

No. 13009

Supreme Court of Illinois

Chase

vs.

McDowell et al

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 186.

Chase

vs

McDonnell

Deputy

Chase

vs

McDonnell

SUPREME COURT OF ILLINOIS, } APRIL TERM, A. D. 1860.
THIRD GRAND DIVISION.

HENRY I. CHASE,

ALEXANDER McDONELL AND JOHN NELSON.

APPELLEE'S POINTS AND ARGUMENT.

I. Either Winn was the tenant of Chase, and so owned the entire property in the crop, or he was tenant in common with Chase in said property, and in either case could of course mortgage his interest.

Allwood v. Ruckman 21 Ill. 200.

II. Even if the contract was executory only the mortgagee's title should prevail against Chase.

This is clear in law or in equity, although the property is not in existence which is mortgaged, e. g. the proceeds of a whaling voyage.

Langton v. Horton, Story on Sales, 185, 186. 1 Hare 549.

The question, whether the contract was that Winn was to own his half of the corn on the making of the contract, was fairly left to the jury under the 2nd, 3rd 4th and 6th instructions, of plaintiff; the law was there laid down as claimed by him. The defendant's single instruction was predicated on the fact that the jury should believe from the evidence "that Winn was to have the other half of the corn" by the contract. The jury have found against the plaintiff on this question of fact, as to what the contract was, fairly left to them, and the court will not disturb the verdict. They might well so find, Winn stating that it was his understanding from the contract that he had the right to sell or mortgage his corn, and having both used and sold part of the corn, and mortgaged the whole without objection.

In every case where the court has held a sale to be conditional they regard the intentions of the parties as manifested in their acts and their contract. There is no condition in this contract as stated; Winn was to have one half of the corn for

harvesting and delivering the other. This was the contract without addition. He was simply to pay in services thereafter to be rendered, and immediately commenced acting upon the understanding by using the corn.

The delivery was absolute. There was no provision in the contract that the title to the corn should remain in the plaintiff until performance by Winn.

Perry states "the contract was that Winn should go on the place; thrash the wheat; take care of and harvest the corn; deliver one half to plaintiff, and for so doing should have the other half."

Winn states the contract thus:

"I was to take charge of the place, tend and harvest the corn, thrash the wheat, and deliver one half of each to Chase, and for doing this I was to have the other half"—abstract, page 1. Again he says, "I was to have one half of corn for taking care of it, and deliver the other half to Chase"—abstract, page 2.

Kelly says "Winn was to have one half for tending and delivering the other half at Chase's house, or Langdon Station"—abstract, page 2. Again, he says "Winn was to take Duffy's place, as I understood; take care of farm; keep up fence; take care of and harvest crops; deliver one half where Chase desired, either at Chase's house or Langdon Station, for the other half, and to occupy the house where Duffy was living"—abstract, page 3.

That the parties intended that Winn should own and sell his half of the corn is shown by the statements of Winn, (the witness of plaintiff and adverse in feeling to defendants,) as to his understanding of contract:

"I understood from the time I made the contract that I had the right to sell or mortgage my half of the crop"—abstract, page 2.

This is shown also by the acts of the parties:

Winn sold part of the corn—page 4. He fed about 100 bushels of the corn—page 2. He mortgaged to defendants in September, about a month after he leased of Chase—page 4.

That the intention must have been that Winn should have the right to treat the corn as his own, and use it, is manifest, too, from the circumstance of his having till March, 1859, to complete delivery, for as he was a very poor Irishman, a renter, and dependent for support on his work, it was certain that he must use the property from time to time for his support—page 2.

No objection is ever made by Chase to Winn's acts, and as done on his farm over a period of more than five months, they must have been with his knowledge. It is only after defendants, to secure themselves, were compelled to take Winn's horses

under mortgage, that Winn's and Chase attempted to defraud them of the property in suit by the pretence that the corn was not Winn's. To effect this, Winn testimony, and the testimony of Perry, the brother-in-law of Chase, push the language of the letting to Winn as far toward imposing a condition precedent on Winn's right to the corn as possible. The jury took this into consideration, in determining what the agreement was, and relied on the testimony of Kelly.

Give the language of the parties the strongest interpretation for the plaintiff, and the contract is, "Winn was to have one half the crop for furnishing, raising, harvesting and delivering the other." It was then delivered to him unconditionally.

There is no provision in the contract that he is not to have the title to his half till he does these acts.

In every case of a sale that can be cited where a condition precedent to the title vesting in vendee was held to exist there was an express agreement of parties to this effect. This makes the plaintiff's authorities inapplicable to the case.

If A. sells B. a horse for \$20, B. cannot take horse till he pays the \$20; but if A. agrees that B. shall have horse for \$20, payable in 90 days, and delivers the horse to B., the title passes.

5 Viner's Abr., 509.

The right of Winn to his half of the corn was not a chose in action; it was a chose in possession—a right to personal property which was then in his possession. It could be enforced without suit, and the assignment by mortgage is not * within the mischiefs sought to be prevented by the rule of law forbidding the assignment of choses requiring litigation or actions to enforce them.

Parsons on Contracts, vol. 1, page 192, and n. (c.)

But Winn was the tenant of Chase, and their contract was a contract of tenancy.

Duffy was the tenant of Chase. When he gave up to Chase, on same day and at same time, the contract was made with Winn. Perry's language is, "Winn was to occupy shanty when Duffy went out. Winn was not in on same terms with Duffy. Duffy was to pay cash *rent*; Winn was to have half the crops as stated."

Kelly says "Winn * * had charge of whole crops and farm. I suppose Winn was in as tenant. Winn was to take Duffy's place as I understood *"—pages 2 and 3.

Otis v. Wood, 3 Wendell 498.

This was a contract for the possession and profits of the farm and house Duffy left, and a recompense of rent by the finishing of the raising, guarding,

harvesting, and delivering, one half of the crop, and keeping up the fences and caring for the farm. This makes a lease.

Woodfall's Land L. and Ten.—p. 1.

There is no personal trust or confidence in the sense claimed by plaintiff implied in a contract of letting premises; the right of a tenant to underlet rebuts such presumption. The fact that the crop was partly grown, and the term was for less than one year, but expiring with the usual tenant year, cannot change the relations of the parties.

The objection that Winn could have sold next day after the lease was made him will apply as an objection to the right of any tenant to assign his lease, and therefore proves too much.

This general power to assign or underlet a tenant always has, and can only be restrained by express agreement or covenant to the contrary. He has a power coupled with an interest. Surely Winn had this.

Woodfall's Land and Ten., pp. 90, 91.

The landlord, Chase, had ample protection under our laws by the right of distress. And if not could have protected himself by contract against the ordinary casualties of letting.

Winn by virtue of this contract had a power coupled with an interest in the crop. It was not a bare power, nor a naked expectancy. It was therefore assignable and the subject of a mortgage.

Woodfall's Landlord & Ten., 416.

Winn's right to the corn was certainly equal to that of a mortgagor in possession. It was at most only liable to be defeated by a failure to complete delivery by March 1st, 1859. Could Chase have taken it from Winn before that time? Winn had a present interest vested in him with possession and could sell or assign it. Chase could only ask that the contract of Winn should be fairly performed, and this the jury have found that defendants did perform or offered to perform.

Otis vs Wood, 3 Wend 498; Van Antwerp vs Newmam, 2 Cowen 543.

The property mortgaged was well described as an undivided interest. This it must be till divided, if Winn had any interest. The authorities cited by plaintiff do not apply to this case on this point. The corn was in existence and could only be described according to this fact as an undivided interest. There is nothing in the language of the agreement to justify the assertion that the title was not to enure in Winn till delivery to Chase as above agreed.

The corn mortgaged might well be cared for and removed to cribs by mortgagee. The doctrine of the plaintiff that mortgaged property must remain in

statu quo, so that growing corn mortgaged could not be gathered without invalidating the mortgage, is simply absurd, and is not supported by a single authority.

