems to us clear and indisputable.

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For Defendant in Error.

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Warren
vs
Cushman et als

Certiorari

STATE OF ILLINOIS SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

FRANCIS WARNER
vs.
CUSHMAN, TRUE & WATERMAN.

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The facts are these:

March 17th, 1860, defendants filed affidavit in replevin, alleging that they were justly *entitled to the possession* of 7,000 bushels of corn detained by plaintiff, &c.

Fairfield & Weld were warehouse men in Ottawa during November and December 1st, 1859.

In November, 1859, an agreement was made between Cushman, True & Co., the plaintiffs, and Fairfield & Weld, by which Cushman, True & Co. agreed to advance to Fairfield & Weld money to buy corn. The corn, when purchased, was to be the property of Cushman, True & Co., and should be ship-

ped to such persons as Cushman, True & Co. should direct, and when they should direct. That Fairfield & Weld should store the corn, and after it should be sold they were to receive as compensation for buying and storing, all the corn should be sold for over the amount advanced by True & Co. to buy the same, and 12 per cent. interest on the same.

That Fairfield & Weld purchased corn under the agreement. Cushman, True & Co. advanced $3,800 for that purpose. That on the 22d day of December, 1859, they had in cribs about 14,000 bushels of corn, being the same corn in controversy, and other corn belonging to Herford, Olmstead, Umlauf, Harding, and others, who had stored corn with them.

The abstract is wrong here. It states that the 14,000 bushels consisted of the corn in controversy and corn belonging to *Fairfield & Weld*, and the others named. There is no such proof. Fairfield & Weld are not shown to have had an ear of corn of their own in the cribs. The amount of corn purchased by Fairfield & Weld with money furnished by Cushman, True & Co., was 7,000 bushels. The other corn stored by Olmstead and others was mixed with the other corn purchased with the money advanced by Cushman, True & Co., with the consent of Olmstead, Herford, and the others storing, except Cushman, True & Co. In the latter part of November, a small amount of corn was placed in the cribs, but the larger part was placed there between December 1st and 22d. Fairfield & Weld from time to time executed and delivered to Cushman, True & Co. warehouse receipts for the corn purchased with money advanced by them, and also issued warehouse receipts to Olmstead, Herford, Umlauf, and the others who stored corn with them. The arrangement between Cushman, True & Co. and Fairfield & Weld was made before any corn was placed in the cribs.

On the 1st day of March, 1860, Fairfield delivered the possession of the corn in the cribs to Cushman, True & Co., as the corn purchased for them, and for the purpose of satisfy-

ing the aforesaid corn receipts. And Cushman, True & Co. took possession of the cribs and corn, and Cushman, True & Co. placed a fence around the cribs.

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The action of replevin is a possessory action, and if Cushman, True & Co. had the right of possession of this corn as against the Sheriff, they can maintain this action.

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Cushman, True & Co. were lawfully in possession of the corn at the time it was levied upon. The whole corn had been lawfully in the custody of Fairfield & Weld, and was by them turned out to Cushman, True & Co., who became thereby lawfully in possession of the corn. It is true that Olmstead, Herford, Umlauf, and others, who stored corn with Fairfield & Weld, had a claim upon the mass of corn for their respective portions, and when they took possession of the corn from Fairfield & Weld they had the right to retain their 7,000 bushels, and deliver to the other storers the amount be-

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Had the Sheriff any right to take this corn, or any of it, from the possession of Cushman, True & Co.? We insist that he had not, because; first, the 7,000 bushels was the property of Cushman, True & Co.

Second, The balance of the corn in the cribs belonged to Herford, Umlauf, Olmstead and the others, who had stored it.

There was no lien upon this corn from the time the Sheriff received the execution, because Fairfield and Weld did not own any of the corn, and the lien could only attach to their property.

The only question is, if Warner, without right, took a quantity of corn from the possession of Cushman, True & Co., and of which they were lawfully in possession, and of which the actual ownership was in them, Olmstead, Herford and others, could not Cushman, True & Co. replevy the share belonging to them, because in any event, and as security, the ownership, the possession and the entire control of the corn was in them until sold, and they were in the same position as others holding warehouse receipts.

If the corn of Cushman, True & Co. was mixed with the corn of Olmstead, Herford and others, by the consent of all parties, then the several proprietors had a property in common in the whole, according to their respective portions put in mass.

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had been delivered to Cushman, True & Co. for the purpose of having their portion of the corn separated from the mass, and the residue delivered to the owners. The possession of Cushman, True & Co. was a lawful possession. They had the absolute possession and the absolute right to it, except as against Olmstead, Herford, Umlauf and the other storers; and in replevin, absolute possession of property, combined with the absolute right to it, except as against some person other than the defendant, will entitle the plaintiff to maintain his action. This was expressly decided in

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The point made by Judge Leland is, that because Cushman, True & Co. had the possession of their own corn, but had it mixed with the corn of Umlauf, Herford, Olmstead and others, all of which was in their possession, that, therefore, when Warner took the whole from them, without any right, that they could not replevy their own share, because it was mixed.

But the corn belonging to Cushman, True & Co. was not mixed with their consent. Their consent was an affirmative fact to be proven by the party alleging it. The only evidence on this point is the testimony of Fairfield, who testified that Cushman told him before the corn was purchased that he wanted it kept separate, and not mixed with other corn. Fairfild said it would be inconvenient, but did not say he would not keep it seperate, and did not give Cushman to understand that he would not do it. It is said that True passed by the warehouse on his way to his meals. What opportunity did that give him to know that the corn was mixed? He did not know of whom Fairfield & Weld were buying for Cushman, True & Co., and seeing corn unloaded, even if he did see it, of which there is only a slight presumption, would afford him no information on the subject.

It is insisted that the 3d, 4th, 5th and 8th instructions given for plaintiffs in the Court below are wrong.

The 3d and 4th instructions are *perhaps* not technically correct, but this is no ground for reversing this judgment.

If substantial justice has been done, even if improper instructions had been given, a judgment will not be disturbed.

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For Defendant in Error.

Warner
vs
Custom [illegible]

Affi- bnif

Filed May 5. 1865
D. Lacaze
Clk

STATE OF ILLINOI[illegible] SUPREME COURT,

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corn to Cushman, True & Co., who by receiving it became liable to account to the other owners for their respective portions, and that Warner, by virtue of an execution against Fairfield & Weld, which was no lien on the corn, took forcible possession of the corn. Under these circumstances the right of Cushman, True & Co. to regain possession of the corn as against Warner, in this form of action, seems to us clear and indisputable.

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For Defendant in Error.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

FRANCIS WARNER
vs.
WILLIAM H. W. CUSHMAN. } *Brief of Plaintiffs in Error.*

It is not a disputed point in this case, that the corn replevied by the plaintiffs was at the time thereof actually mixed with that of several other persons who had stored with Fairfield & Weld, and that the very corn of these other persons, and which never had been that of the plaintiffs, was actually taken by the coroner on the writ. If our views of the law of this case are correct, it is not material to consider whether this admixture had, in point of fact, been acquiesced in by the plaintiffs before the commencement of this suit. If, however, this, in fact, be so, then in no possible point of view—not even admitting that the ruling of the Court below, at plaintiff's request, was right—can the plaintiffs recover. It seems to us that there is no real question in this case, and that the plaintiffs cannot properly maintain this action, allowing them the benefit of every position they claim the evidence tends to prove. Although there might have been some conversation between Cushman and Fairfield about keeping the corn of plaintiffs separate from that of other storers, it is manifestly apparent that the idea was never seriously entertained by the plaintiffs that Fairfield & Weld should do so. It was rather a speculative inquiry on the part of Cushman whether such a thing was practicable, than a thought to be seriously entertained. There can hardly be said to be a shadow of a doubt, that the plaintiffs did, before this suit was brought, acquiesce in the admixture of the corn; all there is in the record to countenance the contrary idea, is the following statement of Fairfield; "When the arrangement to advance money was made, Cushman requested Fairfield to keep the corn purchased with money furnished by plaintiff separate. Fairfield said it would be inconvenient to do so; made no agreement that he would do so: and did not, in fact, do so, but mixed it." On the contrary (if it can be called the contrary), it appears that the universal custom in Ottawa of doing a grain and produce business, is to mix the corn of different storers: that True, one of the plaintiffs, passed the cribs daily, and knew just what was being done; that the grain receipts mentioned in the receipts dated Dec. 22d, 1859, were not for the real amounts of corn purchased

and received in store by Fairfield & Weld, but receipts for assumed amounts, as security for a loan. There were no 5000 bushels of corn in the cribs before December 1st, 1859. Fairfield says there was only a small amount placed in the cribs in the latter part of November, 1859; and Olmstead says his corn was the first put into the cribs. The corn receipts given the plaintiffs, for 5000 bushels, dated November 23 and 28, were fictitious—that is, the corn was not yet purchased: but they were given in advance, to secure money at the time it was purchased. Whenever a sum of money was borrowed, a warehouse receipt was issued for corn in store before the corn was bought with the money, as collateral security for it. The notes, if they had been introduced in evidence, would undoubtedly have corresponded in date with the warehouse receipts. The striking out of the receipts, by True, the words "at the owners' risk," shows that there was no particular 7000 bushels of corn in the cribs owned by plaintiffs, which, if destroyed by casualty, would have entitled Fairfield & Weld to a credit for its value on the notes they had given for the money borrowed of the plaintiffs, or would have injured the value of the receipts as security, except *pro tanto*, by reason of an apportionment of the loss among all the storers. The giving of the notes, including more corn in the grain receipts than the money loaned paid for, the taking other notes, also, as collateral security for the indebtedness, the payment of insurance, and all other expenses, by Fairfield & Weld, the erasure of the words "at owners' risk" from the grain receipts, the payment of one and one-half per cent a month for the use of the money, all shew that the grain receipts were issued as security for the loaned money, and that the corn mentioned in them was not intended to be kept separate, but was understood to be so much corn mixed with that of others. The corn mentioned in the receipts could not have been all delivered without a delivery of some of the corn of other storers. Whatever, therefore, may have been the conjectured inquiries made by Cushman of Fairfield about keeping separate the corn purchased with the money borrowed at the banking house of Cushman, True & Co., or whatever may at first have been the understanding, the idea, if ever seriously entertained at all, was abandoned long before this suit was commenced, and the plaintiffs had merely, what is so clearly apparent by an examination of the receipt of December 22, 1859, certain warehouse receipts for corn mixed by the warehouseman with that of others, and certain promissory notes, as collateral security for the notes which Fairfield & Weld had given them for money borrowed. It is not a question of conflicting evidence passed upon by the jury. There is no conflict. If this be so, then, by the law, as settled in the case of *Low* vs. *Martin*, (18 *Ill.*) the plaintiffs cannot recover. But a distinction is sought to be taken between the case of *Low* vs. *Martin* and the one at bar, in this, that if the plaintiffs did not acquiesce in the mixing of the corn purchased with the money loaned by them (and which they were to have as security for the money) with that of other storers with Fairfield & Weld, they had the legal right to replevy out of the mixed mass as much corn as was purchased by Fairfield & Weld with the money they borrowed of the plaintiffs. The doctrine that one who had left corn to be stored with a warehouseman, under an agreement that it should be kept separate, might maintain replevin against the warehouseman for an equal

