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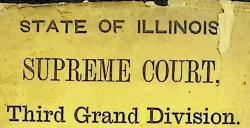
Supreme Court of Illinois

Hale

VS.

Barrett

71641



No. 253.



SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1861.

JOSEPH BARRET, et al.,

vs.

FRANKLIN M. HALE, et al.,

Appellants.

APPELLANTS, POINTS.

The following are the facts in this case:

Barret & Cutting shipped from Massachusetts a lathe to Kendal of Chicago, to be sold on commission. At the same time Ball & Ballard, of Massachusetts, also sent to Kendal a quantity of merchandise to be sold on commission; both lots of goods were sent by same vessel and came to Hale's warehouse in Chicago. Hale delivered the goods to Kendal in his absence in the country. Before Kendal went into the country he directed his clerk, Prouty, to pay the charges on the goods. When Kendal returned from the country, and some days after the goods were received, he found

the bill had not been paid and gave Hale his note for the charges; after the note was given, Prouty, without the knowledge or consent of Kendal, gave Hale a warehouse receipt for the goods. The goods remained in Kendal's possession from early part of the Summer till the next February; then, Kendal quit business and one Manning went into his store. After this, Hale took the goods and removed them to another warehouse.

The bill presented by Hale to Kendal, embraced the charges on the lathe and also on the merchandise sent by Ball & Ballard, in gross, and Kendal's note was given for the whole amount.

Afterwards Doane, the plaintiffs' agent, called upon the defendants, Hales, and found the lathe in their possession, and offered to pay the freight and charges and demanded the goods; they refused to deliver them unless he would also pay the charges on the goods sent by Ball & Ballard. Doane frequently made a like demand, and several times asked them for a bill of the charges on the lathe; they made him out three different bills, each varying in amount, but each embracing the freight and charges on the bill sent by Ball & Ballard as well as the lathe, and at all times refused to deliver the lathe unless the charges on the goods of Ball & Ballard as well as of Barret & Cutting were paid.

There is also evidence, that Doane at one time actually tendered them \$105 or \$110 for the charges, though the charges on the lathe were only about \$28 to \$38; there is, however, contradicting evidence as to this tender.

I.

No tender of the charges was necessary, because:

First—The defendants had parted with their lien, by delivering

the goods to Kendal. The warehouse receipt and note shows clearly that they intended to part with their lien and rely upon them instead of their lien.

SECOND—The tender was waived by defendants claiming to hold them not for the lien, but upon another ground, to-wit: for the payment of charges due from other parties upon other goods.

Dirks vs. Richards, 43 Eng. C. L. R. 298.

Jones vs. Tarlton, 9 Meeson & Wellsby,

4 Man. & Gr. 574.

4 Man. & Gr. 675.

2 John. cases, 411.

THIRD—The tender was waived, because he had taken other security, to-wit: Kendal's note.

If a lien commences under an implied contract, and a contract is made for payment, in the nature of things one contract destroys the other.

> Raitt vs. Mitchell, 4 Camb. R. 149. 4 B. & Ald. R. 50. 16 Vesey R. 275.

FOURTH—The plaintiff, by his agent Doane, repeatedly offered to pay the charges, which the defendants refused to take, and so stated to him; therefore, no tender was necessary—it would have been an unnecessary act, which the law does not require.

II.

The warehouse receipt gave defendants no lien upon the goods, because :

First—It was given several days after the lathe had been delivered — Kendal gave his note some days after the lathe was delivered — and the warehouse receipt was given after that. A lien once lost can not be revived, except by the parties.

Second—Because the clerk had no authority to give it. Kendal says he did not know anything of it until 'some months afterwards.' Kendal himself could not give a warehouse receipt; he received the property to sell on commission; he could not, therefore, pledge it or incumber it by a warehouse receipt, no more than he could bind it by a chattel mortgage; his agency was limited.

III.

If no tender was necessary then no instruction upon that abstract question, whether right or wrong, amounts to anything; in other words, even if it is wrong it is no error.

VAN BURENS & GARY,

Attorneys for Appellees.

Supreme Court.

Poseph Barret, Et al., Appeller,

Franklin Mr. Hab, ctal.

Appellies Points.

Van Burens Gary, Attys for Appellus.

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VAN BURENS & GARY,

Attorneys for Appellees.

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Supreme Court.

Appellers,

Franklin M. stale, et al.,

Appellers Points

Other for April 18.1861

Ailed April 18.1861

SUPREME COURT OF ILLINOIS.

GRAND DIVISION. THIRD

APRIL TERM, A.D. 1861.

FRANKLIN M. HALE, THOMAS HALE AND MARTIN C. HALE,

Appellants.

JOSEPH BARRETT & CALEB CUTTING,

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

This was an action of Trover brought to the January Term 1860, by the Appellees vs. the Appellants, to recover the value of a ten-foot Engine Lathe with counter shaft and hangers, consigned to James Kendall, and received by Hale & Co. in the regular course of their business as receiving and forwarding merchants at Chicago, June 29th, 1857, from one of a line of propellers for which they were agents, and held by them for charges, &c.

Record page 8.

The declaration was in the usual form in trover to which the appellants pleaded, seve-Record p. p. 5, 6 & 7. rally, the general issue. The cause was tried at the February Term, 1861, before Grant Goodrich, Judge, and a Jury. Verdict for the plaintiffs below for \$425, against all the defendants who entered a motion for a new trial, which was overruled and judgment entered Record p. 12. on the verdict at the March Term, March 15th, 1861. Appeal prayed and allowed on filing bond in \$600, to be approved by a Judge of the Court in thirty days, and bill of exceptions by the 29th of March, which was done. Kendall

The first witness introduced by the plaintiff in the trial below was James Randall, who testified as follows:

I resided in Chicago in the year 1857; I was selling machinery on my own account and as Commission Merchant; my place of business was at the north end of Wells street, just over the bridge; it was in the bnilding occupied by the Hales; I rented a store in that building; I know the defendants Franklin M. Hale and Martin C. Hale; they were, in the summer of 1857, doing business under the name of Hale & Co.; I can't say of my own knowledge that they were partners; they were doing business in the same office; Franklin. generally did the business; Martin was there; I supposed they were doing business under that name; I know the lathe and counter shaft in controversy; I think it was about twelve feet long; the counter shaft and weights came with this lathe; the lathe was consigned to me by the plaintiffs Barrett & Cutting, for sale on commission; when it arrived, it came with some other machinery in boxes; Ball & Ballard consigned the machinery to me; when the bill for the charges was presented I told Prouty, my clerk, to pay the charges and money coming; told him to apply it for charges and supposed he had done so until some time

afterwards; I had occasion to go into the country about that time, and I was surprised on my return to find he had not done so; in my absence, Prouty got the lathe and counter shaft into my store, and it remained there until the next February, in 1858; the lathe and machinery came early in the summer in the previous year, in 1857; in February, 1858, I removed from that store to 86 Lake street; all the machinery in that store was taken to 86 Lake street, in February, Record p. 15. 1858, except this lathe; that was left in the store on Wells street; I rented the store on Wells street of one of the Hales; my lease was with the young man, Franklin M. Hale; the store was in the same building occupied by the Hales; I saw the lathes there several times; not long after I left, Mr. Manny went into the store; I have not seen the lathe since; I was there afterwards; it had been removed; I don't know who removed it.

Being cross-examined he testified as follows:

Ball & Ballard and Barrett & Cutting lived in Worcester, Massachusetts; the lathe and boxes of machinery came in bill of lading under one charge; my impression is that the charge upon the lathe was \$42, though I am not positive; I executed the due bill now shown to me, (here was shown to the witness the exhibit marked "Exhibit A," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); that was for the amount of freight and charges paid by Hale on the lathe and boxes of machinery and the dockage in Chicago; I have no recollection of signing it, but it is in my hand-writing; the warehouse receipt now shown to me is signed by Mr. Prouty, who was my clerk at that time, (here was shown to the witness the exhibit marked "Exhibit B," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); Prouty had the money with which to pay the Record p. 16. charges on the lathe and machinery, but he paid it on one of the notes I was owing at that time; the lathe and machinery were consigned to me at Chicago; they came by the same boat and at the same time; I did not have any sign up as Commission Merchant; the warehouse receipt was given without my knowledge; I did not know of it till months afterwards.

Record p. 16.

Record p. 18.

The plaintiffs then introduced as a witness William H. Doan, who proved the signatures to a Power of Attorney, given on pages 16 and 17 of the Record, and which was read to the jury, and the witness proceeded as follows: I know the Hales by sight; the two Hales that are present-Martin C. Hale, and Franklin M. Hale; I know Thomas Hale; I have had repeated conversations with the Hales about the lathe; it was a long time before I could find the lathe; I finally found it in an old building on the North Side; it was in the warehouse of Sanford & Hall; I first saw Franklin, and then Martin, and all together; Franklin at first seemed to think I had no business with it; I showed them my Power of Attorney; their business was all done together; I applied to the Hales to get the charges on the lathe, and told them I would pay all proper charges upon it; they finally gave me a bill for about \$140, for advanced charges in gross; I told them there was some mistake, and wanted them to give me the items; they afterwards gave me another bill for about \$110, including the boxes; I objected to paying charges on another man's property; my talk was with all of them; I then proposed to give them seventy-five dollars, and close it up; they said they would write to Buffalo; they finally said if I would pay the whole bill they would deduct nine dollars; I made them a tender of from \$100 to \$105, in bank bills; they refused to let me have the lathe unless I paid them the whole amount of their bill; I have been in the machinery business five years, and know the value of this lathe; I could have sold the lathe repeatedly for \$475; I had already sold it for \$475; when the lathe was shipped the usual price for freight Record p. 19. from Worcester to Chicago was from sixty cents to one dollar; there would have been no difficulty in ascertaining the freight on the lake by weighing it.

And being cross-examined said witness testified as follows: I have been acting as salesman for myself and others for nearly ten years; am acting as salesman for Fay & Co. and for myself; my brother, James T. Doan, went with me to the Hales when I made the tender of which I have spoken; I saw Hales' book-keeper, or the person I took to be the bookkeeper; I can't say that I saw any one else; I don't think any of the Hales were in; I did not see either of them; I tendered the money to the book-keeper; it was in bank bills; I laid it on the counter; he said he had no instructions to take anything less than the amount of the bill, and that I had better see Mr. Hale; I did not see Mr. Hale; I know it was over one hundred dollars that I tendered, but how much over I can't say; I know it because we went

right from Mr. Van Buren's office to the Hales to make the tender; I had \$100 when I was in Mr. Van Buren's office, and he said I had better be sure and tender a little more, and I borrowed some more on the way, from my brother, who went with me; I can't say how much more—four or five dollars perhaps; this was a short time before this suit was commenced; a week or two perhaps before it was commenced; I first saw the Hales about this lathe in the summer or fall of 1858; I can't say which of them I first saw, it is so long ago; I saw them a good many times; I can't state the substance of any particular conversation I had with either of them before I went to Mr. Van Buren's office with Martin C. Hale, it is so long ago; I can't state what I said or what they said in any particular conversation; I had learned where the lathe was before I went to the Hales; I had learned this from Kendall; I wanted to know of the Hales what their charges were on the lathe; I have the bills they rendered to me from time to time of the amount of their charges; the following was the first bill they rendered to me in the fall of 1858.

Here was presented the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

Mr. James Kendall, or whom it may concern,

TO THOMAS HALE, DR. North Water St., between Wells and La Salle Sts.

Storage on Lath	ne -	-		-	-	-	-	-	-	-	-	\$17 10	
Bill rendered June 29		-	-	-	-	-	-			-	-	106 01	
Advances for	-	-	-	-	-	-	-	-	-	-	-	2 60	
Interest -	-							-					
Cart account	-	-				-	-	-	-	-	-	3 50	
													\$137 82

Record p. 21.

When they handed me this bill I told them the charges ought not to be so high; that I wanted a bill of the items; that there was one charge of \$106.01 all in one lump, and I wanted the items. I think it was Martin C. Hale that handed me the bill, and afterwards they made out and handed me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

Mr. JAMES KENDALL,

To Thomas Hale, for F. M. Hale, Dr.

North Water Street, between Wells and La Salle Streets.

[For Freight and Charges on Goods per Propeller Galena, June 29th, 1857.]

Seven boxes Machinery - - - - 3,216

One Engine Lathe, Counter Shaft attached

One Box, one Weight, - - - - 3,800

Advances, - - - - - - \$24 90
Freight to Chicago - - - - - - 77 61
Dockage - - - - - 3 50—\$106 01

(Duplicate Bill.)