It is immaterial in this case whether Winn had forfeited his mortgage to defendants. This question could not affect plaintiff's right to maintain trover for the corn mortgaged.

But Winn had clearly forfeited it. He had sold part of the property mortgaged without the *written* consent of defendants. And besides, Winn had attempted to dispose of the property Chase, and Chase, according to his testimony, had taken the corn before defendants insisted on the forfeiture. Either of these acts created a forfeiture by the terms of the mortgage.

There is no good foundation for the assertion that the mortgage was satisfied. Winn does not swear to the value of the property, except one horse and pony both amounting to less than \$100; his narration of the sum he had given for the other horse at some unknown time, and of the price this horse afterwards had been sold for by some unknown person, was justly disregarded by the jury as no evidence of his value.

The offer of defendants was to deliver the corn in accordance with Winn's contract; the words "at Langdon depot" may be treated as surplusage, controlled as they are by the language referring to the contract. Besides, it was so understood by Chase, who placed his refusal on the ground that he had, and would, have nothing to do with them. Langdon's depot was distant fourteen miles, and was farther than the other point named in the contract, and Chase well understood the offer to be to perform Winn's contract, as shown by his reply—page 3.

If defendants had the right to perform Winn's contract, then no notice to Chase was necessary of their intention to *divide* the corn. Winn could not be blamed for not giving notice. The only effect of notice would have been that Chase would have enjoined defendants from entering to secure their rights, as they well knew.

The 8th and 9th instructions of plaintiff were properly refused. If Winn was not bound, neither were Winn's mortgagees bound to notify Chase that they were dividing the corn. All Chase could ask was a proper and honest performance of Winn's contract of letting. This was done, and the jury so found.

The court will presume that the magistrate resided in the township where Winn is shown to have resided, on the principle that it will presume an officer did his duty till the contrary is shown. Besides, the mortgage purports to be made in the town. At any rate, this objection comes too late, when not made at the time mortgage was offered in evidence. It might easily have been obviated by proof if then made.

At furthest, Winn and Chase were tenants in common in the corn. Winn was to have half the crop for maturing, guarding and delivering the other.

In Putnam v. Wise, 1 Hill, p. 238, "The agreement was, that they were to work so-and-so, and each have and be entitled to one-third of his, said Edwards', share, &c.," and the parties were held to be tenants in common in the crop.

On page 247, the court say, "The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants that the latter should come in rather as servants, than tenants; each party taking an interest as common owners in the crops and other products as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor."

The 7th instruction of plaintiffs was therefore erroneous as well as inapplicable to the facts. For even if Winn had been a servant, under this peculiar contract he was a joint owner of the corn. Winn was not the mere servant or laborer of Chase, employed to do work for a few days.

Winn was in exclusive possession of the entire farm. His term expired with the usual tenant year, March 1st, 1859. He was to take care of the farm; to take of the fences; he was to occupy the house; he stepped into the shoes of Duffy and Kelly who was present and heard the contract, understood that he was a tenant. Perry says "Winn was in on different terms from Duffy. Duffy paying *cash rent*, and Winn one half the crop."

The truth is the agreements for Duffy to give up the farm and Winn to go in were made at the same time, and were parts of the same bargain. Chase never received possession from Duffy. Duffy moved out of the shanty and off the farm and Winn moved in some days after the contract. The arrangement with Winn was but the continuance of the tenancy with Duffy. Winn remains in possession during the winter, and was using, we have the right to presume, the premises as one in full possession could.

According to the distinguishing characteristics of a tenancy, where land is let for a single crop, laid down in Allwood vs. Ruckman, 21 Ill., 200, Winn was a tenant. He moved on the farm, occupied and controlled it exclusively, was to occupy till March 1st, 1859, the expiration of the tenant year. Every distinguishing mark of a tenant there noted exists here.

In any event Winn was either a tenant in common in the crop with Chase or was as tenant, the exclusive owner of the corn after he had gathered and detached it from the soil until he had set off the stipulated rent to Chase; and in either case his interest could be mortgaged.

21 Ill 200, 4 Kent, 98-99.

Taylor's Landlord and Ten, p 14 and cases there cited.

McCOY & HARDING, *Defendant's Att'ys.*

186-80

Chase

no

McDonnell Ital

Apples points &
Argument

Filed Apr 28, 1860
L. Delaney
Clerk

STATE OF ILLINOIS--THIRD GRAND DIVISION.

HENRY I. CHASE

vs.

ALEXANDER McDONNELL,
AND JOHN NELSON.

POINTS MADE BY PLAINTIFF IN ERROR.

- 1st. The note of Winn and defendants' to Smith, and chattel mortgage made by Winn to defendants, offered to show title in defendants, were improperly admitted in evidence.

Winn, himself, had no title to the corn in question, and could pass none to defendants, when the mortgage was made. He had a contract with Chase, and nothing more; which being a mere *chose in action*, was not assignable at law, and, of course, not the subject of a chattel mortgage.

Parsons on Contracts, 192.

Further: To entitle a man to sell or mortgage goods, he must himself own them, *at the time*. By the terms of his contract, as proved, Winn's title to any part of this corn was only to accrue *after full compliance on his part*. Performance by him was clearly a condition precedent. The mortgage, therefore, being made not only before such performance, but before it was practicable, the corn not being then ripe and fit to harvest, no title could or did pass by it.

Besides, if Winn had the right to mortgage this interest, it might have been seized on execution, or he might have sold to whom he pleased the next day and put the purchaser in possession, not only of the corn, but of Chase's land, shanty and all, against the will of Chase, which will hardly be contended.

Again, the mortgage is upon an *undivided interest* in the corn, still in the field and unharvested; while, plainly, by the contract, Winn's title, when it should enure, was to be to the *divided half which would remain*, after Chase had received the other half. A mortgage cannot apply to goods not in existence or capable of being identified at the time it is made; nor to after purchased goods.

Parsons on contract; 1.454
Note C. Barnard vs. Eaton, 2 Cush. 294;
Rhines vs. Phelps, 3 Gilman, 455.

So, the goods mortgaged must be described and set forth on the Justices docket, and must *remain* with the mortgagor and *in statu quo*, according to the terms of the mortgage.

Purp. Stat. 1, 136-7; 18 Ill. 396, (Davis vs. Ransom & al.)

Till divided and Winn's part set off, or left to him, this could not be.

2d. Winn's interest in this corn, under his contract with Chase, was coupled with a personal trust and confidence and could not be transferred to another, or the performance of the trust delegated, without the consent of Chase. And of the exact terms of this contract defendants had notice when they took their mortgage. Their attempt therefore to substitute themselves for Winn, against the consent of Chase, was a mere intrusion which could confer no right upon them, as against Chase. A personal trust or confidence cannot be delegated.

Story on agency, sec's 12, 14, 29, 34 & 108.

3d. Even as against Winn, defendants had no right to the corn when they took it. By the mortgage Winn was to retain possession till default in payment of the note. The note was not due, and *non constat*, but that he would have paid it at maturity.

Nor had any other contingency arisen to justify their interference with the property. The two loads of other corn embraced in this mortgage which Winn did sell, he sold at their instigation and they could not therefore complain. Besides, they had already seized, under color of this same mortgage, other property more than sufficient to cover the whole debt.

4th. But granting defendants' right to substitute themselves for Winn and complete his contract, their offer to do so was insufficient. The contract was to deliver one-half at Langdon Station, or Chase's residence, as Chase might elect. The notice served on Chase and read in evidence, against the objection of plaintiff, proposed to deliver at *Langan depot*, and no where else. Waiving this, however, their offer came too late. They had, already, without his knowledge or consent, but violently and surreptitiously entered upon Chase's premises, divided in their own way and carried off what they claimed as their part, and Chase was not bound afterwards to accept at their hands, and upon their statement, what was left, as a satisfactory fulfillment of his contract with Winn. But this the instructions of the Court expressly direct the jury to find.

