

14427

No. _____

Supreme Court of Illinois

Deshler

vs.

Beers

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 100

Decker
vs.

Decker

1863

14-7

4427

SUPREME COURT,

THIRD GRAND DIVISION, AT OTTAWA.

APRIL TERM, 1863.

CYRENIUS BEERS, <i>Defendant in Error,</i>	} <i>Error to the</i> <i>first</i> <i>Supreme Court</i>
<i>ads.</i>	
JOHN G. DESHLER, <i>Plaintiff in Error.</i>	} <i>of Chicago.</i>

Argument and Brief of Defendant in Error,

BY HOSMER & PECK, ATTORNEYS.

Filed May 13
1863

S. Secor

CHICAGO:

J. HAMPEON, PRINTER, 186 SOUTH WATER STREET.

1863.

DESLER TO TIFFANY OR BEERS.

BUFFALO, OCT. 12TH, 1860.

C. BEERS OR J. M. TIFFANY, Esq.,
Chicago,
Gentlemen,

I enclose sales—

18,436	45	Bu.	Corn,	Cargo	Craig	7 ³ / ₄	Bu.	\$8,261	58
19,499	00	"	"	"	Iowa	"	8,788	29
2,877	37	"	"	"	Danube	"	1,273	78

The charge of \$107 05 for general average tax on Pro. Iowa, I hope to get back from the Insurance Companies. So far they have shown but little disposition to settle.

The sales of Potomac's cargo I am unable to render just now. I have collected and placed to your credit the proceeds of 13,157 10 bu. of the cargo sold Sept. 14th.

On the 18th I telegraphed you of closing the cargo, viz:—4,238 47 white, and 4,389 19 mixed, @ 56 & 55 respectively.

For these two parcels the purchaser A. L. Griffin of this place, who had up to this transaction borne an unexceptional character for business integrity, and pecuniary resources failed to pay—I therefore replevied the property at Lockport and Rochester.—And it is now awaiting a decision as regards ownership.

Parties in New York claim it on the ground that they have accepted Griffin's drafts made against it.

My position is that the corn is yours until paid for by Griffin, as all my orders on vessels and elevators read, subject to my order until paid for.

No positive steps have yet been taken by the New York House—owing perhaps to the fact that the drafts have not yet matured. In the meantime I have retained counsel and if our opponents proceed we shall meet them.

Truly,

JOHN G. DESHLER,

Per. J. DARRAGH.

About the 1st of October, the defendant having recovered possession of the corn sold it a second time, and having refused to account for the corn or its proceeds, this action is brought on the 30th of May, 1861.

The defendant resists payment on the ground that he has used all the diligence which the law requires of him, and that without any fault on his part, actions have been brought against him in Buffalo to recover the value of this same corn, and that until those actions shall have been decided in his favor, he is not bound to pay over the proceeds of the corn belonging to the plaintiff.

In order to establish this defence, we insist that the defendant must show by competent legal testimony—first, that he has used

such diligence as a consignee is bound to exercise in the conduct of the business of his consignor; and, secondly, that suits are pending in Buffalo of such a nature that judgments adverse to him would be a bar to this action.

It is to be observed that the question of diligence in this case is only a preliminary one. If the Buffalo suits originated out of the negligence of the defendant, of course their pendency cannot be urged as a defence to this action; but on the other hand, if the defendant shows that he has exercised the utmost diligence, he is still bound to go one step further, and prove, by competent testimony, that such suits were pending and undetermined.

These are not two distinct defences, but one defence resting upon two independent propositions, both of which must be made out to establish it.

Did the plaintiff use that degree of diligence which a reasonably prudent man would exercise in the management of his own affairs? To establish the affirmative of this, the defendant relied on showing first, that as a matter of fact he had been diligent; and secondly, that there had been an implied ratification of his conduct by the silence of the plaintiff, which would in law be equivalent to showing due diligence on his part. Neither of these positions can be sustained.

First, then, as to the actual diligence of the defendant:

Mr. Tiffany testified that he acted as the plaintiff's agent in shipping this corn, and that it had been shipped in the usual course of trade, without any specific instructions. (Record p. 25.) A mass of depositions were taken by the defendant, to show that the custom of the Buffalo market is to sell grain for cash, but that the term cash sale, was that the buyer should have three or four days after the delivery of the corn before he was called upon for the pay.

On the 18th of September, 1860, the defendant sold the corn to one A. L. Griffin, and on the 20th, or two days after the delivery of the corn, he sent in the bill, when Griffin refused or failed to pay, and the defendant rescinded the sale and recovered possession of the corn. But while the corn had been in Griffin's possession for these two days, other parties, it is said, acquired an interest in it through Griffin; and in this way the defendant became involved in the Buffalo suits.

To determine whether Deshler, the defendant, used proper diligence in this transaction with Griffin it is necessary to inquire what the terms of the sale to him were; and on this point we have full information, furnished by the defendant himself.

It appears from the testimony of James Van Buren that Deshler was on the stand as a witness in a suit, in which it was claimed that this sale to Griffin had been made in accordance with the custom of allowing two or three days time between the delivery and the time of payment; and Mr. Deshler then stated that the sale was strictly for cash on delivery. The question distinctly presented to him was, whether the sale to Griffin was strictly for cash on delivery or with the usual interval of two or three days; and he swore distinctly that the agreement between himself and Griffin was that the corn should be paid for on delivery, and expressly negated the idea that the purchaser was to take possession of the corn under the custom sworn to exist. This is also confirmed by his subsequent conduct in rescinding the sale and replevying the corn. The only ground upon which he could possibly retake the corn or defend against Griffin's vendees, was that Griffin had obtained possession of the corn surreptitiously. And this position he did take and supported it by his oath. And now we take the same position in this case.

We insist that in contravention of the terms of the sale made to him, Griffin was allowed to get possession of the corn without paying for it. And this is negligence on the part of the defendant, unless he explains it.

The testimony relative to the custom of making sales for cash in the Buffalo market has no bearing on this case when it appears that the sale to Griffin was not made under that custom, but under an express agreement that the grain should be paid for when it was delivered.

When a consignee sells goods to be paid for on delivery, it is his duty to see that they do not go beyond his control until they are paid for, and a failure to do this renders him liable, although he might have been authorized, in the first instance, to give time to the purchaser. The fair presumption, in this case is, that the defendant refused Griffin the usual indulgence, because he knew that he was not reliable.

Now, as to the implied ratification in this case which the defendant claims.

The corn was sold September 18th, the sale was rescinded September 20th, and the corn replevied on the following day. About the 1st of October it had been sold again. The plaintiff had been notified by telegram and by letter of the first sale on the day it had been made, and the next communication was the defendant's letter of October 12th, some twenty-four days later, and about three weeks after the rescission of the first sale. (Record p. 29.)

In this letter he seeks to have Beers delay a little; says, I am unable to render the accounts *just now*—that the corn is now awaiting a decision as regards the ownership. That no suits have been commenced by the parties in New York, who claim under Griffin. Not one word is said about the second sale, or about Deshler then having the money in his pocket, Beers innocently supposing that the corn was tied up awaiting the decision as regards ownership, delayed until the 2d of January following; when he drew for \$3,000 on account of the corn. Deshler, the defendant answered this by writing—January 5th, 1861. (Record p. 37)—that he cannot pay the draft; that the suits don't come off until the fourth Monday in January, that he feels certain of gaining them, and that if he does gain the suit he will pay over the balance at once. Upon the receipt of this Beers waited again until the fifth of March, 1861, when he wrote again to learn the result of the suit, and was informed that the suits had been postponed until the third Monday in May, and upon the 30th day of May he commenced this suit.

We claim that, under these facts, there is no ground for an implied ratification. In the first place, the most important fact of all, the fact that the corn had been sold a second time was concealed; and secondly, this is not a case where the doctrine of implied ratification applies. The whole transaction had been concluded before the first letter was written. Nothing that Mr. Beers could do or say, could affect the position of his consignee; the rights of all the parties had been fixed and determined. He was requested to wait for the result of a litigation in which his agent had become involved, and he did wait for several months, but the delay was at the request of the agent and for his benefit.

The rule governing this case is laid down in *Armory vs Hamilton* 17 Mass. 109, and is cited as a leading authority in the text books—"The cases of ratification are where the agent has gone beyond or beside his authority, for the benefit as he supposes of his principal and gives him immediate notice, in such a case, silence is construed, acquiescence and ratification. But a delay of intelligence until an election to approve or disapprove would be attended with no advantage to the principal, defeats the right to construe silence into ratification."

The negligence with which we charge the defendant is, that he sold corn upon an express agreement that it should be paid for on delivery, and that he afterwards allowed the purchaser to take it without paying for it—is it now claimed by the defendant that he admitted this in his letter, and that by our silence we have approved of it? On the contrary, he denies it altogether.

Before he claims that we have ratified his misconduct by our silence, he must show that his alleged misconduct was communicated to us, and then if we failed to object to it, we may perhaps be estopped from objecting to it now. He first denies that he ever committed the act we charge upon him, and then he says, that not only did he commit it, but, that he promptly notified us of it, and that we have acquiesced in it.

If we founded our charges of negligence upon admissions made by himself in his letters, then there might be some grounds for claiming an implied ratification.

We say to the defendant you sold our corn for cash on delivery, and delivered it without getting the cash. The defendant answers, No! I did nothing of the kind; but that being decided against him, he answers further; if I did commit that negligence, you were notified of it and acquiesced in it. This we deny, and he produces his letter of Oct. 12th, 1860, which he says, contains a full statement of all that he did. We reply, that it does not contain the very matter which constitutes the negligence.

If the letters contain a full statement of all that he did and omitted to do, he has not been negligent. If they do not contain such full statement, we can not be charged with having ratified any negligence which we prove to have been done and not stated in them.

The negligence charged in this case is upon matters not con-

tained in the letters; and, therefore, we say no question of ratification has arisen—because we did not object to their contents.

We now leave the preliminary question of diligence with the remark, that however diligent the defendant Deshler may have been, he is nevertheless liable to account for the proceeds of the corn, unless he has established by legitimate evidence some good excuse for not doing so. The defence assumed by the defendant Deshler is, that parties who had made advances upon the grain while it was in Griffin's possession, have brought actions of trover against the defendant Deshler, to recover value of the grain, and that, those suits were still pending and undecided when this action was brought.

The only evidence offered as to these matters, was oral evidence, contained in the deposition of Robert Stevens. To this the plaintiff Beers objected upon the ground that the questions involved in those suits, and the object and extent of that litigation, and the effect of any judgment which could be rendered in those proceedings, should be proved by the production of the record—and that oral evidence was inadmissible for that purpose.

It will be observed that this objection is not properly stated in the abstract. (The court are referred to the Record p. 41.) The motion to exclude this evidence was sustained and the evidence ruled out.

The defendant Deshler now admits that this ruling of the court was correct, but endeavors to evade it by the claim that our objection came too late, and that enough evidence was before the jury to enable them to take the trover suits into consideration.

These positions will be fully answered hereafter.

We will only ask the court to note as to the first point, that we objected to the interrogatory and the answer of Stevens when the commission was sued out to take his deposition—and again upon the trial; and as to the second point, that the letters in this case were all written long before the trover suits were commenced, and that neither of those suits had been commenced when Mr. Beers brought this action.

We say, then, that the evidence as to those suits having been ruled out, the jury were compelled to find a verdict for the plaintiff.

We will now proceed to examine specifically the errors alleged by the plaintiff in error to have occurred upon the trial below :—

I.

That oral evidence of the shipment of the corn was admitted. This was proper, unless it was shown that a bill of lading existed. The witness merely testified that he did not know anything about a bill of lading.

This was not secondary evidence. We did not seek to prove the contents of the bill of lading, but to prove that the defendant, Deshler, had received from the plaintiff a cargo of corn; this was abundantly proved by repeated admissions of the defendant Deshler, by his letters, and by testimony which he himself introduced.

The point we were seeking to establish was, that the defendant, Deshler, had received some 8,000 bushels of corn for which he was bound to account to us, no question arose upon the shipment or the transfer of the corn.

The evidence of this fact was not contained in any written instrument, and there were several ways in which it might be proved. It might be traced to his hands by showing a shipment of the corn and a delivery by the master of the vessel to the defendant Deshler; or we might show an acknowledgement by the defendant, Deshler, that he had received it, or an account rendered by him crediting the plaintiff with the cargo of corn. There was abundant evidence of each kind.

If it had appeared upon the trial that a bill of lading was in existence, which we had failed to introduce, and the court had allowed secondary evidence of its contents. The case would stand thus. We proved a fact in three different ways, but in one of our methods of proof improper evidence was admitted.

The admissions contained in the defendant's letters, furnished all the evidence we require in the case, as to the receipt of the corn by him. We refer to the 1st of Greenleaf on Evidence, p. 108, s. 82.

1st. Sanders on Pleading and Evidence, 318. 2 Ib. 598.

II.

That oral evidence of the retainer of the defendant Deshler, by the plaintiff Beers, was allowed.

The testimony on this point was that of Mr. Tiffany, who testified that he had been the agent of Mr. Beers during the year 1860. And when the objection to the oral evidence was taken, this witness stated—"that the corn in question had been shipped in the usual course of business, and without any specific instructions so far as he knew." (Record p. 24, abstract p. 3.) This was all the preliminary evidence offered on this point. The witness stated generally that there had been a correspondence between the parties, but that there had been nothing in the correspondence relative to the shipment of this corn so far as he knew. At this stage of the case, the letters would have been inadmissible, for it appeared that they had nothing to do with this transaction. The plaintiff in error argues that there must have been some instructions sent by a letter; while the witness states positively that there were no such instructions.

If we are to abandon the plain statement of the witness and go upon inferences, it is fair to assume that no such letter ever was written, or the defendant Deshler would have introduced it upon the trial.

But, the evidence is plain and conclusive, that this grain was sent without reference to any special retainer or instructions; but in the usual course of trade which then existed between the parties, and the two ports of Buffalo and Chicago.

It only remained for us to prove what that usual course of trade was.

III.

That the court refused to instruct the jury to find for defendant on the ground that no demand had been made or proven.

There was no such ruling in the case.

The attorney for the defendant Deshler had sought all through the case to draw from the court expressions of opinion, as to whether the plaintiff had made out a case. The plaintiff had rested his case without offering any direct evidence of refusal, but upon the length of time which had elapsed, and the attendant circumstances.

The defendant's attorney then orally asked the court to instruct the jury to return a verdict for the defendant. The court very properly declined to instruct the jury in the middle of the case, but expressed his willingness to lay down the law as he understood it, as soon as the evidence was closed on both sides—but he did not intimate what the instruction would be on that point.

It was this refusal to instruct the jury at all to which the defendant Deshler expected. (p. 28 of the Record, and pages 4 & 5 of the abstract show this.)

We would add upon this point, that pending the discussion between the court and the defendant's attorney. The plaintiff offered in evidence, the letter of Deshler, dated Oct. 12th, 1860, showing a refusal to account for the corn.

IV.

The exclusion of the evidence contained in the defendant's deposition relating to the suits in New York.

The defendant Deshler set up the defence, that certain actions of trover had been brought against him in the state of New York which had not been decided; that in those suits the title to this corn was involved, and that a judgment against him there would be a bar to this action.

The defendant in choosing his own ground of defence, decided to rely upon the pendency of those suits, and with ample time to prepare his defence, selected his own mode of proof, and deliberately went to trial without being prepared with a certified copy of the records of the New York cases.

Several months before the trial, when the deposition of Stevens was taken, the defendant's attorneys had notice of the insufficiency of the proof they were taking on that point. There was no surprise about it; we supposed up to the time of trial, that the defendant Deshler was ready with the proper evidence, and upon the trial when the objection was again raised and insisted upon, and when the testimony of Stevens was ruled out, the defendant manifested no desire for further time to prepare his case, and made no application to the court for that purpose.

For reasons best known to himself, the Defendant Deshler has purposely and wilfully withheld evidence showing what those suits in Buffalo really involve. He has preferred to offer the statements of his attorney, to the full and accurate exhibit of the record.

Perhaps a transcript of those proceedings would show a very different condition of affairs from the statements made in the deposition.

The rule is laid down in Greenleaf on Evidence, vol. 1, p. 108, s. 82, which exactly fits this case:

"A fourth rule which governs in the production of evidence, is that which requires the best evidence of which the case in its nature is susceptible.

"This rule does not require the greatest amount of evidence, which can possibly be given of any fact; *but its design is to prevent the introduction of any which from the nature of the case supposes that better evidence is in the possession of the party.*

"*It is adopted for the prevention of fraud; for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that if offered, his design would be frustrated.*"

We understand the rule to be as laid down in Frink vs McClung 4 Gilm., R. p. 577, that formal objections such as the manner of taking testimony, or the failure to ask preliminary questions, or any defect which might be cured by a re-examination of the wit-

ness, or objections to the form or return of the deposition, must be taken before the trial—but no case can be found where an offer to prove a record by parol has been allowed because the objection was not a substantial one. This was not one which could have been obviated, and as I said before it was no oversight, it was the determination of the plaintiff Deshler to wriggle his defence through without offering any record of the proceedings, and if he failed then to appeal to the sympathies of this court to give him another chance, because a material part of his case had been omitted. We hope that no indulgence will be shown by this court towards such a manner of trying cases.

The plaintiff was prepared to try this cause and would have got a verdict anyway, because the merits were with him; and the instructions with one or two exceptions, allow the defendant the full benefit of all he claims.

The defendant Deshler confidently elected to take the ground that the pendency of those suits was sufficient excuse for not paying over the money. We joined issue on this, and claimed that the defence was not maintained, for the reason that no legitimate evidence was furnished of the existence of the suits—this point was conclusive in itself, but the result would have been just the same if it had not been insisted upon, and in fact, only one out of the nine instructions asked for by the plaintiff Beers, was predicated upon this technical advantage. Justice to our client would not allow the attorneys for the plaintiff Beers to waive so important and palpable advantage, but the court entirely overlooked it in instructing the jury for the defendant Deshler, and gave for him eleven instructions, upon the assumption that the question of negligence on his part was the real issue. We say, then, that the question was fairly tried on the issue of the Defendant Deshler's negligence, and if it was not so tried, it was his own fault.

The defendant Deshler claims further that notwithstanding the ruling out of the testimony of Stevens, there is other evidence in the case tending to show the pendency and subject matter of the Rawls & Seymour suits. To demonstrate this, he refers to the

letter on page 5 of the abstract, written by Deshler & Beers, and dated, Oct. 12th, 1860. And the letter on page 8 of the abstract, written by Deshler & Beers, and dated, March 5th, 1861. And the letter on same page written by Deshler & Beers, and dated, March 7th, 1861; and asks you to compare these with Van Buren's testimony.

Deshler's letter of Oct. 12th, 1860, gives an account of the transaction with Griffin, and states that he, Deshler, "has replevied the corn, and it is now awaiting a decision as regards ownership. Parties in New York claim it on the ground that they have accepted Griffin's drafts made against it." * * "No positive steps have yet been taken by the New York house, owing perhaps, to the fact that the drafts have not matured. In the mean time I have retained counsel, and if our opponents proceed we shall meet them."

The next letter, from Deshler to Beers, is dated January 5th, 1861, when he says the suit, in regard to your corn, does not come off until the fourth Monday of this month, and, until that is decided, can do nothing." * * * "*I hope I may be able to report before long that the suit is decided in your favor, and when I can do so, will pay over any balance in my hands at sight.*"

On the 5th of March, Beers writes to inquire about the suit, and Deshler replies March 7th, 1861: "that the suit was laid over until the third Monday in May."

Here there is a correspondence which shows that a suit was pending in Buffalo which delayed the payment of the money, but Deshler promises that just as soon as that suit is decided in his favor he will ask no more delay but will pay over the money, at once.

The learned counsel who have argued this cause with so much ability now urge upon the court that from this evidence the jury might infer that the Rawls and Seymour suits were then pending; but a comparison of dates show that this is impossible. The correspondence was from October 12th, 1860, to March 7th, 1861, while page 45 of the Record shows that one of the Rawls and

Seymour suits was commenced in the spring or early summer of 1861. We ask the court to look at the Record, for the abstract states that the first suit was commenced in the spring of 1861—the words—“or early summer,” are omitted. It is absurd then to say that this correspondence, in the winter and spring of 1860 and 1861, furnishes evidence of the existence of suits which were not commenced until several months later.

The fact that the evidence is so vague and uncertain as to mislead the defendant, Deshler's own counsel, shows conclusively that it is not such evidence as would justify the jury in finding that the issue involved in them was such as to excuse the defendant, Deshler, for withholding our money. It will not suffice for the defence to show that suits of some indefinite nature or description were pending in Buffalo; it is for him to show what the suits were about, what was involved in them, and how they originated; and for these purposes the records alone are sufficient.

Upon the ruling out of Steven's testimony, the only evidence before the jury, referring in any way to the Rawls and Seymour suits, was the testimony of Van Buren, page 4 of the abstract; which merely states that Deshler was on the stand giving testimony in a case with Rawls and Seymour in regard to this corn. All the other evidence in the case relating to any suits is referred to a time before these trover suits were commenced, which was long after all the letters in this case were written, and after this action had been brought.

As far as the replevin suits were concerned, it will appear that there were three of them, in one of which, judgment was immediately rendered for Deshler, as was also the case with the others.

We would call the attention of the court to an error on the 11th page of the abstract, and refer them to the 45 page of the record for its correction.

Steven's testimony as to the judgments and rulings of the court in Buffalo had been ruled out, but the plaintiff Beers, by his counsel, stated that he was willing to waive his objection so far as to allow oral evidence to go to the jury, that the replevin suits had

been decided in favor of Deshler; and the defendant, Deshler, by his attorney, read in evidence the testimony showing that fact.

The statement in the abstract is somewhat different, but the above is a correct account, as will appear by the bill of exceptions.

As the case went to the jury there was no evidence of the existence of the trover suits of Rawls and Seymour, and the only evidence of the replevin suits was contained in the letters, which showed that Deshler would be ready to pay over the money when the suits were determined, and that they had been determined in his favor. It may be material to add here that the fact of the determination of the suits in favor of Deshler was the only fact admitted; the time of the trial of the causes or the dates were not admitted; and, as this one bare fact was admitted by consent, no objection can now be taken by either party as to its effect until it has been suggested, as a last resort, that decision was not rendered in all of these cases until after the action had been commenced. As a technical answer to this we say that the evidence of the favorable decision in each was allowed to go to the jury, and nothing else; the time of each decision was not read. The defendant, Deshler, having consented that, the single fact of a favourable decision in these cases should be read to the jury ought not to be permitted, now to defeat the effect of that fact by lugging in the dates which were not admitted in the case.

And as a matter of substantial justice it can make no difference, that perhaps one of those suits was not decided until after this one had been commenced. Especially as the defendant, Deshler, admits that the decision was in his favor in each suit. An effort has been made by the plaintiff in error, in this court, to change his base and claim that the replevin suits were the suits which were relied upon to defeat a recovery. Whether the Court decides this upon the strict and technical rules of law or upon the substantial justice of the case; its decision must be in our favor.

We copy the following from the Record, p. 45:

“The plaintiff, Beers, by his counsel, stated that he was wil-

“ling to waive his objection so far as to allow oral evidence to go
 “to the jury, that the replevin suits had been decided in favor of
 “the plaintiff, Deshler, (the defendant here,) and the defendant,
 “by his attorney, read in evidence the testimony showing that
 “fact.”

The object of this agreement between the attorneys was to simplify the case by eliminating from it the replevin suits, and that was the last that has been heard of them in this case.

V.

The next point is that the damages awarded are excessive.

The testimony of Van Buren shows that on the 1st of October, part of the corn had been sold, and that soon after the ballance was sold. The testimony of Jno. Darragh, page 7 of abstract, shows that mixed corn was selling about the same price on the 1st of October as on the 18th of September, when the original sale to Griffin was made. It is true he states the price a cent a bushel lower than the defendant, Deshler, reported the sale to Griffin. But he says the price was about the same, and the jury acted upon this testimony. The price obtained for the corn was in the exclusive knowledge of the defendant, Deshler, and he offers this statement of his agent and bookkeeper, that the market was about the same on the 1st of October as it had been on the 18th of September; this made a *prima facie* case and justified the jury in taking the measure of the damages at the same on each sale.

It is never required of a party to offer very strong evidence of facts which lie exclusively within the knowledge of the other party.

The evidence shows that the second sale was made about the 1st of October, and that the market was about the same on that day as upon the day of the sale to Griffin.

If Deshler actually sold the corn at some other day, when the market was duller, it was an easy matter for him to prove it. We asked the question of each of his witnesses, including his clerks

and confidential agent; who gave their opinions and hearsay knowledge upon other matters very freely, but were totally ignorant of this second sale; but the confidential agent, Darragh, testifies reluctantly that the market was about the same. Again, we object to this manner of testing a verdict. A judgment will not be reversed for excessive damages because a certain combination of figures show that the jury probably included something which they ought to have omitted. The proper method is to examine the evidence, and if the amount of the verdict is no greater than the evidence will justify, then the verdict must stand; for the presumption of law is, that it is based upon the evidence which was legitimate—all ingenious figuring to the contrary notwithstanding.

We claim that, under the evidence, the jury were justified in giving the plaintiff interest.

The true rule seems to be the one laid down in *Sammis vs. Clark*, 13 Ill. 547.

That there must be something more than mere delay to entitle the party to interest; there must have been some conduct on the part of the debtor which induced the creditor to delay his suit. A creditor ought not to put off payment from day to day, and month to month, inducing his debtor to think that the matter will soon be adjusted, and then refuse to pay for the delay which he has secured by his cunning promises.

In this case, it appears that the custom of dealing between the parties, was to draw at sight, as soon as the sale was made.—Deshler sold this corn about the 1st of October, on the 12th of October he wrote to the plaintiff asking for delay, upon the ground that the corn was tied up awaiting a decision of ownership, when at the time of writing the letter he had the money for which he had sold the corn in his pocket. This whole letter is an artful appeal for delay. On the the 2nd of January, 1861, Beers drew a draft for the proceeds of the corn which Deshler refused to pay, but asked for further delay, until the fourth Monday of January, when he promises to pay without further grace. Beers waits again until the 5th of March, when he writes an impatient letter

finding fault because he heard nothing more about his money.— Deshler replies that the suit has been laid over until the third Monday in May. The third Monday in May passed and no money is forthcoming, and on the 30th of May Beers commenced this suit. Any jury that was ever impannelled would say that Beers was as much entitled to interest as he was to his principal.

If Mr. Deshler was not justified in withholding the proceeds of this corn altogether, then his conduct was vexatious, and he induced Mr. Beers to delay the suit in the hope that his various promises would be fulfilled.

If it is in order to guess at the course which the jury took in making up their verdict, I would suggest that they set off the use of \$4,787.00, from Oct. 1st, 1860, to the time of trial, May 27th, 1862, being some \$500.00 against Deshler's claim for extra services.

The verdict is justifiable on another ground. If Deshler was diligent in his conduct he may have been entitled to compensation for his extra services, although he would still be liable for the proceeds of the second sale. But, if he was negligent about the first sale, then the jury could not allow him for those expenses. And the presumption is that they found him to have been negligent, and, therefore, not entitled to indemnity. In either event the evidence will sustain the verdict.

It has been objected by the defendant, Deshler, that the evidence shows that the corn, in controversy, did not belong exclusively to the plaintiff Beers, but, that a man named Smith had an interest in it. The only evidence of this is Mr. Beer's letter of January 5th, in which he apologises to Deshler for dunning him so frequently, by saying that Smith had an interest in the corn and must have his pay.

The testimony of Mr. Tiffany was conclusive to the effect that the corn belonged to Beers; but we rely upon the following rule laid down in all of the text books, which we quote from Story on Agency, s. 217:

“If, therefore, an agent has received goods from his principal, and has agreed to hold them subject to his order, or to sell them for him and account for the proceeds, he will not be allowed to set up the adverse title of a third person to the same goods and defeat his obligations.

Story on Agency, s. 217.

The following authorities are to the same effect:

Kiernan v. Sanders, 6 Ad. & El., p 515; 33 Eng. Com. Law, 135.
 Dunlap's Paley on Agency., 53, 10.
 10 Bing, 246. 2 Camp. R. 243. Ib. 344.
 2 B. & Ald, 310. 7 Bing, 339. 9 Bing, 378.
 9 Price, 269. 9 Bing, 382. 6 Ad. & El., 515.
 3 Dow. & Cus., 540. 24 Wend, 169.
 Murray v. Toland. 3 Johnson, Ch. R, 572.

Before commenting upon the instructions I will state again our position upon the record.

We charge that the defendant, Deshler, received from us a cargo of corn, which he has sold, but never accounted for. The defendant claims, as a defence, that he first sold the corn to one A. L. Griffin, who failed to pay for it, that he thereupon recovered possession of the corn and sold it a second time: that he was guilty of no negligence in the transaction with Griffin, but, that while the corn was in Griffin's possession it was pledged to Rawls and Seymour, who have sued the defendant in trover for the value of the corn.

We claim that all of these facts must be shown in order to constitute a defence. The only effect of a ratification is a substitute for diligence, but when he has shown due diligence all the evidence upon that point is merely preliminary to the real question in the case. The fact of ratification or diligence in itself amounts to nothing, unless it is followed up by other evidence, showing that notwithstanding the diligent conduct of the consignee he has been involved in the trover suits which have not yet been decided in his favor.

I have endeavoured already to show, in the first part of this argument, that this is a case where the doctrine of implied ratification of the acts of an agent, by the silence of his principal, has no application—first, because the information was delayed until the rights of the parties had all become fixed, and there was no election to approve or disapprove offered to Beers.

Secondly, because the acts which we charge as constituting the negligence were never communicated to us by the defendant, Deshler, but have always been denied by him.

We say further, that upon the failure to introduce legitimate evidence of the pendency and subject matter of the Rawls and Seymour suits, the whole of the evidence relating to the diligence of the defendant, Deshler, became irrelevant and should have been disregarded.