quantity of corn that was mixed, might seem to a casual observer to be sustained in the case of *Low* vs. *Martin* (18 Ill) Such might seem to be the idea intended to be conveyed by the Judge who delivered the opinion, and it was this construction of the dictum which is in some instances introduced in the rulings of the Court below; but the idea of there being other persons besides the warehouseman Low and the storer Martin, whose rights might have been affected, did not probably occur to the Judge who wrote the opinion, and the idea of the dictum undoubtedly was, that the wrongful admixture should be one which would make the whole property, the property of the plaintiffs in replevin, because that is the principle of the authorities cited as to the effect of what is called the wrongful admixture. The position assumed, that the parties storing with a warehouseman are tenants in common, with a proportion, continually shifting every time one removes his deposit, or as the warehouseman sells a portion of the amount he owns himself, is necessarily inconsistent with the idea that the action can be maintained for the undivided share or interest. All authorities agree that an action of replevin can only be maintained for property capable of identification, and delivery by the Sheriff to the plaintiff, and never by a tenant in common for an undivided share or interest in chattels, and this principle is settled in the above case of *Low* vs. *Martin*. It is, then, only an admixture which destroys the relation of tenants in common between the plaintiff in the replevin and the warehouseman, which may make it *otherwise*, as mentioned by Judge Skinner, and this of course can only be done by such an admixture as destroys this relation, by making the plaintiffs in replevin the owner of the whole, and this can only be so where the plaintiff in replevin and the warehouseman were the only owners of the mixed grain. It is not necessary to argue that if Olmstead, Herford, Harding and others were really the owners of an undivided interest in the corn in the three cribs, as mentioned in *Low* vs. *Martin*, that Cushman and Fairfield could not make any arrangement to deprive them of said interest without their consent, or without their fault, so that the plaintiffs could become the owners of the whole mixed mass, or so that they could take out of the warehouse, by replevin. part of the identical corn which the other storers had stored therein.

The case of *Gardner* vs. *Dutch*, which is one of doubtful authority, and which places the right to recover on a right of selection by the plaintiff of his 76 bags of coffee (a right which did not exist any more than that of the officer who made the attachment to select by taking all but 76 bags) has no application when their are others to be affected. Selecting one's bags of coffee might be easier, too, than selecting ones own ~~pounds~~ Kennels and fractions of ~~pounds~~ Kennels of corn. The selection doctrine will not answer for mixed corn, if it will for coffee bags. By measuring out the quantity the property of other storers is inevitably taken, without their consent, and to their serious injury where there is a deficiency, Suppose there had been several persons who had the same right to 76 bags of the coffee that the plaintiffs had, and suppose, by the sale and removal of bags of coffee by Wellman & Ropes, or by creditors for them, on execution, the number of bags had been so reduced that there were not 76 bags for each of the parties having the right to so much each remaining in the mass, could these respective owners legally snatch, by replevin, under this doctrine of selec-

tion, upon the principle of the devil take the hindmost, till the hindmost might be left, at best, with only a bag to hold? If so, the doctrine of selection would be of no more use to the last one in saving his coffee, than the doctrine of election. His coffee might thus be lost without any fault on his part. Perhaps brother Cook, who knows more about these things, can read his title clear to the replevied corn; if so, it must be by faith alone in something that is incomprehensible to us.

Let us see, now, what were the erroneous rulings, if we are right in our position. The jury must have been somewhat perplexed to know exactly what the law was from the instructions. They would seem to be somewhat in conflict. This is sometimes unavoidable, owing to the want of time necessary for reflection by the Court below. Although the propositions in accordance with our view of the law, requested to be given, were in many instances refused, or their effect neutralized by other instructions containing the converse of the proposition, it is perhaps enough to call the attention of the Court to a few of them only. This Court having once reproved one of our firm for writing too many instructions, we desire briefly to apologize for there being so many in this case. We did not know but the jury might apply the republican doctrine, that the majority should govern; and we hoped to have the weight of authority on our side; and as fast as one was neutralized by an opposite one from brother Cook, we endeavored to supply its place. Again, we did not write them all, and in the hurry of a trial at *nisi prius*, too many instructions will thus get in, for want of time to compare and digest them properly. The 4th instruction of the plaintiffs is not the law, as applicable to the facts of this case, nor is it the law as applicable to any possible state of facts in any replevin suit. The issue in replevin on a plea of property in a third person is never whether the property is in such third person, but on that part of the plea which alleges that the property is not the plaintiffs—and such is the issue on the third plea. (1 Gilman, 365.) The 3d and 5th instructions are not the law. The issue is the same on the 2d and 5th pleas. The jury, then, are instructed that on a denial of property in the plaintiffs, it is not necessary for them to introduce any proof whatever, and that consequently it is entirely immaterial whether the plaintiffs in this case were tenants in common or sole owners of the replevied property, or whether they own any interest at all in it. Now, as the jury are instructed, in the 3d 4th, and 5th instructions, as to the very pith and marrow of the controversy, we think it is not necessary to press any other points to entitle us to a reversal. However, as we desire an expression of an opinion, which will end the controversy, if we are right in our views that the plaintiff cannot properly recover, in this action, we claim that the eighth instruction given at the request of the plaintiffs is not the law, and that the 5th instruction asked by the defendant is the law. By the eighth instruction for plaintiff the jury are directed that if the plaintiffs had a pledge of the replevied corn, as security for a debt, it is a sufficient ownership to enable them to maintain this action. We claim that this would not be so if they were really the owners, having stored the 7000 bushels, and that before this suit was brought, it was with their acquiescence mixed, or if without their consent, it was mixed with

the corn left in store by the other storers, the latter not being aware of the supposed agreement between Cushman and Fairfield, and having, in ignorance of it, consented to the admixture of their corn with other corn in the cribs. It may be said that the idea intended to be conveyed in the 8th instruction was, that the property of one who holds by pledge as security is just as good as though he was the actual owner. Such is not the fair construction of the language of the instruction. The gist of the controversy is perhaps as well set forth in the 5th instruction asked by the defendant and refused by the Court, as anywhere in the record; and we claim, for the reason heretofore given, that it should not have been refused. The Court will perceive that the erroneous rulings complained of will be found in many other places in the record. We therefore claim a reversal because the evidence proves no case by which the plaintiff is entitled to a verdict, and that the views which the Court below took of the law were inaccurate. The supposed difficulty alluded to in relation to there not being coffee bags enough is the real trouble in this case. After the 7000 bushels were taken out of the cribs, there was not enough left to go round. C. S. Dole & Co. are the real parties in interest, and the Martin judgment was really theirs. On the 22d of Dec., 1859, Fairfield & Weld assigned their interest to them, and they took all the corn, and after the 7000 bushels were replevied out, they divided what was left, (being fifty-five per cent. only,) belonging to Olmstead, Harding, Herford and others, among them, and the controversy is as to which of the creditors, C. S. Dole & Co. or Cushman, True & Co., both of whom have advanced money, shall hold the Fairfield & Weld corn, not the corn of the storers. We desire to be understood as speaking only for Dole & Co. We have no authority to speak for the plaintiffs. We can merely hope they will do right to those who have actually stored corn with Fairfield & Weld.— There was a deficiency of some three or four thousand bushels. Fairfield & Weld had no 7000 bushels over the amount for which other storers had receipts, although this part of the case cannot be seen by your honors. ~~Judicially, it~~ may be taken only as a supposed state of facts to illustrate that the principle of allowing replevin to be maintained upon the facts in proof is not sound If the form of action was trover, justice could be done by the jury by fixing a proper sum in the verdict. Justice cannot be done in replevin, and the action ought not to be sustained, the interest of the plaintiffs being, in every point of view, only an undivided one.

LELAND & BLANCHARD,
For Plaintiff in Error.

Warren
vs
Cochman et al
Brief

Filed A/c 21. 1863
L Leland Clk

State of Illinois. Sup. Court April Term 1864

William H Workman
William H Shue and
Isaac V Workman
als
Francis Wamsley

Error to La Salle
Motion for a rehearing

In support of the motion
we desire to make the suggestion only.
Our arguments at the last term have no appli-
cation to the case stated in the opinion but do,
we think, apply to the case presented in the record
We are placed in the attitude of being in the
[redacted] Court a case so plainly argued on
that its appearance in the report is a reflection
upon us. The oversight of Judge Caton is
one which might happen to the most learned
man under the pressure of much business with
a limited time within which it is to be done
We do not complain. Such accidents will hap-
pen in the best regulated families.
The lien of the execution attaches on the 22d
day of December AD 1859 (Decree 58 + 13) long before the de-
livery by Hamilton & Wells to the plaintiffs below
of the cross writs. (57) March 1 1860 The right of priority in the
officer relates back to the inception of the lien of
the execution i.e when the execution is placed
in the hands of the officer. We do not desire to
reargue the case. We only desire to make the
argument
the ~~case~~ plain. Leland & Bryan and
for appellees

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Francis Wainwright

vs

William H. W. Custis-
man

Petition for rehearing

Delaware Blanchard

for petitioners

Feb 21st 1854

L. Leland
Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

FRANCIS WARNER
vs.
WILLIAM H. W. CUSHMAN. } *Brief of Plaintiffs in Error.*

It is not a disputed point in this case, that the corn replevied by the plaintiffs was at the time thereof actually mixed with that of several other persons who had stored with Fairfield & Weld, and that the very corn of these other persons, and which never had been that of the plaintiffs, was actually taken by the coroner on the writ. If our views of the law of this case are correct, it is not material to consider whether this admixture had, in point of fact, been acquiesced in by the plaintiffs before the commencement of this suit. If, however, this, in fact, be so, then in no possible point of view—not even admitting that the ruling of the Court below, at plaintiff's request, was right—can the plaintiffs recover. It seems to us that there is no real question in this case, and that the plaintiffs cannot properly maintain this action, allowing them the benefit of every position they claim the evidence tends to prove. Although there might have been some conversation between Cushman and Fairfield about keeping the corn of plaintiffs separate from that of other storers, it is manifestly apparent that the idea was never seriously entertained by the plaintiffs that Fairfield & Weld should do so. It was rather a speculative inquiry on the part of Cushman whether such a thing was practicable, than a thought to be seriously entertained. There can hardly be said to be a shadow of a doubt, that the plaintiffs did, before this suit was brought, acquiesce in the admixture of the corn; all there is in the record to countenance the contrary idea, is the following statement of Fairfield; "When the arrangement to advance money was made, Cushman requested Fairfield to keep the corn purchased with money furnished by plaintiff separate. Fairfield said it would be inconvenient to do so; made no agreement that he would do so: and did not, in fact, do so, but mixed it." On the contrary (if it can be called the contrary), it appears that the universal custom in Ottawa of doing a grain and produce business, is to mix the corn of different storers; that True, one of the plaintiffs, passed the cribs daily, and knew just what was being done; that the grain receipts mentioned in the receipts dated Dec. 22d, 1859, were not for the real amounts of corn purchased