5th. To be valid, a chattel mortgage must be acknowledged by the mortgagor before a justice of the district in which he resides.

Purple's Statute, 1, 136-7. This was not shown to have been done.

6th. The modification of plaintiff's 4th instruction, and refusal of the Court to give Nos. 7, 8, 9, were errors for which the judgment should be reversed. So the instructions given for defendants below are not law, are inapplicable to the evidence, and calculated to mislead the jury.

7th. The verdict should have been set aside and a new trial granted.

J. K. COOPER,

For Plaintiff in Error.

186 = 57

Chase vs McDonald

Sup Points

The plaintiff, Chase, claims that the defendant, McDonald, owes him the sum of \$100.00. Chase claims that McDonald borrowed the money from him on the 1st day of January, 1881, for the purpose of buying a horse. McDonald claims that he borrowed the money from Chase for the purpose of buying a horse, but that he never received the money. Chase claims that McDonald is liable to him for the money because McDonald borrowed the money from him for a specific purpose, and because McDonald failed to return the money to him. McDonald claims that he is not liable to Chase for the money because he never received the money from Chase. The court has ruled in favor of Chase, and has ordered McDonald to pay Chase the sum of \$100.00.

100°
85
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92
7
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375
813.00

STATE OF ILLINOIS--THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

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vs.

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Besides, if Winn had the right to mortgage this interest, it might have been seized on execution, or he might have sold to whom he pleased the next day and put the purchaser in possession, not only of the corn, but of Chase's land, shanty and all, against the will of Chase, which will hardly be contended.

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J. K. COOPER,

For Plaintiff in Error.

Chase vs M^d Donald

Pepp Points

ST. LOUIS, MO. 1884

J. A. Cooper
H. L. Linn
Clerk

Subscribed and sworn to before me this 18th day of May 1884
at St. Louis, Mo.

Henry S. Chace } Supreme Court Third
 versus } Grand Division =
Alexander McDermott } April Term A.D. 1860
John Nelson } Error to Penia Circuit Court

Argument on part of plaintiff in error =

Plaintiff in Error sued Defendants in Trover for certain Corn, which he claimed as his property, and which defendants took and converted to their use =

The general issue only was pleaded, And defendants to maintain said issue, set up a chattel mortgage, executed to them on the 16th of September A.D. 1858, by One Hugh Ginn, which, with the note hereafter named, they were permitted to read to the jury, against the objections of the plaintiff =

The leading facts are as follows = The corn in question was put in and partly raised by One Peter Duffy, as tenant of said Chace, on the N. W. 29, T. 11 N. R. 6 E. in said Penia County in the Spring and Summer of 1858 = Duffy was paying a cash rent and owed Chace for backrent = About the last of July or first of August 1858, Chace bought out Duffy's interest in said corn then growing on the land and some wheat then in shock, and also a Shanty which belonged to

Duffy, and for which Chase paid him in full and took possession of Shanty, land and crops= see Abstract pp. 1= Immediately thereafter, Chase put said Wynn in possession under a contract in substance and terms as follows= viz: That Wynn should go upon the premises, live in the Shanty, thresh the wheat, keep up the fences, protect, tend and harvest the corn, divide it, and deliver One half of both wheat and corn to Chase, at his residence or at Qingdao Station, as Chase should direct, And for so doing, Wynn was then to have the other half= see testimony of Perry p. 1, Wynn pp. 1, 2, 4 and Kelly pp 2 and 3, of Abstract= Wynn had till March 1st 1859, to complete delivery under his contract, see his testimony or Cr. Ex. p. 2 of Abstract= On the 13th of September 1858, Wynn and said defendants made their joint and several note to R. A. Smith for \$207.³⁵ payable Six months from date, with 10 pr. ct. interest= Defendants claimed to be securities for Wynn on this note, and the Mortgage purports to be given to secure them against their liability thereon, and covers quite a considerable amount of other property besides this corn, p. 4 of Abstract= The Mortgage provides for possession in Wynn till default in payment of note, or attempt by him to sell the property without consent of the mortgagor, see p 4 of Abstract= Chase knew nothing of the Mortgage till long

after it was given, when he repudiated it and told Winn the corn was not his till he had complied with his contract, and that he had no right to make it. But when defendants took the Mortgage they knew just what the contract between Chase and Winn was, and what interest Winn had in this Corn, see Winn's testimony, when called by defendants p. 4 of Abstract.

Winn never complied with his contract, but finding himself unable to do so, in consequence of losing his horse, he gave up his contract and surrendered possession to Chase, who then put Winn in possession again to take care of the property for him, as his agent. This was a week or two before Christmas. page 2 of Abstract.

About the first week of January thereafter, on pretence that Winn had sold a couple of loads of the corn, the defendants came with six (6) teams and 16 or 17 men and carried off what they called half of the corn, and defendants left the remainder in a pen on the premises, Winn forbidding them to touch it and saying it was not his, that he had given it up to Chase &c. Before this, Winn had husked and put in pens the larger part of the corn, the balance remaining in the field ungathered. Defendants took down these pens and carried off part of the corn in them, and also carried off part of

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the corn which was ungathered = Vinns testimony p. 4, David Wendell p. 3 = Some three weeks after this defendants sent to Chase a notice, dated January 24/59. to the effect that they were ready to deliver his part of the corn at the Langdon depot, according to Vinns contract = This notice was read, against the objection of plaintiff, to the jury = When the notice was read to Chase he seemed to get angry and not to recognize defendants in the matter = p. 3. of abstract =

There are the main facts in the case, and they, of course, showed plaintiff entitled to recover unless defendants were protected by their mortgage and offer to comply with Vinns contract, as indicated in said notice =

One error assigned is the admission of these papers and said note in evidence =

There was no proof that the mortgage was acknowledged before a justice of the proper district = This point is submitted, without remark, for what it may be worth =

But admitting the formality of execution &c. the plaintiff insists that it gave the defendants no title to the corn in dispute, as against him =

When this mortgage was made Vinns himself had no title to this corn, and could pass none by sale or otherwise to defendants = Compliance on his part, with the terms of his contract, was clearly

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a condition precedent to the ensuring of such title, and of this the defendants had notice. The most that can be said is, that he had ^{an} inchoate interest under his contract, capable of ripening into title to the property, upon full performance on his part. To suppose such an interest the subject of a Chattel Mortgage seems to me inconsistent with the nature and object of such securities, the purpose of which, as between the parties, I take to be, to fix a subsisting, continuing lien, on certain specific articles of property, which shall remain and be forthcoming to answer the exigencies of the case, if default is made in payments, which cannot with any safety, be predicated of a shifting, contingent interest such as this, subject to fail at any moment when by accident or design the mortgagor shall become unable or unwilling to perfect his title; and which failure can only be avoided by suffering the officious intermeddling of the Mortgagee with the rights and interests of the real owner of the property, who is an entire stranger to the Mortgage. But not to dwell on this. It is clear that a man cannot mortgage chattels which he does not own at the time. Two things must concur to make such a Mortgage good. The goods must be in esse, at the time, and the Mortgagor must then own them.

after acquired property will not pass. And on this head, in addition to the authorities in printed Brief. I refer the Court to 10 Nectoff's reports 481. 13 ibid. 17 = 32 N.H. Rep. p. 505 and cases there cited. One remark further on this point = This corn was not strictly in esse, at the time the mortgage was made, at least, not in the condition it was, by the contract, to be, when it should become the property of Winsor. The divided half which should remain, after Chase should have received his, was only to become the property of Winsor = He was not to have title to an undivided half before it was harvested = As the property was placed in the sole possession and control of Winsor, Chase doubtless designedly thus retained the ownership until his part was delivered, in order the better to ensure a faithful performance, and protect his rights in the premises = This was clearly the understanding of Chase and, as I presume from the whole case, of Winsor also, notwithstanding his loose declaration about having a right to sell &c., to the contrary = But this mortgage was made before the corn was fully grown or ripe, much less harvested and divided = And if it could be mortgaged in that state, why not the seed before, or the day after it was planted, or the sprouted vegetable at any intervening period of its growth =

which the Court can act in this case, any further than as indicating the propriety of subjecting them to the rule stricti juris, when they defend under this Mortgage - And I suppose Chase is entitled to avail himself of this, if they intermeddled with and appropriated the property to themselves before they had a right to do so, whatever may have been their ultimate rights in the case -