It will throw some light upon the confused manner in which the instructions were given to state that upon the argument before the jury; the attorneys for the defendant, Deshler, claimed that the evidence relating to the suits was properly before them, and as it had all been read in their hearing the case was argued on behalf of Deshler, as if all the evidence had been admitted. The attorneys for the plaintiff, Beers, insisted that this evidence had been ruled out, as the bill of exceptions shows that it was, but at the same time knowing that a jury are governed as much by evidence surreptitiously got before them as by any other, we claimed that there was sufficient evidence of Deshler's negligence to justify a verdict.

The 1st, 3rd, 7th, 8th and 9th instructions asked for by the plaintiff, asserts, that if Deshler sold the corn to Griffin under an express agreement that it should be paid for on delivery, it became the duty of the defendant Deshler to collect the money before he allowed the corn to get beyond his control. For if Deshler sold the corn in this way, as Van Buren states that he admitted under oath he did, then the custom of the Buffalo market became immaterial to the issue. Because it is customary in the

Buffalo market to wait for two or three days upon cash sales, no reason is perceived why the parties may not agree to waive this custom, and the inference is, that if Deshler expressly refused to allow Griffin the usual time, it was because he did not consider him responsible. We certainly had a right to have the jury instructed, that if this sale was not made in accordance with, but in express disregard of it, that then the custom should not govern.

The fifth instruction states that if the defendant Deshler was guilty of the negligence in the transaction with Griffin, that he cannot set up any controversy which grew out of that sale as a defence to this action, it being the result of his own negligence.

The 4th defines the degree of diligence which the law requires of a consignee. The word diligence and its counterpart negligence having been used generally in the other instructions, it was deemed better to state the exact degree of diligence required in one instruction, than to attempt to define those words every time they were used.

It is objected by the defendant Deshler, that in all these instructions, the question of ratification is ignored. We have before stated the reasons why the question of ratification did not arise, and moreover, it would have been perfectly proper for us to have ignored the whole question of diligence or negligence of the defendant, for he had no right as the record stood, to have that question presented.

The 2nd states that admissions of a party made under oath, are entitled to more weight than admissions made carelessly and in the ordinary dealings of life. And the court added to it, "are of the highest character of testimony." To this addition the defendant Deshler objects; but rightly understood, it is perfectly proper. The court does not say that Van Buren's testimony in relating these admissions, is the highest character of testimony, but that if such admissions actually were made by the defendant while testifying under the solemnities of an oath, then they should be conclusive upon him. It is a strange position for a party to take, that his own admissions made under oath are of an inferior character of testimony. But the matter is of but little importance.

To justify the 6th instruction would be merely to reiterate what has been said before.

If the defendant Deshler failed to establish his defence by legitimate evidence, then the jury were properly instructed, that the only question to be determined by them, was whether the defendant had received the plaintiff's corn and had received the money for it, and failed to account for it.

This instruction we say was correct, and all the other instructions on behalf of both parties might have been refused by the Court. The fact that the other instructions were also given, and the real question of the negligence or diligence of the defendant Deshler presented to the jury when he had no right to have it presented, may be error, but it is such error as he cannot take advantage of.

The only remaining point to be examined is the claim made in this court, that the Judge who tried the cause below, made remarks which were not reduced to writing, and which might have influenced the jury.

The leading counsel for the defendant Deshler in the court below, employed a large portion of the time during the trial in endeavoring to have the case taken from the jury. The record shows that at four different times the counsel for Mr. Deshler undertook to convince the Court, that the plaintiff below, had not introduced sufficient evidence to make a shadow of a case. This, of course, led to more or less discussion between the Court and the counsel. There is no pretence that the remarks were made to the jury or were intended to affect their minds, or did actually influence them in any way. In this Court the learned counsel insists that he had a right to pump the Court for an expression of opinion, but if the opinion was adverse to him, then it was error in the Court to speak it above his breath.

He boldly challenged the Court over and over again, to say whether the plaintiff's evidence would justify a verdict, and we think the Court exhibited remarkable equanimity of temper con-

sidering the utter irregularity of the defendant's motions, their frequency, and the importunate manner in which they were urged.

We say in conclusion, that the defendant Deshler has had a fair trial, and if for any reason his case was not fully presented, it was his own fault.

HOSMER & PECK,

By C. F. PECK,

Attorneys for Defendant in Error.

100

SUPREME COURT.

THIRD GRAND DIVISION, AT OTTAWA—APRIL TERM, A. D. 1863.

JOHN G. DESHLER,
PLAINTIFF IN ERROR,

vs.

CYRENIUS BEERS,
DEFENDANT IN ERROR.

} Error to the Superior Court
of Chicago.

Argument and Brief of Plaintiff in Error,
AND REPLY TO DEFENDANT'S POINTS.

By GEORGE PAYSON AND WILLIAM C. REYNOLDS.

BEACH & BARNARD'S Print, 14 South Clark Street

Filed May 13th 1863
S. Leland
Clk

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HISTORY OF THE CASE.

[~~As~~ In the following brief, the references are to the transcript of the whole record. As the same paging is preserved on the margin of the printed abstract, the court can readily refer to either.]

No positive steps have yet been taken by the New York House, owing, perhaps, to the fact that the drafts have not matured.

In the meantime, I have retained counsel, and if our opponents proceed, we shall meet them.

Truly,

JOHN G. DESHLER,

Per J. DARRAGH.

After the receipt of this letter, Mr. Beers remained silent and inactive for the space of two months and twenty days, and then wrote as follows (30):

CHICAGO, January 2d, 1861.

JOHN G. DESHLER :

Dear Sir—I have this day drawn on you for three thousand

dollars, on that corn sent you last summer. It belonged to Smith and myself, and Smith must have his money; hence this draft. I hope it will be convenient for you to pay it, and oblige

Yours, &c.,

C. BEERS.

Which letter was immediately answered (37):

BUFFALO, January 5, 1861.

C. BEERS, ESQ. :

Dear Sir—Yours of 2d received. I cannot pay the draft. The suit in regard to your corn, does not come off until 4th Monday of this month, and, until that is decided, can do nothing. Again, when you were last here, I gave you the full market value of your corn, then on hand; and had I then sold, as I had a perfect right to do, there would have been nothing due. If I lose the suit you will be in good luck, if you are not called on to pay me the corn account, instead of my paying you. My attorneys feel sure of gaining, but the uncertainties of law are great.

I feel perfectly justified in taking above course, when I know you already have in your hands all you would have been entitled to, had I sold as I had a perfect right to do, and as others did — that is, at maturity of paper and advances. I hope I may be able to report before long, that the suit is decided in our favor, and when I can do so will pay over any balance in my hands, at sight.

Respectfully yours,

JOHN G. DESHLER.

Mr. Beers, after this, remained quiet for two months longer, when he wrote again (47):

CHICAGO, March 5, 1861.

JOHN G. DESHLER, ESQ. :

Dear Sir—I have not heard the result of that corn suit, or whether there has yet been a trial, and what the prospects are for a termination. Will you please inform me how matters stand? Our warehouses here are nearly filled with grain, and much more in the country than ever before, to come forward as soon as it can be shipped. Buffalo need have no fears of famine after navigation opens, and I hope there will be a market for it at fair prices. Please inform me the result of the suit.

Yours, respectfully,

C. BEERS.

To the above letter, Mr. Deshler immediately replied as follows (38):

BUFFALO, March 7, 1861.

C. BEERS, ESQ., *Chicago* :

Dear Sir—Your favor of the 5th is at hand. The suit has been laid over, in consequence of the absence of witnesses, until the third Monday in May. The captains of the boats could not be found when wanted.

Your advice of grain accumulations corresponds with statements from all sections. * * * * *

Truly yours,

JOHN G. DESHLER,

Per JOHN DARRAGH.

May 30th, 1861 (1), Beers commenced an action in the Superior Court of Chicago, by foreign attachment against Deshler (alleging a failure to account, etc.) and on the 27th day of May, 1862 (17), recovered a judgment against him in said cause for \$4,787.78. The defendant below brings the record into this court, and prays a reversal of said judgment, for reasons which will be briefly stated.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

The case, it will be at once apparent, divides itself into two separate and entirely distinct branches.

First. Was the defendant below liable for the sale to Griffen on the ground of negligence?

Second. If not, was he liable in this suit on the ground of having received the proceeds of a subsequent sale, made after replevying the corn?

tiff's attachment.

There are other defences which will appear in the course of our argument. There are also various errors, all highly prejudicial to the defendant below, and which we deem amply sufficient to entitle him to a new trial.

I.

The Bill of Lading not Produced.

The first error is the admission of oral testimony as to the shipment of corn to the defendant below (23). The plaintiff's witness,

Tiffany, testified that "he had no remembrance particularly of any bill of lading in this case, but it was the usual course of dealing between the parties to make and send a bill of lading." Even without this, the custom of sending a bill is so general, not to say universal, that, in the absence of any proof to the contrary, judicial notice might well be taken of it. The court below, however, in spite of this well known custom, and of the above statement, admitted oral testimony of the shipment without any further attempt by the plaintiff to disprove the existence of a bill or to account for its non-production.

No argument is required to show the incorrectness of this ruling, under the general rule of law relating to secondary evidence. We simply refer to an authority where the direct point is decided:

1 Saunders Pl. & Ev., 96. (Fifth American Edition.)

If it be answered, that the rule is merely technical and that defendant was not prejudiced by the court's decision—we reply that it is impossible to say whether he was prejudiced or not until we know the contents of the bill of lading. Its absence is, of itself, suspicious; and had it been produced, perhaps the plaintiff's alleged right of action might have been utterly disproved. It might, for instance, have appeared that the grain was shipped on account of Smith & Beers, who were joint owners (30), (See letter of January 2, 1861) in which case an action by one alone could not be maintained.

Our objection, moreover, is precisely similar to one raised by the plaintiff (which will be presently considered), and which was held to be well taken. The more technical a rule may be, the more necessary it becomes to apply it with equal strictness to all parties; as otherwise it degenerates inevitably into a means of injustice and oppression.

II.

Written Retainer not produced.

A similar error, and yet more important, was the admission of oral

testimony of defendant's retainer (24); notwithstanding the evidence showed conclusively that it was in writing, and no attempt was made to account for the absence of such writing. The witness Tiffany testified that the plaintiff lived in Chicago and the defendant in Buffalo; that so far as he knew (and he was plaintiff's agent in this behalf) all intercourse between them was by letter. There can be no doubt in fact that the plaintiff did send some kind of written instructions or retainer, and it was his duty to produce it at the trial or account for its non-production.

1 Saunders Pl. & Ev., 96.

He failed to do either, and the court should thereupon have excluded all oral testimony as to the mode of making shipments and sales, and of what was "expected" by the plaintiff. (See Tiffany's evidence at page 24.) The witness further testified that, the corn in question had been shipped in the usual course of business, without any specific instructions so far as he knew. It was not the cue of this witness to know too much; but defendant was entitled to demand proof of what *was* the usual course of business between the parties, in accordance with which the corn was shipped; and that this proof be made by the best evidence, viz: by their correspondence prior to the shipment. Not a single letter, however, was produced.

After the plaintiff had again rested his case, the defendant again raised the same point in another form (27), and also prayed an instruction (73) based upon it (which was refused); thus showing that he in no manner waived his objections to this oral testimony, and that the plaintiff still chose to trust to it.

III.

Opinions expressed by the Judge within hearing of the Jury.

In overruling defendant's motion, founded upon the point above discussed (27), the court stated "he thought the shipment and sale *had been proven*; that if any special instructions were given to defendant it was for him to show them."

To which ruling and expressions of opinion defendant then and there excepted.

Again, during the reading of defendant's depositions, the plaintiff objected to certain testimony concerning the meaning of "cash sales," according to the usage of the Buffalo market. The court admitted it to be read, but added (54), "It would take pretty strong evidence to satisfy me that such a custom existed. If they could show a seller might wait three days on a cash sale, he might wait three years."

This was plainly in violation of the spirit of our practice act :

§ 28. "The Circuit Courts, in charging the jury, shall only instruct as to the law of the case."

§ 60. "No judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing."

Fisher vs. The People, 23 Ill. R. 283 ;

Ray vs. Wooters, 19 Ill. R. 82.

In the case last cited, the judgment was reversed because oral remarks were made by the judge, explaining his instructions ; although it did not appear what the explanations were, and although it was conceded, upon the argument, that they were immaterial.

We do not presume that Judge Goodrich intended to influence the jury by his remarks. These were, however, as much in their hearing as anything that was said by court or counsel during the trial ; and it is evident that opinions so expressed cannot but be greatly prejudicial. They incline a jury to look with disfavor towards a party against whose defence disparaging reflections are made, even from the bench. The utterances of counsel they listen to with many "grains of allowance," but those of the judge are oracular. In an emphatic sense, "his word is law" ; and the more carelessly his opinions are expressed, the more influence, in many cases, will they be likely to have.

IV.

No demand for an account proven.

The next error is the refusal of the court to instruct the jury to

find for defendant, on the ground that no demand for an account had been proven (28). The defendant believes this objection was well taken. The plaintiff had rested his case, and offered not a particle of evidence to prove a demand. If, then, a demand was necessary, the court should have granted the instruction as requested.

Amos vs. Sinott, 4 Scam. 447.

But there can be no doubt that a demand was necessary in this case, and in every other of the kind where there are no special circumstances to excuse it. Here there was no proof of any such circumstances. "Agents are not liable to suit for money collected, unless it has been previously demanded; nor a factor who sells goods, or receives goods that remain unsold."

Armstrong vs. Smith, 3 Blackf. 251;

Judah vs. Dyott, Ib. 324;

Burton vs. Collier, 3 Mo. 315;

Lucas vs. Growing, 1 Stark. 391;

Ferris vs. Parks, 10 Johns. 285;

Topham vs. Braddish, 1 Taunt. 572.

The cases are all agreed that, when the factor notifies his principal of the sale in a reasonable time, he is not liable to suit without a previous demand. To this rule we have not been able to find a single exception.

The counsel for defendant in error contend that the judge did not overrule our motion, but only declined to instruct the jury at all, unless we were prepared to rest. We submit, however, that this can make no difference. If the plaintiff below had not made out a case, we ought not to be compelled to assist him. Neither should we be compelled to stake our success upon the chance of securing an instruction to which we were legally entitled. We were ready to rest the case if our motion were granted; and if the instruction prayed was proper in itself, it should have been given when requested.

V.

Evidence of Suits in New York excluded.

We now come to the exclusion of evidence, contained in Robert H. Stevens's deposition, of the suits pending in New York (42). We will admit that this evidence, if objected to in season, would have been incompetent. But we insist that the objection, not being made until the trial, came too late. The right to insist upon the primary evidence is one that a party may waive. And when he suffers his adversary to go on taking deposition after deposition, without objection, he ought in fairness to be held to have waived it. "He who does not speak when he ought to speak, will not be allowed to speak when he ought not."

"A party cannot be allowed to lull his adversary into security by his silence, till the trial commences, and then spring an objection on him which, if sustained, may deprive him of the proof of material facts which he might have established in a more formal or regular mode had the objection been made and sustained at an earlier period."

Kimball vs. Cook, 1 Gilman, 425.

Substantial objections may be made at the trial; but this is not such an one. It is precisely analogous to the case of a witness's incompetency, which, it is well settled, must be objected to before the trial. Substantial objections are such as go to show that the evidence does not tend to prove the issue, or is not applicable to the pleadings.

Frink vs. McClung, 4 Gilman, 577.

"When secondary evidence is offered, it must be objected to in season, or its competency cannot be questioned. The objection should be made when the evidence is offered, so as to afford an opportunity of obviating it."

Cowen & Hill's notes to Phillips on Ev. 1213,
and cases cited.

But certainly, in this case, the defendant below had no opportunity of obviating the objection.

"The cases are numerous where a party has been concluded from questioning the propriety of secondary proof, after neglecting to call at the proper time for primary."

Ibid, 558.

The defendant in error may reply that, he did object at the time the interrogatories were framed; and, although it does not appear by the bill of exceptions, we admit that he did except generally "to each and every one" of our interrogatories.

"But general objections to a deposition, good in part, must be rejected.

Walker vs. Walker, 34 Ala., 469.

Saltmarsh vs. Bower, *Ib.*, 613.

Mt. Olivet Cemetery vs. Shubert, 2 Head, (Tenn.) 116.

Kiler vs. Kimball, 10 Cal., 267.

"The party objecting to secondary evidence must be careful in all cases to point his objection to the real error relied on."

Cowen & Hill's notes, 1068.

We insist, therefore, that the evidence, not having been objected to until the trial, should have been admitted. By the exclusion of this evidence, moreover, the defendant below did not receive that equal and exact justice to which he was entitled. The court enforced the rule as to secondary evidence with the utmost rigor when it prejudiced the defendant; and, as we have seen, refused to enforce it when it would have been to his advantage.

Sufficient Evidence of the Suits Aliunde.

As to the facts, however, sought to be established by Stevens's testimony, viz.: the pendency and subject matter of certain suits in New York to which Deshler was a party, there was ample evidence in the case which was not objected to, and to which, in fact, there could be no objection, inasmuch as most of it was furnished

by Beers himself. We request the court to read carefully the letters which are above inserted in our statement of the case. The first of these letters was written by Deshler to the plaintiff below and introduced by the latter (29). It must, therefore, be considered as evidence of all it recites. The plaintiff below, moreover, waived all objections to Stevens's testimony (45) relative to the judgments rendered in the three replevin suits, and it is mere trifling afterwards to urge that it did not appear any such suits were pending. These same suits were the subject of correspondence in the above letters, by which Beers admitted not only their pendency, but that until they were decided he did not expect Deshler to pay for the corn. This correspondence came down to March, 1861, when the suits were still undetermined, and nothing was shown to prove that they were decided before Beers's attachment in May, 1861. This may not all be the strongest evidence; but it was not objected to at any time, and, in the absence of any rebutting testimony, was amply sufficient to justify the jury in finding that such suits did actually exist.

"The rule excluding parol admissions as evidence of a record do not go to the utter exclusion of this evidence, but only to its effect."

1 Greenleaf Ev., § 203.

"What a party says in evidence against himself as an admission, though it relate to the contents of a paper or anything else."

Earle vs. Picken, 5 Car & Paine, 542.

Newhall vs. Holt, 6 Mee. & Welsby, 662.

"When issue is joined on the contents of a deed, the plaintiff may give in evidence admissions by the defendant of its contents, without producing the deed or accounting for its non-production."

Slatterie vs. Poole, 6 Mee. & W., 664.

VI.

Evidence of Defendant's Expenses, as Agent, Excluded.

On motion of the counsel for the plaintiff below, the court ex-

cluded all evidence as to costs and expenses incurred by Deshler in pursuing, and recovering the corn in question (46). It is difficult to imagine an argument in support of this ruling. Deshler was not acting for himself; he did not claim to do so. His time, his labor, his money, were freely expended to protect the interests of his principal, who was bound to indemnify him. The general rule applicable to such cases is that, whenever the agent suffers loss without his own default in the service of his principal, the latter must make it good.

Darcy vs. Lyle, 1 Am. L. Cas., 711, S. C., 5 Binney, 441.

Powell vs. Trustees of Newburgh, 19 Johns, 284.

Ramsey vs. Gardner, 11 Johns, 439.

Stocking vs. Sage, 1 Conn., 519.

The counsel for the plaintiff moved to exclude the testimony as "irrelevant." Why irrelevant? Because, they answer, Deshler was guilty of negligence in letting the corn go beyond his control, and therefore not entitled to compensation for the cost of recovering it. Well, that is the very question which the jury were to decide upon; but by this ruling the court usurped the place of the jury and decided it himself.

If there were no other error in the record but this single one, it is amply sufficient to entitle us to a new trial. An error in the court below, which on its face could do no possible injury, is not cause for reversing a judgment. But when the error is in the admission of illegal evidence, or in rejecting legal evidence which bears upon the result, it cannot be disregarded, and a new trial must be granted.

Worrall vs. Parmelee, 1 Comst., N. Y., 519.

VII.

The damages were excessive.

Let us admit, for the sake of argument, that there was no suffi-

cient proof of any suits in New York, and that Deshler was absolutely liable in this suit for the proceeds of the second sale; we insist that this can make no possible difference on the motion for a new trial, and that the question could not properly arise on that motion, inasmuch as the amount of the verdict proves conclusively that it was based upon the first sale to Griffen.

This will appear on a simple calculation :

4,238 " bushels white corn, @ 56 cts.	\$2,373 74
4,389 " " mixed " @ 55 cts.	2,414 04
AMOUNT OF VERDICT.	<u>\$4,787 78</u>

Before the second sale the market had fallen (34), but moderate sales were made at $53\frac{1}{2}$ and 54 cents per bushel. (See Darragh's testimony). The defendant also was entitled to ordinary commissions as factor, and to compensation for his services and expenses in recovering the corn. Disregarding this, the jury gave as damages the full amount of the first sale, *without even deducting defendant's commissions*, which were from half a cent to a cent per bushel.

Not only, therefore, were the damages excessive, but they were based upon improper evidence. The action was for a failure to account, and not for negligence; and it is not even pretended that Deshler ever received the proceeds of the first sale.

The counsel for the defendant in error, perceiving that this point, if established, must necessarily be fatal, suggested several ingenious hypotheses to sustain the verdict. For instance, that the jury set off the interest upon \$4,787.78, to the time of trial, against defendant's claim for extra services and expenses. This they did not do, because all evidence as to those expenses *had been excluded* (46); and secondly, the case was not one where interest could properly be allowed.

"There must be something more than mere delay, to authorize a recovery of interest under the statute. The delay in payment must have been both unreasonable and vexatious. That is, the debtor must, in some way, have thrown obstacles in the way of the collection of the demand; or by some circumvention, contrivance,

or management of his own, have induced the plaintiff to delay his suit."

Sammis vs. Clark 13 Ill. 547;

Hitt vs. Allen, Ibid, 597;

Aldrich vs. Dunham, 16 Ill. 404;

Raybnrn vs. Day, 27 Ill. 48.

In spite of all argument to the contrary, we submit it to the court, that in this case there was no evidence tending to show any circumvention, contrivance, or management, on the part of the defendant below. Neither did the plaintiff claim any interest at the trial; and finally, as a matter of fact, it is absolutely certain that the jury did not give interest. From all this, it appears beyond a doubt, that the verdict was based upon the first sale alone. In no other way is the amount of the verdict susceptible of explanation. This being so, important consequences follow. A number of questions, both of law and fact, arise, as to negligence, custom, and ratification. If those questions were not properly presented to the jury, owing to the erroneous rulings of the court, or if the plaintiff in error was denied the advantage of them on the motion for a new trial, it is easy to see that great injustice has been sustained by him. That both of these suppositions are true, will be seen on an examination of the instructions. "The issue," says the defendant in error, "was fairly tried on the question of Deshler's negligence."

We agree that the issue was tried, in fact, by the jury upon that question, but we deny that it was tried fairly.

VIII.

The plaintiff's Instructions.

Our first proposition here is that, it is error to grant any instruction which is based only on part of the evidence, and which excludes the rest from the consideration of the jury.

And secondly, that each set of instructions should be sufficient, by itself, with all the necessary qualifications.

Reese vs. Rich, 24 Ala. 651;

Holmes vs. The State, 23 Ala. 17;

Bower vs. Kellett, 11 Georgia, 286.

We object to the instructions given at the plaintiff's request, that they all, in one way or another, and whether considered separately or collectively, tended to mislead the jury.

"The object of instructions is to convey to the minds of the jury correct principles of law, as applicable to the evidence which has been laid before them, and nothing should be given them unless it will promote that object."

Baxter vs. The People, 3 Gilm. 381.

"If instructions are given to the jury which are calculated to mislead them, the judgment will be reversed."

Brown vs. Graham, 24 Ill. R. 628.

And it is evident that if any instruction "tends to mislead" ordinary men, such as jurors usually are, no intendment can be made in its favor. An instruction can hardly cease to be useful, without being actually mischievous; and if it is irrelevant or improper, on any ground, unless the court can affirmatively say that it could not have misled the jury, a new trial should be granted.

Admissions declared to be the highest character of testimony.

The plaintiff's second instruction was as follows (69):

"The jury are instructed that admissions made by a party to a suit, while testifying under the solemnities of an oath, are entitled to more weight than admissions made in the ordinary course of business, and ARE THE HIGHEST CHARACTER OF TESTIMONY."

This not only lays down an abstract proposition of law, but one that has no proper application to the case. The last clause ("and are the highest character of testimony") was added by Judge Goodrich himself. The admissions contemplated by him, in making the addition, were doubtless judicial admissions, or those made by a

party to a cause, for the purpose of dispensing with certain evidence. These, for the purposes of the suit for which they are made, are usually conclusive, and are equivalent to the "highest character of testimony." But there were no such admissions in this case. The only admissions referred to by the counsel who prayed the instruction, and those to which the jury applied it, were made by Deshler at the trial of one of those very trover suits in New York, of whose existence the defendant in error now claims there was no competent evidence! These were repeated at second hand in this case by the witness Van Buren (26), who said:

"He had heard defendant speak of selling the corn now in controversy. The statement was made in court giving testimony in a case with Rawls & Seymour in regard to this corn. The controversy was, whether the corn was sold on time or for cash on delivery. Mr. Deshler said he had given Griffen no time, that he was to respond on delivery of the corn. Griffen claimed that he was to have three or four days time. Mr. Deshler denied this; said he sent in the bill in two or three days, but that Griffen failed to pay."

No one can say that this is the highest character of testimony. Van Buren was entitled to no more credit than any other witness; not so much, in fact, since he owed Deshler a grudge, growing out of these very transactions. He had brought suit against Deshler for freight on the corn replevied by the latter. Judgment was given against him, with \$100 costs, which he had not paid (45). He is, therefore, a "swift witness" against his former antagonist. The alleged statements of Deshler are repeated, severed from their connection, and without any opportunity of hearing their natural qualifications. Yet the jury could draw no other conclusion from this instruction than that Van Buren's testimony was of the highest character, instead of being, as it really was, the lowest.

"It is always held that the repetition of oral statements must be subject to much imperfection. The party receiving them may not have understood their meaning correctly, or remembered the precise words used which, if given precisely as uttered, might vary the effect of the statement."

C. B. & Q. R. R. vs. Hazard, 26 Ill., 382.

This testimony, too, was the corner stone of the plaintiff's case. His argument and most of his instructions were based upon the theory that Deshler's sale to Griffen was not made in accordance with the custom as to sales in Buffalo. The only evidence to support this theory is that which we have above quoted. If this was believed, the plaintiff argued that all of defendant's testimony relative to the custom of the Buffalo market had no application to the case on trial.

This instruction then, we say, with confidence, not only tended to mislead the jury, but actually did mislead them. When the Judge himself mistook the law, it is not likely that the jury corrected his error!

"Such instructions only should be given as are based upon legitimate evidence in the case; and if an irrelevant instruction be given (*although it may be unobjectionable as an abstract proposition of law*), which is calculated to mislead the jury and affect their conclusion upon the issue submitted to them, it will be "error."

Coughlin vs. The People, 18 Ill. R., 268, and cases cited.

"When instructions are so drawn that they will be more likely to mislead than instruct a jury, although after careful study we may be able to extract a correct principle of law from them, it becomes the undoubted duty of the court to refuse such instruction."

Baxter vs. The People, 3 Gilman, 381.

See also *G. W. R. R. Co. vs. Hanks*, 25 Ill. R., 241.

"In all cases an instruction must have some evidence on which to base it, and must spring out naturally from such evidence."

G. & C. U. R. R. vs. Jacobs, 20 Ill. R., 485.

Ewing vs. Runkle, *Ib.*, 463.

Riley vs. Dickens, 19 Ill., 29.

The Jury allowed to decide as to the Law.

The plaintiff's sixth instruction was as follows (70):

“ If the jury believe, from the evidence, that the plaintiff con-
signed the corn in question to the defendant, to be sold on his
account, and that the defendant has sold the corn and received
the pay for it, and failed and refused to account for the same,
they will find for the plaintiff.”

This withdraws from the consideration of the jury all evidence
of EVERY DEFENCE relied on by the defendant below. It also leaves
them to find according to their own notions of what a “ failure to
account” might be ; and the whole instruction is palpably erroneous.

A similar error furnished ground for reversal in

Gehr vs. Hagerman, 26 Ill., 441,

where the court below said :

“ Unless the jury believe from the evidence that Gehr at the
time he commenced his suit had done everything the law required
him to do to rescind the contract, they will find for the defendant.”

WALKER, J. (Delivering the opinion of Supreme Court):

“ The court erred in giving this instruction. It leaves the jury
to find both law and facts. It should have informed the jury
what acts the law required the plaintiff to perform before he could
insist upon a rescision, and left the jury to find whether the evi-
dence proved their performance.”

Taken by itself this sixth instruction *could* not but tend to mis-
lead ; and there was no qualification of it in any instruction given
on behalf of the plaintiff. Even if there *had been* another instruc-
tion for the plaintiff, modifying this one, it would not suffice unless
the court could *affirmatively* see that the jury *could not* have been
misled.

“ Whether one instruction qualifies another without reference to
it must depend on its connection. If it is apparent that the two
must have been considered together and have been properly un-
derstood by the jury, their finding should not be disturbed.
Otherwise a new trial should be granted.”

Springdale Cem. Association vs. Smith, 24
Ill. R., 482.

The above case was reversed, although the qualifying clauses
were found in other instructions given upon the same side. A

fortiori, a faulty instruction, could not be aided by others given at the request of the opposite party.

Defendant made liable for any negligence.

The plaintiff's third instruction makes the defendant liable for any negligence. But this is not the law. "The utmost degree of diligence is not required of a factor, but only such as an ordinarily prudent man would use in his own business."

1 Parsons on Con., 79.

But "*any* negligence" implies the utmost degree of care.

"There are three degrees of diligence, and as many of negligence corresponding thereto; for negligence may be ordinary, or less than ordinary, or more than ordinary."