The above bills were read to the jury, and the witness further testified as follows: I thought the charges were too high; they insisted that they had a right to hold the lathe and counter shaft, &c., until the charges on the seven boxes of machinery were paid; I insisted that they had no such right, and told them I was willing to pay the charges on the lathe, but that they had put it all in one bill; I recollect Martin C. Hale saying something about their having to write to Buffalo to see how much the charges were on the lathe; that they could not separate it from the charges on the machinery; Martin C. Hale said if my lawyer would satisfy them that they had no right to keep the lathe for the charges on the boxes of machinery, then he would not insist upon it, and I went with him to Mr. Van Buren's office;

Record p. 22;

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we saw Mr. Van Buren there, and he said to Mr. Hale that they had no right to keep one man's goods for the charges on another man's goods; Mr. Hale, after talking some time, said he wanted to see his lawyer, and went out; Mr. Hale then rendered to me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, SEPTEMBER 3RD, 1859.

MR. THOMAS, KENDALL, CHICAGO,

To THOMAS HALE, ASSIGNEE OF F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

June	29th.	For freight charges, &c.
"	"	Lathe, &c 3,800
"	"	Freight advanced N. Y. C. R. R \$61 14
"	"	2½ per cent. for adve'g 1 52
"	"	Interest 10 per cent. to date (2 years 2 2-12 months) - 13 42
"	"	Paid 3 Cartages 6 00
		Storage 27 00
		\$109 08

Record p. 23.

Which last mentioned bill was read to the jury, and the witness further testified as follows: This bill was rendered after Martin C. Hale and I went to Mr. Van Buren's office; I told Mr. Hale that I thought the bill was large; that when the lathe and counter shaft weighed only 3,800 pounds, and the machinery weighed 3,216 pounds, I could not see how the charges on the lathe were \$109.08, when the charges on the whole were only \$137.82; he insisted that the bill was right and said that they had advanced the \$61.14 for freight as stated in last bill, and that the other charges were correct; I think he said he had written to Buffalo and found out, though I don't recollect that he showed me the letter; I don't know but that the building of Sanford & Hall was good enough to keep the lathe in.

Thereupon the plaintiffs called as a witness T. Rogers, who testified as follows:

I am selling machinery; have been engaged continually for two years; I have seen the lathe; I have not examined it particularly; think a ten foot lathe is worth from \$450 to \$500.

On his re-examination in chief, he said: When each of these bills were presented, I offered to pay them all charges on the lathe if they would let me have it, and at each time they refused, unless I would pay for the charges on the other goods.

The plaintiffs here rested.

Record p. 24.

And, thereupon, the defendants read in evidence the deposition of Judson M. Bemis, taken in said cause, whose testimony, as read to the Jury, was as follows:

I am 27 years old in May next, and live in St. Louis; occupation, manufacturing bags; in 1857, I was clerk for Hale & Co; they (Hale & Co.) received seven boxes of machinery; one engine-lathe, counter shaft attached, one box and one weight, June 29, 1857; Hale & Co. were at that time Receiving and Forwarding Merchants; the said property was received in the ordinary course of their business; the property was all consigned to James Kendall; the charges which Hale & Co. paid on it were \$102.51, the amount of the dock charges was \$3.50,—total \$106.01; these were the charges upon the whole property in that consignment; Mr. Kendall gave us a warehouse receipt for the property, subject to the order of Hale & Co., for the purpose of holding the property to secure the above charges, \$106.01; the paper now shown me and marked "Exhibit 1," is the warehouse receipt above referred to; the receipt is signed by Mr. Prouty who was at that time clerk for Mr. Kendall; I saw him sign it; the arrangement that this property was to be held as security for the charges was made by Mr. Kendall; there was a due bill given by Kendall for the same amount of charges at the same time; the paper now shown to me and marked "Exhibit 2," is the due bill referred to above; the property remained in Mr. Kendall's store for how long a time I don't know; the lathe and weight and box were afterwards sent to Sanford & Hall for storage by Thomas Hale; I saw it there afterwards; Franklin M. Hale composed the firm of Hale & Co.; no

Record p. 25.

one else to my knowledge; I remained in their employment until the 1st of January, 1858, and was there with Thomas Hale until the 1st of January, 1859; I suppose the property came into the hands of Thomas Hale as the assignee of Hale & Co.; I don't know what became of the seven boxes of machinery; there was no division of the charges to Hale & Co. on the bills of lading on the several pieces of property; it was one gross charge on the whole property; there were no minutes by which we could apportion the charges on the different lots; we might have done so by weighing each piece, if we had known the rates; the property was shipped from Buffalo on the New York Central line of Propellers, of which Hale & Co. were agents; Mr. Kendall had several other lots of freight sent that year; his freight was usually shipped by said line of Propellers and came into Hale and Co.'s hands, as the agents; the goods were marked James Kendall, Chicago; he came frequently with duplicate bills of Record p. 26. lading to inquire after his goods; some time in the fall of 1858, Mr. Doan came in and inquired if we had a lathe; Mr. Doan claimed to have some letters regarding the disposition of the property, or something to that effect. (Any conversation with Doan objected to.) The goods were not claimed by anybody but Kendall before the fall of 1858 to my knowledge; Mr. Kendall never paid these charges to my knowledge.

On his cross-examination his testimony, as read to the Jury, was as follows: I know the lathe I have been testifying about is the one which is in controversy in this suit; I know it, because it was first received in store and sent to Sanford & Hall's; I saw it afterwards at Sanford & Hall's, and when Mr. Doan came to inquire after it, I told him it was there; I think I went with Mr. Doan to Sanford & Hall's to see it; when the propeller Galena discharged this freight, she was lying at Hale & Co.'s dock on the North side of the river, next East of Wells street bridge; the lathe was first discharged at Hale & Co.'s dock; it was first moved from the dock to James Kendall's store, next adjoining Wells street bridge; his store was a separate room from any warehouse of Hale & Co.'s; he rented of Hale & Co.; the lathe was put into his store before the said warehouse receipt (Exhibit 1) was given; the vessel had a bill of lading; there was no other bill; the charges on the book were made up from that bill of lading; the book is a copy of the bill of lading, so far as relates to the marks of the goods, the articles, weight and charges; the bill of lading was delivered to the vessel by Hale & Co., after they had receipted it; the amount of the due bill (Exhibit 2) was taken from Hale & Co.'s book; I did not keep the book; Mr. Holliday did; the warehouse receipt is in my hand writing, with the exception of the signature; the due bill is not; I have such a recollection of amounts, dates and weights that I could have sworn to about the amount of the charges, without referring to the books; I do not know what became of the other things mentioned in exhibit "1" besides this lathe.

On his re-examination his testimony, as read to the Jury, was as follows: My recollection is that the warehouse receipt was given the same day Kendall took the lathe; the arrangement to give the warehouse receipt was made between the time of delivery of the goods on the dock and the delivery to Kendall. JUDSON M. BEMIS. [SIGNED.]

The defendants, by their counsel, thereupon read to the Jury the receipt and the due bill referred to by said witness in his deposition, and marked respectively Exhibits 1 and 2, which are in the words and figures following:

EXHIBIT 1.

Сыслао, July 1, 1857.

Received in store from Prop. Galena, subject to the order of Hale & Co. : 7 Boxes Machinery; 1 Engine Lathe, Counter Shaft attached; 1 Box; 1 Weight. JAMES KENDALL, BY B. T. PROUTY.

EXHIBIT 2.

Due Hale & Co. for freight received per Propeller Galena One Hundred and Six JAMES KENDALL. ol Dollars, June 29, 1857. \$106.01.

The defendants thereupon introduced as a witness Wm. Howe, who testified as follows:

Record p. 28.

I am in the Forwarding and Commission business in Chicago; have been so engaged for the last seven years; in 1857, the customary charge in Chicago by warehousemen as commissions for advancing and paying charges for freights upon goods which came subject to such charges, was 2½ per cent.

Thereupon the counsel for the defendants asked the witness the following question: "State whether it was then customary for warehousemen in Chicago to make any further charges as interest upon the advances so made by them, when such advances were not repaid to them within a short time after they were made." Counsel stated his object was to prove Record p. 29. a custom to charge ten per cent. interest. To which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to allow the witness to answer said question; to which ruling and decision of the Court, the defendants, by their counsel, then and there excepted.

Said witness further testified as follows: The established rate for storage then was one dollar per ton for the first month and fifty cents per ton after that time, until taken away; I think the cartage would be worth one dollar for each removal; I am acquainted with Sandford & Hall's warehouse, which has been referred to; I consider it a good building, better, if anything, than that of Mr. Hale's, and a suitable place for storing:

Thereupon the defendants introduced as a witness Mr. Wm. Clary, who testified as follows:

I am engaged in the Forwarding and Commission business in Chicago; have been so engaged for nine years; in 1857, a proper charge by warehousemen, by way of commission for advancing freight and charges was 21 per cent.; there was then, and now is, a custom among warehousemen in Chicago, regarding the rate of interest to be charged upon advances thus made.

The counsel for the defendants thereupon asked the witness the following question: "What was the custom?" and stated that his object was to prove a custom to charge ten per cent. interest; to which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to permit said question to be answered; to which ruling and decision the defendants then and there excepted.

Said witness further testified as follows: The customary charge for storage in 1857 was one dollar per ton for the first month and then fifty cents per ton per month afterwards until the goods were taken away; this I consider a fair and reasonable charge.

Thereupon the defendants introduced as a witness B. T. Prouty, who testified as follows:

I was clerk for James Kendall in the summer of 1857, and had been for about a year; I had charge of his business during his absence; the seven boxes of machinery, the lathe and counter shaft attached, and one box and weight all came together, and subject to one entire charge for freight, as appeared by the bill of charges as presented to us; the freight was not apportioned. Here was shown to witness the warehouse receipt above referred to, and he further testified: I cannot recollect giving this receipt, though the signature to it is in my hand writing, and I must have given it; I do not recollect about giving it, it is so long ago; I think Mr. Kendall had orders for the seven boxes of machinery at the time or soon after it was received, and it was shipped away; the machinery was shipped to Kendall by Ball & Co.; the charges on the lathe and machinery for freight was about \$106; that was the charge on both. The lathe was an old-fashioned lathe and out of order. I think it was worth about \$200. The lathe had been manufactured for other parties and they would not take it, and then it was sent out here. It was a good deal out of order. We had it in the store to see if we could not get an offer for it. But we did not get any offer for it.

On his cross-examination he testified as follows:

I was clerk for Kendall for about a year. I did not know anything about lathes before I came there. I know it was ont of order, for I tried to fix it up and get it into shape several times, and could not. It was first entered on our books for sale at \$400; it was so entered because the plaintiffs told us to sell it for that price. Afterwards when we couldn't sell it, they told us to sell it for any price. The gross amount of the charges, about \$100, included the goods shipped by Ball & Ballard and by Barrett & Cutting. The lathe was shipped by Barrett & Cutting, and the rest of the goods by Ball & Ballard.

Record p. 80.