Again, the notice given to Chase, coming at the time and under the circumstances it did, was, besides being entirely insufficient, a mere mockery -

By serving such notice they admit Chase right, in some sense to be advised of what was going on - Should he not ^{have} known about it before they made this intrusion into his premises, undertook to ascertain and determine his rights of property, to carry off one part and leave another, as it suited them, with no opportunity, on his part, to watch their proceedings or know whether he was fairly or unfairly dealt by in the matter? It seems to me, but one answer can be given to this question, and the refusal of the Court to give plaintiff's 8th & 9th instructions, was not only error, but an ignoring of the commonest principles of honesty and fair dealing between man & man -

For reasons above stated and given in printed brief, the modification of plaintiff's 1st instruction and refusal to give the One numbered 7 was error for which the case should be reversed.

For similar reasons the instructions given for defendants were wrong, and in at least two particulars not adapted to the evidence - viz: in assuming that Vinn attempted to sell the corn without the consent of defendants, and that there was any offer by defendants to deliver the corn at Langdon Station or at the residence of Chase, as Chase might direct. As above stated, the sole pretext for seizing the property under the mortgage, attempted to be shown on the trial, was the sale of the two loads, to which defendants consented, not only, but advised. And as to the offer to deliver, whether Langdon Depot, is the same as "Langdon Station", or not, and of which I am not inclined to make much account, there was no offer to deliver at the residence of Chase, at all. And in these particulars these instructions were calculated to present the case unfairly and mislead the jury. For other points &c. in the case, I refer to printed Brief =

Isaac K. Cooper
att'y for plaintiff in error =

Since the foregoing was written, the printed Brief and argument of defendants counsel have been filed, on which I propose to offer a few remarks - And

1st It is assumed and runs through the entire argument, that Chase and Winn were either "tenants in common" of the property, or that the relation of Landlord and Tenant existed between them - Without stopping to enquire how far this would have entitled Winn to mortgage these crops as against Chase, I submit that neither the one relation nor the other existed - That they were not tenants in common, is, I suppose, sufficiently met by the remark that, by the terms of the contract, and in fact, the exclusive possession was in Winn, and as to remain, till actual delivery to Chase, of his part -

If Winn became the tenant of Chase, in the ordinary sense of that term, by this contract, then he became at once the exclusive owner of the entire property, the wheat no less than the corn, Chase retaining only his right to a share, as rent for the term - This is clearly the doctrine of the case of Alwood versus Ruckman XXI Ill. p. 200, and indeed seems to be admitted by defendants.

So, if the contract is to be taken as a lease, then Winn, as tenant had an estate in the land for the term - Smith's Landlord and Tenant, 356, top page -

Now, at the time this contract was made, the wheat was already harvested and in shock, and the corn must necessarily have been pretty well grown; And can it be supposed that Chase, who had just become absolute owner of both, by purchase from Duffy, intended by the arrangement entered into, as shown by the evidence, to divert himself of his property, and confer upon Trinn such rights and control of the premises? The simple statement of the case would seem to carry with it, its own refutation. Trinn was employed to take charge and care of the premises, ^{thrust} the wheat, tend, so far as needed, & harvest the corn divide and deliver one half to Chase, and for doing was to have the other half. This is the language of all the witnesses, and while it certainly indicates a design on the part of Chase to make it the interest of Trinn to be faithful in the execution of his trust, and have as large a yield as possible, the giving him one half for his services was only a mode of compensation for those ser-
vices, and no more made Trinn the owner of those crops or any part of them until division made and Chase had received or been duly tendered his part, than the clerk who is paid for his services by a share of the proceeds or profits of a trade, becomes from the time of his engagement, the owner in whole or in part of the capital or property invested.

or used in that trade =

2d It is said, that if the contract was only executing the defendants title as such Mortgages, was lost, and that personal property not in existence, may be the subject of a chattel Mortgage. This is believed not to be the Law, and is with better reason, held not to be, in the cases heretofore cited =

3d No such question as "Whether the contract was that Winn was to own his half of the corn on making the contract" was "left to the jury" - and had it been, it would have been improper, that being, upon the proof, a question of law for the court, and not, of fact, for the jury = The court it is true, did instruct for the plaintiff that under such a contract, as proved, Winn could have no title "to any part of the corn till he had fully complied with his contract," see instruction 2^d for plaintiff, abstract p. p. 4 & 5. And that said contract "did not divert the title of Chase" instruction 3 p. 5 abstract = And yet, in the face of this, admitted the Mortgage, made ^{at a time} when, confessedly, by these instructions, Winn had no title to Mortgage, and then so instructed for defendants ~~for defendants~~ as completely to nullify the instructions given for plaintiff, leaving but one course for the jury upon the evidence, as admitted, namely thus shutting up the jury, if they regarded the instructions given for

defendants, to find but one way upon the
evidence.

The concluding statement of this paragraph (p. 1 of Defts. Brief) that Vinson "both used and sold part of the corn, & mortgaged the whole without objection" - meaning by Chase, is simply untrue. On the contrary Chase at once repudiated Vinson's act in making the mortgage, when made known to him (see Vinson's test. p. 4 of abstract) And as to his selling or using any part ^{of this corn,} there is no evidence that Chase knew any thing about it. Nor did he in fact sell any of the corn ^{or} ~~spit~~ ^{sold} on Chase's land. As to Vinson's understanding that he had the right to sell or mortgage his part, (not the whole as he doubtless would ^{have} said, if he tho't he owned it all as tenant,) that, I presume, is pretty fairly met by Chase's understanding very clearly expressed just the other way. Besides, the contract as it was made and existed, must govern as to the rights of the parties under it, not what the parties respectively may have inferred those rights to be.

4th Nor can Trimm's having entire possession of the property avail defendant's anything, as they had full notice (as here before stated) of the terms by which he held, when they took their mortgage (see Trimm's testimony page 4 of abstract)

5th The suggestion that Winmar right "to his half of the corn was not a chose in action" but "a chose in possession", as Winmar had possession, seems to proceed from some confusion of ideas. Winmar's possession of the corn is one thing; his right of property in that corn, under his contract, is another and different thing; and when he attempts to assign that contract, and put the assignee in his place, to complete and carry out this contract, thus turning Chare over, against his consent, to other parties than the one with whom he contracted, this is what is claimed to be the assigning or attempting to do so, of a chose in action, which it is submitted, cannot legally be done.

6th And lastly—it is said, p. 6 of defendants Brief, that, "the agreements for Duffy to give up the farm and Winmar to go in"—"were parts of the same bargain"; and that "the arrangement with Winmar was but a continuance of the tenancy with Duffy". These are again rather extraordinary assertions, and seem to have no foundation in the evidence. It is true that the bargains were both made on the same day, and one perhaps immediately after the other. But they had no necessary connection whatever, any farther than they related to the same property. Duffy owned the crops, ^{of tenants} and was paying a cash rent; Chare bought him out, went

upon the ground, received possession and put
Winn ~~him~~ in, under a contract essentially different
in every particular = Winn neither received the
possession, in point of law, nor held under Duffy
which he must have done, to make the arrangement
with him a continuance of Duffy's tenancy =
On the contrary Winn came in and held under
Chase directly, and never tho't or pretended otherwise.
All which is respectfully submitted by -

J. K. Cooper
for Jeff in error =

186 - 80
Henry S. Chase
versus
Alexander McDonnell
John Nelson

Argument for plff. in Error

No. 186.

