No. 14289

Supreme Court of Illinois

Ogden

vs.

Stewart

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

1889

No. 271.

Ogden
vs
Stewart

Samuel Ogden
vs.
James Stewart
John A.G. Murray

In the Supreme Court
3d Grand Division
April Term 1862=
Error to Peoria=

Statement and argument for Defendants=

There is cause to complain of the printed abstract of plaintiff in this case. It is neither so full, nor accurate as it should be=

The evidence in several instances is not satisfactorily given, and the instructions, are not imbraced in it at all=Such as are objected to, are professedly not set out in the printed Brief of plaintiff, but not always as they stand in the Record= A little fuller specification of the goods named in the declaration, is also desirable, for the sake of comparison with the evidence= The attention of the Court is therefore asked more particularly to the case made in the Record itself, than would be necessary were the Abstract more complete=

The material facts, as we understand and gather them from the Record, are briefly these= Rudolphus Ansley, who kept a Tavern, in Peoria, sold to Harrison & Bennett, about the 7th of February 1861, his Household furniture and other goods, including a lot of liquors, in Barrels, Bottles &c. receiving part of the purchase money down and

taking notes, with Mortgage on the goods sold, from Harrison and Bennett, to secure the unpaid balance, amounting to $793.25/100= There were six notes given for this sum, in all, the last of which fell due in ten months, or December 7th 1861= The Mortgage was duly executed, acknowledged and recorded, and by its terms the property was to remain with the Mortgagors till all the notes fell due, but reserving to the Mortgagee the right to take possession of them and make his whole debt, if he chose, on default of payment of any note at maturity, or in case the Mortgagors should attempt to sell or remove the property, without the consent in writing of the Mortgagee, or the goods should be seized in execution &c=

At the time of the taking charged in the declaration, more than one of the notes was due and unpaid, and moreover Harrison and Bennett, without the consent and against the will of Ansler, sold, in the lump, and were in the act of delivering, all the liquors mortgaged which they still had on hand, to Ogden, the plff. when Ansler interfered, demanding possession of the goods under his mortgage, and at the same time exhibiting the Mortgage; but Harrison and Bennett and plaintiff, refused to let him

have them, & kept some empty Barrels, which had contained liquors that were covered by the Mortgage, which Barrels Amsler was allowed by Harrison and Bennett and plaintiff, to take away, without objection, under his Mortgage = Failing to get the other goods peaceably, Amsler had recourse to his writ of Replevin, which is the taking complained of = Ogden, the plaintiff, knew of the Mortgage to Amsler, and that it was still unsatisfied, when he bought the goods, but concluded to run his risk, as against it, saying, that, "there was no danger as it" (the Mortgage) "had run out = That it had not been "closed and could not hold the liquors" &c. = See testimony of Willis, p.p. 30 & 31 of Record = It is also a part of the case, that when Amsler sold out to Harrison and Bennett, he was engaged in keeping a Tavern in which a Bar was kept, and liquors sold at the Bar - That Harrison and Bennett bought with the understanding that they were to go on and keep the House as usual = That after their purchase and the making of the Mortgage, they did carry on the business as Amsler had done, and made use of the liquors Mortgaged to supply the Bar from time to time, as needed, with the knowledge and without objection from Amsler = There was no Express agreement between the parties

on this subject, as stated in the Brief of plaintiff, but it is admitted, that the record does show that Harrison and Bennett had this understanding, and that it was tacitly acquiesced in by Ansler= It is further in evidence, that Harrison and Bennett bought some other liquors after those purchased from Ansler, and it is pretended that little, if any, of the liquors contained in the Mortgage, remained, and that the liquors sold Plaintiff were almost exclusively of the new purchases= A comparison of the declaration with the evidence will show that this is not true to anything like the extent stated= The only liquors bought by Harrison and Bennett, other than from Ansler, was the Bill got of the witness, Levi, consisting of one Barrel Bourbon Whiskey, one Barrel Port Wine, one Barrel Gin, Two Boxes of Catawba Wine and Two Boxes of Absint. (See abstract p 3 referring to Record p. 18) And two or three Barrels of Whiskey, of one Miller, in Peoria= Plaintiff, in his Brief, says liquors were bought of two men abroad, one in St. Louis, the other in Cincinatti; But this is not so= Harrison speaks of buying of a man from St. Louis - Bennett, who did the business, and knew better, says the man lived in Cincinatti, and neither of them pretend they bought from more than one man besides Miller. Besides they call the

a question of that sort, for the first time, on the trial = Neither Ansler nor the Sheriff could make the proper discrimination = past of the casks containing the liquors were in plaintiffs cellar when Ansler first came up, so that he could not see them = And they were all in the cellar when the Sheriff came to levy the writ (see testimony of Bennett); and as to the Bottles of wine, (supposing them to be different), it is not likely they could be distinguished from those enumerated in the Mortgage ~~distinguished from those enumerated in the~~ by any but Harrison and Bennett, or plaintiff = The truth is however, the pretence that any material part of the goods taken are not those named in the mortgage, is an after thought = Ogdens whole conduct shows he knew the liquors he was getting were mainly, if not entirely, covered by the mortgage; and if there were any outside of the mortgage, he made little or no account of them = What he purposed evidently was, to disregard the mortgage, and to hold the goods in spite of it, not because they were not embraced in it =