and received in store by Fairfield & Weld, but receipts for assumed amounts, as security for a loan. There were no 5000 bushels of corn in the cribs before December 1st, 1859. Fairfield says there was only a small amount placed in the cribs in the latter part of November, 1859; and Olmstead says his corn was the first put into the cribs. The corn receipts given the plaintiffs, for 5000 bushels, dated November 23 and 28, were fictitious—that is, the corn was not yet purchased: but they were given in advance, to secure money at the time it was purchased. Whenever a sum of money was borrowed, a warehouse receipt was issued for corn in store before the corn was bought with the money, as collateral security for it. The notes, if they had been introduced in evidence, would undoubtedly have corresponded in date with the warehouse receipts. The striking out of the receipts, by True, the words "at the owners' risk," shows that there was no particular 7000 bushels of corn in the cribs owned by plaintiffs, which, if destroyed by casualty, would have entitled Fairfield & Weld to a credit for its value on the notes they had given for the money borrowed of the plaintiffs, or would have injured the value of the receipts as security, except *pro tanto*, by reason of an apportionment of the loss among all the storers. The giving of the notes, including more corn in the grain receipts than the money loaned paid for, the taking other notes, also, as collateral security for the indebtedness, the payment of insurance, and all other expenses, by Fairfield & Weld, the erasure of the words "at owners' risk" from the grain receipts, the payment of one and one-half per cent a month for the use of the money, all shew that the grain receipts were issued as security for the loaned money, and that the corn mentioned in them was not intended to be kept separate, but was understood to be so much corn mixed with that of others. The corn mentioned in the receipts could not have been all delivered without a delivery of some of the corn of other storers. Whatever, therefore, may have been the conjectured inquiries made by Cushman of Fairfield about keeping separate the corn purchased with the money borrowed at the banking house of Cushman, True & Co., or whatever may at first have been the understanding, the idea, if ever seriously entertained at all, was abandoned long before this suit was commenced, and the plaintiffs had merely, what is so clearly apparent by an examination of the receipt of December 22, 1859, certain warehouse receipts for corn mixed by the warehouseman with that of others, and certain promissory notes, as collateral security for the notes which Fairfield & Weld had given them for money borrowed. It is not a question of conflicting evidence passed upon by the jury. There is no conflict. If this be so, then, by the law, as settled in the case of *Low* vs. *Martin*, (18 *Ill.*) the plaintiffs cannot recover. But a distinction is sought to be taken between the case of *Low* vs. *Martin* and the one at bar, in this, that if the plaintiffs did not acquiesce in the mixing of the corn purchased with the money loaned by them (and which they were to have as security for the money) with that of other storers with Fairfield & Weld, they had the legal right to replevy out of the mixed mass as much corn as was purchased by Fairfield & Weld with the money they borrowed of the plaintiffs. The doctrine that one who had left corn to be stored with a warehouseman, under an agreement that it should be kept separate, might maintain replevin against the warehouseman for an equal

quantity of corn that was mixed, might seem to a casual observer to be sustained in the case of *Low* vs. *Martin* (18 Ill). Such might seem to be the idea intended to be conveyed by the Judge who delivered the opinion, and it was this construction of the dictum which is in some instances introduced in the rulings of the Court below; but the idea of there being other persons besides the warehouseman Low and the storer Martin, whose rights might have been affected, did not probably occur to the Judge who wrote the opinion, and the idea of the dictum undoubtedly was, that the wrongful admixture should be one which would make the whole property, the property of the plaintiffs in replevin, because that is the principle of the authorities cited as to the effect of what is called the wrongful admixture. The position assumed, that the parties storing with a warehouseman are tenants in common, with a proportion, continually shifting every time one removes his deposit, or as the warehouseman sells a portion of the amount he owns himself, is necessarily inconsistent with the idea that the action can be maintained for the undivided share or interest. All authorities agree that an action of replevin can only be maintained for property capable of identification, and delivery by the Sheriff to the plaintiff, and never by a tenant in common for an undivided share or interest in chattels, and this principle is settled in the above case of *Low* vs. *Martin*. It is, then, only an admixture which destroys the relation of tenants in common between the plaintiff in the replevin and the warehouseman, which may make it *otherwise*, as mentioned by Judge Skinner, and this of course can only be done by such an admixture as destroys this relation, by making the plaintiffs in replevin the owner of the whole, and this can only be so where the plaintiff in replevin and the warehouseman were the only owners of the mixed grain. It is not necessary to argue that if Olmstead, Herford, Harding and others were really the owners of an undivided interest in the corn in the three cribs, as mentioned in *Low* vs. *Martin*, that Cushman and Fairfield could not make any arrangement to deprive them of said interest without their consent, or without their fault, so that the plaintiffs could become the owners of the whole mixed mass, or so that they could take out of the warehouse, by replevin, part of the identical corn which the other storers had stored therein.

The case of *Gardner* vs. *Dutch*, which is one of doubtful authority, and which places the right to recover on a right of selection by the plaintiff of his 76 bags of coffee (a right which did not exist any more than that of the officer who made the attachment to select by taking all but 76 bags) has no application when their are others to be affected. Selecting one's bags of coffee might be easier, too, than selecting ones own ~~pounds~~ Kernels and fractions of ~~pounds~~ Kernels of corn. The selection doctrine will not answer for mixed corn, if it will for coffee bags. By measuring out the quantity the property of other storers is inevitably taken, without their consent, and to their serious injury where there is a deficiency, Suppose there had been several persons who had the same right to 76 bags of the coffee that the plaintiffs had, and suppose, by the sale and removal of bags of coffee by Wellman & Ropes, or by creditors for them, on execution, the number of bags had been so reduced that there were not 76 bags for each of the parties having the right to so much each remaining in the mass, could these respective owners legally snatch, by replevin, under this doctrine of selec-

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Let us see, now, what were the erroneous rulings, if we are right in our position. The jury must have been somewhat perplexed to know exactly what the law was from the instructions. They would seem to be somewhat in conflict. This is sometimes unavoidable, owing to the want of time necessary for reflection by the Court below. Although the propositions in accordance with our view of the law, requested to be given, were in many instances refused, or their effect neutralized by other instructions containing the converse of the proposition, it is perhaps enough to call the attention of the Court to a few of them only. This Court having once reproved one of our firm for writing too many instructions, we desire briefly to apologize for there being so many in this case. We did not know but the jury might apply the republican doctrine, that the majority should govern; and we hoped to have the weight of authority on our side; and as fast as one was neutralized by an opposite one from brother Cook, we endeavored to supply its place. Again, we did not write them all, and in the hurry of a trial at *nisi prius*, too many instructions will thus get in, for want of time to compare and digest them properly. The 4th instruction of the plaintiffs is not the law, as applicable to the facts of this case, nor is it the law as applicable to any possible state of facts in any replevin suit. The issue in replevin on a plea of property in a third person is never whether the property is in such third person, but on that part of the plea which alleges that the property is not the plaintiffs—and such is the issue on the third plea. (1 Gilman, 365.) The 3d and 5th instructions are not the law. The issue is the same on the 2d and 5th pleas. The jury, then, are instructed that on a denial of property in the plaintiffs, it is not necessary for them to introduce any proof whatever, and that consequently it is entirely immaterial whether the plaintiffs in this case were tenants in common or sole owners of the replevied property, or whether they own any interest at all in it. Now, as the jury are instructed, in the 3d 4th, and 5th instructions, as to the very pith and marrow of the controversy, we think it is not necessary to press any other points to entitle us to a reversal. However, as we desire an expression of an opinion, which will end the controversy, if we are right in our views that the plaintiff cannot properly recover, in this action, we claim that the eighth instruction given at the request of the plaintiffs is not the law, and that the 5th instruction asked by the defendant is the law. By the eighth instruction for plaintiff the jury are directed that if the plaintiffs had a pledge of the replevied corn, as security for a debt, it is a sufficient ownership to enable them to maintain this action. We claim that this would not be so if they were really the owners, having stored the 7000 bushels, and that before this suit was brought, it was with their acquiescence mixed, or if without their consent, it was mixed with

the corn left in store by the other storers, the latter not being aware of the supposed agreement between Cushman and Fairfield, and having, in ignorance of it, consented to the admixture of their corn with other corn in the cribs. It may be said that the idea intended to be conveyed in the 8th instruction was, that the property of one who holds by pledge as security is just as good as though he was the actual owner. Such is not the fair construction of the language of the instruction. The gist of the controversy is perhaps as well set forth in the 5th instruction asked by the defendant and refused by the Court, as anywhere in the record; and we claim, for the reason heretofore given, that it should not have been refused. The Court will perceive that the erroneous rulings complained of will be found in many other places in the record. We therefore claim a reversal because the evidence proves no case by which the plaintiff is entitled to a verdict, and that the views which the Court below took of the law were inaccurate. The supposed difficulty alluded to in relation to there not being coffee bags enough is the real trouble in this case. After the 7000 bushels were taken out of the cribs, there was not enough left to go round. C. S. Dole & Co. are the real parties in interest, and the Martin judgment was really theirs. On the 22d of Dec., 1859, Fairfield & Weld assigned their interest to them, and they took all the corn, and after the 7000 bushels were replevied out, they divided what was left, (being fifty-five per cent. only,) belonging to Olmstead, Harding, Herford and others, among them, and the controversy is as to which of the creditors, C. S. Dole & Co. or Cushman, True & Co., both of whom have advanced money, shall hold the Fairfield & Weld corn, not the corn of the storers. We desire to be understood as speaking only for Dole & Co. We have no authority to speak for the plaintiffs. We can merely hope they will do right to those who have actually stored corn with Fairfield & Weld.—There was a deficiency of some three or four thousand bushels. Fairfield & Weld had no 7000 bushels over the amount for which other storers had receipts, although this part of the case cannot be seen by your honors. Judicially, it may be taken only as a supposed state of facts to illustrate that the principle of allowing replevin to be maintained upon the facts in proof is not sound If the form of action was trover, justice could be done by the jury by fixing a proper sum in the verdict. Justice cannot be done in replevin, and the action ought not to be sustained, the interest of the plaintiffs being, in every point of view, only an undivided one.

LELAND & BLANCHARD,
For Plaintiff in Error.

Warren
vs
Cushman et al

Brief

Filed Feb. 21. 1863
L Leland
Clk

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APRIL TERM, 1862, AT OTTAWA.