Filed May 5, 1860
Leland
Clark

Pleas before the Circuit Court within and for the County
of Peoria in the State of Illinois on the 5th day of December
in the year of our Lord One thousand eight hundred and
fifty nine. Present Hon. Elihu N. Powell, Judge of the sixteenth
judicial Circuit in the State of Illinois. John Boyner Sheriff
and Enoch P. Sloan Clerk to wit:

State of Illinois }
Peoria County } ss Be it Remembered that heretofore to
wit on the fourth day of February in the year of our Lord
One thousand eight hundred and fifty nine, there was filed
in the office of the Clerk of the Circuit Court within and
for the County of Peoria, State of Illinois a precept for
Summons which is in the words and figures following
to wit:

Precept

" Henry J. Chase

vs

Alexander McDonnell

John Nelson

In the Circuit Court

Peoria County Illinois

March term 1859

In Trover - Damages \$800.00

The Clerk of said Court will

2

please issue summons for Defts in above entitled cause returnable as the law directs.

Peoria February 4/59

E. P. Sloan Esq. }
 clk }

Cooper for plff

Summons

And thereupon on the same day there was issued out of the Clerk's office of said Court under the seal thereof a summons directed to the Sheriff of Peoria County, which is in the words and figures following to wit:

"The People of the State of Illinois to the Sheriff of Peoria County Greeting. We command you to summon Alexander McDonnell and John Nelson if they may be found in your County to appear before our Circuit Court on the first day of the term thereof to be held at Peoria within and for the said County of Peoria on the first Monday of March next then and there in our said Court to answer unto Henry J. Chase in a plea of trover to his damage eight hundred dollars as it is said and make return of this writ with an endorsement of the time and manner of serving the same on or before the first day of the term of the said Court to be held as aforesaid. Witness Enoch P. Sloan Clerk of our said Court and the seal thereof at Peoria this 4th day of February in the year of our Lord One thousand eight hundred and fifty nine
 Enoch P. Sloan Clerk
 R. H.

Which summons was afterwards returned by the said

3

Endorsement

Sheriff endorsed as follows to wit:

"I have duly served the within on the within named John Nelson & Alexander Mc Donnell by reading to them the same this 15th day of February 1859

John Bryner Sheriff
by J. N. J. Murray Dpty."

And afterwards to wit on the 4th day of February A.D. 1859 there was filed in the clerk's office of said Court a declaration in the above cause which is in the words and figures following to wit:

Declaration

"State of Illinois

Peoria County et

} In the Circuit Court
Of the March term A.D. 1859

Alexander Mc Donnell & John Nelson were summoned to answer Henry J. Chase of a plea of trespass on the case; and thereupon the said plaintiff by J. H. Cooper his attorney complains; for that whereas the said plaintiff heretofore to wit on the twentieth day of January A.D. 1859 to wit at said Peoria County was lawfully possessed as of his own property of certain goods and chattels, to wit: twelve hundred bushels of shelled corn and of two thousand bushels of corn in the ear, of great value to wit: of the value ^{to wit of the value} of one thousand dollars, and being so possessed, the said plaintiff afterwards to wit, on the day & year aforesaid casually lost the said goods and chattels out of his possession, and the same afterwards to wit, on the day and year aforesaid, at the County

aforesaid came to the possession of said defendants by
 finding, yet the said defendants well knowing the said
 corn, goods & chattels to be the property of said plaintiff,
 and of right to belong & appertain to him, but continuing
 & fraudulently intending to deceive & defraud the plaintiff
 in this behalf have not as yet delivered the said corn
 goods & chattels or any or either of them, or any part there-
 of, to said plaintiff although often requested so to do;
 and afterwards to wit on the day and year aforesaid at
 Peoria County aforesaid converted and disposed of the
 said corn goods & chattels to their own use.

And also for that whereas the said defend-
 ants on the day and year aforesaid with force & arms
 &c to wit at the County of Peoria aforesaid seized took
 & carried away certain other goods & chattels to wit,
 two thousand bushels of other corn in the ear and twelve
 hundred bushels of other shelled corn, the property of
 the said plaintiff, of great value to wit; of the value of
 One thousand dollars, there then found and being, and
 converted and disposed of the same to his own use;
 and other wrongs to the said plaintiff then and there did
 to the great damage of the said plaintiff, wherefore the
 said plaintiff saith that he is injured and hath sustained
 damage to the amount of \$800, and therefore he sues &c
 J. K. Cooper, for plff.

And afterwards to wit on the 10th day of March
 A D 1859 the defendants filed their plea to plaintiff

5

Plea

declaration in the above cause which is in the words
and figures following to wit:

"Henry J. Chase

vs

Alexander McDonnell
John Nelson

Circuit Court of Peoria County
March term A.D. 1859

And now come the said
defendants and defend the wrong and injury when &c
and say that they are not guilty in manner and
form as the said plaintiff has herein complained
against them, and of this they put themselves upon
the Country

By A. McCoy their atty.

Proceedings at a Special term of the Circuit Court
began and held at the Court house in the City and
County of Peoria in the State of Illinois on the second Monday
in the month of June in the year of our Lord one thousand
eight hundred and fifty nine it being the thirteenth day
of said month. Present the Honorable Elisha N. Powell
Judge of the 16th judicial Circuit in the State of Illinois
John Boyner Sheriff and Enoch P. Sloan, clerk to wit:
Tuesday June 21st A.D. 1859.

Henry J. Chase

vs

Alexander McDonnell
John Nelson

Trover

This day came the plaintiff by
Cooper his attorney and the defendants by McCoy their

6
attorney and it is ordered that a jury be impanelled to try the issues, whereupon came a jury of twelve good and lawful men to wit: J. H. Floyd A. Palmer, Geo. I. Taggart - G. W. Rees, J. R. Murphy, A. B. Pash, A. H. Smith, J. A. Winder, A. J. Neil, Geo. B. Parker, Geo. W. Kellogg & Fred. Ruspelius, who being duly chosen tried and sworn to well and truly try the issues joined in this cause and a true verdict give according to the evidence and not having heard all the evidence in the case were adjourned to meet the Court at 8 o'clock to morrow morning.

Wednesday June 22nd A.D. 1859
Henry J. Chase

vs
Trover
Alexander M^cDonnell
John Nelson

This day came the parties to this suit by their respective attorneys and also came the jury impanelled on yesterday and sworn to well and truly try the issues joined in this cause and a true verdict give according to the evidence. And the said jury upon their oaths aforesaid do say "We the jury find the issues for the defendants." Whereupon the plaintiff by his attorney entered his motion for a new trial.

Thursday June 30th A.D. 1859
Henry J. Chase

vs
Trover
Alexander M^cDonnell, John Nelson

This day this cause came on to be heard on plaintiff's motion for new trial and the Court being satisfied in the premises sustains said motion and orders a new trial of this cause by the plaintiff paying all costs herein up to this date. Therefore it is considered that the said Alexander McDonnell and John Nelson have and recover of the said Henry J. Chase their costs and charges by them about their defense in this behalf expended and that they have execution therefor.

Proceedings at a term of the Circuit Court of Peoria ^{County} began and held at the Court house in the City of Peoria in said County and State of Illinois on the third Monday in the month of November in the year of our Lord One thousand eight hundred and fifty nine, it being the twenty first day of said month. Present the Honorable Elisha N. Powell judge of the 16th judicial Circuit in said state, John Boyner Sheriff and Enoch P. Sloan Clerk to wit:

Friday December 2nd A.D. 1859
Henry J. Chase

vs
Alexander McDonnell
John Nelson

Trover

This day came the plaintiff by Cooper his attorney and the defendants by McCloy & Harding their attorneys and it is ordered by the Court that a jury be empanelled to well and truly try the

This day this cause came on to be heard on plaintiff's motion for new trial and the Court being satisfied in the premises sustains said motion and orders a new trial of this cause by the plaintiff paying all costs herein up to this date. Therefore it is considered that the said Alexander McDonnell and John Nelson have and recover of the said Henry J. Chase their costs and charges by them about their defense in this behalf expended and that they have execution therefor.