But not to dwell longer on this = The material inquiry, we take it, is, was this mortgage valid as against Ogden, the plaintiff in this case? = It is not disputed,

but that this Mortgage was made in good faith: and entirely good between the parties to it; Being duly acknowledged and recorded it was also good as to all third parties, unless the Acquiescence of Ansler in the use of the liquors to supply the Bar, rendered it invalid: Whatever might be the effect of this as to creditors and subsequent bona fide purchasers, upon principle, no less than the authorities cited in the Brief, this did not invalidate it, either as to the parties, or purchasers not bona fide: Was Ogden such a purchaser? We have seen that he knew of the existence of the Mortgage, and that he bought without the consent of Ansler, and not with the view of aiding him to make his debt out of the Mortgaged goods, but clearly the contrary: Upon the reasoning in the case of Heathorn & Lewis 22d Dec. R: p. 398. this made him a purchaser Mala fide, and put him, as to the Mortgaged goods, just in the shoes of the mortgagors, with no higher or better rights, as to Ansler, to, or over that property, than had Heaviside and Bennett, the Mortgagors, which, as the case stood, was simply the right to redeem = And this is certainly the true doctrine on the subject = Suppose the case of an absolute sale of a chattel,

where possession is left with the vendor. Such a sale is so entirely void, as to creditors and subsequent bona fide purchasers, that no Explanation, it is said, is admitted, and yet, who doubts that, if the purchaser knows the chattel has been sold to another, that his purchase will be held fraudulent and void? It is of course always a fraud in the vendor to sell the chattel a second time, without the consent of the first purchaser, and just as certainly will the second purchaser, in such case, be adjudged a partaker in that fraud, and held to take nothing by his purchase: So here, it was a fraud in these Mortgagors to sell this property without Ansley's consent, and Ogden, knowing this, is implicated in that fraud, and his purchase shall not avail him, as against Ansley, the mortgagee.
If it be said that the case of Fuller & Paige 26 Ill. R. p. 358 indicates that an actual intent to cheat must be proved affirmatively upon the purchaser, in order to invalidate his ~~Mortgage~~ purchase, we reply, the case does not necessarily go that far. The Court, it is true, approved an instruction which holds a sale to be void, when the pur-

chaser knew of the mortgage and bought "with intent" "to cheat and defraud," the mortgagee "of his lien"; and so it well might= But, non constat that an instruction less strongly worded, would not also have been held good= assuming this instruction however to be the criterion, the present case can still be shown to fall within the rule= The "intent to cheat," within the scope of this decision, is made out, as we take it, when it is shown that the purchaser knowingly enables the mortgagor to "pocket the avails" of the mortgaged property, to the detriment of the mortgagee= It is not necessary that the purchaser shall intend to cheat the mortgagee, for his own benefit- It is enough under this decision if he knowingly enables the mortgagor to do it= The facts of the case, as reported, were simply these, Fuller, the purchaser, "stated that he knew of the existence
" of the mortgage, at the time of the purchase,
" but that it was good for nothing, inasmuch as it had not been recorded" And on this the Court say= "Here the facts show
" a contrivance and a design by the appellant (Fuller) "knowing of the existence of the
" mortgage, in collusion with the mortgagor, to cheat the mortgagee" and, the Court had before remarked that it was the enabling Mayer, the mortgagor

"to put the money into his own pocket"
which constituted the fraud on Paige,
the Mortgagee =
The case now before us is at the least as
strong as this = Ogden knew of the Mort-
gage to Ansler, and that the debt was
not paid = This is clear from the proof,
and is besides settled by the verdict of
the jury, to whom the question went, up-
on the instructions = But he determined
to disregard it, and risk the purchase, assu-
ming that the mortgage had "run out"
and that, by failing to "close" it, in season,
Ansler had lost his remedy, as against
purchasers = For this reason alone, and not
because Ansler consented to or authorized
the sale, as is now pretended, Ogden con-
cluded to buy, and arrange with Harrison
and Bennett for the price; believing un-
questionably, that Ansler owned now, not
only his lien, but his debt, by the opera-
tion = Other circumstances in the case,
as, for instance, the low price at which
the liquors were sold, the hasty and ea-
ther unprecedented hour of the day at
which they were delivered - might be ad-
duced to show direct collusion between
Ogden and these mortgagors, to forestall
action on the part of Ansler, and
effect a disposition of the goods by which

sition asserted by plaintiff, and may have been designed to avoid the conclusion intended to be raised by, or likely to be drawn from the instruction, as asked, that, as between a purchaser and third parties, fraud must, in every case, be affirmatively shown by proof aliunde of the particular facts and circumstances of the transaction itself; which is not true; Or it may have been to meet another view, still more objectionable, which the generality of the instruction countenanced - namely, that a purchase of a chattel, without delivery, would be presumed good, as between the purchaser and third parties, till the contrary appeared - And as this very question of delivery figured in the case, (there being evidence tending to show that the delivery was not complete when Ansler appeared and demanded the goods under his mortgage) the limitation made by the Court, was appropriate=

The fourth instruction asked by plaintiff, is clearly not law in any view that can be taken of it, and was rightfully refused, especially under the issues; one of which simply denied property in the plaintiff - And yet the instruction requires the jury to find property in the plaintiff" provided only the ligures referred are not the identical ligures embraced in

a certain Mortgage; which last might be true, and yet the liquors not belong to the plaintiff; and this the plaintiff had to prove = For a further reason also, the instruction was properly refused =
By its terms, unless all the liquors were embraced in the mortgage, the jury were to find property, in the whole, in the plaintiff = As the evidence stood, the instruction should have been just the other way, since, whatever portion of the liquors were not embraced in that Mortgage, were mixed up with them, either by the plaintiff himself, or his vendors; and it was his, or their fault that they were taken with the mortgaged goods, by the Defendants =
3d P. 11 = Under the issues in this case, the plaintiff was bound to show property in himself, and it is therefore not seen, why the 2nd instruction given for the Defendants, was not proper =
The objection taken to Defendants 4th instruction, (which see in Record) is entirely unfounded = There is no evidence whatever that Musser authorized this sale to Ogden, but just the contrary = The suggestion that his acquiescence in the sale of the liquors to customers of the House, by retail at the Bar, (for that is doubtless the authority referred to) author-

ized the sale to Ogden, is so manifestly mere pretence that it is not entitled to any consideration=