Story on Bailments, § 17.

See *Chi. & Mis. R. R. Co. vs. Patchen*, 16

Ill., 201 & 204, where a similar instruction was held bad.

G. & C. U. R. R. vs. Jacobs, 20 Ill., 489.

A. B. R. R. vs. Grimes, 13 Ill., 590, 591.

Evidence as to Usage withdrawn from the consideration of the Jury.

The seventh and ninth instructions are alike destitute of foundation. They withdraw from the jury all evidence as to the manner of making sales in Buffalo. The whole of these instructions might be true, and yet the plaintiff not entitled to recover. To this it was answered that the sale spoken of in the instructions was for cash on delivery and so did not come within the usage.

But the witnesses all agreed that it was accounted a cash sale in Buffalo, though the bill was not sent in for from one to three days. And it is very clear that, whether a sale is for cash or not depends not on the fact of actual immediate payment, but on the agreement between the parties. It is a cash sale if the seller has a right to demand his money at the time; and it is still a cash sale though he sees fit to wait for it. This is the plain reason of the case, and this is also the ruling of the courts.

“ In sales of goods for cash. to be paid for on delivery, the title does not rest even by actual delivery, without payment, unless the condition be waived. If the goods are delivered at time of sale, and vendor calls for his pay in two or three days, this is no waiver if consistent with usage.”

Fleeman vs. McKean, 25 Barb., 474.

This was a sale of hops. Two or three days delay before sending in the bill seems to have been admitted as the usage in cash sales.

Again in *Dows vs. Denniston*, 28 Barb., 400, flour was sold for cash to be paid for in ten days, such being the usage.

In all these sales there is no agreement to wait; no credit is given. The sales are for cash on delivery, but the usage then comes in and for the convenience of trade allows the seller two or three days to examine the purchase and to make his arrangements for payment (63). This agrees perfectly with the testimony of Deshler, in the trover suit, as reported by Van Buren. “ The controversy was, whether the corn was sold *on time* or for cash on delivery. Mr. Deshler said he had given Griffen no time; that he was to respond on delivery. Had sent in the bill in two or three days, but Griffen failed to pay.” Here there is no discrepancy between Deshler’s statements and our claim that he sold strictly in accordance with the usage. He did not tie up his hands. The sale was for cash, but according to custom the bill would be presented in one to three days afterwards, *at the seller’s option*. Yet from this testimony alone it was contended that the sale could not have been according to the custom.

But these instructions may be shown to be erroneous on other grounds. They both assume that, a factor who parts with his principal’s property, without receiving the price, thereby becomes liable for the amount. But this is not the law. It has been repeatedly held that, by the law merchant, a factor may sell on credit unless restrained by special orders or by the usage of trade.

Goodnow vs. Tyler, 7 Mass., 36.

1 Am. Leading Cases, 654.

Greeley vs. Bartlett, 1 Greenlf., 172.

Van Allen vs. Vanderpool, 6 Johns, 72.

All the cases agree that he may sell on credit if the usage permit.
 "Constant and daily experience shows that factors may sell on
 "credit without special authority. If it were otherwise, it would
 "be the greatest prejudice to trade."

Scott vs. Surman, Willes R., 406.

Willshire vs. Sims, 1 Camp, 259 and note.

McConnico vs. Curzon, 6 Call (Va.), 307.

A factor, until instructed, may sell according to his discretion, and
 in the usual course of trade.

Marfield vs. Douglass, 1 Sandf., 360.

Marfield vs. Goodhue, *ibid.*

A factor sold on six months and took in payment a bill on other
 parties. Held, not liable if it was usual to sell on credit, and the
 acceptor was good when the bill was taken.

Etheridge vs. Binney, 9 Pick, 272.

If there are any authorities that seem to contradict this doctrine,
 they will all be found to come under one of two heads. Either the
 factor was expressly instructed to sell for cash, or the property was
 of a character, such as stocks, for instance, that are always expected
 to be paid for when delivered.

The ninth instruction is also faulty, because it assumes that there
 was evidence showing that Griffen became insolvent between the
 time when the grain was delivered to him, and the time when pay-
 ment was demanded from him; and that Deshler became liable on
 account of such insolvency. There was no testimony to support
 this, and nothing from which to infer it, except the one fact that
 the bill was not paid when presented. Whether Deshler was neg-
 ligent in not presenting it sooner, was the very question in dispute,
 and to say that he was negligent because he didn't get the money,
 is begging the question.

Our defences ignored by the Instructions.

Most of the errors above adverted to, in regard to some of plain-
 tiff's instructions, are equally patent when they are all considered

together. Not only does every instruction, except the first, withdraw from the jury all evidence of usage, but two other grounds of defence urged by defendant, viz.: that Beers could not sue by himself, and that he had ratified the acts of Deshler, his agent—were not stated, or alluded to, in any one of the plaintiff's instructions.

Our defences, in fact, were as completely ignored as though Deshler had been defaulted, and the jury were sitting merely to assess the damages.

"It must be recollected that, in this case, several issues had been formed. * * * * Now, in such a case, the party asking instructions must either confine them (if they are of partial application, only) in terms to the particular issue to which they are intended to apply, or must modify them in such a manner as will make the jury aware that it is only in the event that other issues are not found against him, they can base their verdict, if supported by facts, on the law, as asked in his favor by him."

Vallandigham vs. Huston, 4 Gilm. 127.

"And while a party, in asking his instructions, may assume any reasonable hypothesis which the evidence tends to prove, yet that hypothesis should be sufficiently broad to exclude others which might be found to be true from the evidence, and which, if true, would render the instruction improper."

Hamilton vs. Hunt, 14 Ill. 474.

The same doctrine is sanctioned in

Denman vs. Bloomer, 11 Ill. 193,

where Mr. Justice CATON says (delivering the opinion of the court):

"The fifth instruction, also, should have been refused. All that is assumed in that instruction might have been true, and the other party still entitled to a verdict. For instance, Bloomer might have RATIFIED all that Johnson is supposed to have done in his name; in which event, the defendant's liability would have been the same as if the agent had acted strictly in pursuance of his original appointment. It is not sufficient that the necessary qualification may be found in the instructions given on the other side;

“ unless we can say with entire confidence that the jury could not have been misled by the erroneous instructions. Each party should see that his own instructions are proper in themselves.”
(Citing)

Gregory's heirs vs. Ford, 5 B. Monroe, 473.

I X .

The Defendant's Instructions.

The first instruction prayed by the defendant below, was modified by the court, by cutting off the second part (72). The defendant deemed himself entitled to the whole; the plaintiff claimed that he was not entitled to any part of said instruction; and the court imitated the judgment of Solomon, by cutting it in two.

Whether it was correct or not, as requested, we need not inquire. It is clearly erroneous as it was given. It first instructs the jury that the defendant is liable, if at all, on one of two grounds. It then shows what will save his liability on one of those grounds, but withholds the corresponding qualification as to the other; thus leaving it to be inferred that, on that ground, he is liable at all events. The instruction should have been given entire, or not at all.

The next instruction (No. 1, page 17 of abstract) should have been given, for reasons already shown. If there was any written evidence of retainer, the plaintiff was bound to produce it, or account for its absence. The court's refusal to give this instruction, was, however, strictly consistent with his previous declaration, “ that he thought the shipment and sale had been proven; and that “ if any special instructions were given to defendant, it was for “ him to show them.”

The *third* instruction is in exact accordance with the law, as laid down in authorities above cited. The court, however, ruled that no such question arose in the case, as this did not purport to be a sale on credit. But every greater includes the less; and if a factor may sell on credit, much more may he sell as defendant sold in this

case. There is a far less risk of loss in such sales, than where a credit of months is given, during all which time the right to sue is taken away.

The principles applicable to the *fourth* instruction, have already been fully stated; and if that statement is correct, this instruction should have been given. It was, too, of much greater importance to the defendant than this court might at first glance suppose.

The pretended distinction between a cash sale, according to the usage, and that testified to by Deshler (as reported by Van Buren), was constantly urged by the plaintiff to the court and the jury, and to the manifest prejudice of the defendant.

Motion in arrest of judgment.

A motion in arrest of judgment was made in this case; but the court having overruled the motion for a new trial, at once entered judgment on the verdict, without disposing of the motion in arrest.

As this objection, though technically good, has, perhaps, little else to recommend it, we will submit it to the court without further comment, and consider the reasons on which the motion was founded, as though it had been regularly overruled.

X.

The declaration does not sustain the verdict.

As already shown, the verdict was based upon the first sale—the sale to Griffen—and the issue was tried upon the question of negligence in that sale. But there was no count adapted to that sale. The first and second counts are for not accounting, and to sustain them, receipt of the proceeds must be averred and proved. This is too clear, on principle, to require any authority, but authorities are not wanting.

In special count for not paying over proceeds, receipt of the proceeds should be averred.

1 Saund. Pl. & Ev. 93;

Serra vs. Wright, 6 Taunt. 45;

Varden vs. Parker, 2 Esp. 710.

And being alleged, it must be proved.

Cooley vs. Betts, 24 Wend. 203;

Elbourn vs. Uppjohn, 1 Car. & P. 572.

In actions for proceeds, the plaintiff must prove that the transaction is closed, or that it is defendant's fault that it is not.

1 Saund. Pl. & Ev. 97;

Lucas vs. Growing, 1 Stark, 392.

But no proceeds were received under the first sale, and of course none could be proved. If it be said that it was defendant's fault that they were not received, we reply, neither of these counts are for negligence, and therefore they are neither of them suited to the theory. The plaintiff must recover, if at all, *secundum ALLEGATA ET PROBATA*. He might have added a count, saying nothing about non-payment of proceeds, if he had so chosen. This he has not done; and having brought defendant into court to answer one cause of action, he cannot be allowed to substitute another.

The third count is for money had and received. Under this, clearly, receipt of the money must be proven.

The fourth and last count alleges a retainer to sell for cash, and a promise to sell for cash; the plaintiff, therefore, must prove the retainer and the promise. But there was no evidence of either.

We can see no way, under the pleadings, by which the verdict can be sustained.

The court below evaded this difficulty, as they had a preceding one, by assuming *that the jury had given the plaintiff interest* on the amount of the second sale. But the jury, as a matter of fact, did not give interest; nor if they had, could it have been allowed.

XI.

Other parties should have been made plaintiff.

In the plaintiff's letter of January 2, 1861, he expressly says that the corn belonged to one Smith and himself. Smith then should have joined in the action.

To this it is replied that Smith was a dormant partner, and need not be joined. We deny that he can be considered as a dormant partner. Possibly he may have been in the beginning, but in this letter he throws off that character, or Beers does for him, and assumes that of an active partner. It was not Beers but Smith who caused that letter to be written. It was not Beers but Smith who "must have his money." And this letter it must be observed was a very important part of the transaction. It constitutes the only demand made upon the defendant, and that demand is joint for Smith and Beers.

In *Holliday vs. Daggett*, 6 Pick., 359, the plaintiff being partner of a house in Scotland, and its agent for exporting goods to this country, consigned goods to a commission merchant in Boston, by whom they were sold to defendant: This suit was to recover the price. Under the general issue the court ordered a non-suit for the non-joinder of the other owners, observing that the action should have been in the name of all the owners, or in that of the agent who made the contract.

So, in this case, the action should have been by Smith and Beers jointly, or by Tiffany their agent, with whom the contract was really made. Had there been no intervening agent the case might have been different.

Again, "Assumpsit must be joint or several according to the promise. When the promise is express there can be little difficulty. But an implied promise, being altogether ideal, and raised out of the consideration only by intendment of law, follows the nature of the consideration, and as that is joint or several, so is the promise."

1 Parsons on Contracts, 31, note.

Here the promise was implied and the action clearly joint. Hence the action should have been joint also.

The Defendant did not have a fair trial.

We have now shown, we think, sufficient cause to reverse this judgment. If not, it must be because the court is thoroughly satis-

fied from an examination of the whole record, that substantial justice has been done, and that the defendant below was not prejudiced by any of the errors whereof he complains. But can the court say this with certainty, or even with confidence? The court, before coming to such a conclusion, must be satisfied of several distinct facts—not one of which, we believe, has been proved. The court must be fully satisfied that the defendant below was guilty of negligence on the sale to Griffen; and not only of negligence, but of more than ordinary negligence. Further, that there was no usage in Buffalo authorizing that sale. And that there was no ratification by the plaintiff.

But all these are peculiarly matters for the jury, and should have been left to the jury, instead of being withdrawn from them by improper instructions. If there was no negligence; if there was a usage authorizing the first sale; or if there was a ratification; in either of these cases the defendant below, so far as the first sale was concerned, was entitled to a verdict on the merits.

His receipt of the money on the second sale could not make him liable on the first. That was an entirely separate transaction, and attended by a separate liability. If he was liable at all on the second sale; if our evidence of the suits brought against him were not a defence, he was still only liable for what he received; and from those receipts he had a right to deduct his commissions; his expenses in pursuing the corn across the country; the retainer he paid his attorney; the costs of storage, and, we believe, the whole expenses of the replevin suits.

The evidence of the termination of those suits was admitted by the plaintiff below, and he is consequently precluded from denying that such suits were brought. But setting this aside, there still remain various expenses, not part of any suit, and which could not be proved by any record, and which the defendant had an undoubted right to deduct from the proceeds of the second sale. *Yet all evidence of these expenses were excluded from the consideration of the jury.*

In what position did Deshler stand? He was acting as the plaintiff's agent in selling this corn. He was bound to act in good faith and with reasonable prudence, but he was not required to be infallible. He was bound to be diligent and zealous in his principal's

service, and when that was done his duty was done. He was not bound to insure his principal. He received no *del credere* commission, and did not contract to guarantee him against loss. We are confident that no one can examine carefully the evidence in this case without reaching the conclusion that the defendant below acted throughout with prudence, diligence and fidelity. And when an agent has acted with integrity and good faith, he should be judged fairly and liberally. Mr. Deshler was chosen as agent by the plaintiff, who might have given him any specific instructions he chose. Not doing so, his commission was that Deshler should sell according to the ordinary usage of trade. What that usage was, we have proved with the utmost fulness and by unimpeachable testimony. Half a score of witnesses, of high position and ripe experience, testify that the universal custom, as it has existed for thirty years, is to first deliver the grain and to demand payment in from one to three days after delivery. This usage is "long established, general and uniform." By uniformity we understand a usage always the same; that is, not one thing to-day and another to-morrow, but a usage so certain and invariable that it may at all times be safely depended upon. The rule must always be the same, but within its limits there may exist considerable diversity. If the witnesses had—some of them—put the time at three days, others at ten, and others again at twenty, that would not have been a good custom, because no certain rule would be established. But when all the witnesses agree, there is the certainty and uniformity which the law requires. And in this case all the witnesses did agree; only one excepted. He, being both the youngest and the least experienced, was, we may fairly presume, mistaken.

In such a case as this, evidence of usage is peculiarly appropriate to explain the actual intent and dealing of the parties. A usage, though it be general, cannot be allowed to alter, vary or control the *express terms* of a contract. "But it may explain what is not agreed expressly, and how an *implied contract* may be understood and fulfilled."

Caldwell vs. Meek, 17 Ill. R., 228, and cases cited.

Such a usage is not to be condemned, because, in the course of

time, some one suffers a loss. No human agency is perfect. This custom, which has existed for so many years, has been found on the whole to promote the convenience and prosperity of both sellers and purchasers. It is easy enough to say that, "Deshler should not have let go the corn without getting the money;" but we are judging after the fact. Confidence is the very life of trade; the air in which it lives and has its being. Business men are not like blackguards trading over a table, where each fears the other will get hold of his bargain first. The corn was sold in accordance with usage and to a buyer in good credit. In what consisted the negligence? As to Griffen's credit, no attempt was made to impeach it, but as a work of supererogation we proved it affirmatively by a cloud of witnesses. Mr. Deshler had sold him in the same way on the 6th, 8th, and 11th of September. On the 18th he sold the corn in question. When he received it, the price was lower, by six cents per bushel, than the price agreed on with Griffen. He waited until the market reached its highest point. Does any one believe that, for this corn, or for previous shipments, as good a price could have been obtained if it had not been sold in accordance with the usage? The plaintiff below experienced the benefits, and received the profits, of the usage, with much complacency; but when a loss occurred he seeks to make his agent responsible. At this rate, Deshler would have done better to sell when the market was lower; his responsibility would have been less. The more zealous he was for his principal, the greater his own risk!

The orders which he gave to Griffen were in the usual form, and contained the clause, "subject to my order until paid for." When payment was refused, he secured an attorney, and went personally, by night, with carriage and horses across the country, to stop the corn. He overtook and secured it at the cost of much labor, expense and trouble.

Surely, this does not exhibit any lukewarmness in his principal's service. As soon as he found his suits were likely to be defended, he wrote to Beers a full account of the transaction.

But let us assume that Mr. Deshler was not protected by the usage shown to exist; we say, further, that his acts were fully and completely ratified by his principal. To make such ratification

*Evidence of
Ratification
Complete*

binding, the principal need only to be informed of all *material* facts and circumstances.

Caldwell vs. Meek, 17 Ill. R. 228.

He was so informed, fully and fairly, by Deshler's letter of Oct. 12, 1860. If he was dissatisfied, he should have replied immediately, or within a reasonable time. Instead of that he waited for *eighty days*, and then sent the letter of January 2, 1861. In this, it will be observed, he makes no complaints of defendant's acts, and does not disavow them. He merely draws for a certain sum, and expresses a hope that it may be convenient to pay it. After receiving defendant's reply to this demand, Beers again waited for *two months* more, and then wrote (March 5, 1861) in such a way as to admit of but a single construction—that he was satisfied with what Deshler had done; that he had adopted his views of the case, and looked upon the suits as his own.

If he was dissatisfied, and really meant the while to hold defendant liable, his conduct was not a little singular, and very hard to reconcile with fair dealing.

The defendant had expressly disclaimed any liability, and if the plaintiff was of a different way of thinking he ought to have given him immediate notice. He had no right to remain silent, watching meanwhile the prospects of the suits in New York, and at any time disavow connection with them, and proceed against the defendant. The law in such cases puts the principal to his election. He is not allowed to speculate in chances at his agent's expense.

Beers should have written to Deshler, "I do not recognize the sale to Griffen, or your subsequent acts; and I shall look to you for the value of the corn."

Take all these letters together, and stronger evidence of ratification can seldom be found. This is fully borne out by the reported cases.

First. "The acts of the principal are to be construed liberally in favor of the agent. Slight circumstances and small matters will sometimes suffice."

1 Liv. Pr. & Agt., 394.

Story on Agency, § 253.

Codwise vs. Hacker, 1 Caines, 526.

Armstrong vs. Gilchrist, 2 Johns. cases 430,
note a.

Owings vs. Hull, 9 Peters, 613.

Byrne vs. Doughty, 13 Georgia, 53.

pass "By far the largest class of cases arise by implication from acts
"in fair. It is not necessary that there should be any positive or
"direct confirmation."

Story on Agency, § 253.

Second. The principal must dissent immediately, or in a reasonable time.

1 Saund Pl. & Ev., 101.

Chitty on Cont., 212, note 2.

Ward vs. Williams, 26 Ill., 451.

Three months is not a reasonable time.

Cairnes vs. Bleeker, 12 Johns. 300.

Nor is two months and ten days.

Prince vs. Clark, 1 Barn. & Cress., 186.

Third. The ratification relates back to the inception of the transaction, and has a complete retroactive efficacy.

Story on Agency, § 244.

Dunlap Paley on Ag., 171.

This applies to the agent as well as to third persons. (Ib.)

Fourth. "The agent need not communicate anything which he
"has a right to presume his principal knows. When a merchant
"makes a consignment to a distant port, he is presumed to be acquainted with the nature of the business, and this includes not
"only the customary modes of buying and selling, but the usual
"rates of charges, &c."

Norris vs. Cook, 1 Curtis Cir. Ct. R., 468. See the whole case.

The defendant in error objects that there could be no ratification

because he was not informed of the manner of sale. This objection is fully met by the case last cited. The sale was according to the long established custom of Buffalo, and with that custom the law conclusively presumes the principal to be acquainted. See further on this point.

Bayliffe vs. Butterworth, 1 Exchq., 425.

1 Smith Leading Cases, 585.

Dwight vs. Whitney, 15 Pick., 183.

And as to the general question: how full the information should be—

Prince vs. Clark, 1 Barn. & Cress, 186.

The information in this last case was very meagre, but was held sufficient.

It is true the defendant in error contends that the sale was not in accordance with usage, but this assumption is not sustained. It rests wholly on the statements testified to by Van Buren, which are doubly distorted, first by the interested and prejudiced witness who reported them, and secondly by the counsel who manipulates the testimony to suit his case.

Beers, then, was informed of everything useful for him to know, which he was not presumed by law to know already. He was informed, in the first letter, that Deshler could not then render an account; that he had sold the corn to Griffen, who had failed to pay; that Deshler had thereupon replevied the corn at Lockport and Rochester, and that the replevin suits were still pending; that parties in New York claimed the corn on the ground that they had accepted Griffen's drafts, but that he (Deshler) claimed it was still the property of his principal; and, finally, that no suit had yet been brought by the New York house, but that he had retained counsel and was prepared to meet them.

From the whole letter, and especially from the statement that defendant could not then render an account, Beers would know that defendant did not consider himself liable, but was acting solely on his account. Looking at this letter alone, then, what single fact was withheld from the plaintiff below that could have influenced his conduct? "He should have been informed," say his counsel,

“ that the corn had been again sold.” What possible difference could that make? Beers’s right to the proceeds was the same as his right to the corn itself, and no greater. If the defendant was negligent in his sale to Griffen, he was just as much liable before he had replevied and sold the corn again, as afterwards. Had the plaintiff known of the subsequent sale, that could not have influenced his opinion of the first. Besides, it nowhere appears that more than one boat load had been sold at the date of this letter. The only testimony on the point is that of Van Buren (27 :

“ Witness was at Lockport about October 1, 1860, and defendant “ then told him he had sold one boat load, and that the others were “ in store. *Subsequently* stated that he had sold the balance.”

The defendant in error further objects, that, at the date of the first letter, the rights of both parties had become fixed, and nothing he could say or do would have changed their relative position. This is wholly unfounded. The rights of all parties were the same on the day the letter was sent, as on the day the corn was replevied. If Deshler had been notified in season, his course might have been very different. He might have compromised with his New York adversaries. He might have dismissed his replevin suits, given up the corn, and sued Griffen in *assumpsit*. But not knowing that he was to be placed between two fires, and expecting from his principal the same fair dealing and good faith which he exercised himself, he went on with the suits. If any doubt as to the ratification could possibly remain, it is completely removed by the subsequent correspondence. In his letter of January 5, 1861, Deshler explicitly states that he should not hold himself liable in case he should lose the suits. To this the plaintiff makes no reply until two months later, and then it is to confirm our previous conclusions.

In that reply *he adopts the suits as his own.*

Nevertheless, in the May following this letter, before any suit is determined ; without any further demand ; without any note of warning, the plaintiff attaches in this State the property of his agent, and compels him to abide the chances of still greater loss than he has already sustained.

Messrs. Rawls & Seymour, of New York, have recovered judgments against Mr. Deshler for the full value of the corn. If the judgment in this case is affirmed, he will have to pay the money

twice over. If this result grows out of his own negligence, it is perfectly right that he should bear the loss; but the question of negligence should be fairly tried. It was not fairly tried, for reasons already shown. The court, in many of the instructions, withdrew from the jury the evidence of ratification, and misstated the law as to cash sales and usage. No wonder, therefore, that the jury, for their verdict, gave the full amount of the sale to Griffen—not even deducting commissions or necessary expenses!

In conclusion, we would say, that this a case, requiring, for some reasons, more than ordinary consideration. If injustice, as must sometimes happen, be done between our own citizens, it is at least by a tribunal of our own choice, and before which we stand on a perfectly equal footing. But the plaintiff in error is a citizen of another State, and a resident of a rival city. He is not a voluntary suitor in our courts, but is brought in, against his will, to defend himself, under every disadvantage. The defence, which, in Buffalo, would be received without hesitation, is here viewed with jealousy and suspicion. It is almost impossible for him to obtain here a perfectly impartial jury. It is for our courts, then, and for this honorable court more than any other, to throw over him the ægis of its protection. It is here, alone, that he can look for that enlarged and noble hospitality, that *hospitis arena*, which knows no difference between a citizen and a stranger. To that protection, and to that hospitality, we commend him.

All which is respectfully submitted.

PAYSON & REYNOLDS,

Att'ys for Plaintiff in Error.

REMARKS UPON THE ARGUMENT OF DEFENDANT IN ERROR.

The counsel for the defendant in error urges, with great pertinacity, that the questions of usage and ratification are merely preliminary to the real issue, viz.: the duty of Deshler to account for the proceeds of the corn. He then urges further, that no competent evidence was produced of suits in New York which could justify Deshler in withholding the proceeds; and claims that he must be considered as absolutely liable for them.

To combat these premises we will not add anything to what we have above written. The defendant in error admits the pendency and subject matter of the suits in New York, but denies that they were in evidence. *Provided* this assumption be correct, he does well to insist upon it. We do not deny his right to every advantage, technical or otherwise, which the law gives him.

But, if he stands upon the strict letter of the law, let him see to it that his own case has no flaw.

“ This bond doth give thee here no jot of blood,
The words expressly are a pound of flesh,
Shed thou no blood; nor cut thou less nor more
Than just a pound of flesh.”

The defendant in error admits, and even insists, that, after all, the issue passed upon and decided by the jury was the question of Deshler's negligence. In this we are agreed. It only remains then to determine whether this issue was tried fairly. We believe we have shown conclusively that it was not. Nay more, the question was decided against us in advance, by the court, *in excluding all evidence as to Deshler's necessary expenses in recovering the corn.* This exclusion was absolute. It shut out everything. Had it been confined to the taxable costs of suit, there might be a chance for argument in favor of the ruling; but as it stands, there can be none. Our defences were disparaged by the court, and disregarded by the jury. All our evidence, as to usage, was declared to have no appli-

cation to the case, if Deshler sold for cash on delivery; and the attention of the jury was withdrawn from everything else by an instruction which declared that Van Buren's statements (for so it was understood) were the *highest testimony*. Taken by themselves the plaintiff's instructions were nearly all erroneous and misleading; and, in the language of Justice CATON, above quoted,

"It is not sufficient that the necessary qualification may be found in the instructions given for the other party, *unless we can say with entire confidence that the jury could not have been misled by the erroneous instruction.*"

Assuming then, for the sake of argument, that all the premises set up by the defendant in error are correct, we are still entitled to a new trial, unless the court is satisfied:

First. That Deshler was guilty of negligence; and that in the trial of this issue he was not prejudiced by any of the errors complained of.

Second. That the jury were justified in giving interest upon the amount of the second sale, and that they actually passed upon the question of interest.

The amount of the verdict is exactly the amount of the sale to Griffen. It could not, however, be legally based upon that sale under the pleadings. The proceeds subsequently received were not so large, and from those proceeds Deshler was entitled to deduct his ordinary commissions at all events. Otherwise, Beers would actually make a profit out of his agent's misfortune. The verdict is plainly excessive, unless it can be bolstered up by the suggestion of interest. This is the course adopted in our opponent's argument. As in working an algebraical problem, he borrows a fictitious quantity. His theory is a mere makeshift to cover an unlucky error. For it is absolutely certain that the jury did not give interest, and interest was not claimed at the trial either in argument or by any instruction. To authorize interest the jury must have found, as a matter of fact, that Deshler's conduct was vexatious and unreasonable. And it would be, indeed, extraordinary to sustain a verdict only because the jury *might* have decided this in a certain way, when the question was not, in fact, presented to, or considered by them.

The defendant in error leans upon a broken reed. The other horn of his dilemma is as weak as the first. To have given interest, had they been ever so much disposed to do it, the jury must have found that Deshler's conduct was both VEXATIOUS AND UNREASONABLE. We submit it to the judgment of this honorable court whether they could justly so find. Those terms would much better describe the conduct of his principal. If ever an agent struggled manfully, in the midst of difficulties, to further the cause and protect the interest of his employer, Mr. Deshler has done this. On his behalf he has sustained the burden and the cost of six litigated suits. Finding him thus attacked, on the right hand and on the left, Mr. Beers seized a favorable opportunity to attack him in the rear! But, howsoever beset, the plaintiff in error prays only for "a fair field and no favor."

We have here touched upon one or two only of our opponent's objections, as most of them have been anticipated in our main argument. We have therein set forth as briefly as possible the errors on which we rely, and which we believe are amply sufficient to reverse this judgment.

Respectfully submitted,

PAYSON & REYNOLDS.

100

Greene, Bentley & Reynolds

ATTORNEYS, COUNSELLORS & SOLICITORS

Collections made in all parts of Illinois & Iowa.

P.O. Drawer 6166

112 DEARBORN STREET

Chicago July 19 1863

clerk Supreme Court
Dear Sir

November 22^d 1862

Cyrenius Peers recovered a judgement in the
Superior Court of Chicago against John
G. Deshler in Attachment for \$4787.78 + C

Please issue a writ of Error or
Scire facias, to remove the record in said
Cause to the Supreme Court (Peers is a
resident of this County.)

Enclosed find cheque to you order for
\$16. on account of costs. If any Bond
for costs is required please inform me

An early answer will oblige
Please issue the writ of immediatly

Yours Truly

Wm O. Reynolds

P.O. Box

6166

Chicago Illinois

{ attorney for
John G. Deshler
Plaintiff in Error }

John G. ¹⁰⁰ Deshler
vs
Cyrus Beers
Receipt

Filed Jan. 24, 1863
L. Wilson
Clerk.