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WILLIAM H. W. CUSHMAN. } *Brief of Plaintiffs in Error.*

It is not a disputed point in this case, that the corn replevied by the plaintiffs was at the time thereof actually mixed with that of several other persons who had stored with Fairfield & Weld, and that the very corn of these other persons, and which never had been that of the plaintiffs, was actually taken by the coroner on the writ. If our views of the law of this case are correct, it is not material to consider whether this admixture had, in point of fact, been acquiesced in by the plaintiffs before the commencement of this suit. If, however, this, in fact, be so, then in no possible point of view—not even admitting that the ruling of the Court below, at plaintiff's request, was right—can the plaintiffs recover. It seems to us that there is no real question in this case, and that the plaintiffs cannot properly maintain this action, allowing them the benefit of every position they claim the evidence tends to prove. Although there might have been some conversation between Cushman and Fairfield about keeping the corn of plaintiffs separate from that of other storers, it is manifestly apparent that the idea was never seriously entertained by the plaintiffs that Fairfield & Weld should do so. It was rather a speculative inquiry on the part of Cushman whether such a thing was practicable, than a thought to be seriously entertained. There can hardly be said to be a shadow of a doubt, that the plaintiffs did, before this suit was brought, acquiesce in the admixture of the corn; all there is in the record to countenance the contrary idea, is the following statement of Fairfield; "When the arrangement to advance money was made, Cushman requested Fairfield to keep the corn purchased with money furnished by plaintiff separate. Fairfield said it would be inconvenient to do so; made no agreement that he would do so: and did not, in fact, do so, but mixed it." On the contrary (if it can be called the contrary), it appears that the universal custom in Ottawa of doing a grain and produce business, is to mix the corn of different storers; that True, one of the plaintiffs, passed the cribs daily, and knew just what was being done; that the grain receipts mentioned in the receipts dated Dec. 22d, 1859, were not for the real amounts of corn purchased

and received in store by Fairfield & Weld, but receipts for assumed amounts, as security for a loan. There were no 5000 bushels of corn in the cribs before December 1st, 1859. Fairfield says there was only a small amount placed in the cribs in the latter part of November, 1859; and Olmstead says his corn was the first put into the cribs. The corn receipts given the plaintiffs, for 5000 bushels, dated November 23 and 28, were fictitious—that is, the corn was not yet purchased; but they were given in advance, to secure money at the time it was purchased. Whenever a sum of money was borrowed, a warehouse receipt was issued for corn in store before the corn was bought with the money, as collateral security for it. The notes, if they had been introduced in evidence, would undoubtedly have corresponded in date with the warehouse receipts. The striking out of the receipts, by True, the words "at the owners' risk," shows that there was no particular 7000 bushels of corn in the cribs owned by plaintiffs, which, if destroyed by casualty, would have entitled Fairfield & Weld to a credit for its value on the notes they had given for the money borrowed of the plaintiffs, or would have injured the value of the receipts as security, except *pro tanto*, by reason of an apportionment of the loss among all the storers. The giving of the notes, including more corn in the grain receipts than the money loaned paid for, the taking other notes, also, as collateral security for the indebtedness, the payment of insurance, and all other expenses, by Fairfield & Weld, the erasure of the words "at owners' risk" from the grain receipts, the payment of one and one-half per cent a month for the use of the money, all shew that the grain receipts were issued as security for the loaned money, and that the corn mentioned in them was not intended to be kept separate, but was understood to be so much corn mixed with that of others. The corn mentioned in the receipts could not have been all delivered without a delivery of some of the corn of other storers. Whatever, therefore, may have been the conjectural inquiries made by Cushman of Fairfield about keeping separate the corn purchased with the money borrowed at the banking house of Cushman, True & Co., or whatever may at first have been the understanding, the idea, if ever seriously entertained at all, was abandoned long before this suit was commenced, and the plaintiffs had merely, what is so clearly apparent by an examination of the receipt of December 22, 1859, certain warehouse receipts for corn mixed by the warehouseman with that of others, and certain promissory notes, as collateral security for the notes which Fairfield & Weld had given them for money borrowed. It is not a question of conflicting evidence passed upon by the jury. There is no conflict. If this be so, then, by the law, as settled in the case of *Low* vs. *Martin*, (18 *Ill.*) the plaintiffs cannot recover. But a distinction is sought to be taken between the case of *Low* vs. *Martin* and the one at bar, in this, that if the plaintiffs did not acquiesce in the mixing of the corn purchased with the money loaned by them (and which they were to have as security for the money) with that of other storers with Fairfield & Weld, they had the legal right to replevy out of the mixed mass as much corn as was purchased by Fairfield & Weld with the money they borrowed of the plaintiffs. The doctrine that one who had left corn to be stored with a warehouseman, under an agreement that it should be kept separate, might maintain replevin against the warehouseman for an equal

quantity of corn that was mixed, might seem to a casual observer to be sustained in the case of *Low* vs. *Martin* (18 Ill) Such might seem to be the idea intended to be conveyed by the Judge who delivered the opinion, and it was this construction of the dictum which is in some instances introduced in the rulings of the Court below; but the idea of there being other persons besides the warehouseman Low and the storer Martin, whose rights might have been affected, did not probably occur to the Judge who wrote the opinion, and the idea of the dictum undoubtedly was, that the wrongful admixture should be one which would make the whole property, the property of the plaintiffs in replevin, because that is the principle of the authorities cited as to the effect of what is called the wrongful admixture. The position assumed, that the parties storing with a warehouseman are tenants in common, with a proportion, continually shifting every time one removes his deposit, or as the warehouseman sells a portion of the amount he owns himself, is necessarily inconsistent with the idea that the action can be maintained for the undivided share or interest. All authorities agree that an action of replevin can only be maintained for property capable of identification, and delivery by the Sheriff to the plaintiff, and never by a tenant in common for an undivided share or interest in chattels, and this principle is settled in the above case of *Low* vs. *Martin*. It is, then, only an admixture which destroys the relation of tenants in common between the plaintiff in the replevin and the warehouseman, which may make it *otherwise*, as mentioned by Judge Skinner, and this of course can only be done by such an admixture as destroys this relation, by making the plaintiffs in replevin the owner of the whole, and this can only be so where the plaintiff in replevin and the warehouseman were the only owners of the mixed grain. It is not necessary to argue that if Olmstead, Herford, Harding and others were really the owners of an undivided interest in the corn in the three cribs, as mentioned in *Low* vs. *Martin*, that Cushman and Fairfield could not make any arrangement to deprive them of said interest without their consent, or without their fault, so that the plaintiffs could become the owners of the whole mixed mass, or so that they could take out of the warehouse, by replevin, part of the identical corn which the other storers had stored therein.

The case of *Gardner* vs. *Dutch*, which is one of doubtful authority, and which places the right to recover on a right of selection by the plaintiff of his 76 bags of coffee (a right which did not exist any more than that of the officer who made the attachment to select by taking all but 76 bags) has no application when ~~their~~ there are others to be affected. Selecting one's bags of coffee might be easier, too, than selecting ones own ~~pounds~~ ounces and fractions of ~~pounds~~ ounces of corn. The selection doctrine will not answer for mixed corn, if it will for coffee bags. By measuring out the quantity the property of other storers is inevitably taken, without their consent, and to their serious injury where there is a deficiency, Suppose there had been several persons who had the same right to 76 bags of the coffee that the plaintiffs had, and suppose, by the sale and removal of bags of coffee by Wellman & Ropes, or by creditors for them, on execution, the number of bags had been so reduced that there were not 76 bags for each of the parties having the right to so much each remaining in the mass, could these respective owners legally snatch, by replevin, under this doctrine of selec-

tion, upon the principle of the devil take the hindmost, *till the hindmost might* be left, at best, with only a bag to hold? If so, the doctrine of selection would be of no more use to the last one in saving his coffee, than the doctrine of election. His coffee might thus be lost without any fault on his part. Perhaps brother Cook, who knows more about these things, can read his title clear to the replevied corn; if so, it must be by faith alone in something that is incomprehensible to us.

Let us see, now, what were the erroneous rulings, if we are right in our position. The jury must have been somewhat perplexed to know exactly what the law was from the instructions. They would seem to be somewhat in conflict. This is sometimes unavoidable, owing to the want of time necessary for reflection by the Court below. Although the propositions in accordance with our view of the law, requested to be given, were in many instances refused, or their effect neutralized by other instructions containing the converse of the proposition, it is perhaps enough to call the attention of the Court to a few of them only. This Court having once reproved one of our firm for writing too many instructions, we desire briefly to apologize for there being so many in this case. We did not know but the jury might apply the republican doctrine, that the majority should govern; and we hoped to have the weight of authority on our side; and as fast as one was neutralized by an opposite one from brother Cook, we endeavored to supply its place. Again, we did not write them all, and in the hurry of a trial at *nisi prius*, too many instructions will thus get in, for want of time to compare and digest them properly. The 4th instruction of the plaintiffs is not the law, as applicable to the facts of this case, nor is it the law as applicable to any possible state of facts in any replevin suit. The issue in replevin on a plea of property in a third person is never whether the property is in such third person, but on that part of the plea which alleges that the property is not the plaintiffs—and such is the issue on the third plea. (1 Gilman, 365.) The 3d and 5th instructions are not the law. The issue is the same on the 2d and 5th pleas. The jury, then, are instructed that on a denial of property in the plaintiffs, it is not necessary for them to introduce any proof whatever, and that consequently it is entirely immaterial whether the plaintiffs in this case were tenants in common or sole owners of the replevied property, or whether they own any interest at all in it. Now, as the jury are instructed, in the 3d 4th, and 5th instructions, as to the very pith and marrow of the controversy, we think it is not necessary to press any other points to entitle us to a reversal. However, as we desire an expression of an opinion, which will end the controversy, if we are right in our views that the plaintiff cannot properly recover, in this action, we claim that the eighth instruction given at the request of the plaintiffs is not the law, and that the 5th instruction asked by the defendant is the law. By the eighth instruction for plaintiff the jury are directed that if the plaintiffs had a pledge of the replevied corn, as security for a debt, it is a sufficient ownership to enable them to maintain this action. We claim that this would not be so if they were really the owners, having stored the 7000 bushels, and that before this suit was brought, it was with their acquiescence mixed, or if without their consent, it was mixed with

the corn left in store by the other storers, the latter not being aware of the supposed agreement between Cushman and Fairfield, and having, in ignorance of it, consented to the admixture of their corn with other corn in the cribs. It may be said that the idea intended to be conveyed in the 8th instruction was, that the property of one who holds by pledge as security is just as good as though he was the actual owner. Such is not the fair construction of the language of the instruction. The gist of the controversy is perhaps as well set forth in the 5th instruction asked by the defendant and refused by the Court, as anywhere in the record; and we claim, for the reason heretofore given, that it should not have been refused. The Court will perceive that the erroneous rulings complained of will be found in many other places in the record. We therefore claim a reversal because the evidence proves no case by which the plaintiff is entitled to a verdict, and that the views which the Court below took of the law were inaccurate. The supposed difficulty alluded to in relation to there not being coffee bags enough is the real trouble in this case. After the 7000 bushels were taken out of the cribs, there was not enough left to go round. C. S. Dole & Co. are the real parties in interest, and the Martin judgment was really theirs. On the 22d of Dec., 1859, Fairfield & Weld assigned their interest to them, and they took all the corn, and after the 7000 bushels were replevied out, they divided what was left, (being fifty-five per cent. only,) belonging to Olmstead, Harding, Herford and others, among them, and the controversy is as to which of the creditors, C. S. Dole & Co. or Cushman, True & Co., both of whom have advanced money, shall hold the Fairfield & Weld corn, not the corn of the storers. We desire to be understood as speaking only for Dole & Co. We have no authority to speak for the plaintiffs. We can merely hope they will do right to those who have actually stored corn with Fairfield & Weld.— There was a deficiency of some three or four thousand bushels. Fairfield & Weld had no 7000 bushels over the amount for which other storers had receipts, although this part of the case cannot be seen by your honors ~~Judicially~~, it may be taken only as a supposed state of facts to illustrate that the principle of allowing replevin to be maintained upon the facts in proof is not sound If the form of action was trover, justice could be done by the jury by fixing a proper sum in the verdict. Justice cannot be done in replevin, and the action ought not to be sustained, the interest of the plaintiffs being, in every point of view, only an undivided one.