Proceedings at a term of the Circuit Court of Peoria ^{County} began and held at the Court house in the City of Peoria in said County and State of Illinois on the third Monday in the month of November in the year of our Lord One thousand eight hundred and fifty nine, it being the twenty first day of said month. Present the Honorable Elisha N. Powell judge of the 16th judicial Circuit in said state, John Boyner Sheriff and Enoch P. Sloan Clerk to wit:

Friday December 2nd A.D. 1859
Henry J. Chase

vs
Alexander McDonnell
John Nelson

Trover

This day came the plaintiff by Cooper his attorney and the defendants by McCloy & Harding their attorneys and it is ordered by the Court that a jury be empanelled to well and truly try the

issues in this cause, whereupon come a jury of twelve good and lawful men to wit: Amos McMill, Edgar Robinson, E. J. Jones, William Maxwell, William Learr, John P. Shehan, Miles Stalker, F. A. Meiller, James Jones, Geo. H. Piper, Thomas Gates and James Elson, who being duly chosen tried and sworn to well and truly try the issues joined in this cause and a true verdict give according to the evidence were adjourned to meet the Court at nine o'clock to morrow Morning.

Saturday December 3rd A.D. 1859
Henry J. Lehare

vs
Alexander McDonnell
John Nelson

Prover

This day come the parties to this suit by their respective attorneys, and also come the jury impannelled and sworn on yesterday to well and truly try the issues in this cause and a true verdict give according to the evidence ~~do say~~ upon their oaths aforesaid do say "We the jury find the defendants not guilty" The plaintiff by his attorney moved the Court for a new trial.

Monday December 5th A.D. 1859
Henry J. Lehare

vs
Alexander McDonnell
John Nelson

Prover

This day came the parties to this

9

first by their respective attorneys and this cause came on to be heard on the motion of plaintiff for a new trial and the Court being satisfied in the premises do overrule said motion. Therefore it is considered by the Court that the said Alexander McDonnell and John Nelson have and recover of the said Henry J. Chase their costs and charges by them about their defense in this behalf expended and that they have execution therefor.

And afterwards to wit on the 23rd day of December A.D. 1859 there was filed in the office of the clerk of the Circuit Court - a bill of exceptions in said cause which is in the words and figures following to wit:

Bill of
Exceptions

" Henry J. Chase

vs

Alexander McDonnell

John Nelson

In the Circuit Court - Peoria
County Ills.

November term A.D. 1859

Be it remembered that on the coming on of this cause for trial before said Court & a jury, the plaintiff to sustain the issues on his part called Duncan J. Perry who being duly sworn testified, that he knew the parties to the suit and knew the land of plaintiff in Princerville township in said County rented of him by Peter Duffy in 1858 & previously; Witness was present when Duffy surrendered the farm & crops to Chase. This was about the last of July or early part of August 1858 - Duffy was paying a cash rent and owed for the rents of 1858 and something for rents of previous

years, and the arrangement was that plff should pay Duffy or did pay him a given amount, but the precise sum not remembered for a shanty upon the land, and to give up all claim for the rents; and in consideration thereof Duffy was to give up & did give up to lease the entire crops then on the farm together with the farm except some potatoes, which he reserved to himself and was to surrender the possession of the shanty in a few days. This was on Friday or Saturday, and the possession of the shanty was to be given to lease in the beginning of the next week. These crops consisted of some wheat, then in the shock and about 40 acres of corn then growing on the farm. At the same time plff contracted with Hugh Winn to go upon the place thresh the wheat and take care of & harvest the corn and deliver one half of each to plff at Langdon Station or the residence of plaintiff, as plaintiff should direct, and for so doing Winn was to have the other half of both the corn & wheat. The distance from said farm to plaintiff's residence is about 12 miles - and from said farm to Langdon Station is about 14 miles. Winn was to occupy and have possession of the Shanty as soon as Duffy went out.

On Cross-examination witness stated "Winn was to have possession or control as a tenant - I suppose" On re-examination witness said - Winn was not in on the same terms Duffy was - Duffy was to pay a cash rent. By the contract with Winn, he said Winn was to have one half the crops as above stated. The contract of sale

11
by Duffy to Chase and the contract between Chase
& Winn in regard to the farm were made on same day and
the latter ~~part~~ just after the former Winn & Duffy being
both present at each contract. Hugh Winn being next
called by self stated - I was present when Duffy gave
up the farm & crops to Chase this was in the latter
part of July or first part of August 1858 - the wheat was
in shock at the time - Duffy owed Chase rents and
agreed to give up the corn on the ground and the wheat
in discharge of said rents - Chase agreed to give Duffy
twenty dollars for a shanty he had on the land - Chase
paid this to Duffy - I carried it to him for Chase a
day or two after - Duffy left the next week and I went
into possession under a contract with Chase, by which I
was to take care of the place tend & harvest the corn,
thresh the wheat and deliver one half of each to Chase,
either at Chase's residence or at Langdon station as Chase
might direct and for so doing I was to have the other half
There was forty acres of the corn - I had husked and
gathered from 500 to 600 bushels of the corn which I
had in pens on the place, and there was still in the field
unharvested from 200 to 300 bushels, when my horse
died and I became unable to fulfil my contract with
Chase and deliver the corn to him as I had agreed -
I had fed out about a hundred bushels of the corn -
I told Chase I could not comply with my contract and
he came out & I gave up the corn remaining and my
contract to him, and Chase put me in possession to

take care of the property for him - This was a week or two before Christmas. Sometime in the first week of January thereafter the defendants Mc Donnell & Nelson came on to the premises with six teams and sixteen or seventeen men and carried off a part of the corn which I had gathered, and also gathered and carried off part of the corn in the field. - They tore down the pens I had built and put the corn they left in another pen on the land. - They did not gather the corn clean in the field - they left some pieces of rows ungathered and left considerable corn besides upon the ground over which they did gather, and some people came the next day and gathered and carried away a good many sacks of corn from the field, which defendants had left - I don't know certainly how much of the corn the defendants carried away, they said they had taken half of what there was, when defendants came I forbid them from taking the corn - Told them it was not mine, that it belonged to Chase, that I had given up my contract because I could not deliver the corn as I had agreed, and had therefore given it all up to Chase, which was the fact - I did not stay till the defendants had divided the corn, but went to find Chase.

On Cross-examination this witness stated I had turned the crop over to Chase and given up my contract a week or two before Christmas and before defendants came and took away the corn, I had not delivered any of the corn to Chase and surrendered to Chase because one of my horses had died & I could not deliver

it. By the contract I had till the first of March 1859 to complete the delivery and was to have had one half the corn for taking care of it and delivering to Lease the other half. Witness understood from the time he made the contract with Lease that he had the right to sell or mortgage his half of the crop.

Plff then proved by George W. Odell, C. J. Jones & James Elton that in January 1859 corn was worth in Peoria from 75 to 80 cents per bushel and by Shehan that it was worth 12½ cents per bushel to shell & haul it from the farm in question to Peoria. - said Winn also stated that corn was worth 50 cents per bushel or more at said farm when Defts came and took this corn away.

Plff here rested

Defendants then to maintain the issues on their part called John Kelley who stated that he was present when Winn & Lease made their contract about the crops on the Duffy farm - It was about the last of July or beginning of August 1858 - Winn was to have one half for tending & delivering the other half at Lease's house or Sangdon station. Winn was in possession a few days afterwards I helped him stack the wheat. Winn had charge of the whole crop & farm. I saw some of the corn in the pen after it was husked - I saw Lease's man afterwards hauling some of this corn away. This was after defts had carried off what they took - I supposed Winn was in same as a tenant.