John G. Deshler
Plaintiff in Error
vs.
Cyrenius Beers
Defendant in Error

In the Supreme Court
of the State of Illinois
3^d Division

We do hereby enter ourselves security for costs
in this case and acknowledge ourselves bound
to pay or cause to be paid all costs which
may accrue in this action either to the opposite
party or to any of the officers of this Court
in pursuance of the laws of this state.
Dated this 20 day of January A.D. 1863

Wm C. Reynolds
Geo. Greene

Ill. Supreme Court

John G. Deshler

Cyrenius Beer

Security for Costs

Filed July 12. 1863
Shelton
Clerk

In the Supreme Court
Of the State of Illinois
In the 3^d Division

John G. Deshler

Cyrinus Peers

} Writ of Error to the
Superior Court of Chicago

Wm C. Reynolds being duly sworn
on oath says that he is the agent
of John G. Deshler Plaintiff in Error
in the above entitled cause; that
Cyrinus Peers Defendant in Error
has gone out of the State of
Illinois so that Process cannot
be served upon him, and that on
due inquiry diligently made he
cannot be found within said State
of Illinois

Wm C. Reynolds

Subscribed and sworn

to this 13th day of February

1863 before me

at Chicago

Notary Public



Deakler
Beers

Affidavit of
Non residence

Filed Feb. 13th 1863
L. Leland
Clerk



No. 100. Supreme Court
of Illinois
3^d. Grand Division

John E. Dishler
Plff in Error
as
Apprentice Recd.
Defendant in Error

It is hereby stipulated that the
above case shall be submitted
upon written or printed
arguments, and that there
shall be no oral argument
in the case -

Sayron & Reynolds
Attys for Plff. in Error
Kearney & Beck
Attys for Deft in Error.

No 100 - 1

John G. Deshler

v

Cyrenius Beers

Stipulation to
submit cause

Filed 21, April 1863
L. Seland
Clk.

~~(20 suit)~~

Security for Costs. — Jones, Perdue & Small, Stationers, Chicago.

John G. Deshler
Plaintiff in Error
vs.
Cyprien Beer
Defendant in Error

In the Supreme Court
of Illinois 3^d Division
Error to the

SUPERIOR COURT OF CHICAGO.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this Court, in pursuance of the laws of this State.

Dated this *sixteenth* day }
of *February* A.D. 186*3*

John Reynolds
Wm. C. Reynolds

100-1

Supreme Court of Ill.
SUPERIOR COURT OF CHICAGO.

No. of the
Mrs. Stephen

vs.
Gerritt Pees

BOND FOR COSTS.

Filed this 17th day of February
A.D. 1865.

A. Deland
Clerk.

Rayson A. Reynolds
Plff's Att'y-S

State of Illinois
Cook County ss. We hereby waive all objection the
Security for cost was not filed on
the filing of the Writ of Error, Feb 16th 1865
H. S. Kirk
Att'y for the pl.

L Seland Esq

Jan 24. 1863

Dear Sir

If you have not yet issued
process in the case of

John G. Deshler

Pltff in Snor

vs
Leyenius Beer

Defdt in Snor

Please defer doing so until I write again.
It is probable the parties will settle without
further litigation.

Yours Truly

W. L. Reynolds

for J. G. Deshler

P. O. Box

6166

Chicago

Decker & Biers
Letter

Supreme Court of Illinois
Third Fraud Division

John G. Deshler
Plaintiff in Error
versus
Cyprian Beers
Defdt. in Error

The arguments in the above case (on both sides) are now in the printer's hands and will be filed in the Supreme Court, within a few days. Should the case be sooner reached, the Judges are respectfully requested not to dispose of it until the arguments are in.

Chicago May 5. 1863

Sayon & Reynolds
Atty for John G. Deshler

Hosmer & Keen
Attys for C. Beers

100 - 1

Dusk in Beach
Stipulation

Field May 6 1863.
Hiland
Ch.

Greene, Bentley & Reynolds

ATTORNEYS, COUNSELLORS & SOLICITORS

Collections made in all parts of Illinois & Iowa.

112 DEARBORN STREET

120 CHESTER

Chicago Feb 13, 1863

P.O. Drawer 6166

L. Leland Esq

Ill. Supreme Court

Dear Sir - The writ of Error

in *John G. Deshler v. Genies Beer* was duly
rec.^d Please issue Scire Facias to

Cook County for Defendant Beer. Acce with
I send you 50^o Revenue Stamp.

Enclosed is affidavit as to Beer being out
of the State. Please issue Publication
notice immediately so as to be in time for
April term. As first publication
must be sixty days before return day you
will see there is scant time. By giving
this matter your best attention you will
much oblige

Yours Respectfully

W. C. Reynolds

P.S. Please send me form for security for costs
in your court. If Printer fees must be paid
now I will send the same on rec^d of yr letter.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House in the City of Chicago, in said County and State, on the first Monday, being the 1st day of November in the year of our Lord One Thousand Eight Hundred and Sixty two and of the Independence of the United States of America the Eighty Seventh

Present, The Honorable John McWilson Chief Justice of the Superior Court of Chicago.

Van D Higgins and Grant Goodrich Judges.

Joseph Knopf Prosecuting Attorney.

Anthony O'Hering Sheriff of Cook County.

Attest, Thomas O'Connell Clerk.

Be it remembered that herefore to wit, on the Thirtieth day of May in the Year of our Lord One Thousand Eight Hundred and Sixty one there was filed in the office of the Clerk of the Superior Court of Chicago, by Cyrenius Deers, a certain Affidavit in words and figures following to wit,

State of Illinois
Cook County

Cyrenius Deers being duly sworn deposes and says that John G. Dehler is justly indebted to this deponent in a sum exceeding twenty dollars viz in the sum of Five thousand seven hundred & twenty dollars for grain heretofore Consigned

2

by this defendant to the said Decker and not
 accounted for and also for grain sold by the said
 Decker for & on account of this defendant and not
 accounted for, and for money due this defendant from
 the said Decker on account of Consignments of
 grain heretofore made to said Decker by this defendant,
 and for breach of Contract and neglect of duty on the
 part of said Decker as this defendant's Agent, This
 defendant further saith that said sum of fifty seven
 hundred & twenty dollars is now justly due this defendant
 and unpaid, This defendant further saith that said
 John G Decker is not a resident of this State, but has
 property & effects therein liable to attachment wherefore he
 procured a Writ of Attachment out of the Superior Court of
 Chicago against the property & effects of the said John G
 Decker in pursuance of the laws of this State.

Cyrenus D. Burd

Subscribed & sworn to before me
 this 30th day of May A D 1861

Walter Kimball Clerk

And afterwards on the day and year aforesaid there
 issued out of the office of the Clerk of the Court aforesaid
 a certain Writ of Attachment, which said Writ with
 the Sheriff's return thereon endorsed are in words and
 figures following to wit:

3

State of Illinois
Cook County

The People of the State of Illinois

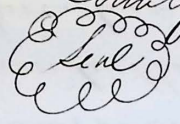
To the Sheriff of Said County. Granting:—

Whereas Cyrenius Pears hath Complaind on oath to Walter Kimball, Clerk of the Superior Court of Chicago, of Cook County that John G Derbler is justly indebted to the said Cyrenius Pears to the amount of Five thousand Seven hundred & twenty dollars and Cents, and oath having also been made, that the said John G Derbler resides out of this State so that the ordinary process of law cannot be served upon him, and the said Cyrenius Pears having given bond and security, according to the direction of the act in such case made and provided, We therefore Command You, that You attach, so much of the estate, real or personal of the said John G Derbler to be found in Your County, as shall be of value sufficient to satisfy said debt and Cents, according to the said Complaint, and such estate, so attached, in Your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a term of said Superior Court of Chicago to be holden at Chicago, within and for the County of Cook on the first Monday of July next, so as to compel the said John G Derbler to appear and answer the Complaint of the said Cyrenius Pears, and that You also Summon James L Reynolds and David J Ely as furnished to be and appear at the said

H

Court on the said first Monday of July next, then
and then to answer to what may be objected against
them. When and where you shall make known to the
said Court how you have executed this writ, and
how you then and there this writ

Witness Walter Kimball, Clerk of said
Court and the Seal thereof, at Chicago in said
County this 30th day of May A D 1861



Walter Kimball Clerk

By virtue of the within writ I did on the 31st day
of May 1861 levy upon the Defendants right title and
interest in and to the following described property to wit,
Twenty Six thousand Six hundred and Sixty $\frac{1}{32}$
bushel of Oats (26606 $\frac{1}{32}$) (which were replenished from
me on the first day of June by W^m James Corcoran of Cook
County, Defendant (not found in my County) served
by reading this writ to the within named James L Reynolds
and David J Ely as Garnishers the 11th day of June
1861

A C. Herring Sheriff
By T. Lombard Deputy

And also on the same day and year last
aforesaid there was filed in the office of the
Clerk of the Court aforesaid a Certain Attachment
Bond which is in words and figures following to wit

Know all men by this Court, That we Cyrus
Pearl and Jabez K. Dotson of the City of Chicago

in the State of Illinois we hold and firmly bound unto John G. Decker of Buffalo in the State of New York in the penal sum of Eleven thousand & five hundred dollars Lawful Money of the United States for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our Seals, and dated this 30th day of May A D 1861

The Condition of the Above Obligation is such, that whereas the above bounden Cyrenius Peers has on the day of the date hereof, procured an attachment out of the Superior Court of Chicago, Cook County at the suit of the said Cyrenius Peers, against the estate of the above named John G. Decker for the sum of Five thousand seven hundred & twenty Dollars and the same being about to be laid out of said Court, returnable on the first Monday of July next, to the term of the said Court then to be holden, Now, if the said Cyrenius Peers shall present to his said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said John G. Decker all such Costs in said said suit, and such Damages as shall be awarded against the said Cyrenius Peers his heirs, executors or administrators, in any suit or suits, which may hereafter be brought for lawfully suing out the said Attachment, then the above obligation to be void & otherwise to remain in full force and effect.

Sign'd sealed and deliver'd.
in Presence of

Cyrenius Peers Seal
J. K. Botsford Seal

And afterwards to wit, on the Third day of July
in the Year last aforesaid, Cyrenius Peers by
Norman & Peck his attorneys filed herein his entire
Declaration in words and figures following to wit

Supreme Court of Chicago
July Term A D 1861

State of Illinois
Cook County }
} of

Cyrenius Peers plaintiff in
this suit by Norman & Peck his attorneys Complain
of John G Decker defendant of a Plea of Trespass
in the Case on premises, For that whereas herebefore
& to wit, on the 20th day of July A D 1860 at Chicago
in said County in consideration that the said
plaintiff at the special instance & request of the
said defendant had sent and consigned to the said
defendant divers goods & chattels of the said plaintiff
& to wit Sixty two thousand four hundred & thirty five
Bushels of Corn of great value to wit, of the value of
Twenty five thousand dollars in order that the said
defendant might sell & dispose of the said goods & chattels
for & on account of the said plaintiff & to render a just
reasonable account of the said sales thereof to the
said plaintiff in a reasonable time there next following
& to pay over the proceeds of such sales to the said plaintiff
whom he the said defendant should be thence to lawfully
requested by the said plaintiff, and although the said
defendant then & there had & received the said goods &

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Chattles for the purpose aforesaid and afterwards to wit
 on the day & year aforesaid & on divers other days & times
 afterwards & before the Commencement of this Suit, sold
 the same for & on account of the said Plaintiff for a large
 sum of money to wit, for the sum of Twenty five thousand
 dollars to wit at Chicago aforesaid, and although a
 reasonable time for the said defendant to render such account
 as aforesaid and paying over the proceeds of the said
 sales to the said Plaintiff hath long since elapsed; yet
 the said defendant not regarding his said promise &
 undertaking but contriving & intending to deceive & defraud
 the said Plaintiff in this behalf (although he was, after-
 wards to wit the 1st day of June A D 1861 at Chicago
 aforesaid) requested by the said Plaintiff so to do) as yet
 hath not rendered to the said Plaintiff a just and reason-
 -able account of the said sales or paid over the proceeds thereof
 to the said Plaintiff, but hath hitherto wholly neglected
 & refused so to do, to wit at Cork County aforesaid

2^d

And whereas also hitherto to wit, on the day & year
 aforesaid, at Cork County aforesaid in Consideration
 that the said Plaintiff at the like special instance & request
 of the said defendant had assigned & delivered to the said
 defendant divers other goods & chattels of great value to
 wit of the value of thirty thousand dollars to be sold
 & disposed of by the said defendant for the said Plaintiff
 he the said defendant undertook & then & there faithfully
 promised the said Plaintiff to render a just & reasonable
 account of the said last mentioned goods & chattels & pay

over the proceeds thereof to the said Plaintiff whenever afterwards he the said defendant should be thereto requested; yet the said defendant not regarding his last mentioned promise & undertaking but contriving & intending to injure & defraud the said Plaintiff in this respect, hath not rendered to the said Plaintiff a just & reasonable or other account of the said last mentioned goods & chattels or any part thereof. Now said over the proceeds or any part thereof all things the said defendant before the Commencement of this suit at Cork County aforesaid has been often requested by the said Plaintiff so to do, but the said defendant hath hitherto wholly refused & still wholly refuses so to do. & wit, at Cork County aforesaid.

Now that whereas, the said defendant on the first day of June in the year of our Lord One Thousand Eight Hundred and Fifty one at Cork County was indebted to the said Plaintiff in the sum of Ten Thousand Dollars lawful money of the United States of America, for divers goods, wares and Merchandises, by the said Plaintiff before that time sold and delivered to the said defendant and at the special instance and request of the said defendant and being so indebted to the said Plaintiff the said defendant in Consideration thereof afterwards & wit, on the same day and year and at the place aforesaid, undertook, and thus and there faithfully promised the said Plaintiff well and truly to pay unto the said Plaintiff the said sum of money last mentioned, when the said defendant should be thereto afterwards requested,

And whereas also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid in Consideration that the said Plaintiff had before that time, at the like Special instance and request of the said defendant sold and delivered to the said defendant divers other Goods wares and Merchandises of the said Plaintiff, the said defendant then and there indutted and faithfully promised the said Plaintiff that the said defendant should well and truly pay unto the said Plaintiff so much Money as the last aforesaid Goods, wares and Merchandises at the time of the sale and delivery thereof was reasonably worth, when the said defendant should be thereto afterwards requested; and the said Plaintiff avers, that the said Goods wares and Merchandises last mentioned, at the time of the sale and delivery thereof, was reasonably worth the further sum of Ten Thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, when of the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas also, the said defendant afterwards to wit, on the same day and year, and at the place aforesaid was indebted to the said Plaintiff in the further sum of Ten thousand dollars, of like lawful money as aforesaid, for Money before that time lent and advanced by the said Plaintiff to the said defendant and at the like request of the said defendant. And for other Money by the said Plaintiff before that time paid, lent out and expended for the said defendant and at the like request of said defendant, And for other Money

by the said defendant before that time had and received to and for the use of the said Plaintiff. And being so indebted the said defendant in Consideration thereof, afterwards, to wit, on the same day and Year, and at the place aforesaid, understood, and then and there faithfully promised the said Plaintiff will and truly to pay unto the said Plaintiff the said several sums of Money in this Court mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and Year, and at the place aforesaid, accounted together with the said Plaintiff of and Concerning divers other sums of Money, before that time due and owing from the said defendant to the said Plaintiff and then and there being in Arrear and unpaid and upon such accounting, the said defendant then and there was found to be in Arrear and indebted to the said Plaintiff in the further sum of Ten Thousand dollars of like lawful Money as aforesaid. And being so found in Arrear and indebted to the said Plaintiff the said defendant in Consideration thereof, afterwards, to wit, on the same day and Year and at the place aforesaid, understood, and then and there faithfully promised the said Plaintiff will and truly to pay unto the said Plaintiff the said sum of Money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested etc) hath not yet paid the several sums of Money above mentioned, or any or either of them or

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any part thereof, to the said plaintiffs, but to pay the same
 or any part thereof to the said plaintiffs the said defendant
 hath hitherto altogether refused, and still doth refuse
 to the damage of the said plaintiffs of Ten thousand
 dollars and therefore the said plaintiffs bring suit etc

Norman & Peck
 Plff Attys

Copy of afe declared on
 John G. Duhler

To Cyrus Peers Dr	
To Goods Wares and Merchandise	\$10000
To Cash paid laid out and expended	\$10000
To Cash had and received	\$10000
To balance due in settlement	\$10000

And whereas also heretofore to wit on the 20th day
 of July A D 1860 at Cork County aforesaid in Consid-
 eration that the said plaintiffs at the special instance
 & request of the said defendant ^{had retained & employed the said defendant} to sell & dispose of for Cash
 Certain other Goods & Chattels to wit Sixty two thousand
 bushels of Corn of the said plaintiffs of great value
 to wit of the value Twenty eight thousand Seven hundred
 & thirty two dollars for Commissioners & Award to the said
 defendant in that behalf; In the said defendant undertook
 & then & there faithfully promised the said plaintiffs to
 endeavor to sell & dispose of the same but not otherwise
 than for Cash; but the said defendant not regarding his
 said promise & undertaking so by him made as aforesaid

but Contriving & fraudulently intending to deceive & defraud
 the said Plaintiff in this behalf afterwards to wit on the
 3rd day of September A D 1860 sold & disposed of the said
 Goods & Chattels of the said Plaintiff for a large sum of
 Money to wit, the sum of thirty thousand dollars & thereupon
 gave for Cash & which said sum of Money is wholly unpaid
 to the said Plaintiff & by reason of the promise for the said
 Plaintiff is likely to lose the same, to wit at Cook County
 aforesaid, Whereupon the said Plaintiff faith that he is
 injured & hath sustained damage to the amount of
 ten thousand dollars & therefore he brings his Suit &c
 Hamer & Peck

Plffs Attys

And afterwards to wit on the Eighteenth day of July
 in the year last aforesaid said day being one of the days
 of the July Term of the said Superior Court of Chicago
 the following among the proceedings was had in said
 Court and entered of record to wit —

Supremis Peers

John G Dehler Attachment

This day Comes the said Plaintiff
 by Hamer & Peck his Attorneys and on this motion it is
 ordered that the above entitled Cause be ~~it~~ is hereby continued
 to the August Term next ensuing of this Court and that pub-
 lication in due form flow be made against the said defendant
 notifying him of the pending of the said Suit in attachment against
 him

And afterwards to wit on the Seventh day of October in the Year last aforesaid. Said day being one of the days of the October Term of Said Court. The following among other proceedings was had in Said Court and entered of record to wit

Agreemus Deors

John G. Decker ^{vs} Attachment

This Day Comes the Said Defendant by George Payne his Attorney and submits motion for Continuance of this Cause for want of a bill of particulars

And afterwards to wit, on the Eighth day of October in the Year last aforesaid. Said day being one of the days of the October Term of Said Superior Court of Chicago the following among other proceedings was had in Said Court and entered of record

Agreemus Deors

John G. Decker ^{vs} Attachment

This Day Again Comes the Said Plaintiff by Hermer & Peck his attorneys and Defendant by George Payne his Attorney also Comes and on motion Defendant it is ordered that Plaintiff file his bill of particulars of Account Said on by Coming in of the Court on Thursday morning next. Whereupon the Defendant's motion for Continuance hitherto submitted is overruled by the Court

And afterwards to wit on the Tenth day of October in
the Year last aforesaid the Plaintiffs herein by Homer
& Peck their Attorneys files herein the Certain Bill of Partic-
ulars in words and figures following

Cyrenius Peers Superior Court of Chicago

John G. Deukler Bill of Particulars

John G. Deukler

1860 To Cyrenius Peers Dr
July To 62435 Bushels of Corn Consigned to Said
Deukler & not acct for & proceeds not paid over \$10.000
" To 21785¹⁰ Bushels of Corn on Board of Potomac Consigned
to Deukler for sale & proceeds not acct for or paid over \$10.000
Sept To 30000 Bushels of Corn Sold by Said Deukler
& not acct for nor proceeds paid over \$10.000
" For money had and received from Sale of Cargo of
Corn shipped by Prop^r Potomac & Consigned to Said Deukler
for acct of Said Peers (not paid over to Said Peers \$10.000
" For balance due from the Sale of a Cargo of Corn shipped
by Prop^r Potomac & Consigned to Said Deukler & by him
Sold for & on acct of Said Peers & not paid over \$6924.86
" For damages in not accounting & paying over balance of proceeds
of Cargo of Corn shipped by Prop^r Potomac Consigned to Said
Deukler for & on acct of Said Peers \$8000.

Homer & Peck

Plffs Attys

And afterwards to wit on the Same day and Year last aforesaid said day being one of the days of the October Term of the Superior Court of Chicago. the following among other proceedings was had in said Court and entered of record to wit.

Agrements Purs

John G Dehler ^{vs} Attachment

This day again Comed the said Plaintiff by Hornor & Peck his Attorneys and on this motion it is ordered that the said defendant plead or demur to plaintiffs declarations in this Cause by coming in of the Court on Monday Morning next -

And afterwards to wit on the Twelfth day of October in the Year last aforesaid. the Defendant by Payne & Reynolds his Attorneys files herein his Answer Pleas in words and figures following to wit

State of Illinois } Superior Court of Chicago
Cook County } } October Term 1861

Agrements Purs }

John G Dehler }

And said defendant by Payne & Reynolds his Attorneys Comed and defends the wrong and injury when &c and says that he did not undertake and promise in manner and form as said

Plaintiff has above than of Complaind against him
And of this puts himself upon the Country to
Payson & Reynolds Defts Attys

And the Said Plaintiff by Hosmer & Peck his Attor-
ney Couns and does the like

Hosmer & Peck
Nov 6 1861. Plffs Attys

And afterwards to wit on the Twenty Seven the day
of May in the Year of our Lord One Thousand Eight
Hundred and Sixty two - Said day being one of the days
of the May Term of the Superior Court of Chicago the
following Among other proceedings was had in Said Court
and entered of record to wit.

Cyrenus Peers }
John G Dehler } Attachment

This Cause being this day called
for Trial Comes Said Plaintiff by Hosmer & Peck his
Attorneys and Said Defendant by George Payson his
Attorney also Couns. and issue being joined herein it is
ordered that a jury Come. Whereupon Comes the jury of
God and lawful men to wit. Burke, Peter Smith
James Grant, G W Centino, W W McMillan, D Langens,
Thos Lander, William A Ruggles, Peter Kniff, John
Bass, Henry Apple, and W C Hendricks, who being duly
selected, tried and sworn, to try the issue joined as afore-
said after hearing part testimony, and the hour of adjournment

Having Arrived it is ordered by Agreement of Parties that
the jury Separate and Court Court tomorrow Morning

And afterwards to wit on the Twenty eighth day
of May in the Year last aforesaid said day being
of the days of the May Term of said Court the
following Among other Proceedings (was had in said
Court and extent of record to wit

Openings Part }
Attachment }
John G. Dehler }

This day again Comes the parties
to this Cause by their Attorneys. And the jury empanelled
herein on Yesterday for the trial of said Cause also Comes
as on Yesterday and after hearing remaining testimony,
Arguments of Counsel and instructions of the Court,
retire to Consider of their Verdict and afterwards return
into Court, submit their Verdict and say. On the jury find
issue for said Plaintiff and we assess his Damages herein
against said Defendant to the sum of Four thousand Seven
hundred and eighty seven dollars and twenty eight
Cents, And thereupon said Defendant submits his
Motion herein in Arrest of judgment and for a New trial
in said Cause

And afterwards to wit on the Twenty second day of
November in the Year last aforesaid said day being
one of the days of the November Term of the said Court
the following Proceedings, Among other, was had in said

Court and extent of record, to wit.

Cyprianus Peers
John G. Dahler

Motion for new trial in Attachment.

This day again comes said Plaintiff by Warner & Peck his Attorneys and said Defendant by Payson & Reynolds his Attorneys also comes and this Cause coming on now to be heard upon the motion of said defendant heretofore submitted herein at the May Term of D 1862 of this Court for a new trial in said Cause, and Counsel being heard thereon and the Court being fully advised in the premises, it is Considered by the Court that the motion of said defendant to be and is hereby overruled, and that a new trial be refused to said Defendant, to which ruling of the Court in overruling his said motion for a new trial said Defendant then and there accepted, Wherefore said Plaintiff ought now to have judgment entered for his damages against said defendant upon the verdict of the jury rendered herein as aforesaid

Therefore it is Considered that said Plaintiff do have and recover of and from said defendant his damages of Ten thousand Seven hundred and eighty Seven Dollars and Seventy eight Cents in form aforesaid by the jury here found and specified and also his Costs and Charges in this behalf expended and now expending therefor.

And thereupon the said defendant to the finding of the Court and the judgment therein the said

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Defendant by his Council now here having accepted
 and entering his exceptions prays an appeal to the
 Supreme Court of the State of Illinois which is
 allowed on Condition that he execute a bond herein
 in thirty days in the penal sum of Six thousand dollars
 with Security to be approved by a Judge of the Court,
 Conditioned according to law, and thirty days is
 also given him in which to file bill of Exceptions

And afterwards to wit on the Nineteenth day
 of January in the Year of our Lord One thousand
 Eight hundred and Fifty Three, said day being
 one of the days of the January Term of said Court
 the following Among other Proceedings was had in
 said Court and entered of record to wit

Cyprienus Pears }
 John G. Decker } Motion on Attachment

And now comes said
 Defendant by Cyprien and Reynolds his Attorneys
 And on their motion it is ordered that the time
 for said Defendant in which to file his bill
 of exceptions having been and is hereby extended
 ten days from this day

And afterwards to wit on the twenty ninth
 day of January in the Year of our Lord One thousand

Eight Hundred and Sixty Three. Said day being one of the days of the January Term of Said Court the following among other proceedings was had in said Court and entered of record to wit

Cyrenus Burr }
 John G. Durbin } Motion in Attachment

And now at this day again comes the Parties to this Cause by their Attorneys and on motions. Payson & Reynolds attorneys for said defendant and by and with the Consent of plaintiffs attorneys it is ordered that time for said defendant to file his bill of exceptions herein as appeal to the Supreme Court be and the same is hereby further extended from this day until the fourth day of February next A.D. 1863

And also on the day and Year last aforesaid there was filed herein, a Certain Stipulation by the parties in this Cause: referred to in the foregoing order of said Court, which said Stipulation is in words and figures following to wit

Superior Court of Chicago
 Cyrenus Burr }
 John G. Durbin } It is hereby stipulated

one of the days of the February Term of said Court
the following among other proceedings were had in said
Court and to wit of record to wit

Cyprien Poiré }
John G. Decker } Motion in Attachment

And now at the day again
comes the parties to the Cause by their Attorneys and
on Motion of Poyson & Reynolds Attorneys for said
Defendant and by and with the Consent of said
Plaintiffs Attorney it is ordered that time for said
defendant to file his bill of exceptions herein on
appeal to the Supreme Court be and the same is
hereby further extended from this day until Monday
next the eighteenth day of February instant

And afterwards to wit on the eighteenth day of
February said defendant by Poyson & Reynolds his
Attorney filed in the Office of the Clerk of the Court
aforesaid his Certain Bill of Exceptions which is
in words and figures following to wit,

1. ²³ *Cyrenus Pees*
v
John G. Deshler

In the Superior Court of Chicago -
Bill of Exceptions

The Issues joined in this action, came on to be tried at the May term of this Court, before Goodrich Justice, at the Court House in the City of Chicago, on the twenty seventh day of May in the year of our Lord AD. 1862.

The Plaintiff to maintain the issue on his part, called as a witness Joseph W. Tiffany who being duly sworn, testified that he resided in Chicago, and was engaged in the year 1860 in the forwarding and commission business, that he was during that year, the agent of the Plaintiff, and that as such agent, he shipped for the Plaintiff, a cargo of corn, to the defendant by the propeller *Cotnam*, being 17,506 bushels of mixed corn, and 4,208 bushels of white corn. This was about the 21st of August 1860

The Counsel for Defendant objected to the reception of oral testimony as to said shipment without the production of Invoice, or Bill of lading, on the ground that that was the best evidence.

The witness then testified that he had no remembrance particularly of any bill of lading in this case, but it was the usual course of dealing between the parties to make and send a Bill of Lading.

The court thereupon overruled the objection, and admitted the testimony to which ruling the Counsel for Defendant then and there excepted.

2 The witness further testified that he had made prior shipments to the defendant for the plaintiff and for others. The Plaintiff's counsel then asked witness what was the customary or the usual course of dealing in such shipments as to the terms of sale. The witness answered that he always understood that the grain was sold for cash. Only knew from receiving dispatches that sales were made. That the accounts of sales were always rendered as cash sales. The witness further testified as follows. We generally drew at sight upon being advised of sales; may sometimes have drawn on time. I acted as Plaintiff's agent, during the year 1860, and had full authority to act for him as for myself. I have been engaged in the business of forwarding grain to Buffalo for several years. We expect consignees to sell for cash when no special directions are given. One time in Buffalo they sold on time, and charged for guaranteeing. I don't remember particularly about the year 1860. My experience is that sales were made for cash unless other directions were given. This is what I have always understood to be the course of dealing between Buffalo & Chicago.

The witness further testified that the intercourse between Plaintiff and himself with the Defendant was by letter so far as he knew. The counsel for the Defendant then moved the court to exclude all the oral testimony of retained by the Plaintiff of the Defendant as his factor on the ground that the written retained as the

25 2.

best evidence should be produced or its absence accounted for. The witness then testified that the corn in controversy had been shipped without any specific instructions or directions, so far as he knew. That it had been shipped to the defendant in the usual course of trade without any specific directions.

The court then overruled said motion to which decision the Counsel for the Defendant then & there accepted.

The plaintiff then read in evidence without objection a letter from the defendant of which the following is a copy.

Buffalo, Sept 18. 1860

W. Beers or Genl Tiffany.

Genl. I to-day closed out the Potomac's cargo at 55 for mixed? 56 for white, I held until I thought there would be a charge and gave it up - for the present, the drop in wheat has also had its effect on corn buyers. I have some 1300 bu. of Iowa yet on hand will sell and give you sales of all in a day or two.