LELAND & BLANCHARD,
For Plaintiff in Error.

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Stamen
23
Buchanan et al

Brief

Filed April 1863
J. Schaeck
Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

FRANCIS WARNER
vs.
WILLIAM H. W. CUSHMAN. } *Brief of Plaintiffs in Error.*

It is not a disputed point in this case, that the corn replevied by the plaintiffs was at the time thereof actually mixed with that of several other persons who had stored with Fairfield & Weld, and that the very corn of these other persons, and which never had been that of the plaintiffs, was actually taken by the coroner on the writ. If our views of the law of this case are correct, it is not material to consider whether this admixture had, in point of fact, been acquiesced in by the plaintiffs before the commencement of this suit. If, however, this, in fact, be so, then in no possible point of view—not even admitting that the ruling of the Court below, at plaintiff's request, was right—can the plaintiffs recover. It seems to us that there is no real question in this case, and that the plaintiffs cannot properly maintain this action, allowing them the benefit of every position they claim the evidence tends to prove. Although there might have been some conversation between Cushman and Fairfield about keeping the corn of plaintiffs separate from that of other storers, it is manifestly apparent that the idea was never seriously entertained by the plaintiffs that Fairfield & Weld should do so. It was rather a speculative inquiry on the part of Cushman whether such a thing was practicable, than a thought to be seriously entertained. There can hardly be said to be a shadow of a doubt, that the plaintiffs did, before this suit was brought, acquiesce in the admixture of the corn; all there is in the record to countenance the contrary idea, is the following statement of Fairfield; "When the arrangement to advance money was made, Cushman requested Fairfield to keep the corn purchased with money furnished by plaintiff separate. Fairfield said it would be inconvenient to do so; made no agreement that he would do so: and did not, in fact, do so, but mixed it." On the contrary (if it can be called the contrary), it appears that the universal custom in Ottawa of doing a grain and produce business. is to mix the corn of different storers; that True, one of the plaintiffs, passed the cribs daily, and knew just what was being done; that the grain receipts mentioned in the receipts dated Dec. 22d, 1859, were not for the real amounts of corn purchased

and received in store by Fairfield & Weld, but receipts for assumed amounts, as security for a loan. There were no 5000 bushels of corn *in the cribs before* December 1st, 1859. Fairfield says there was only a small amount placed in the cribs in the latter part of November, 1859; and Olmstead says his corn was the first put into the cribs. The corn receipts given the plaintiffs, for 5000 bushels, dated November 23 and 28, were fictitious—that is, the corn was not yet purchased: but they were given in advance, to secure money at the time it was purchased. Whenever a sum of money was borrowed, a warehouse receipt was issued for corn in store before the corn was bought with the money, as collateral security for it. The notes, if they had been introduced in evidence, would undoubtedly have corresponded in date with the warehouse receipts. The striking out of the receipts, by True, the words "at the owners' risk," shows that there was no particular 7000 bushels of corn in the cribs owned by plaintiffs, which, if destroyed by casualty, would have entitled Fairfield & Weld to a credit for its value on the notes they had given for the money borrowed of the plaintiffs, or would have injured the value of the receipts as security, except *pro tanto*, by reason of an apportionment of the loss among all the storers. The giving of the notes, including more corn in the grain receipts than the money loaned paid for, the taking other notes, also, as collateral security for the indebtedness, the payment of insurance, and all other expenses, by Fairfield & Weld, the erasure of the words "at owners' risk" from the grain receipts, the payment of one and one-half per cent a month for the use of the money, all shew that the grain receipts were issued as security for the loaned money, and that the corn mentioned in them was not intended to be kept separate, but was understood to be so much corn mixed with that of others. The corn mentioned in the receipts could not have been all delivered without a delivery of some of the corn of other storers. Whatever, therefore, may have been the conjectured inquiries made by Cushman of Fairfield about keeping separate the corn purchased with the money borrowed at the banking house of Cushman, True & Co., or whatever may at first have been the understanding, the idea, if ever seriously entertained at all, was abandoned long before this suit was commenced, and the plaintiffs had merely, what is so clearly apparent by an examination of the receipt of December 22, 1859, certain warehouse receipts for corn mixed by the warehouseman with that of others, and certain promissory notes, as collateral security for the notes which Fairfield & Weld had given them for money borrowed. It is not a question of conflicting evidence passed upon by the jury. There is no conflict. If this be so, then, by the law, as settled in the case of *Low* vs. *Martin*, (18 *Ill.*) the plaintiffs cannot recover. But a distinction is sought to be taken between the case of *Low* vs. *Martin* and the one at bar, in this, that if the plaintiffs did not acquiesce in the mixing of the corn purchased with the money loaned by them (and which they were to have as security for the money) with that of other storers with Fairfield & Weld, they had the legal right to replevy out of the mixed mass as much corn as was purchased by Fairfield & Weld with the money they borrowed of the plaintiffs. The doctrine that one who had left corn to be stored with a warehouseman, under an agreement that it should be kept separate, might maintain replevin against the warehouseman for an equal

quantity of corn that was mixed, might seem to a casual observer to be sustained in the case of *Low* vs. *Martin* (18 Ill) Such might seem to be the idea intended to be conveyed by the Judge who delivered the opinion, and it was this construction of the dictum which is in some instances introduced in the rulings of the Court below; but the idea of there being other persons besides the warehouseman Low and the storer Martin, whose rights might have been affected, did not probably occur to the Judge who wrote the opinion, and the idea of the dictum undoubtedly was, that the wrongful admixture should be one which would make the whole property, the property of the plaintiffs in replevin, because that is the principle of the authorities cited as to the effect of what is called the wrongful admixture. The position assumed, that the parties storing with a warehouseman are tenants in common, with a proportion, continually shifting every time one removes his deposit, or as the warehouseman sells a portion of the amount he owns himself, is necessarily inconsistent with the idea that the action can be maintained for the undivided share or interest. All authorities agree that an action of replevin can only be maintained for property capable of identification, and delivery by the Sheriff to the plaintiff, and never by a tenant in common for an undivided share or interest in chattels, and this principle is settled in the above case of *Low* vs. *Martin*. It is, then, only an admixture which destroys the relation of tenants in common between the plaintiff in the replevin and the warehouseman, which may make it *otherwise*, as mentioned by Judge Skinner, and this of course can only be done by such an admixture as destroys this relation, by making the plaintiffs in replevin the owner of the whole, and this can only be so where the plaintiff in replevin and the warehouseman were the only owners of the mixed grain. It is not necessary to argue that if Olmstead, Herford, Harding and others were really the owners of an undivided interest in the corn in the three cribs, as mentioned in *Low* vs. *Martin*, that Cushman and Fairfield could not make any arrangement to deprive them of said interest without their consent, or without their fault, so that the plaintiffs could become the owners of the whole mixed mass, or so that they could take out of the warehouse, by replevin, part of the identical corn which the other storers had stored therein.

The case of *Gardner* vs. *Dutch*, which is one of doubtful authority, and which places the right to recover on a right of selection by the plaintiff of his 76 bags of coffee (a right which did not exist any more than that of the officer who made the attachment to select by taking all but 76 bags) has no application when their are others to be affected. Selecting one's bags of coffee might be easier, too, than selecting ones own ~~pounds~~ kernels and fractions of ~~pounds~~ kernels of corn. The selection doctrine will not answer for mixed corn, if it will for coffee bags. By measuring out the quantity the property of other storers is inevitably taken, without their consent, and to their serious injury where there is a deficiency, Suppose there had been several persons who had the same right to 76 bags of the coffee that the plaintiffs had, and suppose, by the sale and removal of bags of coffee by Wellman & Ropes, or by creditors for them, on execution, the number of bags had been so reduced that there were not 76 bags for each of the parties having the right to so much each remaining in the mass, could these respective owners legally snatch, by replevin, under this doctrine of selec-

tion, upon the principle of the devil take the hindmost, till the hindmost might be left, at best, with only a bag to hold? If so, the doctrine of selection would be of no more use to the last one in saving his coffee, than the doctrine of election. His coffee might thus be lost without any fault on his part. Perhaps brother Cook, who knows more about these things, can read his title clear to the replevied corn; if so, it must be by faith alone in something that is incomprehensible to us.

Let us see, now, what were the erroneous rulings, if we are right in our position. The jury must have been somewhat perplexed to know exactly what the law was from the instructions. They would seem to be somewhat in conflict. This is sometimes unavoidable, owing to the want of time necessary for reflection by the Court below. Although the propositions in accordance with our view of the law, requested to be given, were in many instances refused, or their effect neutralized by other instructions containing the converse of the proposition, it is perhaps enough to call the attention of the Court to a few of them only. This Court having once reproved one of our firm for writing too many instructions, we desire briefly to apologize for there being so many in this case. We did not know but the jury might apply the republican doctrine, that the majority should govern; and we hoped to have the weight of authority on our side; and as fast as one was neutralized by an opposite one from brother Cook, we endeavored to supply its place. Again, we did not write them all, and in the hurry of a trial at *nisi prius*, too many instructions will thus get in, for want of time to compare and digest them properly. The 4th instruction of the plaintiffs is not the law, as applicable to the facts of this case, nor is it the law as applicable to any possible state of facts in any replevin suit. The issue in replevin on a plea of property in a third person is never whether the property is in such third person, but on that part of the plea which alleges that the property is not the plaintiffs—and such is the issue on the third plea. (1 Gilman, 365.) The 3d and 5th instructions are not the law. The issue is the same on the 2d and 5th pleas. The jury, then, are instructed that on a denial of property in the plaintiffs, it is not necessary for them to introduce any proof whatever, and that consequently it is entirely immaterial whether the plaintiffs in this case were tenants in common or sole owners of the replevied property, or whether they own any interest at all in it. Now, as the jury are instructed, in the 3d 4th, and 5th instructions, as to the very pith and marrow of the controversy, we think it is not necessary to press any other points to entitle us to a reversal. However, as we desire an expression of an opinion, which will end the controversy, if we are right in our views that the plaintiff cannot properly recover, in this action, we claim that the eighth instruction given at the request of the plaintiffs is not the law, and that the 5th instruction asked by the defendant is the law. By the eighth instruction for plaintiff the jury are directed that if the plaintiffs had a pledge of the replevied corn, as security for a debt, it is a sufficient ownership to enable them to maintain this action. We claim that this would not be so if they were really the owners, having stored the 7000 bushels, and that before this suit was brought, it was with their acquiescence mixed, or if without their consent, it was mixed with