The defendants thereupon introduced as witness John Simmons, who testified as follows: I have been selling machinery for five years; I am acquainted with the kind of machinery in question; I have seen the lathe in question; I have seen it within a week; it is an old-fashioned lathe and out of date; I do not consider it a saleable lathe; I consider it worth about \$250. Thereupon the defendants introduced as a witness, John Onahan, who testified as follows: I am book-keeper of Thomas Hale; I entered his employment as book-keeper in the summer of 1858; Thomas Hale was the assignee of Hale & Co.; there has been no other book keeper in the office from that time down to the present time; I have had the sole charge of the books; Martin C. Hale has attended to the business in the office as has also Franklin M. Hale; I know Wm. H. Doan, who has testified in this case; I have seen him in the office conversing with Mr. Hale about the lathe in question. He never tendered any money to me or offered to tender any money to me on account of this lathe; nor do I know of his ever tendering or of his offering to tender any in the office to any one; Mr. Hale had no other office than the one in which I was book-Here the defendants rested. The plaintiffs thereupon recalled William Kendall, who testified as follows: This was not a second hand lathe; there was another lathe in the store that Prouty worked on several times trying to repair it. In his cross-examination he testified as follows: I will not swear that this lathe had not been used any before it was sent out to Chicago. It was sent from the dock to my warehouse. Here the plaintiffs rested, and the above being all the evidence that was given in the case, the Court at the instance and request of the counsel for the plaintiffs, instructed the jury as follows: PLAINTIFF'S INSTRUCTIONS. 1. That if the jury believe from the evidence that the lathe in controversy was the property of the plaintiffs, and that the defendants had the possession of it, and that the plaintiffs by their duly authorized agent demanded the lathe of the defendants, and that the defendants refused wrongfully (that is without right) to deliver the same, this is evidence of a conversion by the defendants of the lathe to their own use. 2. That if they believe from the evidence that the defendants took the lathe from the store formerly occupied by Kendall, without any authority from the plaintiffs or from Kendall so to do, and then undertook to keep the same from the plaintiffs as security for a debt which Kendall owed them, after a demand by the plaintiffs for the same, then they are guilty of a conversion of the lathe, if the same belonged to the plaintiffs. 3. That if Prouty was simply the salesman and bookkeeper of Kendall, and that Kendall was not a warehouseman, this gave him no authority to give a warehouse receipt for the Record p. 84. lathe, and such receipt so given would have no effect in this suit without special authority to do so or a ratification of the act. 4. That if the defendants had a lien upon the lathe for any freight and charges that they had paid upon it, but took Kendall's due bill for such freight and charges and delivered the lathe to him, then they lost their lien and could not afterwards and by a new contract with Kendall take the lathe and hold it as security for such freight and charges, without the consent of the plaintiffs, if they believed from the evidence that they owned the lathe. 5. That the freight and charges upon other goods belonging to other persons, were never any lien upon the lathe if it belonged to the plaintiffs. 6. That if the plaintiffs owned the lathe and sent it to Kendall as a commission merchant. in the ordinary course of business to sell, then Kendall had no authority to pledge the lathe to the defendants either by a warehouse receipt or in any other way for any debt he on his own account may have owed the defendants. 7. That if the lathe belonged to the plaintiffs and they by their agent demanded the lathe of the defendants, and offered to pay all proper charges for the freight, storage, and other charges upon the lathe, but the defendants refused to deliver it unless charges upon Record y . 35. other goods were also paid, then the plaintiffs are entitled to recover.

- 8. That if the jury find for the plaintiffs their verdict, they may find the value of the lathe at the time of the demand, with interest since that time at the rate of six per centum per annum as damages, less by way of recoupment whatever amount for freight and charges or either, the jury shall believe from the evidence the defendants had advanced on said property-if they shall further believe from the evidence that the defendants had never voluntarily parted with the possession of said property.
- 9. If the jury believe from the evidence that the defendants refused to deliver up the goods unless an amount larger than what they were entitled to should be paid them, and so told the plaintiff or his agent, then, no tender was necessary if the plaintiffs were ready and offered to pay the amount actually due, as the law does not require a party to do a useless

To the giving of each of which said instructions the defendants by their counsel then and there duly excepted at the time they were respectively given.

The defendants by their counsel thereupon requested the Court to instruct the jury as follows:

DEFENDANT'S INSTRUCTIONS.

Record p. 86.

1. A warehouseman on receiving goods in the regular course of his business has a lien upon the goods for any advances which he may have made to the carrier, which may have accrued for the carriage of the goods, and also for his reasonable charges for storage of the goods if he shall have kept them in store, and has a right to retain the possession of the property until such advances and charges are repaid to him. And if the jury shall believe from the evidence in this case, that the defendants or one of them, in the summer of 1857 received the property in question as warehouseman, and paid to the carrier the sum of sixtyone dollars and fourteen cents which had accrued for the carriage of the goods, and afterwards kept the goods in store, they had a right to retain the possession of the property until the sum advanced by them and charges for storage was paid to them. Which was given to the jury.

The defendants by their counsel asked the Court to instruct the jury as follows:

2. If the jury shall believe from the evidence that the defendants or any one of them received the property as stated in the above instruction, and that they had a lien upon said property as stated in said instruction, and that the same was consigned to James Kendall, and that the defendants or one of them made an agreement with James Kendall that the said James Kendall should receive the said goods, temporarily to hold the same as bailee for said Hale & Co., and that for that purpose and in pursuance of said agreement, said Booord p. 87. Kendall or his authorized agent executed the warehouse receipt given in evidence in this cause, and that said goods were delivered to and received by said Kendall under and in pursuance of said agreement, this is not such a delivery of the property as will deprive Hale & Co. of their lein upon the property.

But the Court refused to give such instruction as asked, but modified the same by adding thereto the following words:

"This is so if the said agreement was made at the time the goods were first committed " to the possession of said Kendall."

And the Court read to the jury said instruction thus modified, to which modification and alteration of said instruction the defendants by their counsel then and there excepted.

The defendants by their counsel then asked the Court to instruct the jury as follows:

3. If the jury believe from the evidence that the defendants or one of them received the goods in question as stated in the first instruction, and that they had a lien upon said goods for advances and storage as stated in said instruction, and that they had possession of said goods and continued in such possession to the summer and fall and year 1859, then they had a right to retain the possession of the property until the amount of the charges and advances were paid or tendered.

Which instruction was given to the jury as asked.

And thereupon the defendants by their counsel asked the Court to instruct the jury as follows:



Record p. 88.

4. To constitute a legal tender the money must be actually produced to the party who is entitled to recover it, and if the jury shall believe from the evidence under the above instructions that the defendants or ne of them had a lien upon the property in question, then before they can be charged with having converted it, the jury should be satisfied from the evidence that the amount of this lien was tendered the defendants or one of them, and that upon such tender they or one of them refused to deliver the property. A mere tender to the bookkeeper of one of them is not sufficient.

But the Court refused to give such instruction to the jury as asked, but modified the same by adding thereto the following words:

"Of itself. But if the jury shall further believe from the evidence, that the plaintiffs or their agent offered to pay the actual amount due for such charges and advances, and the defeadants claimed a larger sum and refused to deliver the lathe unless such larger sum was paid, then an actual tender was not necessary."

And read said instruction to the jury as thus modified; to which modification and alteration of said instruction by the Court, the defendants, by their counsel, then and there duly excepted. And thereupon said cause was given to the jury upon the evidence and instructions aforesaid.

ASSIGNMENT OF ERRORS.

1st. The Court erred in sustaining the objection and refusing to allow the witness, Wm. Howe, to answer the question as to the custom among warehousemen in Chicago to charge interest upon advances, &c.

2d. The Court erred in refusing to allow the defendants to prove such custom by the witness Wm. McClary.

3d. The Court erred in giving the plaintiffs' first instruction.

4th. The Court erred in giving the plaintiffs' second instruction.

5th. The Court erred in giving the plaintiffs' third instruction.

6th. The Court erred in giving the plaintiffs' fourth instruction.

7th. The Court erred in giving the plaintiffs' fifth instruction.

8th. The Court erred in giving the plaintiffs' sixth instruction.

9th. The Court erred in giving the plaintiffs' seventh instruction.

10th. The Court erred in giving the plaintiffs' eighth instruction.

11th. The Court erred in giving the plaintiffs' ninth instruction.

12th. The Court erred in refusing to give the second instruction for the defendants, as asked, and in modifying and giving the same as modified by the Court.

13th. The Court erred in refusing to give the fourth instructions for the defendants, as asked, and in modifying and altering the same, and giving the same as modified and altered by the Court.

14th. The verdict of the jury was against the law and the evidence.

15th. The Court erred in overruling the defendants' motion for a new trial and giving judgment on the verdict.

HOYNE, MILLER & LEWIS,

For Appellants.

Franklin In Hale Etab Doseph Barrett Et il Appellus Abstract of Rourb. Filed Opr. 24-1 L. Leland Clark

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A.D. 1861.

FRANKLIN M. HALE, THOMAS HALE AND MARTIN C. HALE,

Appellants.

JOSEPH BARRETT & CALEB CUTTING,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF CHICAGO.

This was an action of Trover brought to the January Term 1860, by the Appellees vs. the Appellants, to recover the value of a ten-foot Engine Lathe with counter shaft and hangers, consigned to James Kendall, and received by Hale & Co. in the regular course of their business as receiving and forwarding merchants at Chicago, June 29th, 1857, from one of a line of propellers for which they were agents, and held by them for charges, &c.

Record page 8.

The declaration was in the usual form in trover to which the appellants pleaded, seve-Record p. p. 5, 6 & 7. rally, the general issue. The cause was tried at the February Term, 1861, before Grant Goodrich, Judge, and a Jury. Verdict for the plaintiffs below for \$425, against all the defendants who entered a motion for a new trial, which was overruled and judgment entered Record p. 12. on the verdict at the March Term, March 15th, 1861. Appeal prayed and allowed on filing bond in \$600, to be approved by a Judge of the Court in thirty days, and bill of exceptions by the 29th of March, which was done.

Record p. 13.

The first witness introduced by the plaintiff in the trial below was James Randall, who testified as follows:

I resided in Chicago in the year 1857; I was selling machinery on my own account Record p. 14. and as Commission Merchant; my place of business was at the north end of Wells street, just over the bridge; it was in the bnilding occupied by the Hales; I rented a store in that building; I know the defendants Franklin M. Hale and Martin C. Hale; they were, in the summer of 1857, doing business under the name of Hale & Co.; I can't say of my own knowledge that they were partners; they were doing business in the same office; Franklin generally did the business; Martin was there; I supposed they were doing business under that name; I know the lathe and counter shaft in controversy; I think it was about twelve feet long; the counter shaft and weights came with this lathe; the lathe was consigned to me by the plaintiffs Barrett & Cutting, for sale on commission; when it arrived, it came with some other machinery in boxes; Ball & Ballard consigned the machinery to me; when the bill for the charges was presented I told Prouty, my clerk, to pay the charges and money coming; told him to apply it for charges and supposed he had done so until some time

(afterwards; I had occasion to go into the country about that time, and I was surprised on my return to find he had not done so; in my absence, Prouty got the lathe and counter shaft into my store, and it remained there until the next February, in 1858; the lathe and machinery came early in the summer in the previous year, in 1857; in February, 1858, I removed from that store to 86 Lake street; all the machinery in that store was taken to 86 Lake street, in February, Record p. 15. 1858, except this lathe; that was left in the store on Wells street; I rented the store on Wells street of one of the Hales; my lease was with the young man, Franklin M. Hale; the store was in the same building occupied by the Hales; I saw the lathes there several times; not long after I left, Mr. Manny went into the store; I have not seen the lathe since; I was

Being cross-examined he testified as follows:

there afterwards; it had been removed; I don't know who removed it.

Ball & Ballard and Barrett & Cutting lived in Worcester, Massachusetts; the lathe and boxes of machinery came in bill of lading under one charge; my impression is that the charge upon the lathe was \$42, though I am not positive; I executed the due bill now shown to me, (here was shown to the witness the exhibit marked "Exhibit A," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); that was for the amount of freight and charges paid by Hale on the lathe and boxes of machinery and the dockage in Chicago; I have no recollection of signing it, but it is in my hand-writing; the warehouse receipt now shown to me is signed by Mr. Prouty, who was my clerk at that time, (here was shown to the witness the exhibit marked "Exhibit B," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); Prouty had the money with which to pay the Record p. 16. charges on the lathe and machinery, but he paid it on one of the notes I was owing at that time; the lathe and machinery were consigned to me at Chicago; they came by the same boat and at the same time; I did not have any sign up as Commission Merchant; the warehouse receipt was given without my knowledge; I did not know of it till months afterwards.

Record p. 16.

Record p. 18.

The plaintiffs then introduced as a witness William H. Doan, who proved the signatures to a Power of Attorney, given on pages 16 and 17 of the Record, and which was read to the jury, and the witness proceeded as follows: I know the Hales by sight; the two Hales that are present-Martin C. Hale, and Franklin M. Hale; I know Thomas Hale; I have had repeated conversations with the Hales about the lathe; it was a long time before I could find the lathe; I finally found it in an old building on the North Side; it was in the warehouse of Sanford & Hall; I first saw Franklin, and then Martin, and all together; Franklin at first seemed to think I had no business with it; I showed them my Power of Attorney; their business was all done together; I applied to the Hales to get the charges on the lathe, and told them I would pay all proper charges upon it; they finally gave me a bill for about \$140; for advanced charges in gross; I told them there was some mistake, and wanted them to give me the items; they afterwards gave me another bill for about \$110, including the boxes; I objected to paying charges on another man's property; my talk was with all of them; I then proposed to give them seventy-five dollars, and close it up; they said they would write to Buffalo; they finally said if I would pay the whole bill they would deduct nine dollars; I made them a tender of from \$100 to \$105, in bank bills; they refused to let me have the lathe unless I paid them the whole amount of their bill; I have been in the machinery business five years, and know the value of this lathe; I could have sold the lathe repeatedly for \$475; I had already sold it for \$475; when the lathe was shipped the usual price for freight Record p. 19. from Worcester to Chicago was from sixty cents to one dollar; there would have been no difficulty in ascertaining the freight on the lake by weighing it.