I yet think well of corn, would rather take it by all odds than wheat. By the by Beers the wheat market has taken the turn just as we talked when you were here, the fortunes then in the hands of a few lucky ones has been swept away - they don't buy so much. Had could not be forced today at over 75 cts - let wheat alone but try corn.

Respectfully Yours,
John V. Dushler.

The plaintiff further to maintain the issue on his part, called as a witness.

James Van Buren, who being duly sworn, testified that he had resided in Buffalo for seven years past and had known defendant, during that time. Had been in the transportation business, during the last four years, and prior to that time, in the commission business. Knew the manner of selling grain in Buffalo in the year 1860. It was sold for cash. Had heard defendant speak of selling the corn now in controversy. The statement was made in court. He was on the stand, giving testimony, in a case with Rawls and Seymours in regard to this corn. The controversy was whether the corn was sold on time or for cash on delivery. Mr. Deshler said he had given Mr. Griffen no time on the corn. That Mr. Griffen was to respond on delivery of the corn. Mrs. Griffen claimed that he was to have three or four days time. Deshler denied this and said he gave him no time. Deshler said he sent in the bill in two or three days, and that Griffen failed to pay. He did not explain the term, cash.

The witness further testified that Griffen sold all of his corn, through him, and that he chartered the canal boats for Griffen on which this corn was shipped. That he knew John Daragh who was in 1860 in defendant's office as his confidential clerk. The orders to Griffen for this corn, were signed by him.

5. 27
That Defendant told the witness he wrote the telegram which was sent to stop the corn. That witness was at Lockport about October 1st 1868. and Defendant then told him that he had sold one boat load of the corn and that the others were in store; and that subsequently, he informed him that he had sold the balance.

The plaintiff here rested his case and the counsel for the Defendant orally moved the court to instruct the Jury that if they found from the evidence that a Bill of Lading was given for the Potomac's cargo, or that the Defendant's retainer was in writing, it was their duty according to law to find a verdict for the Defendant.

The court in reply stated that if the Defendant wished to rest his case as the evidence then stood; he would then instruct the Jury upon the law, as he understood it to be. And in discussing the question with Defendant's counsel the court stated that he thought the shipment and sale had been proven; that if there had been any special instructions given to defendant it was for him to show them.

To which ruling of the court and expressions of opinion the Defendant by his attorney then and there excepted: The court sometime after further discussion with the Defendant's counsel asked him, whether the court could, as

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6. 28
the evidence then stood instruct the jury that there was not sufficient evidence from which they might find the facts of shipment & sale

The counsel for the Defendant then orally moved the court to instruct the jury to find a verdict for the defendant; on the ground that no demand for an account had been proven.

The court in reply stated that it was not the practice in this state to instruct as in case of a non suit:

The counsel for the Plaintiff insisted that after the lapse of time shown to have existed in this case it was unnecessary to prove a demand.

The court then stated that if the Defendant's counsel wished to rest the case at this point he would proceed to instruct the Jury as he understood the law to apply to the case as it then stood.

To which ruling of the court, in declining to instruct the Jury as requested the Defendant by his counsel then and there excepted.

The Plaintiff then produced and read in evidence without objection a letter from the Defendant of which the following is a copy.

Buffalo Oct. 12th 1860.

C. Beers to J. H. Tiffany, Esqrs.

Chicago.

Gentlemen.

7. 29
Enclose sales.

18436 ⁴⁵	Bus. Corn	Cargo	Craig - Ill	\$ 8261.58
19399.	"	"	Iowa	8788.29.
284737	"	"	Dambs	1273.78.

The charge of \$ 107.⁰⁵ for General Avuage tax on Bus. Iowa. I hope to get back from the Insurance Companies - so far they have shown but little disposition to settle - The sales of Potomac cargo I am unable to render just now. I have collected and placed to your credit the proceeds of 13157.¹⁰ Bus. of the cargo sold 14th Sept. On the 18th I telegraphed you of closing the cargo, viz; 4238⁴⁷ white and 4389⁴⁹ mixed @ 56 + 55 respectively - For these two parcels the purchaser A. d. Griffen, of this place, who had up to this transaction, borne an unexceptionable character for business integrity and pecuniary resources - failed to pay - I therefore replevied the property at Lockport and Rochester and it is now awaiting decision as regards ownership - Parties in New York, claim it on the ground that they have accepted Griffen's drafts made against it.

My position is that the corn is yours until paid for by Griffen as all my orders on vessels and elevators read "subject to my order until paid for."

No positive steps have yet been taken by the New York House, owing, perhaps to the fact that the Drafts have not matured. In the meantime, I have retained counsel and if our opponents proceed, we shall meet them.

Truly, John G. Dasher.

P. J. Darragh.

The plaintiff has rested his case and the defendant by his counsel then renewed his motion orally that the jury be instructed to find a verdict for the defendant; for the reason that no demand had been proven and that said letter did not contain such a refusal as would excuse making a demand.

The court again offered to instruct the Jury as he understood the law to be provided the Defendant was prepared to rest his case at that point. To which ruling the defendant by his counsel then and there excepted.

The Defendant to maintain the issues on his part produced and read in evidence a letter from the Plaintiff of which the following is a copy.

Chicago, Jan^y 2^d 1860.

John G. Deshler.

Dr. Sir.

I have this day drawn on you for three thousand dollars on that com sent you last summer. It belonged to Smith and myself, and Smith must have his money. Hence this draft.

I hope it will be convenient for you to pay it and oblige
Yours &c

C. Beers.

(It is admitted by the parties to this suit that the above letter, and also the one hereafter set forth from the defendant dated Jan^y 5. 1860 and the one from the Plaintiff dated March 5. 1860

9 31
were all dated by mistake; and should have been dated
Jan^y 2^d 1861, Jan^y 5, 1861 - & March 5, 1861 respectively.

The counsel for the Defendant then orally
moved the court to instruct the Jury that it was their
duty to find a verdict for the defendant; on the
ground that the letter last read shows that the corn
belonged to Smith and Beers, and that Beers alone
could not maintain this action.

The Court again asked the Defendants Coun-
sel if he proposed to rest his defence there, and
stated that the court was ready to instruct the
Jury as he understood the law to be if the evi-
dence was closed. To which ruling the counsel
for the Defendant then and there excepted.

The Defendant further to maintain the issues
on his part produced & read in evidence the depo-
sition of John Darragh who testified as follows.
I am forty six years of age. I have been employed during
five years past as a Sounding & commission merchant
in Buffalo. I know of Defendants having received
consignments of corn from Chicago in which Plain-
tiff claimed an interest. The first consignment was re-
ceived at Buffalo by the Schooner Craig August 3^d. No
this was shipped by J. H. Tiffany agent for account
D. R. Holt cashier. The defendant did not re-
ceive any shipments of corn from the plaintiff in 1859, or
from any person acting as plaintiffs agent or in which
plaintiff claimed an interest.

The amount of corn so received by defendant during the entire season of 1860 was 62434³⁴ bushels: The consignments were sold by defendant in the customary mode of making cash sales, that is by giving orders for the property and sending in the bill when we wanted the money. This was done only to persons of good standing. The limit of the time for sending in Bill for collection, would vary from the same day to four or five days.

J. H. Tiffany was the shipper of all such corn with the exception of one cargo which purported by the Bill of Lading to have been shipped by C. Beers & for his account. The correspondence in 1860 about such shipments, was carried on by "Beers per Tiffany, by Deshler & by myself for Deshler. Drafts were drawn on defendant on account of the same by Beers per Tiffany except one draft of about \$1000 by "J. H. Tiffany agent". of this corn were 8625 bushels of the cargo of Propeller Potomac. All the rest has been paid and accounted for by defendant.

On the evening of September 18. 1860 defendant sold to Abraham L. Griffen from the cargo of the Potomac 4238⁴⁷ white corn, and 4389 mixed corn. The white corn was sold at fifty six cents a bushel and the mixed at fifty five cents. The Potomac reached Buffalo August 27. 1860. The corn was stored in the Hatch Elevator. I drew the orders for said corn, so sold to Abraham L. Griffen. These orders were in the usual forms. I have not got them in my possession, and I cannot get them. The following is a precise copy of these

orders as they were given to said Griffen.

To the reading of said copies the counsel for the Plaintiff objected because the originals should have been produced or their absence accounted for.

The court sustained the objection, and excluded the copies from the jury, to which decision the counsel for the Defendant then and there excepted.

Said copies as they were set forth in the deposition of said witness were of the following tenor:

(No 1) Buffalo Sept 18. 1860.

Watch Elevator - Deliver to R.L. Griffen Esq. or order, 4238.47 bush. white corn cargo Potomac subject to my order until paid for.

John G. Dishler per John Darragh.

(No 2) Buffalo Sept. 18. 1860

Watch Elevator. Deliver to R.L. Griffen Esq. or order a load of corn or 2319²⁶ bush Sprague 4384⁷ Potomac subject to my order till paid for.

John G. Dishler. per John Darragh.

Said witness further testified as follows:

The sale was made to Griffen as I was informed by Dishler at the time in the usual manner of making cash sales. To this testimony the Plaintiff by his counsel objected, because it was hearsay. The objection was sustained by the court & Defendant's counsel then and there excepted - Griffen did not pay for said corn at the time he received orders for the same, or at any

12. QX

time. Deshler called on Griffen for pay for the same on the second day after the sale.

September 18. 1860 mixed corn was selling in Buffalo at 54 cents. white corn for about 55 cents. Mixed corn was selling October 1. 1860. for about the same price. I cant tell as to white. The market was not active the latter part of September 1860, but moderate sales were made at 53 1/2 & 54 cents per bushel.

The gross amount of Storage, Lake freight and Fire Insurance on the entire cargo of the Potomac was \$2139.73. The cargo was 21785¹⁰ bushels I am not acquainted with commission charged by merchants in Buffalo. except by hearsay. Defendant charged from half a cent to a cent per bushel according to circumstances. Sometimes he charged even 2 1/2 cents per dollar received. The amount paid for Lake freight on portion of cargo sold Griffen was \$733.37 amt. paid for Fire Insurance on same. 19.40
Amount paid for storage was 107.74

Defendants business letters during 1860 & 1861 were written by him sometimes and sometimes by myself. They were usually copied by letter Press by Jacob Williams Jr. who directed and mailed them.

I know of letters written by Deshler or for him to Plaintiff at Tiffany on or about August 29, and October 12. 1860 and January 5 and March 7. 1861. The letter written January 5. 1861 was dated January 5, 1860 by mistake. I think all of these letters were copied

13. 25

addressed and mailed as I believe by Jacob Williams, Jr. The copies thereof are here produced marked Exhibits "A" "B" "C" & "D" respectively.

Exhibit A.

Buffalo Aug. 29. 1860.

J. H. Tiffany Esq.

Dear Sir - We had a decidedly better feeling here today for corn, for past 3 or 4 days sales have been made at 48. today the market was closed at all offered at 49. It is low but there is so much that it does not go off readily - The Propeller is in and corn is in store, where it may lay awhile until the market improves

We have had a big excitement in wheat. Yours were sold freely at the even dollar today. There is considerable of smut in some of your wheat, I received a lot from Stanges and sold it at 80 cts. for which I got all I could of course. I sold it to a party who had it ground at Lockport at 5 bu. for the barrel. the miller taking the wheat here, and putting the flour on the cars there, freight there forty-two cts. to N. Y. the flour was sent to Dows. there was 3000 bu. wheat. 600 bbls. of flour, wheat cost \$2400 today the party showed me a letter where \$3.00 per bu. was all Dows could get for the flour, making a loss of \$600 on \$2400 worth of wheat at 80. cts. - I am so particular that you may avoid dealing in the stuff at any price for this market - don't touch it if any smut in it.

Respectfully Yours
John G. Peshier.

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Exhibit B.

14 The letter marked Exhibit B, is the same as the one
above set forth from the Defendant to the Plaintiff,
dated ~~March~~ ^{October} 12. 1860 and by the Plaintiff produced
and read in evidence.

15 37
Exhibit "B."

Buffalo Jan 3rd 1860

G. Beers Esq.

Dr Sir. Yours of 2nd rec^d. I cannot pay
the draft - The suit in regard to your corn, does not
come off until 4 Monday of this month, and until that
is decided, can do nothing - A gain when you were lost
here I gave you the full market value of your corn then
on hand, and had I then sold as I had a perfect right
to do, there would have been nothing due.

If I lose the suit you will be in good luck, if you are not
called on to pay me on the corn act, instead of my paying
you. My attorneys feel some of gaining, but the uncer-
tainty of law is great. I feel perfectly justified in
taking above course when I know you already have in
your hands all you would have been entitled to had
I sold as I had a perfect right to do, and as others did,
that is at maturity of paper and advances. I hope
I may be able to report before long that the suit
is decided in our favor and when I can do so
will pay over any balance in my hands at sight.

Respectfully Yours,

John G. Decker.

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Exhibit "D"

Buffalo March 7th 1861.

L. Beas Esq. Chicago

Dear Sir.

Your favor of the 5th inst is at hand.

The suit has been laid over, in consequence of the absence of witnesses, until the third Monday in May. The Captains of the Boats could not be found when wanted.

Your advice of grain accumulations correspond with statements from all sections, and if we can start at low figures, the prospects of making a living one good. Our own state is not yet exhausted and its fulness has caused total inactivity in flour and grain here during the winter. The facilities for carrying have been largely increased and there is not much probability that carriers will have everything in their own way during the coming season. The increase in tolls has given much dissatisfaction and energetic measures are now under arrangement to have the action rescinded by the Canal Board. Quotations for wheat and corn merely nominal. Small parcels Canada club sell in bags @ 95 @ 96.

Truly Yours

John G. Deshler.

p. John Darragh.

Said copies were admitted and read without objections, notice to produce the originals having been duly served upon plaintiffs attorneys on the 14th of April 1862. Said witness further testified as follows.

The letter of March 7. 1861. was written in answer to

17 39
one from plaintiff to defendant making enquiry relative to the progress of a suit dated March 5, 1861 and received March 7, 1861. The letter of March 7, 1861, referred to a suit brought by parties in New York to recover the corn sold to A. L. Griffen which was replevied by Deasler.

(To this testimony the plaintiff by his Attorney objected on the ground that it was incompetent to explain the letter by parol. The objection was overruled and the evidence admitted.)

The witness further testified as follows:
The Propeller spoken of in Letter dated Aug 29, 1860 is the Propeller Potomac.

The Plaintiff was in Buffalo September 3, 1860 and the Defendant paid him in my presence \$525 as an advance on said cargo of the Potomac then in store at Buffalo and Beers then instructed Defendant to use his own judgement in the disposal of said cargo. At the time of its receipt corn was dull, sales having been reported the day previous at 49 & 50 cents per bushel. In 1860 J. W. Tiffany acted as agent of other parties in consigning grain to Defendant during the same time he was acting as agent for Beers.

In answer to Plaintiff's cross interrogatories, the witness testified as follows.

The correspondence during the year 1860 relative to the shipments of the 624 3/4 ⁹⁵ bushels corn above referred

to, was carried on between said Defendant and the Plaintiff or his agent J. H. Tiffany. All accounts of sales of said shipments were made out for the account and at the risk of Plaintiff. I do not know that Defendant made any sales in that year except for cash. I believe Defendant sold Plaintiff's corn in accordance with the custom of selling for cash. I am acquainted with most of the correspondence and account of sales rendered to Plaintiff in the year 1860, but do not think the Defendant had any transactions in 1859 in which Plaintiff was recognized as Principal. I can't say whether the accounts of sales purported a cash sale or not. I do not know of any other means the Plaintiff had of knowing the manner in which sales were made by the Defendant of Plaintiff's corn. Defendant was half owner of the Main Street Elevator, & had some interest in the Hatch Elevator, but had no control of either in 1860. He had rented his entire interest in both. He had no interest in the profits so far as I know. I don't know of any own knowledge how corn was then stored in Buffalo, whether each parcel was put in a separate bin or not. The Potomac cargo, except the part sold to A. S. Griffen September 18, 1860, being 13159 bushels was sold September 14, 1860 at 55 cents per bushel. & net receipts credited to Plaintiff's account. The rest was sold to A. S. Griffen as I have stated. It is not now in Defendant's possession. I do not know

49. 41

where it is.

The Defendant then produced and read in evidence, the deposition of.

Jacob Williams Jr. who testified as follows.

I reside in Buffalo, Aged 19. was clerk of Defendant in 1860. September 18. 1860. Deshler requested John Darragh to charge the sale to Griffen, and the same was charged in cash sales memorandum Book. I never knew of Griffen paying for this corn. I called on A. L. Griffen at Deshler's request September 25. 1860 for payment, once before & once after dinner. I know of Darragh calling on Griffen in relation to it on the same day or the next. I copied most of Defendants letters in 1860, & 1861. I copied and mailed the letters referred to in testimony of Darragh whose copies are attached marked Exhibits A B C D E. They were mailed on or about the day they bear date, excepting the one dated January 5. 1860 - which was mailed on or about January 5. 1861.

The Defendant next offered in evidence the deposition of Robert H. Stevens.

The Plaintiff by his counsel here moved the court to exclude from the Jury all parol evidence of the institutions and prosecution of the suits alleged in said Deposition, to have been commenced against or by the Defendant in New York; and of the object extent and effect of the suits, on the ground that Record Evidence was the best evidence, and that it was incompetent

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to prove the pendency of those suits in bar of this action by parol or oral testimony.

The court decided that the defendant might show by parol that suits were pending in New York in which the corn in dispute was the subject of controversy and that such suits had been prosecuted with due diligence, and were still pending; but that parol evidence could not be introduced to prove what the actions were, or what the parties claimed or the pleadings or averments or the effect of the proceedings or any judgements rendered in such suit or suits as a bar or defense to this action.

To which ruling of the court the Defendant by his counsel then and there excepted.

The Defendant then read in evidence such portions of Robert H. Stevens' testimony as is consistent with the foregoing decision of the Court.

The Deposition of said witness is as follows.

I reside in Buffalo, am a Lawyer, aged 44-ty Seven. I went to Lockport, Niagara County, New York, with the Defendant September 25. 1860 to overtake the boats supposed to contain the corn, sold by Defendant to A. L. Griffin, September 18th 1860. At Lockport I made out Replevin papers to retake the corn. There being two boat loads near

X³

there in the Erie Canal. John G. Deshler was plaintiff in both cases. Defendants in one case were A.S. Griffin & Michael Le Roy, Boat Captain. In the other case A.S. Griffin & P. A. Rouse boat captain. Before the papers were served the corn was demanded of the defendants Le Roy & Rouse. About midnight September 20. 1860, canal boat Kalamazoo said Le Roy captain, arrived at Lockport where the Sheriff of Niagara County took possession of the corn by virtue of the Replevin Papers. About daylight next morning, Canal boat O.D. Rouse, said P. A. Rouse being captain, arrived at Lockport & said sheriff by virtue of Replevin papers, took possession of the corn on that boat. By Statute of New York State the Sheriff must keep property in his possession for three days in such cases before he can deliver the same to either party in order that any person other than the Plaintiff may put in a claim of property.

The Plaintiff's counsel here moved to exclude said testimony concerning the statute law of New York on the ground that it was not the best evidence. The court sustained said motion, & excluded the testimony to which decision the Defendant & his counsel then and there excepted.

Said witness further test's filed as follows; The boats were there fore tied up for the purpose of finding a place to store the Corn. The expenses thereof

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as charged by the Sheriff were \$102. Hence Mr. Deshler didn't get possession of this corn until after three days. On tying up said boats Mr. Deshler & myself took the cars, & went to the City of Rochester N. Y. where I made out papers in another Replevin suit in favor of Deshler Plaintiff against A. S. Griffen & C. H. Wendt captain of the boat Growbridge, which contained the balance of the corn. This boat was overhauled the same day & the Corn replevined by Sheriff of Monroe County, New York, & there was the same delay of three days before getting possession thereof by Deshler.

The fifth Interrogatory to this witness was as follows.

(Int. 5.) State whether the Defendant has been engaged as Party in any Law suits growing out of said sale to Griffen or out of claims to said corn set up by any parties. If so who were the parties to said suits, & for what were they brought. Has any such suit been tried. If so state when, where, between what parties, and with what result.

To which said witness answered as follows.

In the three law suits above mentioned, Mr. Deshler was Plaintiff. No defence was put in to suit for corn replevined at Rochester & judgment was rendered soon after on a writ of Enquiry in favor of Deshler. The two suits first spoken of were defended by Griffen & were tried at Rochester, January 28, 1862. In the first Replevin suit, judgment was ren-

23. X5
ded for the Plaintiff for \$ 114.74 costs of suit & in
the other \$ 126.74, costs of suit.

The Plaintiff Beers by his counsel here stated that
he was willing to waive his objections so far as to
allow oral evidence to go to the Jury that the
Replevin suits had been decided in favor of the
Plaintiff Deshler, (the Defendant here,) and the
defendant by his attorney read in evidence the
testimony showing that fact.

The witness further testified that neither of
said Bills of costs had been paid by Deshler, or
by A. L. Griffen. A man by name of James
Van Buren brought suit against Deshler, claim-
ing freight for carrying the corn on the boats.
The suit has been tried, and judgment given in
favor of Defendant, with \$100 Costs which has
not been paid.

Rawls & Seymour Commission Merchants, of New
York City, having accepted one of Griffen's drafts ag-
ainst this corn, brought suit against Deshler in
trover for the corn on the boat Gowbridge, taken at
Rochester. The suit was tried in October 1861, and
a verdict rendered for the Plaintiff against Defendant
Deshler for \$2200 or more & costs, from which Defendant
has appealed & the appeal remains undetermined. The
same parties brought another action against Deshler
in trover for the corn replevined at Lockport, which
suit is being defended for Mr Deshler, by

John Gausson Esq. & the same has not yet been tried. I do not know that any unnecessary delay has transpired in the prosecution of any of these actions. Paul & Keymours first suit was commenced in the spring or early summer of 1861. The other in September or Oct. 1861. When Mr. Deshler & myself went to replenish the corn we took a span of horses & carriage & went to Lockport across the country about 25 miles & thence to Rochester by cars. Deshler must have paid to Sheriff of Monroe County for his necessary expenses not chargeable in a taxed bill of costs about sixty dollars. & he is liable to pay his counsel about one hundred dollars more in these cases which is not taxable in bill of costs.

The Plaintiff by his counsel here moved the court to exclude Stephens testimony relating to the costs and expenses incurred by Deshler, on the ground of irrelevancy. The court sustained the objection and excluded said testimony, to which decision the Defendant by his counsel then and there excepted.

The Defendant then produced & read in evidence without objection, a letter from the Plaintiff of which the following is a copy.

Chicago March 5, 1860

John G. Deshler Esq. Dear Sir.

I have not heard the result of

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that com suit or whether there has yet been tried and what the prospects are for a termination. Will you please inform me how matters stand. Our warehouses here are nearly filled with grain and much more in the country than ever before to come forward as soon as it can be shipped. Buffalo need have no fears of famine after navigation opens, and I hope there will be a market for it at fair prices. please inform the result of the suit.

Yours Respectfully,
E. Bees.

The Defendant further to maintain the issues on his part, produced and read in evidence the Depositions of David W. Tuttle, Silas H. Gish, Jason Parker, Frederick W. Patterson, John B. Griffen, Albert Sherwood, Elias Reed, George S. Hazard, Henry J. Jav, John Davagh and George C. White, who testified as follows in answer to the Interrogatories herein set forth. The answers of said witnesses to each Interrogatory are here thrown together for more convenient reference; the counsel for Plaintiff & Defendant thereto consenting.

Interrogatory 1.

What is your name age & residence. How long have you lived in Buffalo. What are your present & former occupations, & how long engaged therein?

26. David.
N. Tuttle.
Silas H.
Fish.
Jason
Dacker.

Age 55. Residence Buffalo about 14 years. Commission
merchant 14 yrs. & in similar business before coming here.
Age 44. Resided at Buffalo last 15 yrs. During that
time Grain dealer & Commission Merchant about fifteen yrs.
Age 48. I've lived in Buffalo 25 years last Aug.
since 1846, have been engaged in, and given my personal
attention principally to, the Commission business.

Frederick W.
Patterson

Age 52. Resided for 13 years past in Buffalo My
occupation has always been that of Produce & commission
merchant.

John B.
Griffon,

Age 33. Resided in Buffalo last seven years. Have
been a produce & commission merchant for fifteen
years.

Albert
Shewood.

Age 46. Resided at Buffalo 7 1/2 years. I am &
have been for seven & a half years, a Produce & com-
mission merchant.

Elias
Weed.

Age 55. Resided in Buffalo since fall of 1845.
My present occupation is Produce & commission
business & has been up to fall of 1865 from 1845 in the
city of Buffalo.

Henry Saw

Age 66. Residence Buffalo, & have ^{been} resided mostly
since 1816, except ten years & eight of them in this
county. Occupation that of commission merchant
since 1835.

George S
Hazard.

Age 52. Residence Buffalo nearly fifteen years.
During my residence in Buffalo and previously, my
occupation is & has been that of Produce & commission
merchant.

John
Darragh.

Age 46. Residence Buffalo for last fifteen years.
Occupation, Commission merchant. He has been en-
gaged either as proprietor or Employee, as Forwarding
& commission merchant for past fifteen years.

Interrogatory 2.

Are you acquainted with the customs & usages of trade
among commission merchants in Buffalo as they
were Sept. 18, 1865 & prior thereto with regard to
sales on commission especially of corn & other grain?

If you are state generally yr. means of knowledge,
how long you've been familiar with said customs,
amt. of business done under yr. observation &c.

David S.
Yutko.

I am acquainted therewith from my own experience.
Have been familiar with such customs ever since
I've been in Buffalo. My own individual business
has been from \$50000 to \$200000 a year during the
forteen years past.

Silas
H. Fish.

I am acquainted with such customs from my expe-
rience in the business. Have been familiar ever since
I've been in business on the Dock. amt done under
my observation has been two or three millions bushels
annually, in wh. I've been interested as buyer or seller
besides my knowledge of genl. transactions on the Dock.

Jason
Parker.

I am acquainted fr. my experience in buying &
selling daily in this city. Have been familiar
with such customs since 1846. My own sales have
averaged from \$50000 to \$100000 yearly. For

last few years, more than that. Have been familiar with most of the transactions on the Dock in edacity, (except private sales) during this period.

Fredrick W.
Peterson.

Yes - from almost daily transactions on the Dock for past 13 years. My own business done under my observation, has been fr. \$50000 to \$120000 annually. Have been cognizant of the genl. business on the Dock.

John B
Griffen.

Yes - from purchase & sale of produce during last 15 years. Have been familiar with such customs ever since I've been in the business. My own personal business has ranged from \$100000 to \$300000 per annum. Besides I've had a genl. observation of nearly all the large transactions on the Dock.

Albert
Sherwood.

Yes - from my observation & experience I've been familiar with such customs, over seven years. The business I've done myself has been from \$100000 to \$200000 annually, besides genl. observation of business on the Dock.

Elias Weed.

Have been acquainted with such customs ever since I came to Buffalo (1845) up to Sept. 1860 from my experience & observation. During twelve years of that time I've done myself from \$100000 to \$150000 business annually. besides genl. acquaintance with business done on the Dock.

Henry Dan.

Yes - from my experience in the business. Have been familiar with them since I began (1835) My own business has varied from \$500000 to \$1000000 annu.

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George D.
Hazard.

ally. I've also observed generally business on the Dock. Yes - from my personal transactions & those of others. Been familiar with such customs 15 years. Business done under my observation amounts to ^{many} millions in a single season. My own business has been from \$100,000 to \$300,000 a year.

John
Danagh.

Yes - from having had transactions of this kind with business men on the Dock. Have been familiar with such customs from twelve to fifteen years. Amount of business done under my observation has been several millions of Dollars.

Interrogatory B.

When sales were made to buyers of good standing, what was the genl usage as to payment. State whether the usage was to demand payt. on or before delivery, or to deliver the grain &c. to such buyer first. If the latter, what was the usual time allowed by the seller after delivery (in the absence of special agreement) before sending in his bill.

David A.
Luttle.

The genl usage was to deliver the property before payt. I desire to say that I've been more of a buyer than seller. So far as my knowledge extends, the buyer of grain (except in case of special agreement) never pays for grain until after delivery. The usual time before bill is sent in is from one to three days after delivery. On past^{er} transactions when payt was desired on day of sale, it was on special request, for the accomodation of seller.

Lilas McFisk The usage was to deliver grain before payt. usual time after delivery for sending in bill was from one to three days; the payment was then expected & not before (that is in absence of special agreement.)

Jason Parkus The custom is & was to give an order on elevator where the grain is stored. The buyer takes possession of grain or loads it & about the second day bill is sent in for payt. This is the uniform manner of our-king sales, except in case of special agreement. usual time for demanding payt is from one to three days. Sometimes it runs along from or five days. We consider it due the second day after sale.

H. W. Patterson. It was the usage to deliver the grain before payt. was required. The usual time allowed by seller before present-ing bill was from one to three days.

Ans. B. Griffen. It was the usual custom to demand payt. from one to five days after delivery, where there was no special a-greement.

Albert Sherman. When sales were made to persons in good standing payt was not dem anded before delivery in any case that ever came to my knowledge. Usual time for demanding payt- was from one to three days, an average of two days.

Elias Weed The genl usage as to payt was that Bill for grain was sent in from two to three days after. This was in case of cash sales to buyers in good standing. The grain was delivered in most every case before payt was demanded.

- W. Henry Saw. Genl. usage was to deliver grain first and payt was made when the bill was presented. Usual time for presenting bill, after delivery was from one to three days, when there was no special agreement.
- George S. Howard. Genl. usage was to deliver the grain before demanding pay for it. Usual time allowed by seller before sending bill was from one to three days.
- John Darragh. Genl. usage was to send in bills from one to three days after delivery of property. usage was not to demand payt. before delivery of the grain, but payt was demanded when one sent in Bills. usual time after delivery was from one to three days.

Interrogatory 4.