the corn left in store by the other storers, the latter not being aware of the supposed agreement between Cushman and Fairfield, and having, in ignorance of it, consented to the admixture of their corn with other corn in the cribs. It may be said that the idea intended to be conveyed in the 8th instruction was, that the property of one who holds by pledge as security is just as good as though he was the actual owner. Such is not the fair construction of the language of the instruction. The gist of the controversy is perhaps as well set forth in the 5th instruction asked by the defendant and refused by the Court, as anywhere in the record; and we claim, for the reason heretofore given, that it should not have been refused. The Court will perceive that the erroneous rulings complained of will be found in many other places in the record. We therefore claim a reversal because the evidence proves no case by which the plaintiff is entitled to a verdict, and that the views which the Court below took of the law were inaccurate. The supposed difficulty alluded to in relation to there not being coffee bags enough is the real trouble in this case. After the 7000 bushels were taken out of the cribs, there was not enough left to go round. C. S. Dole & Co. are the real parties in interest, and the Martin judgment was really theirs. On the 22d of Dec., 1859, Fairfield & Weld assigned their interest to them, and they took all the corn, and after the 7000 bushels were replevied out, they divided what was left, (being fifty-five per cent. only,) belonging to Olmstead, Harding, Herford and others, among them, and the controversy is as to which of the creditors, C. S. Dole & Co. or Cushman, True & Co., both of whom have advanced money, shall hold the Fairfield & Weld corn, not the corn of the storers. We desire to be understood as speaking only for Dole & Co. We have no authority to speak for the plaintiffs. We can merely hope they will do right to those who have actually stored corn with Fairfield & Weld.— There was a deficiency of some three or four thousand bushels. Fairfield & Weld had no 7000 bushels over the amount for which other storers had receipts, although this part of the case cannot be seen by your honors. ~~Judicially, it~~ Judicially, it may be taken only as a supposed state of facts to illustrate that the principle of allowing replevin to be maintained upon the facts in proof is not sound If the form of action was trover, justice could be done by the jury by fixing a proper sum in the verdict. Justice cannot be done in replevin, and the action ought not to be sustained, the interest of the plaintiffs being, in every point of view, only an undivided one.

LELAND & BLANCHARD,
For Plaintiff in Error.

140.

Warren
to
Buchanan
Brief

~~Buchanan~~
vs
[illegible]

Filed Apr 21 1863
J Leland
Clk

State of Illinois
Supreme Court Third Grand Division
April Term thereof A.D. 1862

Francis Warren
vs.
William H. Washburn Error to LaSalle
William M. Gale
Isaac D. Wortenman

L. L. Leland Clerk of said Court please issue scire facias in the above entitled cause directed to Sheriff of LaSalle County and a duplicate to the Sheriff of Cook County

Leland & Blanchard
Plaintiffs attorneys

Ottawa March 7-1862

128

Francis Warner
vs
William H. Weckerman
William M. Grove
Isaac D. Wolleman

Precipe

Filed March ~~19th~~ 17th 1862
L. Leland
Cl'k

Leland & Blumenkamp

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of La Salle County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between William H. W. Cushman, William M. True and Isaac V. Waterman plaintiffs, and Francis Warner defendant, it is said that manifest error hath intervened, to the injury of the said Defendant as we are informed by his complainant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said William H. Cushman William M. True and Isaac V. Waterman that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William H. W. Cushman William M. True and Isaac V. Waterman notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-two.

R. Lee Cann

Clerk of the Supreme Court.

by [illegible] Deputy

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Francis Warner

No. 128 vs.

William H. W Cushman et al

SCIRE FACIAS.

FILED April 22 A. D. 1862

L. Leland Clerk.

Leonard G. Crowell Esq. Pro Prd. & Isaac P. Rollins Esq. and Rebecca M. Lewis Exs. of Joseph Lewis late of Boston deceased

William H. W. Cushman and Rebecca M. his wife

Sci. Fa.

Dec. 9 Rec. 1.10
2 Mile .10
1.20

Leonard G. Crowell Esq. Pro Prd. & Isaac P. Rollins Esq. and Rebecca M. Lewis Exs. of Joseph Lewis late of Boston deceased

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plaintiffs, and Francis Warner

defendant, it is said that manifest error hath intervened, to the injury of the said defendant

as we are informed by his complainant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said William H. W. Cushman William M. True & Isaac V. Waterman

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William H. W. Cushman, William M. True & Isaac V. Waterman

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 7th day of December in the year of our Lord One Thousand Eight Hundred and Sixty-two.

L. Leland

Clerk of the Supreme Court.

by J. B. Mac Deputy

FIFTY CENTS 50 INTERNAL REVENUE STAMPS GUARANTEED 50 JUDICIAL PROCESS

40

Francis Warner

No. vs.

William H. W. Cushman

& others

SCIRE FACIAS.

FILED. April 20 A. D. 186 3

L Leland Clerk.

I have duly Served the within by reading the same to W. H. W. Cushman this 16th December 1862

W. B. Mulligan Sheff

by Brush Deputy

Fee

Ser & Ret 60 cts

Mileage 5

.65

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between William H Cushman, William McIver and Isaac R Waterman

plaintiff, and [illegible]

defendant, it is said that manifest error hath intervened, to the injury of the said Defendants

as we are informed by his complainant the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said William H Cushman William McIver and Isaac R Waterman

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William H Cushman William McIver and Isaac R Waterman

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-two

R Leland

Clerk of the Supreme Court.

by J. B. Rice Dep't

No. 128 / Writs 10

Francis Pelletier

No. vs.

Mr. M. C. Cashman et al

SCIRE FACIAS.

FILED. March 27, A. D. 1862

L. Leland Clerk.

The within named Defendants are hereby summoned to appear at the next Term of this Court to be holden at the City Hall in the City of San Francisco on the first Monday of April A.D. 1862 then and there to show cause why Execution should not issue against them as prayed for in the within Petition.

Witness my hand and the Seal of said Court this 27th day of March A.D. 1862

L. Leland Clerk.

By Wm. Van Voorhies Deputy Clerk.

Col. Wm. Van Voorhies

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

FRANCIS WARNER, Pl'ff in Error,
vs.
WILLIAM H. W. CUSHMAN *et al.*,
Defendants in Error.
} ERROR TO LA SALLE.

ABSTRACT OF RECORD.

PAGE Of Record.

Action—Replevin—begun March 17, 1860.

2 Affidavit filed March 17, 1860—That William H. W. Cushman, Isaac V. Waterman, and William M. True, defendants in Error, were partners under the firm-name of Cushman, True & Co., and justly entitled to the possession of seven thousand bushels of corn, in the ear, situated in four cribs, standing on Lot Four and the west half of Lot Three, in Block No. Thirteen, in original town of Ottawa; that said corn was unjustly and unlawfully detained from the possession of Cushman, True & Co., by Francis Warner (plaintiff in Error).

3 Plaint filed March 17, 1860, by defendants in Error—That plaintiff in Error, March 15, 1860, unlawfully and unjustly took seven thousand bushels of corn, in the ear, of 75 pounds to the bushel—value $2,800.00—the property of said defendants in Error, and unjustly detained the same.

4–5 Affidavit filed March 17, 1860—That Warner (plaintiff in Error) was Sheriff, &c.

5 Summons, issued March 17, 1860, directed to Coroner of La Salle County, commanding him to take the corn described in the Affidavit and Plaint, &c.

June 11, 1860—Writ returned, endorsed, "Executed the within writ by reading to Francis Warner, and delivering the property within described to plaintiff, this 17th day of March, A. D. 1860."

Bond filed March 17, 1860.

Pleas filed June 7, 1860.

1ST. General issue.

2D. Property in defendant (Warner).

3D. Property in Micaiah F. Fairfield and John D. Weld.

4TH. Was not property of plaintiff.

5TH. On the twentieth day of December, 1859, at the December term of the Superior Court of Chicago, William Martin recovered judgment *vs.* Micaiah F. Fairfield and John D. Weld in the sum of $9404.50 and costs.

Execution issued on said judgment December twentieth, 1859, directed to Sheriff of La Salle County, and came into the hands of defendant (plaintiff in Error), as Sheriff, December 22d, 1859; that on the 9th day of March, 1860, said defendant, as Sheriff, did levy upon, seize and take the said corn, in the declaration mentioned, as the property of said Fairfield and Weld; that said defendant (plaintiff in Error) was Sheriff of La Salle County, duly elected and qualified; that at the time said execution came into his hands, and levied upon said corn, it was the property of said Fairfield and Weld, liable to be taken and sold upon said execution.

6TH. Prior to the commencement of this suit, said Fairfield & Weld were engaged as warehousemen, in the business of receiving from divers persons, corn and other grain, in Ottawa, La Salle County, to be stored, and also in the purchase for themselves of corn and other grain, which said corn (as well that purchased as stored) was so received by them with the understanding, on the part of the storers and Fairfield & Weld, that the same should not be kept separate, but should be mixed, and a like quantity and quality (but not the same corn as that stored) should be delivered to the storers thereof; that at the time of the receipt and levy of the execution hereinafter mentioned, there was in the three corn-cribs, hereinafter mentioned, a quantity of corn composed partly of corn stored and partly of corn purchased, and owned by said Fairfild & Weld, all mixed together by consent of the storers and of said Fairfield & Weld; that while said corn was so mixed in said crib, said Fairfield & Weld, for the purpose & of securing plaintiffs the (defendants in Error) for an indebtedness due them from said Fairfield & Weld, and without receiving in store any corn from said plaintiffs (defendants in Error), issued certain fictitious grain receipts, falsely purporting to be for corn stored with said Fairfield & Weld by the plaintiffs (defendants in Error), said Fairfield & Weld not owning the amount of corn mentioned in said receipts, and

having no corn out of which to pay them in full, without using the corn stored by others, or corn afterwards to be received by them, while the corn which was afterwards replevied was in this mixed condition by consent of
17 plaintiffs, the storers and said Fairfield & Weld. (Same averments as in 5th plea relative to the rendition of judgment in Chicago, issuing execution thereon, its receipt and levy by plaintiff in Error, as Sheriff, &c., that he was Sheriff, &c;) that the corn in the declaration mentioned was replevied, and separated by the Coroner from the mixed mass in said three cribs, the whole of which defendant had seized as the property of Fairfield & Weld; that said plaintiffs (defendants in Error) had no other claim to said corn replevied by them, and separated from the mass aforesaid, except the said
18 receipts given as aforesaid to secure said debts; that no delivery of said corn was made to said plaintiffs (defendants in Error) by said Fairfield & Weld before said execution came into the hands of defendant (plaintiff in Error.)

19 Replications filed June 18, 1860.

Similiter to first plea.

To second plea—That the property was the property of plaintiffs (defendants in Error. Conclusion to the country. Similiter added.

20 To third plea—That the corn was not the property of Fairfield & Weld at the time when, &c., but was the property of plaintiffs. Conclusion to the country. Similiter added.

21 To fifth plea—That the said corn was not the property of Fairfield & Weld. Conclusion to the country. Similiter.

21 Second replication to said fifth plea—That there is no such record of any judgment and execution as in said plea supposed. Conclusion to the country. Similiter.

22 3D. Replication to said fifth plea—That said defendant (plaintiff in Error) was not, at the time when, &c., Sheriff, &c. Conclusion to the country. Similiter.