And being cross-examined said witness testified as follows: I have been acting as salesman for myself and others for nearly ten years; am acting as salesman for Fay & Co. and for myself; my brother, James T. Doan, went with me to the Hales when I made the tender of which I have spoken; I saw Hales' book-keeper, or the person I took to be the bookkeeper; I can't say that I saw any one else; I don't think any of the Hales were in; I did not see either of them; I tendered the money to the book-keeper; it was in bank bills; I laid it on the counter; he said he had no instructions to take anything less than the amount of the bill, and that I had better see Mr. Hale; I did not see Mr. Hale; I know it was over one hundred dollars that I tendered, but how much over I can't say; I know it because we went

right from Mr. Van Buren's office to the Hales to make the tender; I had \$100 when I was in Mr. Van Buren's office, and he said I had better be sure and tender a little more, and I borrowed some more on the way, from my brother, who went with me; I can't say how much more—four or five dollars perhaps; this was a short time before this suit was commenced; a Record p. 20. week or two perhaps before it was commenced; I first saw the Hales about this lathe in the summer or fall of 1858; I can't say which of them I first saw, it is so long ago; I saw them a good many times; I can't state the substance of any particular conversation I had with either of them before I went to Mr. Van Buren's office with Martin C. Hale, it is so long ago; I can't state what I said or what they said in any particular conversation; I had learned where the lathe was before I went to the Hales; I had learned this from Kendall; I wanted to know of the Hales what their charges were on the lathe; I have the bills they rendered to me from time to time of the amount of their charges; the following was the first bill they rendered to me in the fall of 1858.

Here was presented the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

Mr. James Kendall, or whom it may concern,

To Thomas Hale, Dr. North Water St., between Wells and La Salle Sts.

Storage on Lathe -	-		-	-		-	-	-	- 1	-	\$17 10	
Bill rendered June 29	-	-	-	-	-	1-11	-	-	-	-	106 01	
Advances for -	_			-	-	-	-	-	-	-	2 60	
Interest	-	-	-	-	-	-	-			-	8 61	
Cart account -	-		-	-		-	-	-	-	-	3 50	
												\$13

137 82

Record p. 21.

When they handed me this bill I told them the charges ought not to be so high; that I wanted a bill of the items; that there was one charge of \$106.01 all in one lump, and I wanted the items. I think it was Martin C. Hale that handed me the bill, and afterwards they made out and handed me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

MR. JAMES KENDALL,

To THOMAS HALE, for F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

[For Freight and Charges on Goods per Propeller Galena, June 29th, 1857.]

Seven boxes Machinery One Engine Lathe, Counter Shaft attached

One Box, one Weight,

3,800 Advances, \$24 90 Freight to Chicago 77 61 Dockage 3 50-\$100 01

(Duplicate Bill.)

The above bills were read to the jury, and the witness further testified as follows: I thought the charges were too high; they insisted that they had a right to hold the lathe and counter shaft, &c., until the charges on the seven boxes of machinery were paid; I insisted Record p. 22. that they had no such right, and told them I was willing to pay the charges on the lathe, but that they had put it all in one bill; I recollect Martin C. Hale saying something about their having to write to Buffalo to see how much the charges were on the lathe; that they could not separate it from the charges on the machinery; Martin C. Hale said if my lawyer would satisfy them that they had no right to keep the lathe for the charges on the boxes of

machinery, then he would not insist upon it, and I went with him to Mr. Van Buren's office;

we saw Mr. Van Buren there, and he said to Mr. Hale that they had no right to keep one man's goods for the charges on another man's goods; Mr. Hale, after talking some time, said he wanted to see his lawyer, and went out; Mr. Hale then rendered to me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, SEPTEMBER 3RD, 1859.

MR. THOMAS, KENDALL, CHICAGO,

To THOMAS HALE, ASSIGNEE OF F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

June	29th.	For freight charges, &c.	
"	"	Lathe, &c 3,800	
"	"	Freight advanced N. Y. C. R. R \$61 14	
"	"	2½ per cent. for adve'g 1 52	
"	"	Interest 10 per cent. to date (2 years 2 2-12 months) - 13 42	
"	"	Paid 3 Cartages 6 00	
		Storage 27 00	
		 \$109_08	

Record p. 28.

Which last mentioned bill was read to the jury, and the witness further testified as follows: This bill was rendered after Martin C. Hale and I went to Mr. Van Buren's office; I told Mr. Hale that I thought the bill was large; that when the lathe and counter shaft weighed only 3,800 pounds, and the machinery weighed 3,216 pounds, I could not see how the charges on the lathe were \$109.08, when the charges on the whole were only \$137.82; he insisted that the bill was right and said that they had advanced the \$61.14 for freight as stated in last bill, and that the other charges were correct; I think he said he had written to Buffalo and found out, though I don't recollect that he showed me the letter; I don't know but that the building of Sanford & Hall was good enough to keep the lathe in.

Thereupon the plaintiffs called as a witness T. Rogers, who testified as follows:

I am selling machinery; have been engaged continually for two years; I have seen the lathe; I have not examined it particularly; think a ten foot lathe is worth from \$450 to \$500.

On his re-examination in chief, he said: When each of these bills were presented, I offered to pay them all charges on the lathe if they would let me have it, and at each time they refused, unless I would pay for the charges on the other goods.

The plaintiffs here rested.

And, thereupon, the defendants read in evidence the deposition of Judson M. Bemis, taken in said cause, whose testimony, as read to the Jury, was as follows:

I am 27 years old in May next, and live in St. Louis; occupation, manufacturing bags; in 1857, I was clerk for Hale & Co; they (Hale & Co.) received seven boxes of machinery; one engine-lathe, counter shaft attached, one box and one weight, June 29, 1857; Hale & Co. were at that time Receiving and Forwarding Merchants; the said property was received in the ordinary course of their business; the property was all consigned to James Kendall; the charges which Hale & Co. paid on it were \$102.51, the amount of the dock charges was \$3.50,—total \$106.01; these were the charges upon the whole property in that consignment; Mr. Kendall gave us a warehouse receipt for the property, subject to the order of Hale & Co., for the purpose of holding the property to secure the above charges, \$106.01; the paper now shown me and marked "Exhibit 1," is the warehouse receipt above referred to; the receipt is signed by Mr. Prouty who was at that time clerk for Mr. Kendall; I saw him sign it; the arrangement that this property was to be held as security for the charges was made by Mr. Kendall; there was a due bill given by Kendall for the same amount of charges at the same time; the paper now shown to me and marked "Exhibit 2," is the due bill referred to above; the property remained in Mr. Kendall's store for how long a time I don't know; the lathe and weight and box were afterwards sent to Sanford & Hall for storage by Thomas Hale; I saw it there afterwards; Franklin M. Hale composed the firm of Hale & Co.; no

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Record p. 24.

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Record p. 25.

one else to my knowledge; I remained in their employment until the 1st of January, 1858, and was there with Thomas Hale until the 1st of January, 1859; I suppose the property came into the hands of Thomas Hale as the assignee of Hale & Co.; I don't know what became of the seven boxes of machinery; there was no division of the charges to Hale & Co. on the bills of lading on the several pieces of property; it was one gross charge on the whole property; there were no minutes by which we could apportion the charges on the different lots; we might have done so by weighing each piece, if we had known the rates; the property was shipped from Buffalo on the New York Central line of Propellers, of which Hale & Co. were agents; Mr. Kendall had several other lots of freight sent that year; his freight was usually shipped by said line of Propellers and came into Hale and Co.'s hands, as the agents; the goods were marked James Kendall, Chicago; he came frequently with duplicate bills of Record p. 26. lading to inquire after his goods; some time in the fall of 1858, Mr. Doan came in and inquired if we had a lathe; Mr. Doan claimed to have some letters regarding the disposition of the property, or something to that effect. (Any conversation with Doan objected to.) The goods were not claimed by anybody but Kendall before the fall of 1858 to my knowledge; Mr. Kendall never paid these charges to my knowledge.

On his cross-examination his testimony, as read to the Jury, was as follows: I know the lathe I have been testifying about is the one which is in controversy in this suit; I know it, because it was first received in store and sent to Sanford & Hall's; I saw it afterwards at Sanford & Hall's, and when Mr. Doan came to inquire after it, I told him it was there; I think I went with Mr. Doan to Sanford & Hall's to see it; when the propeller Galena discharged this freight, she was lying at Hale & Co.'s dock on the North side of the river, next East of Wells street bridge; the lathe was first discharged at Hale & Co.'s dock; it was first moved from the dock to James Kendall's store, next adjoining Wells street bridge; his store was a separate room from any warehouse of Hale & Co.'s; he rented of Hale & Co.; the lathe was put into his store before the said warehouse receipt (Exhibit 1) was given; the vessel had a bill of lading; there was no other bill; the charges on the book were made up from that bill of lading; the book is a copy of the bill of lading, so far as relates to the marks of the goods, the articles, weight and charges; the bill of lading was delivered to the vessel by Hale & Co., after they had receipted it; the amount of the due bill (Exhibit 2) was taken from Hale & Co.'s book; I did not keep the book; Mr. Holliday did; the warehouse receipt is in my hand writing, with the exception of the signature; the due bill is not; I have such a recollection of amounts, dates and weights that I could have sworn to about the amount of the charges, without referring to the books; I do not know what became of the other things mentioned in exhibit "1" besides this lathe.

On his re-examination his testimony, as read to the Jury, was as follows: My recollection is that the warehouse receipt was given the same day Kendall took the lathe; the arrangement to give the warehouse receipt was made between the time of delivery of the goods on the dock and the delivery to Kendall. [SIGNED.] JUDSON M. BEMIS.

The defendants, by their counsel, thereupon read to the Jury the receipt and the due bill referred to by said witness in his deposition, and marked respectively Exhibits 1 and 2, which are in the words and figures following:

EXHIBIT 1.

Сислоо, July 1, 1857.

Received in store from Prop. Galena, subject to the order of Hale & Co.: 7 Boxes Machinery; 1 Engine Lathe, Counter Shaft attached; 1 Box; 1 Weight. JAMES KENDALL, BY B. T. PROUTY.

EXHIBIT 2.

Due Hale & Co. for freight received per Propeller Galena One Hundred and Six JAMES KENDALL. on Dollars, June 29, 1857.

The defendants thereupon introduced as a witness Wm. Howe, who testified as follows:

Record p. 27.

Record p. 28.

I am in the Forwarding and Commission business in Chicago; have been so engaged for the last seven years; in 1857, the customary charge in Chicago by warehousemen as commissions for advancing and paying charges for freights upon goods which came subject to such charges, was $2\frac{1}{2}$ per cent.

Thereupon the counsel for the defendants asked the witness the following question: "State whether it was then customary for warehousemen in Chicago to make any further charges as interest upon the advances so made by them, when such advances were not repaid to them within a short time after they were made." Counsel stated his object was to prove a custom to charge ten per cent. interest. To which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to allow the witness to answer said question; to which ruling and decision of the Court, the defendants, by their counsel, then and there excepted.

Said witness further testified as follows: The established rate for storage then was one dollar per ton for the first month and fifty cents per ton after that time, until taken away; I think the cartage would be worth one dollar for each removal; I am acquainted with Sandford & Hall's warehouse, which has been referred to; I consider it a good building, better, if anything, than that of Mr. Hale's, and a suitable place for storing:

Thereupon the defendants introduced as a witness Mr. Wm. Clary, who testified as follows:

I am engaged in the Forwarding and Commission business in Chicago; have been so engaged for nine years; in 1857, a proper charge by warehousemen, by way of commission for advancing freight and charges was $2\frac{1}{2}$ per cent.; there was then, and now is, a custom among warehousemen in Chicago, regarding the rate of interest to be charged upon advances thus made.

The counsel for the defendants thereupon asked the witness the following question: "What was the custom?" and stated that his object was to prove a custom to charge ten per cent. interest; to which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to permit said question to be answered; to which ruling and decision the defendants then and there excepted.