What is the meaning of a "sale for cash" or a "cash sale" according to the usage & understanding of commission merchants in Buffalo. Whether or not on a "cash sale" to a buyer on good credit the purchase money was usually demanded on or before delivery? — The plaintiff by his attorney objected to all testimony relating to the custom or usage as to the sales in Buffalo market which go to explain the meaning of the term "cash" or "sale for cash" upon the ground that the cow in controversy had not been sold according to such usage or custom, and because the usage to allow a credit upon a cash sale is fraudulent and illegal.

The court overruled the objection and allowed the testimony to go to the jury.

In a conversation with the counsel upon the argument as to the admissibility of this evidence, the Court decided it to be admissible but stated,

"It would take pretty strong evidence to satisfy me that such a custom existed. If they could show a seller might wait three days on a cash sale he might wait three years."

The reading of said witnesses Depositions was then continued, their testimony being as follows.

David K.
Luthe.

The meaning is when a sale is made to deliver the order for the grain when purchaser calls for it, & to present bill for payt. for one to three days after delivery of grain. The purchase money was never required until after delivery except in cases of special agreement.

Silas H.
Fisk.

The meaning is, upon a cash sale of grain, the seller delivers to purchaser an order for the grain, with a clause in it "subject to my order until paid for". on wh. order purchaser takes the grain & in from 1 to 3 days the seller sends in his bill for payt, & purchase money is not demanded until after delivery.

Bazon
Parker.

The property is delivered & Bill sent in for payt from one to three days thereafter, what I mean by delivery is — we give buyer an order on Elevator in which is usually inserted the clause "subject to my order till paid for." On this order the buyer

loads the property & gets his Bkt, on wh. he usually obtains an advance, with wh. he usually pays for the property. In case of "Cash sale" to buyer in good credit, purchase money was not usually demanded on or before delivery.

J. W. Patterson

A "sale for cash" or "cash sale" means that a sale is made for cash to be paid from one to three days after delivery. On a cash sale to a buyer in good standing the purchase money is never demanded before delivery to my knowledge, but bill is sent in for payt in accordance with this custom.

Jno. B. Giffen

A "Cash sale" is when there's no stipulation as to time of payt. An order for grain is held subject to request of purchaser, and after sale is made from one to five days the Bill is presented & payt required.

Albert Shewood

A "cash sale" would be a sale collectable in form one to three days at the option of the seller. In case of cash sale to buyer in good standing, a demand for payt was never made before delivery to my knowledge.

Elias Weed

The meaning was - where we sold, gave an order to deliver the grain & sent in Bill for payment from two to three days afterwards. An "cash sale" payt. was not demanded before delivery of the grain.

Henry Daw

A "Cash sale" is where seller gave to buyer an order on Elevator or vessel for the property. Buyer got the propy. on the order & in from one to three days

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after, seller sent in Bill for paymt, & the purchase money was not demanded until after delivery.

George A.
Hazard.

A "Cash sale" is where property is delivered in the usual way and paid for in three days. On a cash sale, to a purchaser in good credit the purchase money was never demanded before delivery. If any difference exists it is where purchaser voluntarily offers to pay before delivery & it is not unfrequent that the seller asks paymt. as a matter of accomodation, particularly if he is hard up. Whenever money is paid before delivery, it is the effect of a special agreement.

John
Darragh.

In case of a contract of sale of corn or grain for cash payment was expected to be made, after delivery, in from one to three days where the purchaser was of good standing. The purchase money was not usually demanded on such "cash sale" until after delivery, from one to three days.

Interrogatory 5.

State particularly how long the usage as to sales in Buffalo has been what you describe. How generally known & acted upon. How commonly were sales made in reference to such usage &c.

David A.
Luthe.

This usage has prevailed in Buffalo for the past 14 yrs. I dont know how much longer. It is very generally known & acted upon. Sales were made with reference to this usage daily. I think all sales are so, to buyers in good standing.

Silas H.
Fish.

This usage has existed ever since I have lived in Buffalo. I don't know how much longer. It was universally known & acted on by Dealers on the Dock so far as I know, and sales were universally made in reference to such usage.

James
Parker.

This usage has existed ever since I've been on the Dock. It is known & acted on by every dealer and sales are & were made in reference to this usage, as frequently as sales were made, except on special agreement. The great bulk of sales in Buffalo, are made in accordance with this usage.

J. W. Patterson.

This usage has been as I've described it for thirteen years, before which time I knew nothing about it. This usage is universally known & acted upon & sales are uniformly made with reference to it.

Geo. B. Giffen.

This usage has been as I've described ever since my experience here. Since spring of 1855 to present time. It is known & acted on by all Prod. & Com. Merchants on the Dock. Sales were made in reference to such usage daily.

Albert
Sherwood.

This usage has been as I've described it ever since I've been in Buffalo. This custom is universally known & acted upon on the Dock. I know of no exceptions. Sales are daily & always made in reference to it.

Elias Hall.

The usage has been in existence ever since I've been in Buffalo. It is generally known by all dealers in produce on the Dock here & acted upon in 999 cases out

of a thousand. This applies to cash sales to buyers in good credit. Sales were uniformly made in reference to such usage.

Henry Daw.

The usage as I have described it has existed ever since I have been in business on the Dock. I am the oldest commission merchant in this city. This usage is uniformly known and acted upon, & whenever sales are made they are in reference thereto as far as I remember.

George
Hazard.

This usage as to sales has existed ever since I have been in Buffalo, & how much longer I don't know. It is very generally known and acted upon among Dealers in Produce. I may say universally sales are made in reference to such usage uniformly.

John
Dawagh

The usages, I have described have existed in Buffalo as far back as my knowledge extends. This custom among houses of good standing was universal, and was recognized as a great custom among merchants here. Sales were made in reference to such usage whenever any sales were made to persons in good standing.

Interrogatory 6 & 7.

Do you know Abram, L. Giffen? If you do, state how long you have known him, how well you have known him, & in what business relations. State how long he has been in business in Buffalo. State what you know of his standing among business men (especially among commission merchants in Buffalo). before

& up to September 18th 1860. whether or not you have sold to him or done business with him. If you have state generally in what manner.

David A.
Luttle.

I have known Abram L. Griffen for five or six years more as a buyer than a seller. His business has been principally buying for Eastern Parties. I've known him pretty well. He has been in business in Buffalo five or six years. His credit and standing up to Sept 18. 1860 was very good so far as I was acquainted. I think I have sold to him but do not remember ^{any} particular transactions previous to Sept 18. 1860.

Silas A.
Fish.

I have known him since 1854, mainly as a buyer of grain, & since 1860 as a forwarder. Think he has been in business since 1855. I have known him quite well, having had frequent transactions prior to 1860. Now Griffen had the reputation of an upright man, sound financially. His credit & standing were good. I have done business with him & sold him grain. Did so during 1860. Delivered him the order for grain, waited for him to take it & sent in bill from out to three days afterwards, in accordance with the customs described. Remember no departure from these customs, in any of these transactions.

Jason
Parker

I've known Abram L. Griffen ever since he came to Buffalo; in my business relations & had frequent transactions with him. He has been in business,

in Buffalo since 1856 I think. I never heard anything against his credit or good standing before Sept. 18. 1860 I have sold to him, & done business with him. I think I sold him on or about the 18th Sept. 1860 a load load of corn. I sold to him in the usual manner as I have described. Think I've sold him every year since he has been here, in the same manner.

F. W. Bottusson.

I've known Abram L. Griffen probably as a buyer of grain, for five or six years. He has been in business here ever since I've known him. His credit & standing were good so far as I know. I have had frequent business transactions with him. I sold to him in accordance with this general custom as I have stated it. ^{think I sold him wheat in 1860}

Ans. B. Griffen.

I've known A. L. Griffen 10. or 12 yrs. First as a measure in Albany, since as a com. merchant in Buffalo. He was here in business when I came. Have known him quite well as a business man. His credit up to Sept. 18. 1860 was fair. I don't recollect selling to him. I may have done so.

Albert Sheppard

I have known Abram L. Griffen fully five years, as I know other houses on the Dock. I have often had dealings with him. He was quite a large buyer. He has been in business here in Buffalo, during five years as near as I recollect. His credit and standing up to Sept. 1860 were regarded as very good. I have made frequent sales to him in the usual manner, & on the usual terms. I sold to him in accordance with the custom in

29. 61

the summer of 1860.

Elias Weed.

I've known A. S. Griffen very well for past five years as a buyer of grain on the Dock. I never heard his credit & standing doubted up to Sept 1860. I feel confident in saying that commission merchants here did not hesitate to sell him in the usual manner of making cash sales. He was quite a large buyer. I've frequently sold to him & done business with him. I have sold him both flour & grain in this same manner, & he has always pd. me.

Henry Daw.

I've known Abram S. Griffen in the shipping & comm. business on the Dock some few years, ever since he has lived here. I do not know about his credit & standing on the Dock particularly except as far as I know he had the reputation of paying for what he bought, up to Sept 1860. I may have sold him some, but do not remember any particular transaction.

George S. Hoagad.

I have known A. S. Griffen 3 to 5 yrs by repeated business transactions with him, & seeing him on the Dock from day to day. He has been engaged in the Produce business here 3 to 5 yrs. (7) Up to Sept 18. 1860 he stood well as a fair & honorable dealing man, I've sold quite large amts. of grain & flour to him in the customary way of selling to others. (8) I have been in the habit of selling to him more or less in the business season, I am quite sure I sold him partly in Sept. 1860. I can't call to mind any particular transaction, they were very frequent & of uniform character. I generally

sent in bill in the usual time, & he was usually as prompt as our best business men. He has always paid me in every instance.

John
Darragh.

I've known A. L. Griffen some six years as an operator on the dock. I've known him well & had frequent transactions with him, in the business of commission merchant. (7) His credit & standing up to & before Sept 18. 1860 were good. Deabler sold him corn on the 6th, 8th, & 11th of Sept. 1860, for wh. he paid in the usual custom. These purchases amounted to upwards of 5000 bush. The bills were presented in usual time after purchase, to wh. he responded & paid. I think that occasionally during the season of 1860 we were selling to him in this way, but I do not now recollect any particular transactions.

Deposition of George C. White.

Age 55. I've lived at Buffalo 26 yrs. Have been in Banking business during all that time. I am, & have been nearly 20 yrs. Pres. of White Bank of Buffalo. I've known A. L. Griffen quite intimately in business relations during five or six years. I've known him as a depositor & customer of White's Bank & in discounting & negotiating papers. I have lent him money. His credit and standing among business men was good up to Sept 18. 1860 - also with Com^{rs} Merchts. so far as I know. I have at White Bk. discounted paper for Mr. Griffen on his

personal security. & discounted Lfts. drawn by him
on Com^r in Albany N.Y.

I have trusted him otherwise in business I rec-
ollect discounting Lfts for him along in the summer
& up to September 1860. to a large amt. I shd. think
to the amt of from one to two hundred thousands. I
cant state any particular transactions, they were
of almost daily occurrence. Very frequently I dis-
counted his Lfts, in this season of 1860, without
taking his bills of Lading as security.

(signed.)

George C. White.

Interrogatory 10.

State the usual method of selling grain in
Buffalo. whether it is by sample or by grades,
whether or not there is any genl. system of grain
Inspection by Public Inspectors. If so, describe it.

David N.
Tuttle.

It is the custom to buy grain in Buffalo by sam-
ple, the purchaser examines it on delivery, & if it does
not correspond with sample, he rejects it. There is no
genl. system of grain Inspection by Public Inspectors.

Jason Parkw.

The usual method of selling grain in Buffalo is by
sample. There is no genl. system of Inspection.
There was an attempt to get up such a system, sev-
ers. ago, but it failed.

Elias Reed.

The usual method is by sample. Purchaser takes the
sample & examines the cargo which it represents in
the Elevator. There was an Inspector of Wheat

appointed here sev. years ago, but he has never been used to any extent since. There is no genl system of Public Inspectors.

Henry Daw.

The usual method is by sample. There is no genl system of grain inspection on the Dock, that I know of. There was an effort made to establish one but it failed.

George S. Hazard.

The usual method is by sample. There is no genl system of grain inspection. It is considered the buyer will examine the grain either before or at delivery, & if it is not as good as sample he rejects it.

John Darragh.

The usual method was as follows. It is the custom to keep samples of grain in our office. Purchaser generally buys by that sample, subject to examination of the parcel wh. it represents in the Elevator, or while running into canal boat while delivering. We have a wheat Inspector on the Dock, but his services are not generally called for. That is the only general system there is.

Interrogatory 11.

State the usual method of storing grain in Buffalo whether the grain of diff. parties is mixed or kept separate. Do the orders of Com. Merchts. usually call for certain specific grain or only for a part^{ty} quality. Does the Depositor commonly receive back the same grain he puts in, or only an equal amt. of the same kind.

David N. Little.

The grain of diff. parties is usually stored separate

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The orders of Com^m merch^{ts} usually call for specific cargoes, & Depositor receives back the same grain he puts in.

Jason Parker.

The usual method is to keep it separate as far as I know. The orders of com^m merch^{ts} usually call for grain from specific cargoes, & Depositor receives back the same grain he puts in so far as I know.

Elias Mad.

As a gen^l thing, when a cargo of wheat comes here, they try to keep it separate, but when bins are not full, & there's not suff^t storage another cargo of same quality is sometimes put in. Orders for grain are given for a specific cargo. Depositor expects to receive back the same grain & I think they usually do.

Henry Saw.

The usual method is to keep the grain of diff^t parties in separate bins. Orders of com. merch^{ts} usually call for grain from some specific cargo & Depositor usually receive back the same grain.

George S. Hazard.

The usual method is to keep the grain of diff^t parties separate, & orders call for specific cargoes. Depositor receives the same grain he puts in the Elevator.

John Canagh.

Each cargo is kept separate as far as practicable. Sometimes when a bin is partly full & no room in Elevator, a cargo is put in of same grade. The usual orders call for specific cargoes or parts. I cannot tell whether Depositor receives back the same grain, or equal amt of the same grade, Commonly

Interrogatory 12

If you say that sales of grain are usually made by sample, state whether or not commonly require delivery before payt. to satisfy themselves as to quality of the grain, & how it compares with the sample.

David N
Guttle.

The buyer requires the delivery before payt. in order to see that he gets the same grain as the sample, & also because the seller is not entitled to his money before delivery, according to the customs of the trade.

Jason
Parker.

Sometimes buyers go & examine cargo before it is put in boat, & sometimes while it is being spotted. One of the reasons why buyers require delivery before payt. is to determine whether the grain compares with sample.

Elias Weed.

Payt. is not usually required until after delivery for other reasons than those stated in the Interrogatory.

Henry Dow.

Some do, & some do not, for such purposes.

Gen. S. Hazard.

The buyer does not require delivery before payt. for that purpose. He generally examines the grain before. There are exceptions where the buyer without examination has the grain run into his boat & finding that it does not agree with sample he rejects it.

John Danagh

They do.

Interrogatory 13.

State whether or not orders for grain are frequently given to buyers in wh. the cost to be paid by him is not

45. 67

exactly fixed. It so state the circumstances under wh. they are usually given & what conditions of parties, means of transportation &c may render the same necessary.

David N
Luthe

Orders for grain are frequently given in which the amount is not precisely fixed. The reason is that the Purchaser does not always know the amount his boat will carry.

Jason
Parker.

Sometimes, but seldom orders are given in wh. the amount is not filled in. Sometimes Purchasers want to fill a particular boat & the amt it will hold is not known. In that case we give an order for a boat load.

Elias Mead.

Occasionally orders are given for an indefinite amt. of grain. Reason is, that buyer cannot tell, some- times, on what particular boat grain is going to be shipped.

Henry Daw.

Orders are frequently given for an indefinite amt. because of the indefinite tonnage of the boats, & because buyers may not know what particular boat he may get.

Ben. S. Hazard.

Such orders are frequently given. We give orders for a canal boat load more or less - when the buyer does not know the exact amount his boat will carry.

John
Danagh.

Orders are frequently given to buyers for grain in which the amt to be rec^d is not exactly fixed - when capacity of the boat in wh. it is intended to be

shipped is not exactly known to Purchaser, sometimes for remnants of cargoes, where the amount is not known.

The plaintiff further to maintain the issues on his part recalled as a witness Joseph H. Tiffany, who testified as follows. "I bought the corn of the Potomac's cargo by order of plaintiff. I know that plaintiff owed it, because I bought it for him and got the money from him. I never knew any body else in this transaction.

When a cargo is consigned and is sold in parcels we generally take the charges from the proceeds of the first sale - such is the custom generally with commission merchants, as I understand it. I don't know of my own knowledge what the custom of the Buffalo market in this respect is.

The plaintiff then recalled James VanBuren, who testified as follows.

It is usual in Buffalo, when grain is sold in parcels as in this instance, to take the charges out of the proceeds of the first sale - such has been my experience.

I don't know of any such custom as to cash sales in the Buffalo market as has been sworn to by depts. witnesses. I never heard of any such custom when I have bought grain in Buffalo. I have paid for it on delivery - sometimes the bill has not been sent in until the next day -

47. 69
I never heard before that a sale for cash meant that the buyer should have three or four days in which to pay for his grain.

Above is given all the testimony which was offered by either party at the trial of this cause.

The court then gave to the jury on behalf of the Plaintiff and at his request the following Instructions numbered respectively one to nine inclusive.

Number One.

If the jury believe from the evidence that the Defendant sold the corn in question for cash on delivery & without giving any credit to Giffen, it was his duty to obtain the pay for ^{the} corn before he allowed it to go beyond his control. This is so unless by a usage & custom among commission merchants in Buffalo general & uniform - among such merchants & of long standing, that a sale for cash means a credit of the time stated by the witnesses for the Defendant, & the Defendant sold the corn with reference to said custom and not for cash ^{on} delivery.

Number Two.

The jury are instructed that admissions made by a

58. 70
party to a suit while testifying under the solemnities of an oath, are entitled to more weight than admissions made in the ordinary course of business and are the highest character of testimony.

Number Three.

If the jury shall believe from the evidence, that the Defendant sold the corn to Griffen by special agreement for cash to be paid for on delivery, & that through any negligence or carelessness on the part of the Defendant Griffen was allowed to get possession of & remove the corn without paying for it, then the law is for the plaintiff.

Number Four.

The law holds a consignee in the conduct of the business of the consignor to the same degree of care & diligence which a prudent man would exercise in the management of his own business.

Number Five.

If the jury shall believe from the evidence, that the Defendant sold the corn to Griffen for cash, & that afterwards, he replevied the corn from Griffen, & sold it again, & that Griffen got possession of the corn, through the fault or negligence of Defd. & thereby involved the Defendant in a controversy with the parties to whom he pledged it, then the Defendant

must account to the Plaintiff, for the proceeds of this second sale.

Number Six.

If the jury believe from the evidence that the plaintiff consigned the corn in question to the Defendant to be sold on his account, & that the Defendant has sold the corn & received the pay for it & failed & refused to account for the same, they will find for the Plaintiff.

Number Seven.

If the jury shall believe from the evidence that the Defendant upon the first sale sold the corn to Griffen to be specially paid for in cash on delivery & that afterwards as a matter of favor to Griffen he allowed him to take and keep possession of the same for 2 or 3 days without paying for it, he did so at his own risk & the law is for the plaintiff.

Number Eight.

If the jury believe from the evidence that the Defendant sold the corn in question for cash to be paid for on delivery, not intending it as a sale to be paid in three or four days according to the usage claimed to exist then the testimony of the Defendants witnesses relative to the custom of the Buffalo market has no application to case on trial.

50. 72
Number Nine.

If the jury believe from the evidence that the Defendant sold the corn to Griffen for cash, & it was agreed to be paid for on delivery - and that when the corn was delivered to Griffen, he was solvent and responsible - then it was the duty of the Defendant to collect the money on its delivery - and if they further believe from the evidence he neglected so to do and between the delivery of the corn & the time of the attempt by the Dfdt. to collect his pay for the same, the said Griffen became unable to pay for the same, & thereby the corn became lost to the Plaintiff, then the law is for the Plaintiff.

To the giving of each and every one of which instructions respectively the counsel for the Defendant then and there excepted, as the same were severally given.

The counsel for the Defendant then requested the court to give the Jury the following instruction, viz:
"If the Defendant is liable at all in this action, it must be on one of two grounds - Either on account of the sale to Griffen, or on account of his having received the money for the corn.

But the Defendant is not liable on account of the sale to Griffen, unless the jury find from the evidence that the sale was made contrary to the general

& uniform usage then prevailing at Buffalo or that Griffen was not at that time in good credit; nor is Defendant liable at all on this ground if the jury find from the evidence that the Plaintiff has ratified such sale, & Defendant is not liable in this suit for the money received unless the Jury find from the evidence that when this suit was commenced all suits between Defendant and parties in New York, as to the ownership of said corn had been decided in Defendant's favor, or that it was his fault that they had not been so decided."

The court refused to give said Instruction as requested, but struck out the latter clause thereof, commencing with the words "Defendant is not liable in this suit for the money received unless the Jury find" &c, & ^{then} gave the Jury the remainder of said Instruction. & the counsel for the Defendant to the refusal of the court to give said Instruction as requested, and to the giving of said Instruction as the same was altered by the court did then and there except.

The counsel for Defendant then requested the court to give the Jury the following Instruction.

If the Jury find from the evidence that Defendant was retained by Plaintiff or Plaintiff's agent by letter or by any other writing to sell the corn in question, then the Plaintiff to succeed in

52. 74
this suit must produce such letter or writing, or account for its loss, & if the jury further find that he has not done either, they will find for Defendant.

The court refused so to instruct the jury to which decision the counsel for Defendant then and there excepted.

The counsel for Defendant then requested the court, to give the jury the following instruction.

The jury are instructed that the Plaintiff cannot recover under the 1st count in his Declaration without proving a sale and request to pay.

Nor under the 2d count without proving a request for an account.

Nor under the 3d count without proving receipt of the money by the Defendant and that the transaction is closed, or that it is by Defendant's fault that it is not closed.

Nor under the 4th Count without proving a restraint to sell for cash and that Defendant sold otherwise than for cash.

The court refused so to instruct the jury, to which decision the counsel for Defendant then and there excepted.

The counsel for the Defendant then requested the court to give to the jury the following instructions.

A. Actor - such as the Defendant in this suit - has a right to sell for credit, unless restrained

by express instructions from his principal or by the usage of trade, & the burden of Proof is on the Plaintiff to show that such Instructions were given, & that a usage not to sell for credit existed ~~at~~ Buffalo, at the time of the sale.

The court refused so to instruct the jury, to which decision the counsel for the defendant then and there excepted.

The counsel for Defendant then requested the court to give to the jury the following Instruction.

If the jury find from the evidence that Defendant received no specific Instructions, & that he sold the corn to a buyer in good standing, it makes no difference as to his liability, whether the sale is called a "cash sale" or not; & if the sale was made according to the usual usage of trade in Buffalo, then Defendant was not liable on account of such sale.

The Court refused so to instruct the jury to which decision the Counsel for Defendant then and there excepted.

The counsel for Defendant then requested the court to give to the jury, the following Instruction.

If the jury find from the evidence that on Griffin's refusal to pay for the corn bought by him, Defendant immediately replevied the same, & notified the Plaintiff thereof as soon as he could learn that the suit was likely to be defended, & without

54 76
any unreasonable delay, & that Plaintiff made no reply until two months & a half after, that is evidence of acquiescence by the Plaintiff in what had been done by the Defendant.

The court refused so to instruct the Jury, to which decision the counsel for the Defendant then & there excepted.

The court then gave to the Jury on behalf of the Defendant and at his request the following Instructions, numbered respectively, (2) (3) (6) (7) (8) (10) (12) (14) (15) (16) and (17).

No (2)

Unless the Jury believe from the evidence that a demand was made upon the Defendant, by the Plaintiff, previous to the commencement of this suit, or that Defendant delayed an unreasonable time before ^{sending} the Plaintiff a statement of the transaction with Griffen, the Jury will find for the Defendant, or unless he denied his right to the said corn, or the proceeds thereof.

No (5)

If the Jury find from the evidence that Defendant sold the corn according to the settled usage then prevailing in Buffalo, and that the buyer Griffen was then in good credit, then

the Defendant is not liable on account of said sale. This is so, if the jury believe from the evidence that such usage was of long standing, general and uniform.

No (6).

The Plaintiff in this case was bound to take notice of the usage of trade at Buffalo, and if he was in fact ignorant of that usage, it was his own fault, and the Defendant is not responsible on account of his ignorance.

This is so, if such usage was of long standing, general and uniform.

No (7)

The highest degree of care and diligence is not required from a factor, or one selling on Commission as the Defendant was in this case, but only such care as a reasonably prudent man would use in his own business.

No (8)

A Principal such as the Plaintiff in this suit, when fully informed of what has been done by his agent, is bound to dissent in a reasonable time, or he will be held to have ratified whatever was so done. & if the jury find from the evidence in this case that Plaintiff received full information on or before the middle of October 1860 of Defendants acts and remained silent and inactive until January 5th 1861 that was not a reasonable time.

No (10).

A sale is a cash sale, though the bill may not be sent in for two or three days, if no express orders are given by the owner, and such is the established usage of trade at the place where the sale is made & such usage is of long standing, general and uniform.

No. (12)

If the jury find from the evidence, that Defendant, on or about January 5th 1861 sent the letter herein offered dated January 5th 1861 in regard to the corn that forms the subject of this suit, and that Plaintiff received the letter, and did not reply until the 3th of March, and then sent in reply the letter herein offered of that date, this is evidence tending to show an acquiescence by the Plaintiff in what had up to that time been done by the Defendant, if the jury also find from the evidence, that the Plaintiff had been fully informed of the same.

No (14)

If the jury find from the evidence, that the Plaintiff has with full knowledge of all the facts acquiesced in what has been done by the Defendant - And that the questions of ownership between the Defendant and the several New-York claimants as to the corn or its proceeds were not decided in Defendant's favor before

57 79
this suit was begun and that it is not his fault they were not so decided - the Jury will find for the Defendant.

No (15)

If the jury find from the evidence that Plaintiff instructed the Defendant to use his own judgment as to the terms as well as time in selling the corn, and that Defendant sold it according to the prevailing & long established usage in Buffalo, and that Griffin the buyer was then in good credit - & that Defendant used reasonable diligence to secure the corn or its proceeds on Griffin's refusal to pay - and that any suit or suits brought by or against Defendant to recover said corn or its proceeds was (without the Defendants fault) still pending when this suit was begun, the Jury will find for the Defendant.

No (16)

If the jury find from the evidence that Defendant replenished the corn, & after replenishing the corn, sold it a second time & received the money, and that one or more suits in which Defendant was a party, brought to determine the ownership of said corn or its proceeds were pending in New York when this suit was commenced - that the question of ownership was then undetermined and without Defendants fault that it was not so



determined, then the Defendant is not liable in this suit on account of having received such money, if the jury also find from the evidence that Defendant had been guilty of no negligence in the first sale and up to the time of replevying.

No 177

If the jury find from the evidence, the corn about which this suit is brought was owned by Smith & Beers together, and was shipped to the Defendant by Tiffany as consignor, and that the only demand for payment or for an account was made in the name of Smith and Beers jointly, then Plaintiff cannot maintain this suit by himself, and the jury will find for the Defendant.

The jury found a verdict for the Plaintiff, against said Defendant and assessed the Damages at \$4787.78 as follows.

Chicago, May 28th /62
 We the jury find for the Plaintiff in the case
 of Beers vs Damages at four thousand Seven hundred
 and Eighty Seven Dollars and Seventy eight Cents
 \$4787.78
 Richard Burke
 Foreman

Whereupon the counsel for the Defendants moved the court to set aside said verdict and to grant a new trial to the Defendant and filed in this court May 29th 1862 before judgment was entered at said May Term the said motion and the following points in writing in support thereof & gave a copy of the same to Plaintiffs counsel.

1st Because the verdict is contrary to the evidence
 2nd. Because the verdict is contrary to the weight of evidence
 3^d Because the verdict is contrary to the Instructions given by the Court.

4th. Because the verdict is contrary to the Law.

5th. Because the evidence did not sustain the Declaration.

6th. Because the Court erred in giving the Instructions for the Plaintiff.

7th. Because the court erred in refusing Instructions asked by the Defendant.

8th. Because the court erred in modifying Instructions asked by the Defendant.

9th. Because the court erred in permitting improper evidence for the Plaintiff to go to the Jury.

10th Because the Court erred in excluding from the Jury evidence offered by Defendant

11th. Because the court erred in deciding that certain points made by Defendant did not arise in the case, & in excluding them from the Jury.

12. Because the court erred in deciding as matters of Law what should have been left to the jury.
13. Because the court erred in leaving to the jury questions which should have been decided by the court.
14. Because the court erred in expressing an opinion in the course of the trial in the hearing of the jury as to the facts and law in the case without reducing the same to writing as required by the Statute.

The counsel for the Defendant also moved the court that judgment in said cause be arrested & on the day & year aforesaid filed said motion in said court & the following points in writing in support thereof & gave a copy thereof to Plaintiff's Counsel.

1. Because other Parties should have been made Plaintiff in said suit.
2. Because the Prof did not sustain the Declaration.
3. Because the Declaration is insufficient to sustain the verdict.

Said motion for a new trial having afterwards been argued by counsel for the respective parties, the court overruled the same to which decision the counsel for the Defendant then and there excepted.

No disposition was made by the court of said motion in arrest of judgment and the said motion in arrest of judgment never having been called up for disposal by the counsel for either party. The court then caused judgment to be entered against said Defendant for the amount

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of the above named verdict together with costs of suit.

Thereupon the Defendant by his counsel prays the court to sign this his Bill of Exceptions, and the same is accordingly done, and this Bill of exceptions made a part of the Record in this case.

Grant Goodrich *Clk*

State of Illinois }
County of Cook } S.S.

I, Thomas P. Carter Clerk of the Superior Court of Chicago, within and for the County and State aforesaid do hereby Certify that the above and foregoing is a full true and complete transcript of all the pleadings on file, and of all orders, and judgment entered of record in said Court, together with the bill of exceptions in the suit wherein Cyrenus Pees is Plaintiff & John F. Deshler defendant.