The farm was surrounded with a wire fence through which the cattle were in the habit of breaking and Winn had to watch the crops a part of the time night & day. I was present and heard the contracts between Duffy & Lease and Winn & Lease. They were made together, the latter just after the former & the same persons present at each. Winn was to take Duffy's place as understood; he was to take care of the farm, keep up the fences, take care of & harvest the crops & deliver one half where Lease desired either at Lease's house or at Langdon Station for the other half & was to occupy the house where Duffy was then living.

David Wendell next called by defts, said I was present when defts took away the corn in question - It was in the forepart of January last. It was taken from NW 29 T 11 N R 6 E in Peoria County. They had several teams - some moved the corn in the field and some gathered the corn that was in the field. I divided the corn for them - I first put out 100 bushels to offset what it was said Winn had used, and divided the rest as nearly equally as I could judge. We measured by ^{the} wagon load hauling one half of it to the farm of Nelson adjoining for defendants and leaving the other half for Lease on the land. There were 17 1/2 loads in each share, and I estimated a load at about 13 bushels shelled corn. We first commenced hauling all the corn to Nelson's farm and hauled some half dozen loads intending to divide it there - but concluding this

15

was not the right way, we went and set off as much to beare as we had hauled to Nelson's and after this divided ^{it} load & load about - while the corn was hauled to Nelsons alone I staid there. But when we began to divide, I remained at the pens on Lehares farm - I did not go into the field but saw the loads as they were driven past - the whole thing was done up in one day. The wagon boxes will hold something more than 13 bushels but owing to a bad place in the ground over which we had to haul the corn, we could not fill them full. Corn was worth about \$1.50 cts per bushell at this farm at this time. about 3 weeks after the defts took the corn I carried a written notice to Lehare from the defts, of which the paper now produced is a copy, which said notice is in words & figures following:

"Princeton January 24th 1859

Mr. Henry J. Lehare we the undersigned are ready to deliver your part of the corn according to Hugh Wiggins contract at the Langan Depot - which was raised on the N.W. quarter of sect. 29 twenty nine eleven north six east -

Alex^r. M^o Donnell

John Nelson"

Defts then offered to read said notice to the jury, to the reading of which in evidence plff then and there objected but the Court overruled the objection and permitted said notice to be given in evidence to the jury and plff by his counsel then & there excepted.

Witness further stated that when said notice was

given to Chase, he appeared to get angry, said but little but witnesses understood from him that he did not recognize the defendants in the matter and would have nothing to do with them.

Dfts next called William M^c Donough who said he helped dfts to gather the corn and that it was gathered about as clean as usual, that corn at that time was worth from 45 to 50 cts per bushel on the farm.

Dfts next offered in evidence the note and mortgage following to wit:

"Know all men by these presents that Hugh Winn of the County of Peoria and State of Illinois of the first part for and in consideration of giving security on a note to Robert Arthur Smith for two hundred and seventeen dollars 35 cts by Alexander M^c Donnell and John Nelson of Peoria County Illinois of the second part do hereby covenant grant bargain and sell unto said parties of the second part their heirs and assigns the following goods and chattels to wit: one half of forty acres of corn on the north west quarter of twenty nine eleven north and six east of fourth principle meridian, two thirds twenty seven acres of corn section one Boimfield township one bay horse with white face coming five years old, one sorrel mare rising eight years old dun pony six years old one set double harness three plows No. six No. five and shovle plow forty bushels of wheat in pen. To have and to hold all and singular the said goods and chattels unto said

17

parties of the second part their heirs and assigns forever
 and the said party of the first part for himself, his heirs
 executors and administrators doth hereby covenant to and
 with the said parties of the second part and their assigns
 that he is lawfully possessed of the said goods and chattels
 as his own property that the same are free from all incum-
 brance and that he will warrant and defend the same to
 them the said parties of the second part and their assigns
 against the lawful claims and demands of all persons
 Provided nevertheless that if the said party of the first part
 his heirs, executors and administrators shall well and truly
 pay to Robert Arthur Smith two hundred and seventeen
 dollars and 35 cts on or before the thirteenth day of March
 next with interest from date according to one certain
 promissory note given by said party of the first part to
 Robert A. Smith or order bearing date thirteenth September
 1858 then this mortgage to be void otherwise to remain
 in full force and virtue. And provided further that
 until default be made by said party of the first part
 in the performance of the condition aforesaid it shall and
 may be lawful for him to retain possession of said goods
 and chattels and to use and enjoy the same but if the
 same or any part thereof shall be taken on execution
 attached or taken by any other person or persons at any
 time before payment or if the said party of the first part
 shall attempt to sell the same without the authority
 and permissions of said parties of the second part in
 writing expressed then it shall and may be lawful

for said parties of the second part or their assigns to take immediate and full possession of the whole of said goods and chattes to their own use. In witness whereof the said party of the first part has hereunto set his hand and seal this sixteenth day September 1858

Hugh ^{his} Winn 
mark

State of Illinois

Peoria County

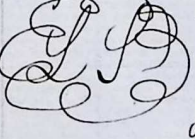
This mortgage was acknowledged before me by Hugh Winn this sixteenth day September 1858

Joseph Armstrong
Justice Peace Peoria County Illinois

State of Illinois

Peoria County

Recorders Office

I, Enoch P. Sloan, Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois, and ex officio Recorder of deeds in said County, do hereby certify that the annexed mortgage was filed for record in my office on the 2nd day of October A.D. 1858 and has been duly recorded with the accompanying certificates on pages 594 & 595 in Vol. 3 in said Recorders office. In witness  whereof I hereto set my hand and affix the seal of the said Circuit Court at my office in Peoria this 2nd day of October A.D. 1858

Enoch P. Sloan, Clerk & Recorder

\$217³⁵

Peoria Ill. Sept. 13, 1858

Six months after date for value received we or either of us promise to pay to Robert Arthur Smith or order

the sum of two hundred and seventeen ³⁵/₁₀₀ dollars
with interest at ten per cent from date if not paid when
due.

Witness Edward ^{his} Grant
_{mark} for Winn }

Hugh ^{his} Winn
Alex. ^{mark} Mc Donnell
John Nelson

Know all men by these presents, that whereas the subscriber
of Brimfield Ills are justly indebted to Robert Arthur Smith
upon a certain promissory note bearing even date herewith
the sum of two hundred and seventeen dollars and thirty
five cents, made payable to the said Robert Arthur Smith
or order and due in six months after date. Now therefore
in consideration of the premises and of the sum of one
dollar to us in hand paid by the said Robert Arthur
Smith, the receipt whereof is hereby acknowledged, we and
each of us do hereby make constitute and appoint —
or any attorney in any Court of record to be our true and
lawful attorney, irrevocably for us and in our names place
and stead to appear before any justice of the peace, or in
any Court of Record in term time or vacation in any
of the States or territories of the United States, at any
time after the date hereof, to waive service of process and
confess a judgment in favor of the said Robert Arthur
Smith or his or their assigns or assignees, upon the said
note for the above sum or for as much as appears to be
due according to the tenor and effect of said note with
interest thereon, together with costs, also for — the usual
attorneys fees to be added to the amount due on entering
up judgment; also to file a cognovit for the amount that

may be so due with an agreement therein, that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof nor any bill in equity filed to interfere in any manner with the operation of such judgment, and to release all errors that may intervene in the entering up of such judgment, or issuing the execution thereon, and also to consent to immediate execution upon such judgment. Hereby ratifying and confirming all that our said attorney may do by virtue hereof. Witness our hands and seals this thirteenth day of September A.D. 1858

In presence of
Witness Edward ^{his} Grant _{mark} }

Hugh ^{his} Winn _{mark} Seal
Alex^r. McDonnell Seal
John Nelson Seal

(Endorsed)
"Received Peoria Illinois Oct. 19th 59 Two hundred
forty \$100 dollars in payment of the within note and
interest for one year twenty six days @ 10 per cent
R. A. Smith

pr. Theo. Walker"
and called Hugh Winn & J. Armstrong who proved
the execution of said note and that said mortgage was
made to secure it. To the reading of which said note
& mortgage to the jury plff. by his counsel then and
there objected but the Court overruled the objection
and permitted said note & mortgage to be given in evidence
and plff. excepted.