Defendants 5th instruction, as printed in plaintiffs Brief, it is admitted is not law= a reference however to the Record, will show that a most material clause, to wit: "with actual notice of the existence of the Mortgage" is omitted- If the words here to fore presented are heard, this makes the instruction proper. The particular objection taken by plaintiff, is in part the same with that last commented on, and it is only deemed material to add here, that the assertion that the jury, by this instruction, was told that, if Ogden knew "of the existence of the mortgage he was not "a purchaser in good faith, although "the mortgagors had sold the property" to him, "by authority of the Mortgage", is not within the fair intendment of the instruction, and the jury would understand nothing of the kind therefrom= Upon the proof, Defendants 7th instruction was appropriate= It is true the Mortgage does not specifically mention the words containing the liquors= But the evidence shows, (see testimony of Henry Lewis) that the liquors, when mortgaged, were contained in Barrels,

Half Barrels, and Bottles: and it is plain that Harrison and Bennett considered the Vessels included as they permitted Amsler to take the empty Barrels, under his mortgage; and it is not a little significant, on this point, as well as some others in the case, that Ogden, tho' present, made no objection to Amsler's taking these empty vessels, tho' they appear to have been delivered to him, or at his store, with all the other goods which he claimed to have purchased of Harrison and Bennett:

Upon the whole, it is submitted, there are no sufficient reasons for reversal of this judgment:

There was undoubtedly proof sufficient to justify the verdict, and if the Court can see that the plaintiff has not been materially prejudiced, it will not reverse the case, tho' some errors may have intervened

Peoria May 22/62 = Cooper & Mass
for Defendants

No. 271

Samuel Ogden

vs.

James Stewart

Argument for Defts.

Filed. day 23d 1862

L. Eleander

Clk.

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Pleas before the Circuit Court, within and for the county of Peoria, in the State of Illinois, on the twenty seventh day of November in the year of our Lord one thousand eight hundred and sixty one.

Be it remembered, that heretofore, to wit: on the ninth day of July in the year of our Lord one thousand eight hundred and sixty one, there was filed in the office of the clerk of the Circuit Court of Peoria County, Illinois, an affidavit in words and figures as follows, to wit:

Affidavit

State of Illinois }
Peoria County } Samuel Ogden being duly sworn deposes and says that he is the owner and entitled to the possession of the following personal property to wit. Three half barrels of Brandy being about sixty gallons. One barrel of Peach Brandy being about forty gallons, Three barrels of Rye Whiskey being about one hundred and twenty gallons, One barrel of Gin being about forty two gallons, One barrel of Port Wine about ten gallons, one barrel of rum about ten gallons. One barrel of Bourbon whiskey about forty gallons, forty five bottles of wine, and eight gallons of common whiskey, of the value of two hundred dollars, which said barrels bottles and contents are the property goods & chattles of this affiant, and he is entitled to the immediate possession thereof & of the value aforesaid, affiant says that said property, goods & chattels were wrongfully taken from the possession of this affiant

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and are now wrongfully detained from affants possession by John A. J. Murray & James Stewart.
That said property goods and chattels nor any part thereof were not taken for any tax assessment or fine nor levied on by virtue of any execution or attachment issued against the goods or chattels of this affiant liable to execution or attachment. He therefore prays that a Writ of Replevin issue herein for said Goods.

Samuel Ogden

Sworn to before me
this 9th day of July AD 1861
E P Sloan Clk.

And afterwards, to wit: on the 9th day of July A.D. 1861, there was issued from the office of the clerk of the circuit court of Peoria County, Illinois a writ of Replevin in words and figures as follows, to wit:

Replevin writ. State of Illinois }
Peoria County } SS.

The People of the State of Illinois
To the Coronor of Peoria County Greeting:

We command you, that without delay, you cause to be replevied and delivered to Samuel Ogden, the following described Goods and chattels, to wit: 3 half barrels of Brandy, being about 60 gallons, One barrel of Peach Brandy being about 40 gallons, 3 barrels of Rye Whiskey, being about one hundred and twenty gallons, One barrel of Gin being about 42 gallons, or

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barrel of Port wine about 10 gallons, One barrel of Rum about 10 gallons, One barrel of Bourbon Whiskey about 40 gallons, 45 bottles of wine and eight gallons of common whiskey of the value of two hundred dollars as it is said which John A. J. Murray & James Stewart wrongfully detains from from the said Samuel Ogden as it is said, and to summon the said to be and appear before our Circuit Court, on the first day of the next Term thereof, to be held at the Court House in Peoria, in and for the County of Peoria, on the first Monday of August next to answer the said Samuel Ogden for the unlawful detention of the Goods and Chattels aforesaid; Provided, however, that the said Samuel Ogden shall give you bond with good and sufficient security to prosecute his suit to effect without delay, and make return of the said Goods and Chattels, if return thereof shall be awarded, and further to keep you harmless in replevying said property, and have you then and there the said bond, together with this writ, and an Endorsement thereon of the manner in which you have Executed the same, Witness Enoch P. Sloan, Clerk of our said Court, and the seal thereof, this 9th day of July in the year of our Lord, one thousand Eight Hundred and Sixty one.