In testimony whereof I hereunto subscribe my name, and affix the Seal of said Court, at the City of Chicago in said County this 21st day of February A.D. 1863
Thomas P. Carter Clerk

Assignment of Error

And the said John J. Decker hereby assigns the following errors whereof he complains (1) The court erred in giving the Jury improper Instructions on behalf of the Plaintiff

(2) In refusing correct Instructions prayed by Defendant

(3) In improperly modifying Instructions prayed by Defendant and in giving the same as modified

(4) In admitting improper Evidence on the part of the Plaintiff

(5) In excluding proper Evidence offered by Defendant

(6) In deciding that points made by Defendant did not arise in the case & in excluding them from the Jury

(7) In deciding as matters of law questions which should have been left to the Jury

(8) In leaving to the Jury Questions which should have been decided by the Court

(9) In expressing opinions in the course of the Trial in the hearing of the Jury as to facts & law in the case and without reducing the same to writing

(10) That the verdict was contrary to Evidence

(11) That the verdict was contrary to the Instructions of the Court

(12) That the verdict was contrary to the law

(13) That the Evidence did not sustain the Declaration

(14) The Court erred in overruling Defendants motion for a new trial

(15) The Court erred in causing Judgment to be entered without disposing of Defendants motion in arrest of Judgment

(16) That Judgment was entered for the Plaintiff instead of for the Defendant

Raynor & Reynolds
Attys for Pltff. in Error

100 - 1

John G. Dresher
Cyprus Burs
Record

Filed March 20 1863
L. Seland
clerk.

Fees. \$20.50

Paid by Seland atty
J. R. Caldwell

SUPREME COURT

OF THE STATE OF ILLINOIS.

APRIL TERM, 1863.

JOHN G. DESHLER, <i>Plaintiff in Error,</i> versus CYRENIUS BEERS, <i>Defendant in Error.</i>	}	<i>To the Superior Court of Chicago.</i>
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PAYSON & REYNOLDS, *Attorneys for Plaintiff in Error.*
HOSMER & PECK, *Attorneys for Defendant in Error.*

ABSTRACT OF THE RECORD.

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1

On the 30th day of May, 1861, Cyrenius Beers commenced an action in the Superior Court of Chicago, by foreign attachment, against John G. Deshler, and filed his declaration therein in assumpsit on the 3rd of July, 1861.

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First Count alleges a consignment to defendant as factor, and a promise by him to sell and account in a reasonable time, and to pay over proceeds when reasonably requested; that sales have been made and that such time hath elapsed, yet said defendant, though afterwards requested, hath not yet rendered a just and reasonable account, or paid over the proceeds, etc.

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- 7 *Second Count* alleges a consignment to, and promise by defendant to render an account and pay proceeds to plaintiff when requested; sets forth a request, and failure to account.
- 8 9 10 *Third. Common Counts.* For money had and received, etc.
- 11 *Fourth Count* alleges a retainer to defendant as factor, to sell for cash, promise to sell for cash, and a sale by him otherwise than for cash.
- 15 16 The defendant filed plea of general issue, October 12th, 1861, and plaintiff added similiter thereto.
- 17 And afterwards, on the 27th day of May, A. D. 1862, this cause being called for trial, and issue being joined, it is ordered that a jury come, who after hearing testimony, etc., submit their verdict and say, "We the jury find for said plaintiff, and assess his damages herein against said defendant, at \$4,787.78.
- Thereupon said defendant submits his motions herein for a new trial and in arrest of judgment in said cause.
- 18 And afterwards, on the 22nd day of November, A. D. 1862, said motion for a new trial coming on to be heard, it is considered by the court that the same be overruled, to which ruling defendant then and there excepted.
- Therefore it is considered that said plaintiff recover from said defendant his damages aforesaid, by the jury here found, and also his costs and charges, etc., and sixty days is given to the defendant in which to file
- 19 20 Bill of Exceptions. Said term having afterwards been extended from
21 22 time to time by order of court, with consent of parties, until the 16th day of February, A. D. 1863, at said last mentioned date, said defendant, by Payson & Reynolds, his attorneys, filed herein the following

BILL OF EXCEPTIONS.

- 23 The issues joined in this action came on to be tried before Goodrich, Justice, on the 27th day of May, A. D. 1862.

The plaintiff called as a witness, Joseph H. Tiffany, who testified that he resided in Chicago, and was engaged, in 1860, in the forwarding and commission business. Was during that year plaintiff's agent, and as such

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shipped for him, about August 21st, 1860, to defendant, a cargo of corn by propeller Potomac, being 17,506 bushels, mixed corn, and 4,208 bushels white.

Defendant objected to oral testimony of said shipment as not the best evidence.

Witness said he had no remembrance particularly of any bill of lading in this case, but it was the usual course of dealing between the parties to make and send a bill of lading.

Objection overruled. Testimony admitted, and exception taken.

24 Witness further testified, he had made prior shipments to defendant for plaintiff and for others. Understood the grain was sold for cash. Accounts of sales were always so rendered. Only knew from receiving dispatches that sales were made. Generally drew at sight on being advised of them; may sometimes have drawn on time. Acted as plaintiff's agent during 1860, and had full authority to act as for himself. Had been engaged in forwarding grain to Buffalo for several years. We expect consignees to sell for cash when no special directions are given. Such is my experience. Don't remember particularly about 1860. One time they sold on time and charged for guaranteeing. Intercourse between witness and plaintiff with defendant was by letter, so far as he knew.

Defendant here moved to exclude oral testimony of retainer by plaintiff of defendant, as not the best evidence.

25 Witness then said the corn in question had been shipped in the usual course of business, without any specific instructions, so far as he knew.

Motion overruled, and exception taken.

The plaintiff then read in evidence the following letter:

BUFFALO, Sept. 18, 1860.

C. BEERS, or JOS. TIFFANY:

Gents:—I to-day closed out the Potomac's cargo at 55 for mixed, 56 for white. I held until I thought there would be a change, and then gave it up for the present. The drop on wheat has had its effect on corn buyers. I have some 1300 bushels of Iowa yet on hand; will sell and give you sales of all in a day or two. * * *

Respectfully,

JOHN G. DESILLER.

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26 Plaintiff then called James Van Buren, who testified, that he had resided in Buffalo and had known defendant for seven years past. Had been in transportation business during last four years, and previously in the commission business. Knew the manner of selling grain in Buffalo in 1860. It was sold for cash. Had heard defendant speak of selling the corn now in controversy. The statement was made in court giving testimony in a case with Rawls & Seymour in regard to this corn. The controversy was, whether the corn was sold on time or for cash on delivery. Mr. Deshler said he had given Griffen no time, that he was to respond on delivery of the corn. Griffen claimed that he was to have three or four days time. Mr. Deshler denied this; said he sent in the bill in two or three days, but that Griffen failed to pay.

Witness further testified, that Griffen sold all his corn through him and that he chartered the canal boats for Griffen on which this corn was shipped. Knew John Darragh, who was, in 1860, defendant's confidential clerk, and signed the order to Griffen for this corn. Defendant told witness he wrote the telegram which was sent to stop the corn. Witness was at Lockport about October 1, 1860, and defendant then told him he had sold one boat load, and that the others were in store. Subsequently stated that he had sold the balance.

Plaintiff here rested, and defendant moved the court to instruct the jury that if they believed from the evidence that a bill of lading was given for Potomac's cargo, or that defendant's retainer was in writing, it was their duty, according to law, to find for defendant.

The court in reply stated, that he would instruct the jury as he understood the law, provided defendant was prepared to rest his case at this point, and in discussing the question with defendant's counsel, the court stated he thought the shipment and sale had been proven; that if any special instructions were given to defendant, it was for him to show them.

To these rulings and expressions of opinion, defendant then and there excepted.

28 Defendant then moved that the jury be instructed to find for defendant, on the ground that no demand for an account had been proven.

The court in reply stated, it was not the practice in this State to in-

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struct as in case of a non-suit; but that he would instruct the jury as he understood the law, provided defendant was prepared to rest his case at this point.

To this ruling defendant excepted.

Plaintiff read in evidence, without objection, the following letter :

BUFFALO, Oct. 12th, 1860.

C. BEERS OR J. H. TIFFANY, ESQ., *Chicago* :

Gentlemen—I enclose sales

29	18,436 ⁴⁵ bus. Corn, Cargo Craig, pro.	\$8,261 58
	19,399 " " " Iowa,	8,788 29
	2,877 ³⁷ " " " Danube,	1,273 78

The charge of \$107.05, for general average tax on Propeller Iowa, I hope to get back from the Insurance Companies. So far, they have shown but little disposition to settle.

The sales of Potomac's cargo I am unable to render just now. I have collected and placed to your account the proceeds of 13,157¹⁰ bush. of the cargo sold 14th September.

On the 18th, I telegraphed you of closing the cargo, viz.: 4,238⁴⁷ white, and 4,389⁹ mixed, @ 56 and 55 respectively. For these two parcels the purchaser, A. L. Griffen, of this place, who had, up to this time, borne an unexceptionable character for business integrity and pecuniary resources—*failed to pay*. I therefore replevied the property at Lockport and Rochester; and it is now awaiting a decision, as regards ownership. Parties in New York claim it, on the ground that they have accepted Griffen's drafts made against it. *My position* is, that the corn is yours until paid for by Griffen, as all my orders on vessels and elevators read, "*Subject to my order until paid for.*"

No positive steps have yet been taken by the New York House, owing, perhaps, to the fact that the drafts have not matured.

In the meantime, I have retained counsel, and if our opponents proceed, we shall meet them.

Truly,

JOHN G. DESHLER,
Per J. DARRAGH.

30 Plaintiff again rested, and defendant renewed his last motion, on the ground that no demand for an account had been proven, and that

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said letter did not contain such a refusal as would excuse making a demand.

The Court replied as before, and defendant excepted.

Defendant then read in evidence the following letter, from the plaintiff :

CHICAGO, January 2nd, 1860 (1861.)

JOHN G. DESHLER:

Dear Sir—I have this day drawn on you for three thousand dollars, on that corn sent you last summer. It belonged to Smith and myself, and Smith must have his money; hence this draft. I hope it will be convenient for you to pay it, and oblige

Yours, &c.,

C. BEERS.

(It is admitted that the above letter, and two hereinafter set forth, dated January 5, 1860, and March 5, 1860, should have been dated 1861.)

- 31 Defendant here renewed his previous motion, on the ground that this letter shows the corn belonged to Smith & Beers, and that Beers, alone, could not maintain this action.

The Court replied as before, and defendant excepted.

Defendant then read in evidence the deposition of John Darragh, who testified as follows:

- I am forty-six years of age; have been, during past five years, in forwarding and commission business in Buffalo; know of defendant's having received consignments of corn in which plaintiff claimed an interest.
- 32 The entire amount so received, during 1860, was 62,434³⁹ bushels. It was sold by the defendant in the customary mode of making cash sales. J. H. Tiffany was the shipper of all such corn, except one cargo, which purported, by bill of lading, to be shipped by C. Beers, and for his account. Drafts on account of the same were drawn by "Beers per Tiffany," except one draft for about \$1,000, signed "J. H. Tiffany, Agent." All of this corn has been paid and accounted for by defendant, except 8,628 bushels of the cargo of Propeller Potomac.

From this cargo, defendant, on the evening of September 18, 1860, sold to A. L. Griffen 4,238⁴⁷ bushels white corn at 56 cents, and 4,389⁹ bushels mixed corn at 55 cents per bushel. The Potomac

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reached Buffalo August 27, 1860. The corn was stored in the Hatch Elevator. I drew the orders for said corn sold to Griffen, which were in the usual form. I have not got them in my possession, and I cannot get
33 them. The following is a precise copy of them as they were given :

(No. 1.) BUFFALO, September 18, 1860.

Hatch Elevator :

Deliver to A. L. Griffen, Esq., or order, 4,238 ⁴⁷ bushels white corn, cargo Potomac, subject to my order until paid for.

JOHN G. DESHLER,
Per JOHN DARRAGH.

(No. 2.) BUFFALO, September 18, 1860.

Hatch Elevator :

Deliver to A. L. Griffen, or order, a boat load of corn, or 2,319 ²⁶, Bt. Spangler.

4,384 ⁹, Potomac. Subject to my order until paid for.

JOHN G. DESHLER,
Per JOHN DARRAGH.

(To the reading of said copies in evidence the plaintiff objected. The Court sustained the objection and excluded them. Exception taken.)

The sale was made to Griffen, as I was informed by Deshler at the time, in the usual manner of making cash sales.

(To this testimony plaintiff objected, and the same was excluded.)

Griffen did not pay for said corn when he received the orders, or at any time.

34 September 18, 1860, mixed corn was selling in Buffalo at 54 cents; white corn for about 55 cents. Mixed corn was selling October 1, 1860, for about the same price; I can't tell as to white. Market was not active latter part of September, 1860, but moderate sales were made at 53½ and 54 cents per bushel.

The gross amount of Lake freight, storage, and fire insurance on Potomac's cargo of 21,785 ¹¹ bushels was \$2,139.73. Defendant usually charged for commissions from half a cent to a cent per bushel. On that portion of the cargo sold Griffen,

Amount paid for Lake freight was.....	\$733.37
“ “ for fire insurance	19.40
“ “ for storage.....	107.79
	<hr/>
	\$860.56

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Defendant then read in evidence the following letters, of which copies were attached to said witness' deposition. No objection was made; notice on plaintiff' to produce the originals having been duly served.

EXHIBIT A.

BUFFALO, Aug. 29, 1860.

35 J. H. TIFFANY, Esq.:

Dear Sir—We had a decidedly better feeling here to-day for corn. For past three or four days sales have been made at 48; to-day the market was closed of all offered at 49. It is low, but there is so much that it does not go off readily. The Propeller is in, and corn in store, where it may lay awhile until the market improves. * * *

Respectfully yours,

JOHN G. DESHLER.

EXHIBIT B.

36 This is the same as the letter read in evidence by the plaintiff; dated October 12th, 1860.

EXHIBIT C.

BUFFALO, January 5, 1860 (1861).

37 C. BEERS, Esq.:

Dear Sir—Yours of 2nd received. I cannot pay the draft. The suit in regard to your corn does not come off until 4th Monday of this month, and until that is decided can do nothing. Again, when you were last here I gave you the full market value of your corn, then on hand; and had I then sold, as I had a perfect right to do, there would have been nothing due. If I lose the suit you will be in good luck, if you are not called on to pay me on the corn account, instead of my paying you. My attorneys feel sure of gaining, but the uncertainties of law are great.

I feel perfectly justified in taking above course, when I know you already have in your hands all you would have been entitled to, had I sold as I had a perfect right to do, and as others did—that is at maturity of paper and advances. I hope I may be able to report before long that the suit is decided in our favor, and when I can do so will pay over any balance in my hands, at sight.

Respectfully yours,

JOHN G. DESHLER.

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Defendant then produced and read in evidence the following letter from plaintiff:

CHICAGO, March 5, 1860 (1861.)

47 JOHN G. DESHLER, Esq.

Dear Sir:—I have not heard the result of that corn suit, or whether there has yet been a trial, and what the prospects are for a termination. Will you please inform me how matters stand? Our warehouses here are nearly filled with grain, and much more in the country than ever before, to come forward as soon as it can be shipped. Buffalo need have no fears of famine after navigation opens, and I hope there will be a market for it at fair prices. Please inform me the result of the suit.

Yours, respectfully,

C. BEERS.

EXHIBIT D.

BUFFALO, March 7, 1861.

38 C. BEERS, Esq., *Chicago* :

Dear Sir—Your favor of the 5th is at hand. The suit has been laid over, in consequence of the absence of witnesses, until the third Monday in May. The captains of the boats could not be found when wanted.

Your advice of grain accumulations corresponded with statements from all sections. * * * * *

Truly yours,

JOHN G. DESHLER,

Per JOHN DARRAGH.

39 The witness further testified as follows :

The letter of March 7, 1861, was written in answer to one from plaintiff, dated March 5th, and received March 7th, 1861, and referred to a suit brought by parties in New York to recover the corn sold to A. L. Griffen, which was replevied by Deshler.

(Objection, here made by plaintiff to this testimony, overruled.)

The Propeller spoken of in letter dated August 29, 1860, is the Potomac. The plaintiff was in Buffalo September 3, 1860, and defendant paid him in my presence \$5,025 as an advance on the Potomac's cargo, then in store; and Beers then instructed defendant to use his own judgment in the disposal of said cargo. At the time of its receipt corn was dull, sales having been reported the day previous at 49@50 cents.

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40 The correspondence during 1860, relative to the shipments of the 62,434³⁰ bushels corn above referred to, was carried on between defendant and plaintiff, or his agent, J. H. Tiffany. All accounts of sales were made out "for the account, and at the risk of C. Beers, Esq."

Defendant then read in evidence the deposition of Jacob Williams, Jr., who testified as follows :

41 I reside in Buffalo ; was clerk for defendant in 1860. September 18, 1860, Mr. Deshler requested John Darragh to charge the sale to Griffen ; and the same was charged in Cash Sales memorandum book. I never knew of Griffen paying for this corn. I called on him for payment at Mr. Deshler's request, Sept. 20th, 1860, once before, and once after dinner. Know of Darragh calling on him in relation to it, the same day or the next. I copied and mailed the letters referred to in Darragh's testimony, whereof copies are attached, marked Exhibits A, B, C and D. They were mailed on or about the days they bear date, excepting the one dated January 5, 1860, which was mailed on or about January 5th, 1861.

The defendant next offered in evidence the deposition of Robert H. Stevens, Esq.

(Plaintiff here moved to exclude all parol evidence of the institution and prosecution of suits alleged in said deposition to have been commenced against or by the defendant in New York, and of the object, effect and extent of the suits ; on the ground that it was incompetent so to prove the same in bar of this action.

42 The court decided that defendant might show by parol that suits were pending in New York, in which the corn in dispute was the subject of controversy, and that they had been prosecuted with due diligence ; but not to prove what the actions were, or what the parties claimed, the pleadings, averments or effect of the proceedings, or any judgments rendered therein as a defense to this action. To which ruling defendant then and there excepted.)

Defendant then read in evidence such portions of Stevens' deposition as is consistent with said decision ; the whole being as follows :

I reside in Buffalo ; am a lawyer. I went to Lockport, New York, with

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defendant, Sept. 20, 1860, to overtake the boats supposed to contain the corn sold by defendant to A. L. Griffen. We took a span of horses and carriage, and went across the country—a distance of twenty-five miles. At
 43 Lockport I made out replevin papers; there being two boat loads near there in Erie Canal. Deshler was plaintiff in both cases. Defendants in one case were A. L. Griffen, and Michael Le Roy, boat captain; in the other, Griffen, and P. A. Rouse, boat captain. About midnight Sept. 20, the Kalamazoo, said Le Roy, captain, arrived at Lockport, and sheriff took the corn by virtue of the replevin papers. At daylight next morning canal boat O. D. Rouse, said P. A. Rouse, captain, arrived, and said sheriff took her cargo by same authority. By New York statute the sheriff must retain property in such cases three days, that any third person other than the plaintiff, may put in a claim thereto.

(Plaintiff here moved to exclude said testimony as to New York statute, as not the best evidence. Motion sustained, and exception taken.)

The boats were therefore tied up for the purpose of finding a place to store the corn. Expenses thereof as charged by sheriff, were \$102.
 44 Deshler and myself then went by cars to Rochester, where I made out papers in a third replevin suit, against Griffen, and C. H. Wendt, captain of boat Trowbridge, which contained the balance of the corn. It was replevied the same day, and a like delay occurred as in the other cases, before Deshler got possession.

No defense was put in to this suit, and judgment was rendered soon after in favor of Deshler. The first two suits were defended by Griffen, and were tried January 28th, 1862, and judgment rendered for plaintiff with \$114.74 and \$126.74 costs of suit respectively, which have not been paid.

45 (Plaintiff here waived all objection to said testimony concerning the determination of said replevin suits in Deshler's favor, and the same was read in evidence.)

One James Van Buren brought suit against Deshler, claiming freight on this corn. Judgment was given against him, with \$100 costs, which has not yet been paid.

Rawls & Seymour, commission merchants of New York, having accepted Griffen's drafts against this corn, sued Deshler in trover, in the spring of 1861, for cargo on boat Trowbridge, taken at Rochester. Suit

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was tried in October, 1861, and a verdict rendered against Deshler for over \$2,200 and costs, from which he has appealed. Same parties brought another action in trover, in September, 1861, for the corn replevied at Lockport. This Mr. Deshler is defending by John Ganson, Esq., and the same has not yet been tried. I do not know that any unnecessary delay has transpired in the prosecution of any of these actions. Deshler must have paid sheriff of Monroe county, for his necessary expenses not chargeable in taxed bill of costs, about sixty dollars; and is liable to pay his counsel one hundred dollars more in these cases, not taxable.

(Plaintiff here moved to exclude Stevens' testimony relative to costs and expenses incurred by Deshler, as irrelevant. Motion sustained, and exception taken.)

Defendant then read in evidence, to show the usage of trade in Buffalo in September, 1860, and prior thereto, and also the business standing of A. L. Griffen, the depositions of the following witnesses :

48 *David N. Tuttle.* Age 55. Has been a commission merchant in Buffalo for fourteen years past.

Silas H. Fish. Age 44. Has been a grain dealer and commission merchant in Buffalo during last fifteen years.

Jason Parker. Age 48. Lived in Buffalo last twenty years, and been engaged in commission business since 1846.

F. W. Patterson. Age 52. Resided for thirteen years past in Buffalo. Occupation has always been produce and commission business.

John B. Griffen. Age 33. Has been a commission merchant in Buffalo last seven years.

Albert Sherwood. Age 46. Has been in said business at Buffalo last eight years.

Elias Weed. Age 55. Occupation has been produce and commission business in Buffalo, from 1845 to fall of 1860.

Henry Daw. Age 66. Has resided in Buffalo mostly since 1816, (only two years outside the county,) and been engaged in commission

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business since 1835. Is the commission merchant of longest standing in said city.

George S. Hazard. Age 52. Resided in Buffalo nearly fifteen years. Has been produce and commission merchant during that time and previously.

John Darragh. Age 46. Has been engaged as proprietor or employee in commission business, in Buffalo, for past fifteen years.

- 49 All of said witnesses testified that they were acquainted with the usages of trade among commission merchants in Buffalo, as they were September 18, 1860, and prior thereto, both from their own experience, and from observation of, and familiarity with, the general business of the dock. The personal sales of said witnesses, as commission merchants in Buffalo, taking all together, have averaged more than six millions of dollars per annum.
- 51 52 All of said witnesses testified that when sales were made to buyers of good standing, the general usage was to deliver the property before payment, and to send in bill therefor to the purchaser in from ONE TO THREE DAYS afterwards. (John B. Griffen put the time as from one to five days.) That when payment was made on the day of sale, it was by special agreement and for the accommodation of the seller.
- 53 Said witnesses were interrogated as to the meaning of a "sale for cash" or a "cash sale," according to the usage and understanding of commission merchants in Buffalo.
- (The plaintiff objected to the reading in evidence of their testimony on this point, as irrelevant. The court decided it to be admissible, but remarked to the counsel, during the argument, as to its admissibility:
- 54 "It would take pretty strong evidence to satisfy me that such a custom existed. If they could show a seller might wait three days on a cash sale, he might wait three years.")
- 55 All of said witnesses testified that on a cash sale to a buyer in good credit, it was the custom to give him orders for the grain before payment, (two of the witnesses adding that such orders usually contained the clause, "subject to seller's order until paid for,") and to present the bill for the purchase money in from ONE TO THREE DAYS afterwards. That

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on such sales payment was never made before delivery, except in cases of special agreement.

57 All of said witnesses testified that this custom had existed during their entire experience in Buffalo. That it was universally known and acted upon, and that sales were uniformly made with reference to it.

59 60 All of said witnesses testified that they had known Abram L. Griffen
61 for several years in Buffalo, prior to September, 1860; that he had been a large dealer during that time, and that his credit and business standing were good. That he had the reputation of an upright man, and sound financially.

Most of said witnesses had made frequent sales to him, always in the manner above described, and had always been paid promptly.

62 John Darragh further testified that defendant, Deshler, sold to Griffen in this way occasionally during the season of 1860, and had so sold him corn on the 6th, 8th and 11th of September, 1860, amounting to upwards of 5,000 bushels, for which he paid when the bills were presented, the usual time after the purchases.

Defendant then read the deposition of GEORGE C. WHITE, as follows :

I have lived at Buffalo and been in the banking business during past 26 years. I am, and have been for twenty years, President of White's Bank of Buffalo. I have known A. L. Griffen quite intimately, in business relations, during five or six years. His credit and standing, up to September 18, 1860, were good. I lent him money, and discounted his drafts along in the summer, and up to September, 1860, to a large amount, from one to two hundred thousand dollars. Very frequently on his mere personal security, without taking his bills of lading.

63 In answer to further interrogatories addressed to Messrs. TUTTLE, PARKER, WEED, DOW, HAZARD and DARRAGH, said witnesses testified that it is the custom to sell grain in Buffalo by sample, subject to an examination of the parcel it represents, either at the elevator or while it is running into the canal boat; that no general system of grain inspection exists in said city. That the grain of different parties is usually stored separately, and orders of commission merchants call for grain from specific cargoes, so that depositors commonly receive back the same grain stored by them.

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The plaintiff then re-called Joseph H. Tiffany, who testified that he bought the corn of Potomac's cargo, by order of plaintiff, and knew plaintiff owned it, because he got the money from him. Knew no one else in the transaction. That when a cargo is consigned and sold in parcels, he generally took the charges from proceeds of the first sales. Understood such to be the custom generally with commission merchants, but did not know of his own knowledge the custom of the Buffalo market in this respect.

The plaintiff then re-called James Van Buren, who testified that it is usual in Buffalo, when grain is sold in parcels, to take the charges out of the proceeds of the first sales. Such had been his experience. He did not know of any such custom as to cash sales in the Buffalo market, as had been sworn to by defendant's witnesses; never heard of any such custom. When he bought grain in Buffalo, had paid for it on delivery. Sometimes the bill wasn't sent in until the next day.

Above is given all the testimony offered on either side at said trial.

69

The court then gave to the jury, on behalf of the plaintiff, the following instructions, to each of which defendant excepted:

1. If the jury believe, from the evidence, that the defendant sold the corn in question, for cash on delivery, and without giving any credit to Griffen, it was his duty to obtain the pay for the corn before he allowed it to go beyond his control. This is so, unless, by a usage and custom among commission merchants in Buffalo, general and uniform among such merchants, and of long standing, that a sale for cash means a credit of the time stated by the witnesses for the defendant, and the defendant sold the corn with reference to said custom, and not for cash on delivery.

2. The jury are instructed that admissions made by a party to a suit, while testifying under the solemnities of an oath, are entitled to more weight than admissions made in the ordinary course of business, and are the highest character of testimony.

3. If the jury shall believe, from the evidence, that defendant sold the corn to Griffen by special agreement for cash, to be paid for on delivery, and that through any negligence or carelessness on the part of defendant, Griffen was allowed to get possession of and remove the corn without paying for it, then the law is for the plaintiff.

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4. The law holds a consignee, in the conduct of the business of the consignor, to the same degree of care and diligence which a prudent man would exercise in the management of his own business.

5. If the jury shall believe, from the evidence, that the defendant sold the corn to Griffen, for cash, and that afterwards he replevied the corn from Griffen, and sold it again, and that Griffen got possession of the corn through the fault or negligence of defendant, and thereby involved the defendant in a controversy with the parties to whom he pledged it, then the defendant must account to the plaintiff for the proceeds of this second sale.

6. If the jury believe, from the evidence, that the plaintiff consigned the corn in question to the defendant, to be sold on his account, and that the defendant has sold the corn and received the pay for it, and failed and refused to account for the same, they will find for the plaintiff.

7. If the jury shall believe, from the evidence, that the defendant, upon the first sale, sold the corn to Griffen, to be specially paid for in cash, on delivery, and that afterwards, as a matter of favor to Griffen, he allowed him to take and keep possession of the same for two or three days without paying for it, he did so at his own risk, and the law is for the plaintiff.

8. If the jury believe, from the evidence, that the defendant sold the corn in question, for cash, to be paid for on delivery, not intending it as a sale, to be paid for in three or four days, according to the usage claimed to exist, then the testimony of the defendant's witnesses, relative to the custom of the Buffalo market, has no application to the case on trial.

9. If the jury believe, from the evidence, that the defendant sold the corn to Griffen, for cash, and it was agreed to be paid for on delivery, and that when the corn was delivered to Griffen he was solvent and responsible, then it was the duty of the defendant to collect the money on its delivery; and if they further believe, from the evidence, he neglected so to do, and between the delivery of the corn, and the time of the attempt by the defendant to collect his pay for the same, the said Griffen became unable to pay for the same, and thereby the corn became lost to the plaintiff, then the law is for the plaintiff.

72 Defendant then prayed the following instruction :

If defendant is liable at all in this action, it must be on one of two

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grounds—either on account of the sale to Griffen, or on account of his having received the money for the corn. But defendant is not liable on the first ground, unless the jury find, from the evidence, that the sale was made contrary to the general and uniform usage then prevailing at Buffalo, or that Griffen was not then in good credit; nor is he liable on this ground if the jury find, etc., that plaintiff has ratified such sale.

And defendant is not liable in this suit for the money received, unless the jury find, etc., that when this suit was commenced, all suits between defendant and parties in New York, as to the ownership of said corn, had been decided in defendant's favor, or that it was his fault that they had not been so decided.

The court struck off the latter clause of said instruction, and gave the remainder; and defendant excepted to its refusal to give the same as prayed, and also to the giving of part thereof, after the rest had been stricken off.