Ofs then again called said Hugh

Winn, who testified that he sold two loads of the corn mentioned in said mortgage, which grew on the land in Brimfield - This is all I sold or offered to sell of said mortgaged goods, and I sold these loads to get myself a stove and with the consent of the defendants who knew I needed the stove, and told me to take some of the corn and sell it & get myself a stove with the price, which I accordingly did.

Said witness further testified that when he gave said mortgage he told the defendants just how the matter stood between him & Chase, that he had undertaken to harvest the corn and deliver one half to Chase as above stated and for so doing was to have the other half - that he also told Chase about the mortgage, when he surrendered the contract to him - and that Chase said he did not care anything for that, - that he, Winn, did not own the corn till he had complied with his contract, and had no right to make such mortgage. Before taking the corn defendants took the horses harness & one of the plows mentioned in the mortgage I paid \$150. for one of these horses and it has since been sold for \$100. one of the others was worth \$50. to \$60. and the pony was worth \$40 to \$50, when taken & sold by defendants.

This was all the material evidence in the case. The plaintiff then asked the court to instruct the jury as follows:

1 If the jury believe from the evidence that the defendants

took and carried away and converted the corn of the plaintiff to their own use they will find for the plaintiff to recover the value of the corn so taken and converted.

- 2 If the jury find from the evidence that the corn growing in the field did at any time belong to the plaintiff was growing upon his land and that the plaintiff contracted with one Winn to tend and harvest the corn and deliver one half of it at a stipulated place within a certain time, in consideration of which he was to have the other half - this gave the said Winn no right of property in any portion of the corn until he had fully complied with the contract.
- 3 Such a contract made with Winn did not divest the title of Chase until a full compliance on the part of Winn, unless Chase had dispensed with such compliance.
- 4 If Winn had no title to the corn he could give none by way of chattel mortgage, and if the said Winn before his title to the corn had become vested or complete, rescinded and abandoned the contract with Chase it follows that no title was vested in him by virtue of such contract so rescinded.
- 5 A chattel mortgage is no lien upon personal property as between the mortgagor and bona fide purchaser, unless the mortgage is acknowledged before a magistrate in the same precinct where the property is situate and it is incumbent upon the defendants claiming under said

mortgage to prove that the mortgage was so acknowledged

- X 6 If the jury believe from the evidence that the plaintiff Chase was the owner of the corn in question growing on the N.W. 29 T 11 N R 6 E. and that he employed Hugh Winn to tend & harvest said corn and deliver one half at Langdon depot or the residence of plff and that for so doing Winn was to have the other half, the half which Winn was to get for such services would not pass to him & become his property until such delivery of the plaintiffs half or offer to deliver it, and if the jury further believe from the evidence that Winn never did deliver said corn or any part of it as required by his contract with Chase and that the said contract was abandoned because of the inability of Winn to comply with it and not for any fault on the part of Chase, the whole of said corn as well the part which Winn was to get as the other became completely revested in Chase as though the contract with Winn had never been made.

7. The contract between Chase & Winn referred to and specified in instruction number 6 immediately preceding is a contract coupled with a personal trust & confidence and could not be assigned by Winn to the defts so as to authorize them without the consent of Chase to take Winn's place and compel him to accept performance from them instead of Winn, and Chase was not bound to recognize them as his servants and agents in the performance of said contract.

24-8 If the jury believe from the evidence that the defendants came on to the premises of the plaintiff and made a division of the corn in question and carried off what they claimed as Winns half without previous notice to lease their acts in so doing were wholly unauthorized and no subsequent notice to lease was sufficient.

9 Before the defendants could claim any right to come upon the premises of lease & undertake to perform & carry out Winns contract, it was their duty to give lease notice of their intention or desire so to do, and if the jury believe from the evidence that without the consent of lease and before giving such notice they came upon said premises and carried away a part of said corn in fulfillment of Winns contract, they acquired no right thereby to the corn so carried off, and are liable in this action to the plaintiff for the amount proved to have been by them so carried away.

Which instructions the court refused to give as asked but modified said 4th instruction by adding thereto between the words "lease" and "it follows" in the 9th line from the top in said instruction the following words ^{to wit} "before he made his mortgage to defendants" and said court then gave said instruction as modified and said court refused to give said 7th 8th & 9th instructions altogether - to which decisions of the court in modifying said 4th instruction and refusing said instructions 7, 8 & 9 plff by his counsel then & there excepted

25

Said Court then gave the following instruction for defts viz:
The Court instructs the jury on part of the defendants that if they shall believe from the evidence that the contract between Chase the plaintiff and Winn the witness was that the plaintiff delivered the corn to Winn for him to take care of and to gather it and to deliver one half of it at Langdon station to Chase or on his premises as Chase should direct and that Winn was to have the other half of the corn and that Winn before the corn was gathered and delivered to Chase according to the agreement (and while he was in possession of the same) gave a mortgage to the defendants for his interest in the corn and afterwards he attempted to sell it without the consent of the deffends. this would be a forfeiture of the mortgage on the part of Winn & the defendants would have the right to take possession of it and then the defendants by such mortgage stood in the place of Winn and were bound to fulfil the contract of Winn with Chase. And if the jury shall further believe from the evidence that the defendants or Winn gathered the corn & delivered it to Chase according to the contract or offered to deliver the corn to Chase at Langdon station or at his farm as Chase should direct and Chase refused to let them deliver the corn as it was to be delivered by the Contract this would be a sufficient fulfilment of the Contract on the part of the defendants and their mortgage entitled them to the corn and the jury in that case should find for the defendants.

To the giving of which instruction for defts

State of Illinois }
 Peoria County } ss I Enoch P. Sloan, clerk of the
 Circuit Court ⁱⁿ and for Peoria County in the State of
 Illinois do hereby certify that the foregoing is a full
 complete and correct transcript of the papers filed and
 of the proceedings of our said Court had in a certain cause
 wherein Henry L. Lehare is plaintiff and Alexander
 McDonnell & John Nelson are defendants as the same
 remain on file and of Record in my office.

Given under my hand and the
 seal of said Court hereunto
 affixed at my office in Peoria
 this 20th day of March 1868
 Enoch P. Sloan, clerk
 per J. G. Schulze Dpty.

Fees for Record \$7⁰⁰ Received of plaintiff
 E. P. Sloan, clk

And now comes the said plaintiff in error
 and says that Manifest error in the record,
 proceedings & judgment of said Circuit Court
 hath intervened to the prejudice of said plaintiff
 in this - to wit =

1st Said Court Erred in the admission of improper
 & irrelevant evidence & testimony on the part of the
 defendants =

over

- 2nd Said Court erred in permitting said notice, note & mortgage to be read in evidence to the jury =
- 3rd Said Court refused proper instructions asked on the part of said plaintiff and in properly modifying said 4th instruction of said plff =
- 4th Said Court instructed the jury erroneously on the part of the defendants =
- 5th Said Court erred in overruling the motion of the plff below for a new trial =
- 6th ^{for error} Said Court erred in rendering judgment against said plff =

Wherefore and for other good & sufficient reasons appearing in said Record said plaintiff prays that the judgment of said ~~Circuit~~ ^{Circuit} Court, may be set aside, reversed & wholly for naught & set aside =

Jonathan K. Cooper

Atty for plff in error

In Mulo est Erratum.

April 8th 1860

W^o Lloyd Huddy
for Defendants & Appellees

1855 1856
Henry J. Chase
102

McDonald + Nelson
Record
for Supreme Court

Filed April 17, 1860
L. Leland
Clerk