Seal

Enoch P. Sloan Clerk

And afterwards, to wit: on the 11th day of July A. D. 1861. the aforesaid writ of Replevin was returned by the Coron

of said County, into the office of the Clerk of said Court, Endorsed as follows, to wit:

Coroners Return

State of Illinois }
Peoria County }

I served this writ of Replevin, by reading it to James Stewart and John A. J. Murray Sheriff and Deputy Sheriff of Peoria County and by delivering the within described property to Samuel Ogden with the addition of forty five bottles of wine which were not contained in the Sheriffs levee this 9th day of July A.D. 1861.

Peoria July 11th 1861.

J. N. Niglas
Coronor of Peoria County

And afterwards, to wit; on the 13th day of July A.D. 1861 there was filed in the office of the Clerk of said court a Declaration, which is in words and figures as follows, to wit:

Declaration

State of Illinois }
Peoria County } ss. In the Circuit Court of Peoria County August Term 1861

To wit: James Stewart and John A. J. Murray the Defendants in this suit, were summoned to answer Samuel Ogden, the plaintiff in this suit, of a plea wherefore they wrongfully took and wrongfully detained the goods and Chattels of the Plaintiff. And thereupon the plaintiff by Williamson & Adams his attorneys

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complains, for that the defendants, heretofore, to wit: in the city of Peoria, to wit, in the County of Peoria, State of Illinois, to wit, on the 9th day of July 1861, wrongfully took the goods and Chattels, to wit. Three half Barrels of Brandy, being about Sixty gallons, One Barrel of Peach Brandy, being about forty gallons - Three barrels of Rye whiskey, being about one hundred and twenty gallons, One barrel of Gin, being about forty two gallons - one barrel of Port wine, being about ten gallons, One barrel of Rum about ten gallons - One barrel of Bourbon Whiskey about forty gallons, Fifty five bottles of wine and Eight gallons of Common whiskey - of the said Plaintiff, of great value, to wit, of the value of Two hundred dollars, and wrongfully detained the same until &c. to the damage of the Plaintiff of two hundred dollars and therefore he brings suit &c -

Williamson & Adams
Attorneys for Plff.

And afterwards, to wit: on the 8th day of August A.D. 1861 Pleas were filed in the office of the Clerk of said court, in words and figures as follows, to wit:

Pleas.

Samuel Ogden
vs.
James Stewart &
John A. J. Murray

In the Circuit Court of Peoria County Ills. Aug. term A.D. 1861:

And the said defendants by

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Cooper & Moss their attorneys come and defend the wrong & injury when &s and say that they did not take the said goods & Chattels in the said declaration mentioned or any or either of them or any part thereof in manner & form as the said Plff hath above thereof complained against them, and of this the said defendants put themselves upon the Country &s

Cooper & Moss
attys for Defts

and the Plaintiff doth the like

M Williamson his atty

2. And for further plea in this behalf defendants say actio non, because they say that the said goods & Chattels, in said declaration mentioned, at the time when &s were not & are not the goods & chattels of the said Plaintiff, and of this the said defendants put themselves upon the Country, when &s.

Cooper & Moss Defts attys

and the Plaintiff doth the like.

M Williamson his atty

3 And for a further plea in this behalf defendants say actio non, because they say that the goods & Chattels in said Declaration mentioned, were not the goods & chattels of the said Plaintiff as in said declaration

7 alleged but were & are the goods and chattels of Rudolphus Amsler, and of this said defendants put themselves upon the Country &c.

Cooper & Mass Defts. attys

And the Plaintiff
doth the like
W Williams his atty.

8 And for a further plea in this behalf defendants say Actio Non, because they say that the goods & chattels in said declaration mentioned, at the time when &c. were not the goods & chattels of said plaintiff, as in said declaration is alleged, but were and are the goods & chattels of one Rudolphus Amsler and were taken & held by said defendants (who then were and still are acting & duly authorized Sheriff & Deputy Sheriff of Peoria County, Illinois) as such Sheriff & Deputy Sheriff as aforesaid for the purpose of delivery to said Rudolphus Amsler under & by virtue of a certain writ of Replevin issued out of the office of the Clerk of the Circuit Court of Peoria County Illinois under the Seal of said Court, heretofore, to wit: on the ninth day of July A D 1861. in favor of said Rudolphus Amsler and against Charles Bennett and Charles Harrison as by the said writ & the returns thereon and the papers & proceedings in said cause (now to the Court here shown) will more fully and at large appear, and not otherwise, and this they are ready to verify, wherefore

8 they pray judgment &c

Cooper & Moss Defts attys

5 And for further plea in this behalf, defendants say actio non, because they say, that said goods & chattels at the time when &c. were not the goods & chattels of the said plaintiff, but were the goods chattels & property of the said defendants - and of this the defendants put themselves upon the country - Wherefore &c.

Cooper & Moss
for Defts

And the plaintiff doth the like

M. Williamson his atty

And afterwards, to wit: on the 11th day of November A.D. 1861. there was filed in the office of the clerk of said court a Replication, in words and figures as follows, to wit:

Replication

Samuel Ogden }
vs } Circuit Court Nov Term 1861
James Stewart }
John A. J. Murray }

And for Replication to the defendants third plea by him above pleaded, the plaintiff says precludi non, because he says that at the time when &c the said goods chattels & property in said declaration mentioned were not the goods chattels and property

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of Rudolphus Amsler as in said plea alleged, but were the goods chattels & property of the plaintiff and of this he puts him upon the country &c

M. Williamson his atty

And afterwards, to wit; on the 22d. day of November A.D. 1861. there was filed in the office of the clerk of said court, an affidavit was filed in the office of the clerk of said court, in words and figures as follows, to wit;

affidavit.