Said witness further testified as follows: The customary charge for storage in 1857 was one dollar per ton for the first month and then fifty cents per ton per month afterwards until the goods were taken away; this I consider a fair and reasonable charge.

Thereupon the defendants introduced as a witness B. T. Prouty, who testified as follows:

I was clerk for James Kendall in the summer of 1857, and had been for about a year; I had charge of his business during his absence; the seven boxes of machinery, the lathe and counter shaft attached, and one box and weight all came together, and subject to one entire charge for freight, as appeared by the bill of charges as presented to us; the freight was not apportioned. Here was shown to witness the warehouse receipt above referred to, and he further testified: I cannot recollect giving this receipt, though the signature to it is in my hand writing, and I must have given it; I do not recollect about giving it, it is so long ago; I think Mr. Kendall had orders for the seven boxes of machinery at the time or soon after it was received, and it was shipped away; the machinery was shipped to Kendall by Ball & Co.; the charges on the lathe and machinery for freight was about \$106; that was the charge on both. The lathe was an old-fashioned lathe and out of order. I think it was worth about \$200. The lathe had been manufactured for other parties and they would not take it, and then it was sent out here. It was a good deal out of order. We had it in the store to see if we could not get an offer for it. But we did not get any offer for it.

On his cross-examination he testified as follows:

I was clerk for Kendall for about a year. I did not know anything about lathes before I came there. I know it was ont of order, for I tried to fix it up and get it into shape several times, and could not. It was first entered on our books for sale at \$400; it was so entered because the plaintiffs told us to sell it for that price. Afterwards when we couldn't sell it, they told us to sell it for any price. The gross amount of the charges, about \$100, included the goods shipped by Ball & Ballard and by Barrett & Cutting. The lathe was shipped by Barrett & Cutting, and the rest of the goods by Ball & Ballard.

Record p. 29.

Record p. 80.

Record p. 81.

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The defendants thereupon introduced as witness John Simmons, who testified as follows:

I have been selling machinery for five years; I am acquainted with the kind of machinery in question; I have seen the lathe in question; I have seen it within a week; it is an old-fashioned lathe and out of date; I do not consider it a saleable lathe; I consider it worth about \$250. Thereupon the defendants introduced as a witness,

John Onahan, who testified as follows: I am book-keeper of Thomas Hale; I entered his employment as book-keeper in the sammer of 1858; Thomas Hale was the assignee of Hale & Co.; there has been no other book-keeper in the office from that time down to the present time; I have had the sole charge of the books; Martin C. Hale has attended to the business in the office as has also Franklin M. Hale; I know Wm. H. Doan, who has testified in this case; I have seen him in the office conversing with Mr. Hale about the lathe in question. He never tendered any money to me or offered to tender any money to me on account of this lathe; nor do I know of his ever tendering or of his offering to tender any in the office to any one; Mr. Hale had no other office than the one in which I was bookkeeper.

Here the defendants rested. The plaintiffs thereupon recalled William Kendall, who testified as follows: This was not a second hand lathe; there was another lathe in the store that Prouty worked on several times trying to repair it. In his cross-examination he testified as follows: I will not swear that this lathe had not been used any before it was sent out to Chicago. It was sent from the dock to my warehouse.

Here the plaintiffs rested, and the above being all the evidence that was given in the case, the Court at the instance and request of the counsel for the plaintiffs, instructed the jury as follows:

PLAINTIFF'S INSTRUCTIONS.

- 1. That if the jury believe from the evidence that the lathe in controversy was the property of the plaintiffs, and that the defendants had the possession of it, and that the plaintiffs by their duly authorized agent demanded the lathe of the defendants, and that the defendants refused wrongfully (that is without right) to deliver the same, this is evidence of a conversion by the defendants of the lathe to their own use.
- 2. That if they believe from the evidence that the defendants took the lathe from the store formerly occupied by Kendall, without any authority from the plaintiffs or from Kendall so to do, and then undertook to keep the same from the plaintiffs as security for a debt which Kendall owed them, after a demand by the plaintiffs for the same, then they are guilty of a conversion of the lathe, if the same belonged to the plaintiffs.
- 3. That if Prouty was simply the salesman and bookkeeper of Kendall, and that Kendall was not a warehouseman, this gave him no authority to give a warehouse receipt for the lathe, and such receipt so given would have no effect in this suit without special authority to do so or a ratification of the act.
- 4. That if the defendants had a lien upon the lathe for any freight and charges that they had paid upon it, but took Kendall's due bill for such freight and charges and delivered the lathe to him, then they lost their lien and could not afterwards and by a new contract with Kendall take the lathe and hold it as security for such freight and charges, without the consent of the plaintiffs, if they believed from the evidence that they owned the lathe.
- 5. That the freight and charges upon other goods belonging to other persons, were never any lien upon the lathe if it belonged to the plaintiffs.
- 6. That if the plaintiffs owned the lathe and sent it to Kendall as a commission merchant in the ordinary course of business to sell, then Kendall had no authority to pledge the lathe to the defendants either by a warehouse receipt or in any other way for any debt he on his own account may have owed the defendants.
- 7. That if the lathe belonged to the plaintiffs and they by their agent demanded the lathe of the defendants, and offered to pay all proper charges for the freight, storage, and other charges upon the lathe, but the defendants refused to deliver it unless charges upon other goods were also paid, then the plaintiffs are entitled to recover.

Record p. 34.

8. That if the jury find for the plaintiffs their verdict, they may find the value of the lathe at the time of the demand, with interest since that time at the rate of six per centum per annum as damages, less by way of recoupment whatever amount for freight and charges or either, the jury shall believe from the evidence the defendants had advanced on said property—if they shall further believe from the evidence that the defendants had never voluntarily parted with the possession of said property.

9. If the jury believe from the contract that the defendants refused to deliver up the goods unless an amount larger than what they were entitled to should be paid them, and so told the plaintiff or his agent, then, no tender was necessary if the plaintiffs were ready and offered to pay the amount actually due, as the law does not require a party to do a useless

To the giving of each of which said instructions the defendants by their counsel t and there duly excepted at the time they were respectively given.

The defendants by their counsel thereupon requested the Court to instruct the jury follows:

DEFENDANT'S INSTRUCTIONS.

Record p. 86.

1. A warehouseman on receiving goods in the regular course of his business has a upon the goods for any advances which he may have made to the carrier, which may h. accrued for the carriage of the goods, and also for his reasonable charges for storage of t goods if he shall have kept them in store, and has a right to retain the possession of th property until such advances and charges are repaid to him. And if the jury shall believe from the evidence in this case, that the defendants or one of them, in the summer of 1857 received the property in question as warehouseman, and paid to the carrier the sum of sixty one dollars and fourteen cents which had accrued for the carriage of the goods, and afterwards kept the goods in store, they had a right to retain the possession of the property until the sum advanced by them and charges for storage was paid to them. Which was given to the jury.

The defendants by their counsel asked the Court to instruct the jury as follows:

2. If the jury shall believe from the evidence that the defendants or any one of them received the property as stated in the above instruction, and that they had a lien upon said property as stated in said instruction, and that the same was consigned to James Kendall, and that the defendants or one of them made an agreement with James Kendall that the said James Kendall should receive the said goods, temporarily to hold the same as bailee for said Hale & Co., and that for that purpose and in pursuance of said agreement, said Record p. 87. Kendall or his authorized agent executed the warehouse receipt given in evidence in this cause, and that said goods were delivered to and received by said Kendall under and in pursuance of said agreement, this is not such a delivery of the property as will deprive Hale & Co. of their lein upon the property.

But the Court refused to give such instruction as asked, but modified the same by adding thereto the following words:

"This is so if the said agreement was made at the time the goods were first committed " to the possession of said Kendall."

And the Court read to the jury said instruction thus modified, to which modification and alteration of said instruction the defendants by their counsel then and there excepted.

The defendants by their counsel then asked the Court to instruct the jury as follows:

3. If the jury believe from the evidence that the defendants or one of them received the goods in question as stated in the first instruction, and that they had a lien upon said goods for advances and storage as stated in said instruction, and that they had possession of said goods and continued in such possession to the summer and fall and year 1859, then they had a right to retain the possession of the property until the amount of the charges and advances were paid or tendered.

Which instruction was given to the jury as asked.

And thereupon the defendants by their counsel asked the Court to instruct the jury as follows:

Record p. 88.

4. To constitute a legal tender the money must be actually produced to the party who is entitled to recover it, and if the jury shall believe from the evidence under the above instructions that the defendants or one of them had a lien upon the property in question, then before they can be charged with having converted it, the jury should be satisfied from the evidence that the amount of this lien was tendered the defendants or one of them, and that upon such tender they or one of them refused to deliver the property. A mere tender to the bookkeeper of one of the party who

But the Court refused to give such instruction to to jury asked, but modified the same by adding thereto the following words:

"Of itself. But if the jury shall further believe from the evidence to distribute the or their agent offered to pay the actual amount due for such charges and the defeadants claimed a larger sum and refused to deliver the lathe unless so sum was paid, then an actual tender was not necessary."

And read said instruction to the jury as thus modified; to which modified alteration of said instruction by the Court, the defendants, by their counsel, the duly excepted. And thereupon said cause was given to the jury upon the evid instructions aforesaid.

ASSIGNMENT OF ERRORS.

1st. The Court erred in sustaining the objection and refusing to allow the wi Wm. Howe, to answer the question as to the custom among warehousemen in Chicago charge interest upon advances, &c.

2d. The Court erred in refusing to allow the defendants to prove such custom by twitness Wm. McClary.

3d. The Court erred in giving the plaintiffs' first instruction.

4th. The Court erred in giving the plaintiffs' second instruction.

5th. The Court erred in giving the plaintiffs' third instruction.

6th. The Court erred in giving the plaintiffs' fourth instruction.

7th. The Court erred in giving the plaintiffs' fifth instruction.

8th. The Court erred in giving the plaintiffs' sixth instruction.

9th. The Court erred in giving the plaintiffs' seventh instruction.

10th. The Court erred in giving the plaintiffs' eighth instruction.

11th. The Court erred in giving the plaintiffs' ninth instruction.

12th. The Court erred in refusing to give the second instruction for the defendants, as asked, and in modifying and giving the same as modified by the Court.

13th. The Court erred in refusing to give the fourth instructions for the defendants, as asked, and in modifying and altering the same, and giving the same as modified and altered by the Court.

14th. The verdict of the jury was against the law and the evidence.

15th. The Court erred in overruling the defendants' motion for a new trial and giving judgment on the verdict.

HOYNE, MILLER & LEWIS,

For Appellants.

253 Hala Os Banrett Abstract Lad Upr. 29-1861 L'Leland Colork

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Attest, Metate the Hanciable, the Judges of the Puperial Jourt of Phicago, within and fat the Jounty of Jack and State of Illinais, at a tegular Term of said Superiar Jourt of Phicago, begun and holden at the Jourt Staves, in the Lity of Phicago, in said Jounty and State, on the first Manday, being the Jourth day of Manday of in the year of our Lord One Thousand Gight Hundred and Sixty Oric and of the Independence of the Minited States of America the Gighty fift.

Present, The Honorable John Mileson Chief Justice of the Superior Court of Chicago. Sheriff of Cook County.

Attest, Milli Ministral Olerk.

Be it remembered that heretofore to not one the thirtenth day of December in year of our Sord one thousand eight hundred and fifty nine there ifened out of the office of the Clerk of the Luperior Court of Chicago the people mit of summons which summons with the chieffs return thereon endorsed is in words and figures following to mit

State of Minois? Country of Country of She people of the State of Illinois to the Sheriff of said Country Geeting. We command

1.