To sixth plea—That long before the said time when, &c., on the first day of December, 1859, Fairfield & Weld agreed to purchase corn with money furnished by plaintiffs (defendants in Error) for that purpose; that
23 it was a part of said agreement; that the corn so purchased by them with money of plaintiffs should become, at the time of purchase, the corn of plaintiffs, and should be sold by plaintiff on their own account; that seven thousand bushels was so purchased by said Fairfield & Weld, and then and there became, and was, the property of the plaintiffs, and was placed by said Fairfield & Weld in certain cribs, in which cribs said corn remained
23 the property of the plaintiffs (defendants in Error) until the execution of the writ of replevin in this cause, by which writ seven thousand bushels of corn was taken, and said corn, while in said cribs, was never mixed with

any other corn by and with the knowledge and consent of plaintiffs, but if said Fairfield & Weld did mix said corn with any other corn, they did so of their own wrong, and without the knowledge and consent of plaintiff, (Concludes with a verification.

23 2D. Replication to said sixth plea—That it is not true that the only
24 right which they had to said corn was by virtue of certain fictitious grain receipts, &c.. but they were the owners of the amount of corn replevied in this suit, which was in certain cribs, where it had been placed by Fairfield & Weld for these plaintiffs, and from which cribs the corn replevied was taken. They deny that said corn was mixed with other corn with their knowledge and consent. (Concludes with a verification.)

27 Additional replication to sixth plea, filed November 16th, 1860—That there is no such record of any judgment and execution as in said plea is supposed. Conclusion to the country. Similiter.

25 Rejoinder to ~~sixth plea~~, June 19, 1860: 1st Rep to 6th Plea

Not true that Fairfied & Weld agreed to purchase corn for plaintiffs
26 (defendants in Error) with money furnished by plaintiffs for that purpose; and it is not true that it was a part of said agreement that the corn so purchased by said Fairfield & Weld with the money of the plaintiffs, should become, at the time of the purchase, the corn of the plaintiff, and should be sold by plaintiffs on their own account; nor was said quantity of corn so purchased and so become the property of plaintiffs until replevied; nor is it true that the corn so replevied was never mixed with any other corn by and with the knowledge and consent of the plaintiffs, &c. To the country. Similiter.

26. Rejoinder to second replication to sixth plea:

That it is true that the only right which plaintiffs (defendants in Error) had in said corn was by said fictitious grain receipts, &c.; it is not true that plaintiffs were the owners of the corn replevied in this suit, nor is it true that it was placed by said Fairfield & Weld, for the plaintiffs, in certain cribs, from which it was replevied; and it is true that said corn replevied was mixed with other corn, with the knowledge and consent of the plaintiffs, &c. To the country. Similiter.

Trial by jury, February 18, 1862. Verdict and judgment for plaintiffs.

BILL OF EXCEPTIONS.

Plaintiffs' Evidence:

52 Micaiah F. Fairfield testified that he and John D. Weld were partners in the business of buying and storing grain at Ottawa, prior and in November and December, 1859; until December 1st, 1859, occupied warehouse on

north side of Madison Street, at which time their lease expired; they then moved on the opposite side of Madison Street, and continued the same business on lot four (4) and the west half of lot three (3), in block thirteen (13), in State's addition to Ottawa. There were three cribs for storing
53 corn, an office, and other buildings on said premises. December 22d, 1859, there was in said three cribs about 14000 bushels of ear corn, belonging to
53 themselves, Herford, Olmstead, Umlauf, Harding, and others, who had stored corn with them, which said corn was mixed by Fairfield & Weld, by consent of Herford, Olmstead, Umlauf, Harding and others, so that the corn replevied, and that of said last named persons, formed a mixed mass in said three cribs, and that said 14000 bushels continued so mixed till the 7000 bushels were separated from the mixed mass and taken away by the Coroner, by virtue of said writ of replevin.

In the latter part of November, a small amount of ear corn was placed in some of said three cribs, but the main portion of 14000 bushels was placed in the three cribs between the 1st and 22d of December, 1859. In the latter part of November, 1859, it was agreed between Fairfield and Cushman, for their respective firms, that Cushman, True & Co., (defend-
54 ants in error,) who were bankers, should furnish Fairfield & Weld money to the extent of thirty cents a bushel, to be used in the purchase of corn; that corn purchased with said money should be for Cushman, True & Co., and become, when so purchased, their corn; that said Fairfield & Weld should store said corn and pay all the expenses of taking care of and shipping the same; that upon the sale of said corn, which should be shipped to such persons as said Cushman, True & Co. should direct, and when they should direct, said Cushman, True & Co. should receive from the proceeds the money advanced by them, together with one and a half per cent. a month interest thereon; that Fairfield & Weld were to pay all expenses,
55 including insurance, and Cushman, True & Co. were to be repaid the money advanced by them, and said interest on said money, and nothing more, and all the profits were to be Fairfield & Weld's; that Fairfield & Wells, when money was advanced to them, gave their notes to Cushman, True & Co. (defendants in error) for the amount advanced, and the interest; that in November and December, 1859, Fairfield & Weld gave to Cushman, True & Co. (defendants in error), warehouse receipts, purporting to be for corn in store, as described in the receipts hereinafter mentioned, dated December 22d, 1859; that when they issued the warehouse receipts, True, one of the plaintiffs, objected to the phrase in the warehouse receipts, "at owners' risk," and the same was stricken out; that the value of the corn in said warehouse receipts was about $400.00 more than the money so advanced by Cushman, True & Co.—they advance about $3800.00.

When arrangement made to advance money, Cushman requested Fair field to keep the corn purchased with money furnished by Cushman, True & Co. (defendants in error) separate. Fairfield said it would be inconvenient to do so, and made no agreement that he would do so, and did not, in fact, keep it separate, but mixed the corn purchased with plaintiffs'

money (defendants in error) with the corn of the others who stored grain
56 with them; that the corn purchased with plaintiffs' money, and stored in said three cribs, amounted to about seven thousand bushels. Did not remember ever having any conversation with John D. Olmstead on the subject of the arrangement between Fairfield & Weld and plaintiffs (defendants in error), in relation to the terms upon which plaintiffs were to advance money. On the 9th of March, 1860, defendant (plaintiff in error) took possession, as Sheriff, of all the corn in the three cribs. On the first of March, 1860, Fairfield delivered to plaintiffs (below) the possession of the
57 corn in said cribs, as the corn purchased for plaintiffs (below,) for the purpose of satisfying said corn receipts. Plaintiffs (below) put a fence around
57 the three cribs. Defendant (below) broke the enclosure—took possession of the three cribs of corn.

Cross-Examination.—Defendant proved by said Fairfield the execution of the following receipt by True, one of the plaintiffs (below,) and read the same in evidence:

57 "Received of Fairfield & Weld the following grain receipts and notes, as collateral security for the payment of their indebtedness to us:

Nov. 23.	Receipt for	3000	bushels of corn at	Ottawa
" 28.	" "	2000	" " " "	"
Dec. 5.	" "	2000	" " " "	Utica
" 5.	" "	2000	" " " "	Ottawa
" 14.	" "	1000	" " " "	"
" 19.	" "	1000	" " " "	"
" 12.	Notes of sundry persons to the amount of $882.58.			

Ottawa, Dec. 22, 1859.

CUSHMAN, TRUE & Co."

58 The defendant (plaintiff in error) proved that a judgment was rendered, in the Superior Court of Chicago, on the 20th of December, 1859, in favor of William Martin *vs.* Fairfield & Weld, for $9404.58, and costs; that an execution was issued upon said judgment December 20th, 1859; that
58 defendant was then Sheriff of La Salle County, duly elected and qualified; that said execution came into his hands, as such Sheriff, on the 22d day of December, 1859, and that the same was levied upon all the corn in the three cribs, on the 9th day of March, A. D. 1860.

58 John D. Olmstead testified that in November and December, 1859, he stored about 1500 bushels of corn with Fairfield & Weld, which was placed in the cribs out of which the corn was replevied; that his corn was mixed with the other corn in the cribs, and was taken by the plaintiffs (defendants in error) on their writ of replevin: that he knew of no arrangement between plaintiffs and Fairfield & Weld that the latter were to keep plain-
58 tiffs' corn separate. Fairfield told witness that Fairfield & Weld were hiring money of the plaintiffs to use in the purchase of grain. Witness was engaged in the warehouse business; had stored a good deal with others; that the usual custom in Ottawa was to mix the corn of different owners

together, they to receive a like quantity and quality, but not the same corn. That True, one of the plaintiffs, (below,) passed the place of business of
59 Fairfield & Weld daily, in going from his place of business to his dwelling house; that Fairfield & Weld, in November and December, 1859, were warehousemen, engaged in buying and storing grain—corn, oats, wheat, &c.

60 Harding testified he was a farmer; stored corn with Fairfield & Weld in the winter of 1859—about December of that year; that his corn went into said cribs from which the corn was replevied, and was mixed up with the other corn therein.

Fairfield re-called.—Said that the arrangement between him and Cushman was made before any corn was stored in the cribs, and that he built the cribs himself.

INSTRUCTIONS GIVEN FOR PLAINTIFF.

60 1ST. If the jury believe, from the evidence, that Olmstead, Umlauf, and Herford, or either of them, or other parties than the plaintiffs, stored corn with Fairfield & Weld, and consented that said Fairfield & Weld might mix said corn in one mass with all the corn held in store by said Fairfield & Weld, and not owned by them, and that they the said storers would receive from said Fairfield & Weld a like quantity and quality of corn from the mass so mixed, in lieu of the amount so stored for them, as aforesaid; and if they further believe, that said Fairfield & Weld did so mix said corn of said storers in one mass with the consent of the plaintiffs, without the plaintiffs' consent, then said storers would thereby lose their right to any portion of the identical corn so stored by them; and if Fairfield & Weld, while in the possession of all of said corn, and before the levy of the execution was made by the defendant upon the same, delivered said corn to the plaintiffs, such possession of said plaintiffs is sufficient to enable them to maintain this action, if they believe that defendant took the corn, as stated in plaintiffs' declaration.

61 2D. If defendant took the corn mentioned in the declaration, before this suit was commenced, they must find the issue on the first plea for plaintiffs, no matter who owned the corn.

62 3D. Unless the corn in controversy was the property of defendant (Warner), or that it was the property of Fairfield & Weld, and levied upon by Warner, the jury should find the issue on the second plea for plaintiffs.

62 4TH. Unless the jury believe, from the evidence, that the corn in controversy was the property of Fairfield & Weld when the same was replevied, they must find the issue, on the third plea, for plaintiffs.

62 5TH. Unless the jury believe, from the evidence, that when the execution read in evidence came to Warner's hands, and afterwards was levied

upon the corn in question, and that the same belonged to Fairfield & Weld, they must find the issue, on the fifth plea, for plaintiffs.

63 7TH. If the plaintiffs loaned money to Fairfield & Weld to buy corn, with the agreement that the corn, when purchased, should be the corn of plaintiffs, and subject to their control, and to be disposed of by plaintiffs, and that Fairfield & Weld should have for their services, in buying the corn, all that the corn was sold for over thirty cents per bushel, and interest at one and a half per cent. per month, from the time the money was advanced, the corn purchased under said agreement with the money furnished by plaintiffs, would be the corn of plaintiffs.