State of Illinois }
Peoria County }

John A. J. Murray, being duly sworn, deposes and says that before the commencement of this suit of Samuel Ogden against James Stewart Sheriff and this defendant in Replevin, that the said defendants contracted and agreed with said Ogden said Ogdens attorney that this affiant should levy upon said goods in controversy in this suit, but not remove them and that when said levy should be made said Ogden should procure his writ of Replevin to be issued and levied upon the property in question in this cause in order that the said defendants should not be at the cost expense and labor of removing the same, This affiant further says that it was a contract made in good faith by the parties hereto for the purpose of trying the right of property to the said property in this suit, and affiants further say they never at any time desired to repudiate said

contract and do not now wish to repudiate the said contract but wished the suit tried to test the right & title of property and that all that portion of the defence made by the attorney for the defendants in relation to the taking of the property was without the consent of and against the wishes of the defendants and that they wished the title to the said property to be tried and nothing more.

J. A. J. Murray

Sworn to and subscribed
before me this 20th day
of November 1861

Enoch P. Sloan Clk

Proceedings at a term of the Circuit Court of Peoria County, begun and held at the court house in the city and county of Peoria, State of Illinois, on the first Monday in the month of October, in the year of our Lord one thousand eight hundred and sixty one, it being the seventh day of said month. Present the Honorable Amos L. Merriman Judge of the 16th judicial Circuit in said State, Alexander McCoy States Attorney James Stewart Sheriff and Enoch P Sloan Clerk, to wit;

Thursday October 10th A.D. 1861.

Samuel Ogden
as
James Stewart et al. Replevin

On motion of Plaintiff by Williamson defendant is ruled to plead by tomorrow morning.

Proceedings at a Special term of the Circuit Court of Peoria County, Illinois, began and held at the Court house in the city of Peoria, in said County and state, on the second Monday of November in the year of Lord one thousand eight hundred and sixty one, the same being on the Eleventh day of said month, Present the Honorable S.L. Richmond Judge of the 23d Judicial Circuit in said State, by interchange with the Honorable A.L. Merriman Judge of the 16th Judicial circuit in said state. James Stewart, Sheriff, and Enoch P. Sloan Clerk to wit:

Wednesday November 20th A.D. 1861.

Samuel Ogden.
vs. Replevin
James Stewart
John A.J. Murray

This day come the plaintiff by Williamson his attorney and the defendants by Cooper their attorney and it is ordered that a jury be empannelled to try the issues in this cause, whereupon come a jury of twelve good and lawful men, to wit: Samuel Dimon, H.E. Stillman, G.S. McMackin, Stark R. Reed, Job Smith, Wm Weis, Geo. Dinelbiss, Orrin Doty, Barret White, Geo Ford, G.W. Hitchcock, & Fred Menkins, who were duly Chosen tried and sworn to well and truly try the issues joined herein, and a true verdict

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give according to the evidence; and the said jury having heard the case &c. retired to consider of their verdict.

Friday November 22 A.D. 1861.

Samuel Ogden

vs. Replevin.

James Stewart &
John A J Murray

This day came the parties to this suit, by their respective attorneys, and also come the jury heretofore sworn to try this cause, and the said jury upon their oaths aforesaid, do say, we the jury find the defendants not guilty, The plaintiff by his attorney filed his motion to set aside verdict and for new trial.

Wednesday November 27th A.D. 1861.

Samuel Ogden

vs Replevin

James Stewart &
John A J Murray

This day came this cause on to be heard, on the motion of plaintiff for a new trial, and the court being fully advised in the premises, overruled said motion, Therefore it is considered by the court that the said defendants, have and recover of said plaintiff their costs and charges by them about their defence in this behalf expended and that they

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have execution therefor. And it is further ordered that a writ of Retorno Habendo issue herein for the return of the property. The plaintiff by his attorney prayed an appeal to the Supreme Court of this State, which is allowed on his giving bond in the penal sum of five hundred dollars, payable to said defendants, conditioned as the law directs with security to be approved by the clerk, by agreement, and filing said bond with the papers in this cause in thirty days.

And afterwards, to wit: on the 7th day of December A.D. 1861. there was filed in the office of the clerk of said court a Bill of Exceptions in words and figures as follows, to wit:

Samuel Ogden
vs.
James Stewart
John A J Murray

Peoria Circuit Court
November Special Term A.D. 1861.

Be it remembered that on this day came on this cause to be heard before Hon. Samuel L. Richmond and a jury empannelled herein to try this cause and in order to mantain the issues on his part plaintiff offered the testimony of Charles Harrison who being duly sworn deposed as follows. My partner and myself sold the liquor in controversy in this cause to Samuel Ogden the plaintiff in this cause in July last - Part of these

liquors were mortgaged to Rudolphus Amsler, we had sold out some of the liquors mortgaged to Amsler and purchased other liquors which last were sold to Ogden and delivered to him but had not been delivered to him a day before Amsler tried to get possession of them - We sold some Brandy to Ogden all of the liquors we sold to Ogden are described correctly in a bill of sale we made to him at the time of the sale - was also peach Brandy, Rye Whiskey dont recollect how much, some Gin suppose about 40 gallons, Rum &c. We purchased the liquors of Amsler in the winter - He was then keeping tavern and a bar & selling liquor - The biggest part of the liquors we purchased of Amsler had been sold out before we sold to Ogden. Amsler knew we were selling the whiskey we mortgaged to him all the time and made no objection - He was often there and knew we were selling the liquors - we bought the liquors of Amsler to sell in the bar, which I told Amsler at the time - I cannot tell how much liquor was left that we bought of Amsler & mortgaged back to him and could not tell it from liquors we bought of other persons afterwards - He had been keeping the bar & selling the liquors in his tavern and we bought him out - Cross Examined. We bought liquor of in spring of a man in St Louis. We bought also two or three barrels of Miller in Peoria. I assisted to deliver the liquors to Ogden - We sold the liquors to