That you summon Frankling M. Hale Thomas Hale and Monthis Co, Hale If they shall be found in your loyaly berenally to be and appear before the luferior lough of Chicago of gaid look lounty on the first day of the next term thereof to be holden at the lout souse in the lity of Chicago in said look lounty on The First Monday of January next to angrier unto Joseph Barrett and leafel butting in a plea of trefpap or the case to the damage of said plaintiffs as they say in the sum of Live Hundred bollows for there and there this mit with an Endorsement thereon in grhat manner you have executed Seal. the same Witness Walter Kun ball blerto of our said Court and the stal thereof at the lity of Chicago in said lounty this thirteenth day of December AD 1859 Served by reading to the nothin named defendants this trustitle day of December AD 1859 John Gray Sheriff By Ab Atfing Depty -

And afternands to mit on tremby third day of December in the year aforesaid Joseph Bomett

and bales butting plaintiffs filed in the office of the clerk of said court a certain declaration

in mords and figures following to mit

State of Ellinois Country of bodo, In the Superior Court of Chicago of the January Ferne AS 1860 Joseph Barrett and bales butting flamfiff in this enit by Van Burrer and Forg their attorneys complain of Franklin M Halo Thomas Hale and Martin & Hale defendants For that ordereas the said plaintiff heretofors to rich on the first day of January AD1859 at said lounty were lawfully poperfied as of their own property of certain goods and chattels to mit one ten foot lugice Lathe with counter shaft and hangers of great value to mit of the value of Five shudred sollars and tring es for Eprob the said plaintiff

afterwards to with ou the day and year afore-

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afternard to mit ou the day and per afresaid at said lounty came to the possession of said descended auto by saiding - Get the said defendants mell knowing the said goods and chattels to be the property of said plan tiff and of right to belong and appertain to these butcontriving and fraudulently intending craftly and subtily to deciros and defraid the said Saintiff in their behalf have not as yet delivered the said goods and Chattels to the said plaintiff although often requested so to do, and afterwards to mit on the days and year afor Esaid at said lounty converted and disposed of the said goods and challels to their own use to the Samage of the said plaintiffs of Five Sundred Dollars and they therefore bue of Van Buren Fray Plf attorneys

And afterwards to rict on the teuth day of Sauvary in the year Eighteen thudred and listy Franklin M. Halo Warter le Halo and Shomas Sale by Aryne Willer and Lewis their attorney filed in the office of said bourt their pleas in mids and figures following

5 to not Superior Court of Chicago January Ferne At 1860 Franklin M. Hale) incheaded with Martin Co Hale infleaded with Martin la Hale and Fromas Hale ad Joseph Barrett Lealed Cutting). defendant by tryne Willer and Lewis his attorney come and defends the mong and infury where all and eap that he together with the raid Martie & Hale and the ties Thomas Halo is not quitty of the said supposed grisvauces about Said to his charge or any or Either of them in manuer and from as the sold plainty, have about thereof or any port thereof a coneplainted against him And of this he the said differedant Franklin Us Nale buts himself upon the country so Hoyne Willer Lewis Attorney for defendant Franklin U. Bal And the said places tiff do the like te Van Burne hay My Atty

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Superion Court of Chicago Samary Jenn AD 1860

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Hormey for defendant Warten & Hale

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Montai le Hale Franklin M. Hall and Thomas Hall And now comes the placed place the for the Burew and Fary their attorneys and the said defendants by Horjne Hiller and Lewis their attorney also comes the ifue being found herein it is ordered a Jung come and hereuford comes the dury of good and lawful to mit All lughts, Fes Lawson Miller Faskett, Hartin Funey I Wilder, Anosletcher, Oliver Mitchell, C. D. Miller, Teo Fiddings, A. E. Sules, N. M. Kught & Co A. Ludden, who bring duly Elected tried and swone to try the iful found as aforesaid after heaving part of the tes hinory and the hour of adjournment having arrived it is ordered upon the agreement of the farther that the Juny separate and must the court to morrow morning

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And again comes again comes the parties to this cause by their respective attorneys as on yesterday and the Jung Empauelled herein efor the trial of this cause as on yesterday also come and submit their verdeet and say We the lung fund the said defendants quitty and no access plaintiffs damages against all defendants to the sure of Gour Hundred threuly five dollars and thereupon the said defendants submit their motion herein for a new trial in said cause,

And afterwards to wit on the twelly third day of I Etuany in the year aforesaid said day being still of the Setuary Senn of earl court the following among other for ceedings were had in said court and entered of Record

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Thomas Halvey Montai CHall And now again comes the said plantiffs by law Burer Ex Fray their attorneys and the said defendants by

Hyne Miller & Lewis their attorneys also come and the cause coming on now to be heard on the nestine heretofore submitted herein by defendants for a new trial in said cause and counsel being heard and the Court being fully advised in the brewises are of the operior that the nestered for a new treat be and hereby is overruled to which ruling and decision of the Court the said defendants except renter their exceptions therefore planshiff ought to have Sudgment entered on the verdeet of quitty hertofore rendered herein against the said defendants and for their damages applied thereon therefore it is considered by the that the said plans tiffs do have and recover of and from the said defendants their damages of Four Hundred and trendy fire Dollars un form aforesaid found and apeped by the day together with their costs and changes in this felalf expended and there of have extention and therefore the said defendants having Entered their exceptions pray an affect heried to the supreme court of this State which is allowed to them upon filing their appeal bond in the finalty of Lis Audred Dollars with security to be approved by a Judge of this Court, had to be filled within treety days from this date and bill of Exceptions to be filed by the twenty minto day of March instant,

13.

And afternands to mit on two trenty Eighth day day of March in the year aforesaid there came Said defendants Franselin M. Halo Phomas Halo and Hartin Hale and filed in the office of the Clerko of said Court a certain bill of exceptions in mords and figures following to mit

Superior bourt of Chicago

Joseph Barrett & Coaled Coutting os Shomas Hale, Franklin II. Hale and Matin le. Hale

De it remembered that on this 12" day of Johnson AD184 the above cause cause on to be tried before the Amorable Grant Fordrich ow of the Justices of said Court and the porties bring represented by their respective Coursel a dury was duly unfamilled and sword to try said Cause And thereufour the plaintiff introduced as a nitrues James Kudall who being duly ewone testified

elling machinery on my own account and as Sommifeion Merchant. My place of Justine mas

14. at the north end of Hello street just over the bridge, it was in the building occupied by the Hales I meted a ctore in that building. I know the defindants Franklin M. Hale and Marten Hale, They were in the summer of 185 f busines adder the name of Hale to capit say of my own King doing trustres in the same office transclus. That they were portners they green daing business in the same files generally did the trescrief. Marten was there I supposed they were doing business under that name, I know the Lathe and Counter That in controversy think it was about 12 feet Jong The counter shaft and weights came with Lathe. The Lathe was Consegned to me by the plaintiff Barrette Cutting for eale on commission When it arrived it came with some other machinery in FoxEs Ballay Ballard consigned the machinery to me when the bill for the charges was presented I told Protty my clarke to pay the changes and money coming told him to apply it for charges and supposed he had done so suitel some time afterwords I had occasion to go into the country about that him and I was suprised on my return to find he had not done so di my absence Prouty got the Lather and Courtershaft into my store and it remained there until the next debreary in 1858 The Lathe and machinery come carly in the commer of the previous year 1854, In February 1858 I removed from that eton to 86 Lake Street All the machinery mathat elore was tradeur to 86 Lake It in February 1858

15 Except this Lathe that was left in the store on Muett I rented the store or Wells It of one of the Hales My Sease was with the young man Franklin M. Hale The store was in the same building occupied by the Hales I saw the Lathe there several himes. Not long after I left Mr Hanny went not The store. I have not seen the Lathe suice. I mas there afternands, it had treu neured. I don't Tenow who reword it - Being crop examined he testified as follows Ball and Balland and Barrett and Centling lived in Forcester glassachusetts. The Lathe and boxes of machinery came in till of lading under one charge. Hey impression is that the charge upon the Lathe was \$42, (dollars) Though Sam not forting I excuted the due till now shown to med Chere mas shown to the netwer the exhibit marked exhibit "A" attached to the deposition of Judson H. Buis and afterwards read in evidence I that was for the amount of freight and charges faid on the Lathe for Hale and boxes of macinery and The Dockeage in Chicago. I dave no recolfection of rigning it but it is in my hand mitting. The more Louse receifet now showed to me is signed by Her Fronty who was my Clink at that there has shown to the witness the exhibit marked Exhibit attached to the deposition of Judan III. Buis and afternands read in Evidence) Printy had the money with which to pay the charges on the Lathe and machining

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William H. Hoan who testifued as follows

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List own all need by these presents that me Soseph Bornett and bales butting both of recenter in the country of recenter and thate of Massachusetts. coporthus under the firm of I Barrett He Hore constituted ordained and made and in our stead and place but and by these presents do constitute ordain and make and in our own stead and flace but Millians I Bran of Chicago in the state of Lelineis to be our true sufficient and lawful attervery for us and in our name and stead to take position of all the machinestrols and other presents for freeze of fames lendall or other persons in the bossepines of James lendall or other persons in Chicago aforesaid and the same to dispose of for cash or if dies cannot be done to our advantage these for

17.

Real Estate the conveyance thereof to be taken is our name by good and slifficient deeds of Warrantee free from all incum brance said heads or movey to be transmitted to us at once upon the recipt thereof The said Down to recine the usual commission for transacting said humes giving and kereby gransling uto our said attorney full from and authority in and about the fortuises and to use all due neaus course and process in the law for the full Effectual and complete execution of the business afort described and in our names to make and execute due acquittance and descharge And guerally to say do act transact determine accomplish and buish all matters and things whatever relating to the preciouses as fully amply and effectually to all intents and hun poses as me the said constituents if present night or might bersonally do du mituele whereof, We have hereue to set our hand reals this second day of December in the year of our Lord One Thousand Eight Hundred and Lifty Eight

Soreth Barrett Chald

I law the Halo by sight the two Hale that are fresent Wartin Chale and Franklin Whale. I have had repeated

conversation with the Hales about the latter, It was a long time before I could find the lather I finally found it in an old building on the North lide; it was in the markhouse of Sauford & Hall I first saw Franselis and The Martin and all together. handlin at first secured to Thuise of had no hisines with it. I should them my power of attorney. Their business was all done tryether. I applied to the Hales to get the charges on the Lathe and told them I would pay all proper charges afon it. they fually gave me a hell for about \$1160, for advanced charges in groß. I told there mas some mistake and manted them to give me the etus. They afterwards gave me another bill for about \$110, including the boxes. I objected to paying charges on author mans property my tallo was with all of them. Then proposed to give there seventy cfive Dollars and Close it up they said they would mite to Buffalo. they finally said if I would pay the whole bill they would deduct nine dollars. I made them a tender of from \$100, to 8105, in bande bills They refused to let me have the lathe unlap I haid them the whole amount of their bill. I have been in the machinery business for cfive years and know tho ralue of this Latte. I could have sold the Latte repeatedly for \$4/5, I had already sold it for \$ 475. When the Lathe was shipped the usual price for

Freight from Wenter to chicago was from eithy cents to one dollar there would have been no difficulty in accertaining the freight on the Lather by meighing it. And being cross Examined said witness testified as follows. I have been acting as sales man for myself and others for nearly the years, an acting as salesman for Lay No. and for my self -My Brother James S. Down west with me to the Hales when I made the Keeder of which I have spoken. I saw Stales Bortesceper or the person I toole to be the Boose Sceper. I can't say that I saw any one else, I done their any of the Hales were in I did not see either of thew. I trudened the money to the Book Keeper. It mas in tank bills. I daid it on the counter. He said he had no instructions to take augthing lef than the amount of the bill and that I had better see Mr Hale. I did not see Mr Hale. I know it was over Ru Audred Dollars that I tendered but how much over & cant pay. I know because no neut right from Mr Van Bureus office to the Hale to madel the truder. I had \$100, dollars where I was in Mrtan Bureus office and he said I had letter be serve and tender a little more and I knowled some more on the tray from my Brother who went with me! Can't say how much more \$4. or \$5, perhaps, This was a short time before this suit was commenced a meet or the for haps before it mas commenced.