Defendant then prayed the following instructions, which were refused, and exceptions taken :

1. If the jury find, from the evidence, that defendant was retained by plaintiff or plaintiff's agent, by letter or other writing, to sell the corn in question; then plaintiff, to succeed, must produce the same, or account for its loss, and if the jury find he has done neither, they will find for defendant.

2. Plaintiff cannot recover under the first count in his declaration, without proving a sale and request to pay. Nor under the second count without proving a request for an account. Nor under the third, without proving receipt of the money by defendant, and that the transaction is closed, or that it is defendant's fault that it is not closed. Nor under the fourth, without proving retainer to sell for cash, and that defendant sold otherwise.

3. A factor, such as the defendant in this suit, has a right to sell for credit, unless restrained by express instructions from his principal, or by the usages of trade; and the burden of proof is on the plaintiff to show that such instructions were given, and that a usage not to sell for credit existed at Buffalo at the time of the sale.

4. If jury, find, etc., that defendant received no specific instructions, and that he sold the corn to a buyer in good standing, it makes no dif-

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ference as to his liability, whether the sale is called a "cash sale" or not; and if the sale was made according to the settled usage of trade in Buffalo, then defendant was not liable on account thereof.

5. If jury find, etc., that on Griffen's refusal to pay for the corn bought by him, defendant immediately replevied the same, and notified the plaintiff thereof as soon as he could learn the suit was likely to be defended, and without any unreasonable delay, and that plaintiff made no reply until two months and a half after, this is evidence of acquiescence by the plaintiff in what had been done by defendant.

76 The court then gave to the jury, on behalf of defendant, the following instructions:

Unless jury believe, etc., that a demand was made on defendant by plaintiff, before commencement of this suit, or that defendant delayed an unreasonable time before sending plaintiff a statement of the transaction with Griffen, jury will find for defendant, or unless he denied his right to said corn or its proceeds.

If, etc., defendant sold the corn according to the settled usage in Buffalo, and the buyer Griffen was then in good credit, defendant is not liable on account of such sale; and if such usage was of long standing, general and uniform.

Plaintiff was bound to take notice of the usage of trade at Buffalo; and if he was in fact ignorant, it was his fault, and defendant is not responsible on account of his ignorance; if such usage was of long standing, general and uniform.

A principal, when fully informed of his agent's acts, must dissent in a reasonable time, or he will be held to have ratified them; and if jury find, etc., in this case, that plaintiff received full information by the middle of October, 1860, of defendant's acts, and remained silent and inactive until January 5, 1861, that was not a reasonable time.

A sale is a cash sale, though bill may not be sent in for two or three days, if no express orders are given by the owner, and such is the established usage of trade at the place where the sale is made, and such usage is of long standing, general and uniform.

If jury find, etc., defendant, January 5th, 1861, sent plaintiff letter

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herein, of that date, in regard to the corn in question, and plaintiff received the letter and did not reply until March 5th, and then sent in reply the letter herein of that date, this tends to show an acquiescence in what had so far been done, if, etc., plaintiff had been fully informed of the same.

If jury find, etc., that plaintiff has, with full knowledge of all the facts, acquiesced in defendant's acts, and that questions of ownership between defendant and the several New York claimants of the corn or its proceeds, were not decided in his favor before this suit was begun, and without defendant's fault, they will find for defendant.

If jury find, etc., that plaintiff instructed defendant to use his own judgment as to terms, as well as time, in selling, and that defendant sold according to the prevailing and long established usage in Buffalo, and that Griffen was then in good credit, and that defendant used reasonable diligence to secure the corn or its proceeds, on Griffen's refusal to pay, and that any suits, by or against defendant, to recover said corn or its proceeds, was (without defendant's fault,) still pending when this suit was begun, they will find for defendant.

If jury find, etc., that defendant replevied the corn, and afterwards sold it a second time, and received the money, and that a suit or suits, in which defendant was a party, brought to determine the ownership of said corn or its proceeds, were pending in New York when this suit was begun and ownership undetermined, without defendant's fault, then defendant is not liable on account of receipt of money, if jury further find that defendant had been guilty of no negligence in the first sale, and up to time of replevying.

If jury find, etc., that corn in question was owned by Smith & Beers, together, and was shipped to defendant by Tiffany, as consignor, and that only demand for payment was in name of Smith & Beers, jointly, then plaintiff cannot maintain this suit by himself, and they will find for defendant.

80 Verdict rendered for plaintiff, for \$4,787.78.

81 Motion for new trial by defendant :

1. Because verdict contrary to evidence.
2. Contrary to weight of evidence.

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3. Contrary to instructions given.
4. Contrary to the law.
5. Evidence did not sustain declaration.
6. Error in plaintiff's instructions.
7. In refusing instructions prayed by defendant.
8. In modifying instructions prayed by defendant.
9. In admitting improper evidence for plaintiff.
10. In excluding evidence offered by defendant.
11. In deciding that points made by defendant did not arise in the case, and in excluding them.
12. In deciding, as matters of law, what should have been left to the jury.
13. In leaving to jury questions which should have been decided by the court.
14. In expressing opinions, in course of the trial, in hearing of the jury, as to facts and law in the case, without reducing them to writing.

Motion in arrest of judgment by defendant:

1. Because other parties should have been made plaintiff in said suit.
2. Proof did not sustain declaration.
3. Declaration insufficient to sustain verdict.

82 Motion for new trial overruled, and exception taken.

Motion in arrest not disposed of. (not called up by either party)

Judgment on verdict.

ASSIGNMENT OF ERRORS.

And the said John G. Deshler hereby assigns the following errors whereof he complains :

1. The court erred in giving to the jury improper instructions on behalf of the plaintiff.
2. In refusing correct instructions prayed by defendant.
3. In improperly modifying instructions prayed by defendant, and in giving the same as modified.
4. In admitting improper evidence on the part of the plaintiff.
5. In excluding proper evidence offered by defendant.
6. In deciding that points made by defendant did not arise in the case, and in excluding them from the jury.
7. In deciding as matters of law questions which should have been left to the jury.
8. In leaving to the jury questions which should have been decided by the court.
9. In expressing opinions in the course of the trial, in the hearing of the jury as to facts and law in the case ; and without reducing the same to writing.
10. That the verdict was contrary to evidence.
11. That the verdict was contrary to the instructions of the court.
12. That the verdict was contrary to the law.
13. That the evidence did not sustain the declaration.
14. The court erred in overruling defendant's motion for a new trial.
15. The court erred in causing judgment to be entered without disposing of defendant's motion in arrest of judgment.
16. That judgment was entered for the plaintiff instead of for the defendant.

PAYSON & REYNOLDS,

Att'ys for Pltff. in Error.

100-1

J. G. Deshler

vs

C. Beers

Abst. Record

Filed Nov. 20
1863

S. Selman, Clk.

S U P R E M E C O U R T

OF THE STATE OF ILLINOIS.

APRIL TERM, 1863.

JOHN G. DESHLER,

Plaintiff in Error,

versus

CYRENIUS BEERS,

Defendant in Error.

To the Superior Court of Chicago.

PAYSON & REYNOLDS, *Attorneys for Plaintiff in Error.*

HOSMER & PECK, *Attorneys for Defendant in Error.*

ABSTRACT OF THE RECORD.

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1

On the 30th day of May, 1861, Cyrenius Beers commenced an action in the Superior Court of Chicago, by foreign attachment, against John G. Deshler, and filed his declaration therein in assumpsit on the 3rd of July, 1861.

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15 16 The defendant filed plea of general issue, October 12th, 1861, and plaintiff added similiter thereto.

17 And afterwards, on the 27th day of May, A. D. 1862, this cause being called for trial, and issue being joined, it is ordered that a jury come, who after hearing testimony, etc., submit their verdict and say, " We the jury find for said plaintiff, and assess his damages herein against said defendant, at \$4,787.78.

Thereupon said defendant submits his motions herein for a new trial and in arrest of judgment in said cause.

18 And afterwards, on the 22nd day of November, A. D. 1862, said motion for a new trial coming on to be heard, it is considered by the court that the same be overruled, to which ruling defendant then and there excepted.

Therefore it is considered that said plaintiff recover from said defendant his damages aforesaid, by the jury here found, and also his costs and charges, etc., and sixty days is given to the defendant in which to file
 19 20 Bill of Exceptions. Said term having afterwards been extended from
 21 22 time to time by order of court, with consent of parties, until the 16th day of February, A. D. 1862, at said last mentioned date, said defendant, by Payson & Reynolds, his attorneys, filed herein the following

BILL OF EXCEPTIONS.

23 The issues joined in this action came on to be tried before Goodrich, Justice, on the 27th day of May, A. D. 1862.

The plaintiff called as a witness, Joseph H. Tiffany, who testified that he resided in Chicago, and was engaged, in 1860, in the forwarding and commission business. Was during that year plaintiff's agent, and as such

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shipped for him, about August 21st, 1860, to defendant, a cargo of corn by propeller Potomac, being 17,506 bushels, mixed corn, and 4,208 bushels white.

Defendant objected to oral testimony of said shipment as not the best evidence.

Witness said he had no remembrance particularly of any bill of lading in this case, but it was the usual course of dealing between the parties to make and send a bill of lading.

Objection overruled. Testimony admitted, and exception taken.


- 24 Witness further testified, he had made prior shipments to defendant for plaintiff and for others. Understood the grain was sold for cash. Accounts of sales were always so rendered. Only knew from receiving dispatches that sales were made. Generally drew at sight on being advised of them; may sometimes have drawn on time. Acted as plaintiff's agent during 1860, and had full authority to act as for himself. Had been engaged in forwarding grain to Buffalo for several years. We expect consignees to sell for cash when no special directions are given. Such is my experience. Don't remember particularly about 1860. One time they sold on time and charged for guaranteeing. Intercourse between witness and plaintiff with defendant was by letter, so far as he knew.

Defendant here moved to exclude oral testimony of retainer by plaintiff of defendant, as not the best evidence.

- 25 Witness then said the corn in question had been shipped in the usual course of business, without any specific instructions, so far as he knew.

Motion overruled, and exception taken.

The plaintiff then read in evidence the following letter :



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26 Plaintiff then called James Van Buren, who testified, that he had resided in Buffalo and had known defendant for seven years past. Had been in transportation business during last four years, and previously in the commission business. Knew the manner of selling grain in Buffalo in 1860. It was sold for cash. Had heard defendant speak of selling the corn now in controversy. The statement was made in court giving testimony in a case with Rawls & Seymour in regard to this corn. The controversy was, whether the corn was sold on time or for cash on delivery. Mr. Deshler said he had given Griffen no time, that he was to respond on delivery of the corn. Griffen claimed that he was to have three or four days time. Mr. Deshler denied this; said he sent in the bill in two or three days, but that Griffen failed to pay.

Witness further testified, that Griffen sold all his corn through him and that he chartered the canal boats for Griffen on which this corn was shipped. Knew John Darragh, who was, in 1860, defendant's confidential clerk, and signed the order to Griffen for this corn. Defendant told witness he wrote the telegram which was sent to stop the corn. Wit-
27 ness was at Lockport about October 1, 1860, and defendant then told him he had sold one boat load, and that the others were in store. Subsequently stated that he had sold the balance.

Plaintiff here rested, and defendant moved the court to instruct the jury that if they believed from the evidence that a bill of lading was given for Potomac's cargo, or that defendant's retainer was in writing, it was their duty, according to law, to find for defendant.

To these rulings and expressions of opinion, defendant then and there excepted.

28 Defendant then moved that the jury be instructed to find for defendant, on the ground that no demand for an account had been proven.

The court in reply stated, it was not the practice in this State to in-

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30 Plaintiff again rested, and defendant renewed his last motion, on the ground that no demand for an account had been proven, and that

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said letter did not contain such a refusal as would excuse making a demand.

The Court replied as before, and defendant excepted.

Defendant then read in evidence the following letter, from the plaintiff :



(It is admitted that the above letter, and two hereinafter set forth, dated January 5, 1860, and March 5, 1860, should have been dated 1861.)

- 31 Defendant here renewed his previous motion, on the ground that this letter shows the corn belonged to Smith & Beers, and that Beers, alone, could not maintain this action.

The Court replied as before, and defendant excepted.

Defendant then read in evidence the deposition of John Darragh, who testified as follows :

- I am forty-six years of age; have been, during past five years, in forwarding and commission business in Buffalo; know of defendant's having received consignments of corn in which plaintiff claimed an interest.
- 32 The entire amount so received, during 1860, was 62,434³⁹ bushels. It was sold by the defendant in the customary mode of making cash sales. J. H. Tiffany was the shipper of all such corn, except one cargo, which purported, by bill of lading, to be shipped by C. Beers, and for his account. Drafts on account of the same were drawn by "Beers per Tiffany," except one draft for about \$1,000, signed "J. H. Tiffany, Agent." All of this corn has been paid and accounted for by defendant, except 8,628 bushels of the cargo of Propeller Potomac.

From this cargo, defendant, on the evening of September 18, 1860, sold to A. L. Griffen 4,238⁴⁷ bushels white corn at 56 cents, and 4,389⁹ bushels mixed corn at 55 cents per bushel. The Potomac

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reached Buffalo August 27, 1860. The corn was stored in the Hatch Elevator. I drew the orders for said corn sold to Griffen, which were in the usual form. I have not got them in my possession, and I cannot get them. The following is a precise copy of them as they were given :

(No. 1.) BUFFALO, September 18, 1860.
Hatch Elevator :
 Deliver to A. L. Griffen, Esq., or order, 4,238 ⁴⁷ bushels white corn, cargo Potomac, subject to my order until paid for.
 JOHN G. DESHLER,
 Per JOHN DARRAGH.

(No. 2.) BUFFALO, September 18, 1860.
Hatch Elevator :
 Deliver to A. L. Griffen, or order, a boat load of corn, or 2,319 ²⁶, Bt. Spangler.
 4,384 ⁹, Potomac. Subject to my order until paid for.
 JOHN G. DESHLER,
 Per JOHN DARRAGH.

(To the reading of said copies in evidence the plaintiff objected. The Court sustained the objection and excluded them. Exception taken.)

The sale was made to Griffen, as I was informed by Deshler at the time, in the usual manner of making cash sales.

(To this testimony plaintiff objected, and the same was excluded.)

Griffen did not pay for said corn when he received the orders, or at any time.

34 September 18, 1860, mixed corn was selling in Buffalo at 54 cents; white corn for about 55 cents. Mixed corn was selling October 1, 1860, for about the same price; I can't tell as to white. Market was not active latter part of September, 1860, but moderate sales were made at 53½ and 54 cents per bushel.

The gross amount of Lake freight, storage, and fire insurance on Potomac's cargo of 21,785 ¹¹ bushels was \$2,139.73. Defendant usually charged for commissions from half a cent to a cent per bushel. On that portion of the cargo sold Griffen,

Amount paid for Lake freight was.....	\$733.37
“ “ for fire insurance	19.40
“ “ for storage.....	107.79
	<hr/>
	\$860.56

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Defendant then read in evidence the following letters, of which copies were attached to said witness' deposition. No objection was made; notice on plaintiff to produce the originals having been duly served.

EXHIBIT A.

BUFFALO, Aug. 29, 1860.

35 J. H. TIFFANY, Esq. :

Dear Sir—We had a decidedly better feeling here to-day for corn. For past three or four days sales have been made at 48; to-day the market was closed of all offered at 49. It is low, but there is so much that it does not go off readily. The Propeller is in, and corn in store, where it may lay awhile until the market improves. * * *

Respectfully yours,

JOHN G. DESHLER.

EXHIBIT B.

36 This is the same as the letter read in evidence by the plaintiff; dated October 12th, 1860.

EXHIBIT C.

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Defendant then produced and read in evidence the following letter from plaintiff:

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39 The witness further testified as follows :

The letter of March 7, 1861, was written in answer to one from plaintiff, dated March 5th, and received March 7th, 1861, and referred to a suit brought by parties in New York to recover the corn sold to A. L. Griffen, which was replevied by Deshler.

(Objection, here made by plaintiff to this testimony, overruled.)

The Propeller spoken of in letter dated August 29, 1860, is the Potomac. The plaintiff was in Buffalo September 3, 1860, and defendant paid him in my presence \$5,025 as an advance on the Potomac's cargo, then in store; and Beers then instructed defendant to use his own judgment in the disposal of said cargo. At the time of its receipt corn was dull, sales having been reported the day previous at 49@50 cents.

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The correspondence during 1860, relative to the shipments of the 62,434³⁹ bushels corn above referred to, was carried on between
 40 defendant and plaintiff, or his agent, J. H. Tiffany. All accounts of sales were made out "for the account, and at the risk of C. Beers, Esq."

Defendant then read in evidence the deposition of Jacob Williams, Jr., who testified as follows :

41 I reside in Buffalo ; was clerk for defendant in 1860. September 18, 1860, Mr. Deshler requested John Darragh to charge the sale to Griffen ; and the same was charged in Cash Sales memorandum book. I never knew of Griffen paying for this corn. I called on him for payment at Mr. Deshler's request, Sept. 20th, 1860, once before, and once after dinner. Know of Darragh calling on him in relation to it, the same day or the next. I copied and mailed the letters referred to in Darragh's testimony, whereof copies are attached, marked Exhibits A, B, C and D. They were mailed on or about the days they bear date, excepting the one dated January 5, 1860, which was mailed on or about January 5th, 1861.

The defendant next offered in evidence the deposition of Robert H. Stevens, Esq.

(Plaintiff here moved to exclude all parol evidence of the institution and prosecution of suits alleged in said deposition to have been commenced against or by the defendant in New York, and of the object, effect and extent of the suits ; on the ground that it was incompetent so to prove the same in bar of this action.

42 The court decided that defendant might show by parol that suits were pending in New York, in which the corn in dispute was the subject of controversy, and that they had been prosecuted with due diligence ; but not to prove what the actions were, or what the parties claimed, the pleadings, averments or effect of the proceedings, or any judgments rendered therein as a defense to this action. To which ruling defendant then and there excepted.)

Defendant then read in evidence such portions of Stevens' deposition as is consistent with said decision ; the whole being as follows :

I reside in Buffalo ; am a lawyer. I went to Lockport, New York, with

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defendant, Sept. 20, 1860, to overtake the boats supposed to contain the corn sold by defendant to A. L. Griffen. We took a span of horses and carriage, and went across the country—a distance of twenty-five miles. At
 43 Lockport I made out replevin papers; there being two boat loads near there in Erie Canal. Deshler was plaintiff in both cases. Defendants in one case were A. L. Griffen, and Michael Le Roy, boat captain; in the other, Griffen, and P. A. Rouse, boat captain. About midnight Sept. 20, the Kalamazoo, said Le Roy, captain, arrived at Lockport, and sheriff took the corn by virtue of the replevin papers. At daylight next morning canal boat O. D. Rouse, said P. A. Rouse, captain, arrived, and said sheriff took her cargo by same authority. By New York statute the sheriff must retain property in such cases three days, that any third person other than the plaintiff, may put in a claim thereto.

(Plaintiff here moved to exclude said testimony as to New York statute, as not the best evidence. Motion sustained, and exception taken.)

The boats were therefore tied up for the purpose of finding a place to store the corn. Expenses thereof as charged by sheriff, were \$102.
 44 Deshler and myself then went by cars to Rochester, where I made out papers in a third replevin suit, against Griffen, and C. H. Wendt, captain of boat Trowbridge, which contained the balance of the corn. It was replevied the same day, and a like delay occurred as in the other cases, before Deshler got possession.

No defense was put in to this suit, and judgment was rendered soon after in favor of Deshler. The first two suits were defended by Griffen, and were tried January 28th, 1862, and judgment rendered for plaintiff with \$114.74 and \$126.74 costs of suit respectively, which have not been paid.

45 (Plaintiff here waived all objection to said testimony concerning the determination of said replevin suits in Deshler's favor, and the same was read in evidence.)

One James Van Buren brought suit against Deshler, claiming freight on this corn. Judgment was given against him, with \$100 costs, which has not yet been paid.

Rawls & Seymour, commission merchants of New York, having accepted Griffen's drafts against this corn, sued Deshler in trover, in the spring of 1861, for cargo on boat Trowbridge, taken at Rochester. Suit

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was tried in October, 1861, and a verdict rendered against Deshler for over \$2,200 and costs, from which he has appealed. Same parties brought another action in trover, in September, 1861, for the corn replevied at Lockport. This Mr. Deshler is defending by John Ganson, Esq., and the same has not yet been tried. I do not know that any unnecessary delay has transpired in the prosecution of any of these actions. Deshler must have paid sheriff of Monroe county, for his necessary expenses not chargeable in taxed bill of costs, about sixty dollars; and is liable to pay his counsel one hundred dollars more in these cases, not taxable.

(Plaintiff here moved to exclude Stevens' testimony relative to costs and expenses incurred by Deshler, as irrelevant. Motion sustained, and exception taken.)

Defendant then read in evidence, to show the usage of trade in Buffalo in September, 1860, and prior thereto, and also the business standing of A. L. Griffen, the depositions of the following witnesses :

48 *David N. Tuttle.* Age 55. Has been a commission merchant in Buffalo for fourteen years past.

Silas H. Fish. Age 44. Has been a grain dealer and commission merchant in Buffalo during last fifteen years.

Jason Parker. Age 48. Lived in Buffalo last twenty years, and been engaged in commission business since 1846.

F. W. Patterson. Age 52. Resided for thirteen years past in Buffalo. Occupation has always been produce and commission business.

John B. Griffen. Age 33. Has been a commission merchant in Buffalo last seven years.

Albert Sherwood. Age 46. Has been in said business at Buffalo last eight years.

Elias Weed. Age 55. Occupation has been produce and commission business in Buffalo, from 1845 to fall of 1860.

Henry Daw. Age 66. Has resided in Buffalo mostly since 1816, (only two years outside the county,) and been engaged in commission

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business since 1835. Is the commission merchant of longest standing in said city.

George S. Hazard. Age 52. Resided in Buffalo nearly fifteen years. Has been produce and commission merchant during that time and previously.

John Darragh. Age 46. Has been engaged as proprietor or employee in commission business, in Buffalo, for past fifteen years.

49 All of said witnesses testified that they were acquainted with the usages of trade among commission merchants in Buffalo, as they were September 18, 1860, and prior thereto, both from their own experience, and from observation of, and familiarity with, the general business of the dock. The personal sales of said witnesses, as commission merchants in Buffalo, taking all together, have averaged more than six millions of dollars per annum.

51 52 All of said witnesses testified that when sales were made to buyers of good standing, the general usage was to deliver the property before payment, and to send in bill therefor to the purchaser in from ONE TO THREE DAYS afterwards. (John B. Griffen put the time as from one to five days.) That when payment was made on the day of sale, it was by special agreement and for the accommodation of the seller.

53 Said witnesses were interrogated as to the meaning of a "sale for cash" or a "cash sale," according to the usage and understanding of commission merchants in Buffalo.

(The plaintiff objected to the reading in evidence of their testimony on this point, as irrelevant. The court decided it to be admissible, but remarked to the counsel, during the argument, as to its admissibility:

54 "It would take pretty strong evidence to satisfy me that such a custom existed. If they could show a seller might wait three days on a cash sale, he might wait three years.")

55 All of said witnesses testified that on a cash sale to a buyer in good credit, it was the custom to give him orders for the grain before payment, (two of the witnesses adding that such orders usually contained the clause, "subject to seller's order until paid for,") and to present the bill for the purchase money in from ONE TO THREE DAYS afterwards. That

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on such sales payment was never made before delivery, except in cases of special agreement.

57 All of said witnesses testified that this custom had existed during their entire experience in Buffalo. That it was universally known and acted upon, and that sales were uniformly made with reference to it.

59 60 All of said witnesses testified that they had known Abram L. Griffen
61 for several years in Buffalo, prior to September, 1860; that he had been a large dealer during that time, and that his credit and business standing were good. That he had the reputation of an upright man, and sound financially.

Most of said witnesses had made frequent sales to him, always in the manner above described, and had always been paid promptly.

62 John Darragh further testified that defendant, Deshler, sold to Griffen in this way occasionally during the season of 1860, and had so sold him corn on the 6th, 8th and 11th of September, 1860, amounting to upwards of 5,000 bushels, for which he paid when the bills were presented, the usual time after the purchases.

Defendant then read the deposition of GEORGE C. WHITE, as follows :

I have lived at Buffalo and been in the banking business during past 26 years. I am, and have been for twenty years, President of White's Bank of Buffalo. Have known A. L. Griffen quite intimately, in business relations, during five or six years. His credit and standing, up to September 18, 1860, were good. I lent him money, and discounted his drafts along in the summer, and up to September, 1860, to a large amount, from one to two hundred thousand dollars. Very frequently on his mere personal security, without taking his bills of lading.

63 In answer to further interrogatories addressed to Messrs. TUTTLE, PARKER, WEED, DOW, HAZARD and DARRAGH, said witnesses testified that it is the custom to sell grain in Buffalo by sample, subject to an examination of the parcel it represents, either at the elevator or while it is running into the canal boat; that no general system of grain inspection exists in said city. That the grain of different parties is usually stored separately, and orders of commission merchants call for grain from specific cargoes, so that depositors commonly receive back the same grain stored by them.

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The plaintiff then re-called Joseph H. Tiffany, who testified that he bought the corn of Potomac's cargo, by order of plaintiff, and knew plaintiff owned it, because he got the money from him. Knew no one else in the transaction. That when a cargo is consigned and sold in parcels, he generally took the charges from proceeds of the first sales. Understood such to be the custom generally with commission merchants, but did not know of his own knowledge the custom of the Buffalo market in this respect.

The plaintiff then re-called James Van Buren, who testified that it is usual in Buffalo, when grain is sold in parcels, to take the charges out of the proceeds of the first sales. Such had been his experience. He did not know of any such custom as to cash sales in the Buffalo market, as had been sworn to by defendant's witnesses; never heard of any such custom. When he bought grain in Buffalo, had paid for it on delivery. Sometimes the bill wasn't sent in until the next day.

Above is given all the testimony offered on either side at said trial.

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The court then gave to the jury, on behalf of the plaintiff, the following instructions, to each of which defendant excepted :

Defendant then prayed the following instructions, which were refused, and exceptions taken :

1. If the jury find, from the evidence, that defendant was retained by plaintiff or plaintiff's agent, by letter or other writing, to sell the corn in question ; then plaintiff, to succeed, must produce the same, or account for its loss, and if the jury find he has done neither, they will find for defendant.

2. Plaintiff cannot recover under the first count in his declaration, without proving a sale and request to pay. Nor under the second count without proving a request for an account. Nor under the third, without proving receipt of the money by defendant, and that the transaction is closed, or that it is defendant's fault that it is not closed. Nor under the fourth, without proving retainer to sell for cash, and that defendant sold otherwise.

3. A factor, such as the defendant in this suit, has a right to sell for credit, unless restrained by express instructions from his principal, or by the usages of trade ; and the burden of proof is on the plaintiff to show that such instructions were given, and that a usage not to sell for credit existed at Buffalo at the time of the sale.

4. If jury, find, etc., that defendant received no specific instructions, and that he sold the corn to a buyer in good standing, it makes no dif-

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ference as to his liability, whether the sale is called a "cash sale" or not; and if the sale was made according to the settled usage of trade in Buffalo, then defendant was not liable on account thereof.

5. If jury find, etc., that on Griffen's refusal to pay for the corn bought by him, defendant immediately replevied the same, and notified the plaintiff thereof as soon as he could learn the suit was likely to be defended, and without any unreasonable delay, and that plaintiff made no reply until two months and a half after, this is evidence of acquiescence by the plaintiff in what had been done by defendant.



80 Verdict rendered for plaintiff, for \$4,787.78.

81 Motion for new trial by defendant :

1. Because verdict contrary to evidence.
2. Contrary to weight of evidence.

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- 3. Contrary to instructions given.
- 4. Contrary to the law.
- 5. Evidence did not sustain declaration.
- 6. Error in plaintiff's instructions.
- 7. In refusing instructions prayed by defendant.
- 8. In modifying instructions prayed by defendant.
- 9. In admitting improper evidence for plaintiff.
- 10. In excluding evidence offered by defendant.
- 11. In deciding that points made by defendant did not arise in the case, and in excluding them.
- 12. In deciding, as matters of law, what should have been left to the jury.
- 13. In leaving to jury questions which should have been decided by the court.
- 14. In expressing opinions, in course of the trial, in hearing of the jury, as to facts and law in the case, without reducing them to writing.

Motion in arrest of judgment by defendant :

- 1. Because other parties should have been made plaintiff in said suit.
- 2. Proof did not sustain declaration.
- 3. Declaration insufficient to sustain verdict.

82 Motion for new trial overruled, and exception taken.

Motion in arrest not disposed of. *(not called up by either party)*

Judgment on verdict.

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ASSIGNMENT OF ERRORS.

And the said John G. Deshler hereby assigns the following errors whereof he complains:

1. The court erred in giving to the jury improper instructions on behalf of the plaintiff.
2. In refusing correct instructions prayed by defendant.
3. In improperly modifying instructions prayed by defendant, and in giving the same as modified.
4. In admitting improper evidence on the part of the plaintiff.
5. In excluding proper evidence offered by defendant.
6. In deciding that points made by defendant did not arise in the case, and in excluding them from the jury.
7. In deciding as matters of law questions which should have been left to the jury.
8. In leaving to the jury questions which should have been decided by the court.
9. In expressing opinions in the course of the trial, in the hearing of the jury as to facts and law in the case; and without reducing the same to writing.
10. That the verdict was contrary to evidence.
11. That the verdict was contrary to the instructions of the court.
12. That the verdict was contrary to the law.
13. That the evidence did not sustain the declaration.
14. The court erred in overruling defendant's motion for a new trial.
15. The court erred in causing judgment to be entered without disposing of defendant's motion in arrest of judgment.
16. That judgment was entered for the plaintiff instead of for the defendant.

PAYSON & REYNOLDS,

Attys for Pltff. in Error.

J. G. Deshler

vs

C. Beers

Abt. Record

Filed Nov. 20

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L. Deland clk