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Ogden one day and delivered them the next - I did not see Amsler at the time the goods were delivered - after the goods were delivered I went away from Ogdens and after a while I came back & then saw Amsler. We bought the liquors of the man in St Louis two or three months after the mortgage was made - He was here when we purchased of him, and the liquors were delivered here. I cannot tell how much liquor we purchased of him It was some Rum Whiskey Brandy Port wine - dont know the value - we got a bill of it when we got the liquor - dont know when we paid for it - we paid the money for it - We also bought liquors of Mr Miller who lives on Bridge Street by the side of Miller the brewer - we bought two or three barrels of whiskey of him - do not know at what time - do not know whether we purchased of any one else or not - I did not, & dont know whether my partner did or not - We put the liquors we purchased of other parties in the cellar with the liquor we purchased of Amsler - The liquors we purchased of others came in barrels and bottles - there was wine, gin, brandy and whiskey - What we got from St Louis all came in barrels - some of this remained in the barrels it came in, the other we sold at retail - Cannot tell whether any of it ever went into the barrels we got of Amsler or not. dont know of any being taken from the barrels until

dont know what brand was on the barrels that came from St Louis - When we purchased out Amsler we gave 5 notes & mortgage the same now shown witness - The mortgage was executed by us in the office of Rupelius - The liquor bought of Miller was paid for - Amsler was in when we were selling the liquor a number of times. was in there sometimes to get pay for the notes as they fell due.

The goods were replevied the same morning they were delivered to Ogden - We delivered the goods to Ogden at his house - Amsler did not come along when I was there - I was there when the liquors were taken up to Ogdens. Amsler was not there when the goods were delivered - I went away as soon as part of the goods were unloaded - When I first saw Amsler part of the goods were in the cellar - I did not tell him it was none of his business nor did Bennet that I know of - We did not say any thing to Ogden about the mortgage at the time we sold to him - We sold the goods to him in his house the day before this replevin suit was commenced.

Reexamined by Plff.

Our place of business was burned out a day or two before we sold the ligaors to Ogden - I did not see Amsler when the goods were delivered when partly unloaded I went down home & came back & saw Amsler there

the drays were gone & the goods delivered - There were some empty barrels that Ogden did not Replevy - dont know how many (Here the Plaintiff showed witness the bill of goods sold to Ogden) This bill of goods was the same liquors replevied Cross Examined by Deft again

All the liquors we sold to Ogden were replevined from him - dont know of my own knowledge what was done - did not see it done - I do not know the liquors were moved by the Sheriff The Sheriff said he had replevied upon the liquors - I do not know the Sheriff but saw him in court room this morning acting as Sheriff

James Levi sworn testified
I reside in Cincinnati Ohio am Engaged in the liquor business - know Harrison & Bennett - Sold them liquors to the amount of $123.08 March 29th 1861 - Sold the liquors to them here in Peoria The goods were shipped that day.

Cross Examined
All the liquors except Absint were put up in barrels - was 1 Barrel bourbon whiskey - 1 Barrel port wine - 1 barrel Gin 2 boxes Catawby wine did not get paid for it nor get a note and am not paid yet - a barrel contains about forty gallons - The whiskey was sold at one dollar per gallon, Port wine $1.50 Gin at 75 cents per gallon, 2 boxes of

Catawba wine at $7.50 pr box, 2 boxes of bottels
Absent at $11 pr dozen - I cannot be positive that
this was the amount of liquors as the order they gave
me was changed before sending the liquors The
barrels were marked on one End "Harrison & Bennett"
on the other with the name of the liquor=

Charles Bennett Sworn testified
I had the Principal charge of the bar and liquor
business at the house - We sold the liquors to Ogden
Contained in this bill of sale the same day they
were replevied

Peoria July 8th 1861

Mr Samuel Ogden

Bought of Harrison & Bennett

3 half barel of Brandy	60	Gal		50	30	00
1 barell of Peach "	40	Gal		50	20	00
3 barell of Ry Whiskey	120	Gal	at	25	30	00
1 barel of Gin	42	Gal	at	75	31	50
10 Gallons of Port wine			at	50	5	00
8 Gallons of Rum			at	60	4	80
1 barell of Burbon	Wh		at	75	30	00
45 bottles of wine			at	50 pr bot	22	50
8 gallons of Comon Whiskey			at	15 cts	1	20
					$ 175.	00

Received Payment Full of S Ogden
Harrison & Bennett

They were delivered to Ogden before they were repl-
ied by the Sheriff - were delivered in the morning -
19 Of the liquors mortgaged to Amsler a little was
remaining - dont know how much there was more
of the whiskey than anything else - There was perhaps
two or three barrels sold to Ogden of the liquors mortgaged
to Amsler. We had been selling the liquors we got
of Amsler all the time - did not fill up the same
barrels with other liquor - We bought liquors of a m
in Cincinnati and three barrels of whiskey of
Miller - Think we bought Brandy instead of Cata
wine of Levi - about ½ barrel - Think the under-
standing was at the time we made the mortgage to
Amsler that we were to sell the liquors. Amsler knew
we were selling the liquors all the time - The goods
sold to Ogden were the same Replevied - dont know how
they were marked - They were in the cellar when the
Coroner replevied them from the Sheriff. When the
Sheriff went to Ogdens for the goods, Ogden was going
to resist his taking them by force - and the Sheriff
and Ogden then locked up the goods in the cellar
and both came up to the office of the Plaintiffs
attorney in this case - When the Sheriff came to
Replevy the goods, there was an agreement between
him and Ogden that the goods should remain in
Ogdens cellar till Ogden could get out a
Replevin upon them and try the right to the
liquors in question. The empty barrels were at

the house of Ogden when the sheriff replevied them and took them away - I do not know the Sheriff or Coronor, but have seen same man that replevied from Ogden acting to day here as Sheriff