20. I first saw de Halas about this Lathe in the summer or fall of 1858. I can't say which of them I first saw it is so clong ago. I saw them a good many times I contitato the autitance of any particular conversation I had with either of them before I went to How Vaice -Bureus office with Martin Hale. It is so long ago. that I can't state what I said or what they said in, any farticular conversation, I had learned or here the Sathe was before I went to the Halis. I had learned this from Kendall & manted to Senow of the Hales ordat their charges were on the Lattie, I have the hels they rendered to new from him to him of the amount of their charges, the following was the first till they rendered to in the year 1858 Here was foresewhed by the mitness the bill referred to by live in the words and efigures collowing Halis Docks Chicago choos q 1858 Mr James Kendall or whom ét may encerns Lo Thomas Hald Don North Water Street between Wells and La Salle Its Storage on Lathe 17.10 Bill rendered June 2 gts. 106.01 Advances efor 2.60 Interest 8,61 Cent of 3,50 \$ 137.82

21. When they handed new this till I told them the changes ought not to be so high that I wanted a till of the iteus that there was one change of \$ 106.01 all in one lemps and I manted the items. I think it mis How time Chale that handed mee the bill and afterwards they made out and handed to me this hill Here the nituels produced the hill referred to by him in The mords and figures following Hales Docks ... Mr Sames Kendall, Chicago Arvig 1858
L'arthe Water Street between Hells & La Salle Ats Mu Halo: For Steeght and Changes on Fords for for Falena June 2 9 1/80 of Boxes Machinery 3,216 l'Eugine Lather Courter Gliaft attached 1 Ba 1 Weight 3,800
Advances
At & Chicago
Dockage 24,90 77.61 3.50 106,01 Dufficato Bill

She above bills were read to the Jury and the methods forther testified as follows, I thought the changes were to high they insisted that they had a right to hold the Lather and Counter that the muti the changes on the seven boxes of machinery were faid. I insisted that that they had no such right and told theme I

22 was willing to buy the charges on the Latho but that They had but it all in one bill. I recollect Martin Ofale saying something about having to mito to Buffalo to see how much the charges overe on the Latto that They could not separate it from the Charges. on The machinery. Martin Male said if my lawyer mould etilify there that they had no nath to Seef the Lather for the charges on the toxes of meachering there he mould not insist upon it and I must with him to Her Van Burens office, we saw Mr Van Buren There and do said to Mr Sale that they had no night to Tempone mans goods for the har ges on anotherman goods Mr tale after talling some time said he manted to see his lawyer and went out. Ill I tale then rendered To me this bill here the metiest produced to bill referred to by him in proods and figures following Kales Docks Chicago Seft 3rd 1859 Mr Janus Kerdall Chicago Jo Thomas Halo Dy Anth Water Street between Hells of Salalle to song min of AM Halo Sune 29 År freight Charges ro . Lathe He 3,800 . Areight adved A.Y. G.R., 61,14 1/2 % for adveg 1,52 Interest 10% to date (2 you/2 me) 13.42 Pd & Contages 6,00 Strage \$10g.08

23.

which last mentioned bill was read to the Jeny and the witness further testified as follows, This till was rendered after Martine Co, Hale and A went to Mr Van Burens office. I told Mr. Hale that I thought the vill longe that when the Lather and counter shaft weighted only 3800 pounds and The machinery weighted 3216 founds I could not see how the charges on the Latho mere 109.08 on hew the charges on the whole were only 137,82, he insisted that the bill was right and said that they had advanced the \$61.14 for freight as staled is last till and that the other charges n'ere correct. I Thuiso he said he had written to Buffalo and found out though I don't recollect that he showed me the letter. I don't know het the building of Sauford & Hall mas good enough to keep the Lathe in thereufon place tiff called as a witness I Rogers who being duly swow testiled as follows I am selling machinery, have bundingaged continually for two years I have seen the Lather I have not examined it particularly. Think a true fort Lathe is morthe from 4.50, to 500, Dollars Ore his reexammation is chief he said when Each of these tills were presented offered to pay There all charges on the Lather if They would let me have it and each time they refused unless I mould key the charges on the other goods The plaintiffs here rest and Thereupon the

Moh This means Disco be your all to Butto the

defendants read in Evidence the deposition of I ced and HI Benis talen in said cause orhose testimony as read to the Jury was as follows I am 27 years old in May next and live in It Louis occupation mansfacturing bagg, in 1851 I was clarlo for Sale blo They (Stale do) recived seven toxes of machinery one Engine Lathe Come Fer shaft attached ne box and one weight Jum 2 9, 1857 Hile olo were at that time recieving and forwarding neichants. The said property was received in The ordinary course of this inef. the brokerty mas all consigned to James Kendall. The charges which Have she paid one it were \$1.2.51 The aurount of the Dock charges mas 3.50 Potat \$106,01 Those mere the charges upon the whole property in that Cousing uneut. Her Kurdall gave us a warEhouse recept ifor the brokerty subject to the order of Stale to for the purpose of holding the brokerty to secure the above Charges \$106, of The baker now shown me and manked & hibit "/" is the monthouse receipt above referred to, The receipt is signed by Mr Prouty who was at that him Clarke for Mer Kendall & som him sign it The arrangement that this property mas to be held as sicurity for the changes mas made by Mr Kendall There was a due till gwen by Kendalo for the sauce amount of charges at the sauce time The paper now shours to me and marked Exhibit

is the due till referred to about, the property remained in Mr Kendalis store for how long a true of don't Turn The Latte and weight and Box mas aftermands sent to Sanford Hall and dos Ar storage by Thomas Halv. I saw it there aftermands. Franklin M. Hale composed the fine of tale Also. no our the to my Tenowledge. I musical in their aufloyment until the first of Samony 1858 and mas then with Showas tale witch the I't Saucony 1859. Souffore the property came into the hands of Showas Hale as the assignee of Hale No. I don't Sund what because of the seven boxes of machining there was no division of the charges to Hale obo on the bills of lading on the several prices of hroperty. It was one gross charge on the whole property. There was no muiretes by which me could apportine the charges on the different lots. me might have done so by weighing each hie ed if we had known the rates. The property was shipped from Buffalo on the N.Y. lentral live of Propellers of which Hale & les were agents Mr Kendall had several other lots of freight sent that year. his freight was usually shipped by said die of propellers and cancer into Halva los hands as the agents. The goods were marked Sauces Rendall Chicago he came frequently with duplicate bills of ladeing to inquire after his goods. some true in the fall of 1858

Mr Down came in and inquired if me had a Latho Mr Doan Clavied to have some detters regarding du dispositions of the brokerty or something to that Effect (any conversation with Draw objected to) The good were not claimed by any our but Kudall with the fall of 1858 to my Enowledge Mr Kudall never paid these charges to my. Ruowledge, Ore his crop examination his testimony as read to the Jury was as follows I know the Lather which I have her kestifying about is the one inhich is in controversy in this suit I know because it was first received in store and leut to Sanford & Rull! I saw it afterwards at Saiforda hells and when Her Down came to anguire after it I told him it mas there. I thunk I went with Mr Down to Sauford of Sull to see it There the profeller discharged this freight who mas lying at Hale & loo's Dock on the Anth side of The nur next East of wells It Bridge The Lathe was first discharged outo Hale auglo, Doelo It was fist moved from the Drest to Sames Kendalls The next ad foring Well He Bridge his store mas a separate room from any marchouse of Halo & boil He ruted of Halo & les Ohe lathe mas put into his store before the said morehouse receipt (Exhibit 1) was given The ressel had a till of lading There The book is go copy of the bio of fading no far as relates

to the meants of the good The articles weight and changes, The bill of lading was delivered for the resel by tale of lading was delivered it The amount of the due bill to hit 2) was taken from that of less Bords I did not deep the boods Mr Holliday did the marehouse receipt in my hand writing with the exception of the signature the due Bill is not I have such a recollection of amounts date and weights that I could have swining to the horses I do not heave what became of the other things must hinted in what I Besides this Sathe On his revacuination his testimony as read to the Same was as follows

Direct examination resumed

My recollection is that the more house receipt mas
given the same day budall toolo the Sathe the
arrangment to give the more house receipt mas made
between the time of delivery of the goods on the doch
and the delivery to kindall

Cogned Souden II. Bemis
the defendants by their counsel Therenfor read to the
lung the receipt and the due bill referred to by
said withing in his deforition and montaed respectively Exhibits (1142) which are in the words and
figures following

28. Chicago July 1-1851

Kecieved in store from Trop Galua subfiet

to the order of Halvey les

of Bals Machinery I Engine Sathe counter Shaftattached 1 Box 1 weight

James Kendall by Bd, Fronty

Due Hale que la for fréight réceived for Propeller Halena One Shoudred que six Dollors Sund 2 9-1887

The defudants thereupor introduced as a vietuel The true who being duly swon testified as follows Sant is the formarding and commission business in Chicago Have keen so Engaged for the dast seven yters, in 1851 the customany change by more housemen as commissions for advancing and paying charges ofer Treights upon goods which come subfired to such Charges was 21/2 for cure Thereupon the coursel for The defendant asked the mitruly the following question. Stale whether it was their customony for marchoneum in Chicago to make any further changes as utterest upon The advances so made by these when such advances mere not repaid to these within a short time after they nere made Coursel stated his object was to a custom

To change to her cut atertet to which question The plaintiffs by their consisel their and there objected and the Court sustained said offection and refused to allow wituep to answer said question to which ruling and descision of the court the defendants by their counsel there and Their objected) Said witues further testified as follows The Established rate for storage There was out dollar for tou for the efirst month and 50 each per tou ofter that him until taken away. I thuise the certage would be mothe one Dollar. for each removal I am accquainted with Sauford ay stull marchouse which has been refferred to I consider it a good building better if anything there that of Uhr Hales and a sentable place for storing Thereupon defendants introduced as a nature Mir Would lary who testified as follows, I am Engaged in the forwarding and commission business in Chicago have been so Engaged for g years, in 1857 a profer charge by morehousemen by may of connecession for advancing freight and changes was 2/2 her enet There was there and now is a custom among morehousemen is Chicago regarding the nate of cutertal to be charged upon advances thus made the counsel ifor the defendants thereupon asked the witness The following question What was that custois and wated his offect aras la smove a seus Souls to cleange 10. In out. Somkich questine the flautiffs by their coursel thew and

and there obsected and the court sustained eard objection and refused to permit said question to be answered to which ruling and descision defendants thur and there offected Laid witness further testified as follows The customary change for alonago is 1851 mas 1. her two for the first mouth and then 50 cuets for true for mouth afternands outil The goods were taken away This I consider a fair and reasonable chargo Thereufon the defendants

by their coursel introduced as a neture BS. Fronty who being swone testified as follows

I was clerk for Samus Kendall in the summer of 1857 and had been for about a year I had charge of his business dering his absence The severe boxes of machinery the Lathe and counter shaftattached and one tox and weight all came togethere and suffect to one Eutire change for freight as appears by the vill of canges for Escuted to us the freight was not apportioned Here was shown to the nitues the marchones receipt about referred to and he further testified I cannot reollect giving this recipit thoughthe signature to it esus my hand miley and I must have given it I do not recollect about geing it it is as longage I thinkso Mr Kennedy had orders for the swew boxes of machinery at the him or soon after it received and it was shipped away The machinery was shifted to Kendall by Balla, le The charges on the latte and machinery

For Freight was about 106, deal was the charge on 31. both The Lathe was an old fash comed Lathe and out of order of think it was morth about \$200. The fathe had been manfactured for other frontes and they would not take it and then it was sent not here. It was a good deal out of order The had it in the store to see if me could not get an offer for it. but me did not get any offer for it On his crop examination he testified af follows I was Clarke ofor Kennedy for about a year I Did not You on any thing about Lather before I came there. I know it was out of order for I tried to fix it up and get it into shafe several trives and could not. It was first Entered on our Boods for sale at & 400. it was so Entered because plaintiffs told us to sell it for that frice afterwards when we couldn't sell it they told us to sell it any frice. The gross amount of the changes about \$ 100 wieluded the goods shifted by Ball & Balland and Barrettan Cutting The Lathe was shipped by Berretta Cutting and The rest of the goods by Ballay Balland The defendants thereufon introduced as a nitues John Summons who being duly swone testified as follows I have been selling machinery for 5 years I am accquainted with the build of machinery in question I have seen the Sathe in. question I have sun it mittien a week It is an old fashioned fathe and out of date I do not

consider it a saleable Lathe I consider it northe about & 250. Thereupon the defendants introduced as a mituele John Orahan who being swone testified as follows I am Book Ruper of Showas Hale I entered his amployment as Boose Keeper in the summer of 1858 Showas Hale was the assigne of Hale it there has been no other Book Keeper in the office cfrom that him down to the present time I have had the sole charge of the Booses Martin le Hale has attended to the business in the office as has also Franklin M Hale I know Mon A. Doan who has testified in this case I have seen him in the office conversing with Mr Hale about the Lathe in question he never trudered any money to me or ever offered to keeder any money to me on account of this Latho Ar do I sknow of his Ever Kudering or of his offering to tender any in the office to any me Mr Hale had no other office there the one in which I was Boose Scuper Here the defendants rest and the plantiff recall Montherdall who theshlis as follows. This was not a second hand Lather there was another Lathe in the store that Prouty worked on several times trying to repair it In his cross examination he testified as follows I will not ewear that this Lathe had not been used any before it was sent out to Chicago it was suit from the Dock to my Workhous Here the Slautiff rest and the above being all the Evidence

33.