63 8TH. If plaintiffs had a right to hold the corn in question, as collateral security for a debt that Fairfield & Weld owed them, that is sufficient ownership of the corn to enable plaintiffs to maintain this action, so far as the question of ownership was concerned.

64 9TH. The execution, when it came to the hands of Warner, was not a lien upon any corn in the cribs except the corn which was actually owned by Fairfield & Weld, or one of them.

64 10TH. If the corn in controversy belonged partly to the plaintiffs and the residue to parties other than Fairfield & Weld, who had stored the same with Fairfield & Weld; and if said corn was mixed by the consent of the owners, such mixing would not make the corn the property of Fairfield & Weld, but the corn would belong to plaintiffs and the other parties storing the same, in common, according to their respective portions mixed in the mass, and in such case, an execution against Fairfield & Weld would not be a lien on said corn, and if, before the corn was levied upon, Fairfield & Weld had delivered the possession of said corn to the plaintiffs, were in the actual and peaceable possession thereof, defendant had no right to take the corn out of plaintiffs's possession to satisfy an execution against Fairfield & Weld, and if he did so, then plaintiffs have a right to replevy the corn as against him, and the jury should find for the plaintiffs.

65 11TH. If Fairfield & Weld purchased the corn in question with money furnished by plaintiffs, and it was the agreement at the time the money was advanced, that the corn, when purchased, should be plaintiffs' corn, to be sold by them, and to be under their control from the time it was purchased, then, even if Fairfield & Weld did issue warehouse receipts to plaintiffs for the corn as it was received in store, the defendant would have no right to levy on the corn by virtue of an execution against Fairfield & Weld.

To the giving of each of said instructions defendant excepted.

INSTRUCTIONS ASKED BY DEFENDANT.

66 1ST. The plaintiffs, in order to entitle themselves to a verdict, must

prove that the identical corn replevied was their property, and proof that they owned 7000 bushels, or any other quantity undivided, of a mixed mass containing a larger amount, the remainder of the mass being the property of others, is not sufficient to entitle them to a verdict against the defendant for taking the whole mixed mass, and unless they have proved the whole mixed mass was their property, the verdict of the jury should be for the defendant.

66 2D. If Fairfield & Weld, as warehousemen at the time this suit was commenced, had in store a mixed mass of corn of about 14,000 bushels, of which about 7,000 bushels only, or any amount less than the whole, belonged to the plaintiffs, they cannot maintain an action of replevin against the defendant for having taken the whole or any part thereof, and unless all the other owners of the mixed mass have consented to the wrongful mixing of the corn of the plaintiff with their own, against the will of the plaintiff, so as to make the whole mixed mass the plaintiffs', or have in some other way caused the plaintiffs to become the owners of their respective undivided interests, the verdict of the jury must be for the defendant.

67 3D. If the jury believe, from the evidence, that Fairfield & Weld, being warehousemen, buying grain for themselves and others, and storing it for themselves and others, borrowed money of the plaintiff to use in the purchase of grain, and as security for said indebtedness, from time to time gave plaintiffs warehouse receipts, purporting to be for corn in store, and if, at the time said receipts were given, the corn which Fairfield & Weld had purchased for themselves, and that which others had stored with them, was mixed together by Fairfield & Weld, with the consent of said storers, the plaintiffs would have no such property in the corn purchased by Fairfield & Weld with the money borrowed of them as would enable them to maintain this action of replevin against the defendant for the quantity of corn in their warehouse receipts mentioned, or any part thereof, though the defendant may have taken all or any portion of the corn which Fairfield & Weld had in store belonging to themselves and others.

68 4TH. If Fairfield & Weld, instead of borrowing money of the plaintiffs and securing it as mentioned in the last instruction, as the agents of the plaintiffs purchased corn for the plaintiffs with the money of the latter, and as such agents of the plaintiffs, being also at the time warehousemen, received the corn, so purchased for plaintiffs, in store, and having so received it in store, mixed it with corn stored by others, with the consent of the latter, and while the corn was so mixed, gave the warehouse receipts to the plaintiffs, the plaintiffs cannot maintain this action against the defendant for the corn so purchased by Fairfield & Weld, and being mixed with said other corn, as aforesaid, or for any part thereof, though defendant may have taken all the corn Fairfield & Weld had thus in store.

69 5TH. If the facts are as mentioned in the last instruction, the plaintiffs cannot recover, though the direction to Fairfield & Weld were to keep the corn of plaintiffs separate by itself. If these directions were not commu-

nicated to the other storers of corn, that is, unless the corn of the plaintiffs was wrongfully mixed with the corn of the other storers, with such participation therein by the latter as would make the whole mixed mass of corn the property of the plaintiffs, they cannot maintain this action against the defendant, though he may have taken the whole or any portion of said mixed mass.

70 6TH. If Fairfield & Weld, being warehousemen, engaged in purchasing grain for themselves or others, and in storing such grain, either purchased the corn, in plaintiffs receipts mentioned, for plaintiffs, or gave them said receipts as security for their indebtedness to them, and said corn was mixed by Fairfield & Weld with that stored by others, by consent of the latter, said other storers being ignorant of any directions having been given by plaintiffs to Fairfield & Weld to keep plaintiffs' corn unmixed, and the defendant, being the Sheriff of La Salle County, did, as such Sheriff, by virtue of the execution issued on the judgment, before said corn was delivered to the plaintiffs, take the whole of said mixed mass of corn, the plaintiffs cannot recover in this action.

70 7TH. Though the Sheriff may not have taken actual possession of the corn till the 9th of March, 1860, the execution became a lien upon Fairfield & Weld's corn from the time it was placed in his hands, and a delivery of the corn by Fairfield & Weld to plaintiffs of their corn between that time and the time the Sheriff made the levy, would not prevent the defendant from taking and selling any interest which Fairfield & Weld had at the time when said execution went into the hands of said defendant, as Sheriff.

71 8TH. If the jury believe, from the evidence, that the plaintiffs were, at the time this suit was commenced, merely the owners of an undivided interest in the corn replevied, or of an undivided interest in a larger amount of corn, which included that from which the corn in controvesy was separated from, by the coroner, in executing the writ of replevin in this case, and that they were not the sole owners of the replevied corn not then mixed, with the other corn, or unless they were the sole owners of the whole of the corn of which the replevied corn formed a part, the verdict of the jury should be for the defendant.

71 9TH. If the jury believe, from the evidence, that the plaintiffs loaned money to Fairfield & Weld, the said Fairfield & Weld being warehousemen, and Fairfield & Weld gave Cushman warehouse receipts for a number of bushels of corn, undivided, in a mass of corn stored by others, as collateral security for the loan of money, and if, before the commencement of this suit, the plaintiffs had consented to the mixture, and the same was so mixed when the receipts were given, when the suit was brought, the jury should find for the defendant.

72 10TH. Will the Court instruct the jury, on behalf of the defendant, that if Fairfield & Weld, being engaged in the business of warehousemen, purchasing for themselves and others, grain, and storing grain for others,

borrowed of the plaintiffs a sum of money, to be used in the purchase of corn, and, in order to secure the payment of the money to the plaintiffs, issued to them warehouse receipts, purporting to be for corn in store, for this amount, or more than this amount, of corn purchased with the money so loaned them by plaintiffs, the said corn so purchased being, at the time when said receipts were issued, actually mixed with the corn of others who had stored corn with said warehousemen, the same having been mixed by the said warehousemen with the consent of the other persons so having stored the corn, the plaintiffs cannot recover, if, at the time of the commencement of this suit, the corn replevied still continued mixed with that of said others, though before the warehouse receipts were issued to the plaintiffs they may have requested Fairfield & Weld not to mix the grain purchased with their money with that of others so storing.

73 11TH. Though the plaintiffs may have required Fairfield & Weld not to mix the corn purchased with their funds, or for them, with the corn of others, yet if, after Fairfield & Weld had purchased and mixed said corn with the corn of others storing with them, they issued to the plaintiffs warehouse receipts purporting to be for corn in store, and the corn purchased with plaintiffs' funds, had been, when said receipts were issued to plaintiffs, mixed with that of others, and so continued mixed till this suit was brought, the jury should find a verdict in favor of the defendant, though he may have seized all the corn which Fairfield & Weld so had in store, including that so purchased with plaintiffs' funds, or for them.

74 12TH. If the jury believe, from the evidence, that Fairfield & Weld, being the owners of the grain in controversy, gave the plaintiffs, in November and December, 1859, warehouse receipts, purporting to be for corn in store, as security for an indebtedness from Fairfield & Weld to plaintiff, and the plaintiffs did not take possession of said corn, but left the same in possession of Fairfield & Weld till the execution issued on the judgment against Fairfield & Weld was, on the 22d of December, 1859, placed in the hands of the defendant, then being Sheriff of La Salle County, and the said defendant, by virtue of said execution, on the 9th of March, 1860, as Sheriff, seized said corn replevied, the jury should find for the defendant, notwithstanding said Fairfield & Weld may have delivered said corn to the plaintiffs between said 22d of December and said 9th of March.

75 13TH. If the jury believe, from the evidence, that Fairfield & Weld bought corn for plaintiffs, the plaintiff furnishing money for that purpose to Fairfield & Weld, then Fairfield & Weld were the agents of plaintiffs, and if such agents mixed the corn bought for plaintiffs with other persons' corn, then the plaintiffs are as much responsible for such mixture as though they did the same themselves, in which case they could not replevy the corn, and the jury must find for defendant.

75 The 5th and 13th instructions were refused. Exception.

75 The 3d, 4th, 7th and 12th were given as asked.

75 The 1st, 2d, 6th, 8th, 9th, 10th and 11th were given with modifications.

75 The 1st instruction by adding the words "As qualified by plaintiffs' 1st instruction.

76 The 2d, by adding the words "But qualified by plaintiffs' 1st instruction.

The 6th, by adding the words "With this qualification, that the jury believe Fairfield & Weld were the agents of plaintiffs in storing the corn."

The 8th, by adding the words "As qualified by plaintiffs' 1st and 10th instructlon."

The 10th, by adding the words, "This is the law, if the jury believe that Fairfield & Weld, at the time the execution was received by the Sheriff, and the levy thereof, owned any part of the corn in controversy, or were the agents of plaintiffs in storing said corn."

The 11th, by adding, "This is qualified as in the next preceding instruction." Exceptions to each of said qualifications.

77 Verdict for plaintiffs.

77 Motion for new trial.

77 Overruled. Judgment. Exception.

ERRORS ASSIGNED.

In rendering judgment for the plaintiff.

In giving instructions which ought not to have been given; by refusing instruction which ought to have been given; also, in modifying instructions which should have been given without modification.

In refusing a new trial.

In not giving judgment for defendant (below).

LELAND & BLANCHARD,
Attorneys for Plaintiffs in Error.

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Answer
of
Cushman et al
Abstract

Filed April 22 1862
L. Leland
Clerk