Cross Examined by Deft

I do not know how much Brandy we bought of Levi. they were the same kind as others. we bought in the summer - did not mix the liquors together - They were in the cellar together, but did not mix any except some Brandy which I put into that got of Amsler. We delivered the liquors to Ogden about 6 or 7 Oclock in the morning after day light - I did not know of any body being there through the night to prevent to prevent us from carrying away goods - dont know how high the Sun was. The 5 Notes we gave to Amsler were part of the consideration to be paid by us on the purchase of Amsler for the house furniture & liquors - On failure to pay any one note all were to become due - We had two fires when we were doing business - We received $100,00 insurance money on first fire and paid out 200$ for repairs - We paid Amsler $ 700 down on purchase Amsler staid with us after we bought him out about a week. We were selling the liquors at the Bar we bought of him all the time he was there and he knew it - He frequently after he moved away came back to the house and always saw us selling the liquors - We bought the Lease of him in February 18[illegible]

Reexamined. There were eight or 10 empty barrels up at Ogdens out of which we had sold liquor mortgaged to Amsler - These he took away and there were two other barrels filled with whiskey, mortgaged to him that was burned at the last fire The liquors were delivered to Ogden the next day after we sold them to him

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The Plaintiff here rested his case

The defendant then called Mr Rupelius who being sworn testified as follows. I know insurance money to the amount of One hundred dollars was paid to Harrison & Bennett said Rupelius also stated saw notes and mortgage there made & signed by Harrison & Bennett in my office, there were originally six notes - all given in part of the purchase money due from Harrison & Bennett for the goods mortgaged back to Amsler. One note of Amslers of $100 was paid & given up to Harrison & Bennett $206 of insurance money on the the last fire was paid to Amsler.

Here the Defendants offered the following notes & mortgage in Evidence and also Docket of Justice of the Peace before whom acknowledged Containing a list of the property mortgaged as required by Statute which said notes and mortgage are as follows

22

$138.65

Two months after date for value received I promise to pay Rudolphus Amsler or order the sum of One hundred and thirty eight Dollars and sixty five cents with interest at the rate of ten per cent per annum from date

Peoria February 7th 1861.

Charles Bennett

Charles Harrison

$138.65

Four months after date for value received we promise to pay Rudolphus Amsler or order the sum of One hundred and thirty eight Dollars and sixty five cents with interest at the rate of ten per cent per annum from date

Peoria February 7th 1861

Charles Bennett

Charles Harrison

$138.65

Six months after date for value received we promise to pay Rudolphus Amsler or order the sum of one hundred and thirty eight Dollars and sixty five cents with interest at the rate of ten per cent per annum from date

Peoria February 7th 1861.

Charles Bennett

Charles Harrison

$138.65

Eight months after date for value received we promise to pay Rudolphus Amsler or order the sum of One hundred and thirty Eight Dollars and Sixty Five cents with interest at the rate of ten per cent per annum from date

23

Peoria February 7th 1861

Charles Bennett

Charles Harrison

$138.65

Ten months after date for value received we promise to pay Rudolphus Amsler or order the sum of One hundred and thirty Eight Dollars and Sixty Five cents with interest at the rate of ten per cent per annum from date

Peoria February 7th 1861

Charles Bennett

Charles Harrison

Mortgage

This Indenture made this seventh day of February A.D. 1861. between Charles Bennett and Charles Harrison both of the City & County of Peoria, State of Illinois of the one part and Rudolphus Amsler of the same place of the other part, Witnesseth, that the said parties of the first part, for and in consideration of the sum of Seven hundred and ninety three dollars and twenty five cents, to them in hand paid by the

said parties of the second part, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, do grant, bargain & sell unto the said party of the second part, all and singular the personal property hereinafter mentioned, that is to say. Forty one bedsteads with beddings, thirteen stands, fifty four chairs, two lounges, Eight tables, two clocks, sixteen pictures, two cupboards, three castors, two chaves dishes, four dozen plates, one dozen dishes, one soup-bowl, three dozen forks & knives, three dozen cups & saucers, one cooking stove with appurtenances, five smoothing irons, three wash tubs one wash stand, one ice box & two vassets, two looking glasses with knobs, one mesp, eight decanters, nineteen bar tumblers, one bell, one sugar bowl. four boxes of segars. one small ice box, one counter & shelves, two curtains one sign, five coal stoves, one ton of hay, two hundred empty bottles, one hundred and nineteen gallons of Cognac brandy, two hundred and sixty four gallons of Rye whiskey, forty one gallons of Peach brandy, two gallons of Rum, twenty one gallons of Gin; two gallons & a half of Bourbon whiskey, one hundered and twenty gallons of whiskey, forty gallons of common brandy, forty two gallons of wine, ten gallons of Port wine, one keg of Kümmel, two Empty barrels, ten gallons of prune brandy three gallons of german Cherry water, twelve bottles of Catawba, Eight bottles of Maraschin, forty seven bottles of wine, three demijans, four bottles Cordian,