That was given in the case the Court at the instance and request of the course if it the Sun blankiff instructed the Suny as follows That if the Sury believe from the evidence that the Lathe in controvery was the frogerty of the plaintiffs and that the defendants had the possession of it and that the plaintiffs by their duty authorized agent demanded the Lathe of the defendants authorized agent demanded the Lathe of the defendants refused monghey (that is mithored right) to deliver the same this is evidence of a conversion by the before dant of the Lathe to their

2

Shat if they believe from the Evidence that the defendant took he Lathe from the there formily occupied by Rendall mothered any authority from the plantiffs or from Lundall so to do And There undertoose to keep the same from the plaintiffs as security for a dett which Rendall owed them after a demand by the plaintiffs for the same them they are guilty of a convenion of the Lathe if the same belonged to the flaintiffs

3

That if Bouty was simply the salesmansand Book keeper of Kendall and that kendall was not a warr-house this gave him no authority to give a markhouse raight for the Lathe and such recipt

34. So given would have no effect in this suit mithout special authority to do so or a valification of the act

11

5

6

1

That if the defendants had a lieu afon the Sather for any freight and changes that they paid upon it het. took lendalls due bill for such freight and Changes and delivered the Sather to him there they lost their lieu and could not afternands and by a new contract with Sudall take the Sather and hold it as presently for such freight and Changes without the consent of the flaintiffs if they believe from the Evidence that They owned the Lather

That the freight and charges upon other goods belonging to other foreign were never any line upon the Lathe if it belonged to the plaintiffs

That if the Saintiffs owned the Lather and sent it to Kendall as a commission merchant in the ordinary courses of business to sell their Kindall had no authority to bledge the Lather to the defendants Either by a march onese receipt or in any Men may for any debt he or his own account may have overed the defendants

That if the Lathe belonged to the place tips and they by their agent demanded the Lather of the defendants and offered to pay all proper charges for the freight

35, enf

8

Storage and other changes afon the Lathe but the defendants refused to deliver it wells changes upon other goods were also paid there the plaintiffs are cutilled to never.

That if the Juny equid ifor the Stantiffs their verdict they may equid the value of the Lather at the time of the demand with interest evice that him at the rate of six fer centum per aument as damages less by may of recoreprisent whatever amount for freight and charges or either the Juny shall believe from the widence the beforedants had advanced on said property if they shall further believe from the evidence that the defendants had never value taily fanted with the possession of said property,

of the Juny believe from the Evidence that the defendants refused to deliver up the goods unless an amount larger than what they were entitled to should be paid them and so told the plaintiff or his agent them no tender was necessary if the plaintiffs was ready and offered to paid the amount actually due as the law does not require a forty to do a well thing

To the giving of Each of which said instructions the defendants by their consisel there and there duly excepted at the time were respectively given

The defendants by Their counsel Therefore orguested the Court to instruct the Juny as follows

A Warthouseman on receiving goods in The regular course of his business has a dien upon the goods for anyadvances which he may have made to the cameer or hich may have account for the carriage of the goods and also for his reasonable Charges for Storage of the goods if he shall have kept There are store and has a right to retain The possession of the property with such admuces and charges over repaid to him. And if the Jury shall believe Arone the Evidence in this case That the defendants or one of them in the Summer of 1857 received the property in question as Warehousewar and faid to the Corrier the suns of sixty one dollars and fourtein cuts which had account for the carriage of the goods and afterwards kept the goods on store they had a right to retain the possessione of the property until the sure advanced by them and change An stronge mus faid to there Which was given to the Juny The defendants by Their coursel asked the court to instruct the duny as follows

If the Very shall believe from the Evidence that the defendauto or any one of them received the property as thated in the above instructions and that they had a live upon said broperty as etaled in said instruction and that the same mas consigned to James kindell. And that the defendants or one of them made an agreement with James kindall that the said James kindall should receive the said goods then forwilly to hold the same as bailed for said Halo be and that for that but forse and in fursuance of said agreement said Lendall or his authorized agent executed the marchano recieft given in Evidence in this cause and that said good were delivered to and recieved by said lendall under and in hursuance of said agreement this is not such a delivery of the property as will deprive Hale who of their lieu whom the property.

But the court refused to give Raid instruction as asked but modified the Rame by adding thereto the following words "This is as if the Raid agreement was made at the time the goods were if its committed to the possess in of Raid Her dall" hid the court read to siny Raid instruction thus modified to which modification and alteration of Raid metrodient the defendants by their coursel their and then excepted The defendants by their coursel their and the court to instruction the defendants by their coursel their asked the court to instruct the Iny as follows

of the dery shall believe from the Evidence that the defendants or one of them received the goods in question as stated in the spirat instruction and that they had a lieu whom said goods fradvanze and storage as stated in said instructions and that they had horsession of said opords recriticularly in such population to the summer and fall and year 1859 them they had a right to retain the property with the amount of the charges and advances never baid or tendered.

And thereifor the defendants by their counsel asked the court to instruct the dury as asked to court to instruct the dury as follows

:

broduced to the party who is entitled to recover it and if the Juny shall believe from the Evidence under the above instructions that the defendants or one of them had a diew upon the property in question Then before they can be charged with having converted it, the Leny should be estified from the Evidence that the amount of this lieu was tendered the defendants or one of them and that afon such truder they or one of them refused to deliver the property a men tender to the Borse Scuper of one of them is not sufficient.

But the land refused to give said instruction to the lung as asked but merdified the same by adding thereto the following words,

"Evidence that the plaintiffs or their agust offered to Say the actual amount due for such Charages and advances and "the defendants claimed a lerroger sum and refused to believe the Lathe unless such larger sum was paid then an actual "truder was not necessary

And read said instruction to the Long on their modified to which modification and alteration of said instruction by the court the defendants by their council their and there duly excepted and thereifon said cause was given to the Lung whom the coidence and instructions aforeaid and the Lung having retired to consider of their verdict retiremed a readiet in favor of the plaintiffs or hereby they of out the defendants quilty and assessed the damages at 8425.

The defendants by their counsel thereupon Entered a motion

39

For a new trial of said cause upon the following grounds

I She Court Erred in overruling defendants motion to the leout that the lourd direct the Juny to shid the defendant Marker Chalo not quilty in order that he might be examined as a vituely for the earl defendants Chomas Hale and Franklin MHale

2

On the ground that court erred in giving to the Liny in behalf of the plaintiffs the everalinstructions marked respectively 1, 2, 3, 4, 5, 6, 7, 8 together with the last instruction which was read to the Liny by the court in behalf of the plaintiffs and the defendants by their coursel insist that there is error in said last mentioned instruction and that there is likewise error in each of the earl with netions marked 1, 2, 3, 4, 5, 6, 7, 4 as the same were given by the court to the Jerry.

3

On the ground that the lovet Erred in instructing the lung in behalf of the planships as he did,

4

That the lourt enred in modifying the first instruction fresented in tehalf of the defendant and in not instructing the Liny as desired by said defendants counsel and as first requested by said defendants counsel

40. 5 That the court erred in modifying the sicout instruction breamted in behalf of said defendants and in growing said instruction as originally requested by said defendants connect.

ny

That the court Enrich in modifying the third instruction bresented in behalf of said defendants and in not giving said instruction as originally requested by said defendants coursel,

That the court erred in modifying the fourth instruction foresurted in that of each defendants and in not giving said instruction as or equivally requested by each defendants coursel

The vardiet of the liny was against the daw and the Evidence

The verdict of the ling should have been for the defends auto, but the court merruled said motion to which relieve and descision of the lowest in overneling said metion for new trial the defendants they their counsel thus and there deely excepted and for assumed as the matters aforesaid do not appear of record in said cause the defendants by their coursel trong steal this bill of exceptions may be signed and sealed by the court and incorporated into the record of said cause which is done this

And afterwards to wit on Second day of Africo 18:11 in the year afresaid Franklin MI Hale Thomas Hale and Martin Chale filed in the office of the Clerch of laid court their affect bond in mode and figures following to mit

Thomas Hale and Montin Estale and Henry & Miller and haled Relling in the bund much soseph Bonnett and laled Culturing in the bund sun of lix Anidred Dollars. (8600) dawiful money of the United States of houncan for the payment of which well and truly to be made to the said I ought Bonnett and laled butting their executors administration or assigns We do kind resolver our heir executors and administrators if muly by these brewet Staled with our own seals and dated this trainly fifth day of March Ab 1861

Whereas the above named Loseph Bornett & bull leating did at the Warch I'm of the Ruferion Court of Chica of AD 1861 recover a Jud opneut against the above bounder Franklin M Hale . Thomas And & Month CHalo, efor the and of Jour Hundred of Inventy five Dollars (1425) and costs of suit efrom which field quent an affect to the Rupreme Court of the State of Illinois was duly brouged by the said Franklin MHale , Chomas Hale & Month Chale,

42. Now therefore the conditions of the above Aligation is any that if the said frankling MHale, Thomas Hale, and Montin State shall duly prosecuto their said affeat and shall well and Truly bray the said Sudgment and all evits intertal and damages in ease the Sudgment appealed from shall be affirmed the this obligation of be mull and void Aranseli Mitale Chipe Martin Estate Cheal Those Hale Estate Henry Gentler Cheal approved Grant Goodrich hedget. State of Sthinois County of book J. S. S. I Walter Kindaw Clark of the Superior bout of Chicago in and for said bounty. do hereby bentify that the foregoing is a full true and Completo Transmit. of all the pleadings on file in my office and of the proceedings and Sudgment entered of Record in said lovest. logether with the Bill of Exceptions and Appell Bond in the care wherein foseph Barrett. & Caleb butting are plaintiff and Franklin M Hale Thomas Heale dend Martin le Made are défendants. Intestimony whereof I hereunto subscribe my name and affighter Scal of said bout at. Chicago in said bounty. this 15th day of April AD 1861 Walter Rimball Click

Supreme Court of Illinois.

April Term 1861. Franklin M. Halo. Thomas Halo. W. Martin C. Halo Appellants. Appeal from the Superior Court of Chicago Doseph Barrett & Caleb. Cutting. Afterwards to with: out the Eighteenth day of April A.D. 1861. at the April Term 1861. of said Supreme Court come the Laid Franklin BH. Blale, Thomas Hale. V Martin Co. Hale by Hogne Miller rewis their Attorneys and Laythat tion of the Judgment aforesaid, there is manifest error in this to-wit: -1st The Court erred in sustaining the objection and refusing to allow the witness Obrud Cowe to answer the question as to the Custom among warehousemen in Chicago, to charge interest upon advanced made by them -Ind. The bourk Erred in suctaining the objection and refueing to allow the Defendants to prove such custom by the witness Blandiffs below as asked 4th. The bourd ened in giving the Plaintiffs second Instruction.

300 The bourt erred in giving the Plaintiff Third Quetuction-6th The Combened in giving the Plaintiff Fourth Instruction. The bour eved in giving the Plaintiffe Fifth Instruction. 8 th The bour Erred in giving the Plaintiff Sixth Onethiction. god. The bout erred in giving the Plaintiffe Deventh Instructions-10th. The Court Erned in giving the Plaintiffs Eighth Instruction! 11th. The bomberred in giving the Plaintiffe Thinth Instruction. for the defendants as asked, and in modifying the fame and giving the fame to the Juny as modified by the Court.
13th. The bourt exied in refusing to give the South Justinetion for the Defendants as asked, and in modifying and attend by the bourt. 14th. The Verdich of the Juny was against the law and the new trial and giving Judgment on the Verdick.

And the land Franklin Mobale, Thomas Hale. Martin b. Deale pray that the Judgment aforesaid, Jot the Errord aforesaid, and for other errord apparent in the record and

proceedings aforesaid may be reversed and annulled, and that they may be victored to all things which they have lost by occasion of the said Judgments &C. Though Willer & Sewid. for Appellanto -. Supleans Joseph Banet 2 Mul how balle Culting appeller, 1861 Franklin m Male Eld in Sury Oppullents | and now Comer the Said appeller ley Pout June Sarry thing Ullowers and key there is no Enor in the record aproceedings agove Lew nor in Swing the finderment aforedaw pray that the Land pedfe ment way wall things les of gener Contonner Lang Alleg for Coppel

250 Suprem Court Trumblin M. Hale dels Franklin M. Hale shal appellants Joseph Barrett x Joseph Barritt tous Caleb Cutting · appellers " buend Framerift of Record de Oriled 8, 118.1861 Q. deland Fus pg.00. Hoyon Miller Lewis