four books, the ice in the ice house, & five hogs, to have and to hold all and singular, the said personal property, unto the said party of the second part forever. Provided always, and these presents are upon this express condition, that if the said parties of the first part, shall and do well and truly pay, or cause to be paid to the said party of the second part the sum of Seven hundred and ninety three dollars and twenty five cents on or before the seventh day of December next with interest according to the tenor and effect of six certain promissory notes, given by the said parties of the first part to the said party of the second part, bearing even date herewith, then these presents and every matter herein contained, shall cease and be null and void, otherwise to remain in full force & virtue; said notes being six in number. the first for the sum of One hundred dollars and each of the five other notes for the sum of one hundred and thirty Eight Dollars and sixty five cents the first due in two weeks after date, the second due two months after date, the third due four months after date, the fourth due six months after date, the fifth due eight months after date and the sixth due ten months after date, and each of said notes bearing interest at the rate of ten per cent per annum from date. It being hereby understood and agreed, that in case any one of said notes with interest shall remain due and unpaid for a longer time, than ten days, af-

it or they shall become due and payable, then and in that case it is hereby agreed, that said party the second part may declare the whole amount of money unpaid to be due and payable, and may at once proceed upon this instrument or otherwise for collection. And it is expressly agreed by the parties hereto, that the said parties of the first part shall have and retain possession of all the said personal property until the seventh day of December A. D. 1861; but in case default shall be made in payment of the said sum of money above mentioned, or the interest thereon, or any part thereof, at the time or times above limited for the payments of the same, or if the said parties of the first part shall sell assign or dispose of, or attempt to sell assign or dispose of, the whole or any part of the said goods and chattels, or remove or attempt to remove the whole or any part thereof from the said County of Peoria, without the written assent of the party of the second part, or if the same or any part thereof shall be seized by virtue of an Execution, attachment or warrant of distress, against the property of the said parties of the first part, then and from thenceforth it shall and may be lawful for the said party of the second part his executors, administrators or assigns, or his her or their authorized agent, to enter upon the premises of the said parties of the first part, or any place or places, where the said goods and chattels or any part thereof may be,

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and take possession thereof, and to sell and to dispose of the same for the best price or prices that can be obtained therefor at public vendue; giving six days notice of the said sale, by written or printed notice, to be posted at one or more public places in the said town and out of the money to arise by such sale thereof to pay and retain the said sum of money above mentioned, and the interest thereon, and all charges of such sale (if so much there shall be) rendering the surplus moneys (if any there shall be) to the said parties of the first part; and the said parties of the first part hereby bind themselves, their heirs, executors, administrators & assigns that they will constantly keep the aforesaid property insured in some reliable Insurance Company during the term of this instrument, and that they hereby assign the policy of insurance in the possession of said party of the second part as collateral security for the performance of the foregoing Covenants and agreements.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Charles Bennett (Seal)
Charles Harrison (Seal)

State of Illinois)
Peoria County) SS. This mortgage was acknowledged before me by Charles Bennett and Charles Harrison the said mortgagors this seventh day of February A.D. 1861.

George Wilmot N P (Seal)

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State of Illinois } Recorders office
Peoria County } 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 7th day of February A.D. 1861. and has been duly recorded with the accompanying certificates on pages 485 & fol. in book Vol 6 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, 7th day of February A. D. 1861.

Seal

Enoch P. Sloan Clerk and Recorder

Rupelius then further testified

I know the goods embraced in the mortgage Amsler has taken goods covered by the mortgage besides the liquors worth 30 to 40 $. He did not get all the goods except the liquors - Think they were in in the house at the time of the fire. Amsler got all the goods he could find composed of furniture ice box stove &c worth some $ 30. to $ 40.

Defendant then called Henry Amsler who testified

I am son of the mortgagee & know the goods mortgaged - was living in the house with father & knew the liquors mortgaged. They were in barrels

and half barrels & some in bottles - They consisted of wine, whiskey, brandy, peach brandy & rum. I saw the goods said to be sold to Ogden, was there at the time they were unloading saw Harrison & Bennett both there Father asked Harrison & Bennett what they were doing with his property there He demanded the goods of Harrison & Bennett Ogden was there then. The goods were all off the drays & on the side walk There were some empty barrels there Harrison & Bennett told Amsler he might have them but could not have the liquors - I know the barrels that had the liquor in They were the same mortgaged to Father - they were marked with Haungs name on them - These barrels had liquor in them - There was two barrels of Peach Brandy one of wine, There were about 14 barrels there besides the empty ones - part of them in the cellar. There was in the bar at Fathers whiskey, brandy 2 half barrels peach brandy 2 or 3 barrels whiskey, some wine, rum Cognac Brandy was in half barrels - dont know how much - was one whole barrel wine - dont know whether was any wine in bottles, there or not - was nearly a barrel of Gin - dont know how much rum - it was in barrels - I saw Harrison & Bennett taking furniture from the house some day the goods were delivered to Amsler - Dont know of Amsler making any demand except at Ogdens House as above stated.

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Cross Examined

The goods were unloaded when we got the some of them were in the cellar - Ogden was in the house - Amsler went in the house & showed Ogden the mortgage did not read it to him nor hand it to him I heard them talking but did not distinguish what was said - I stood at the door - One half of the liquors were in the cellar when I got there - I did not see the liquors that were in the cellar - there were about 6 or 7 barrels on the side walk that I saw - Could not tell what kind of liquors were in the barrels in the cellar - dont know what marks were on the barrels in the cellar - Two half barrels were on the side walk with Peach Brandy in - 2 or 3 barrels of whiskey were on the side walk - When Father sold out to Harrison & Bennett he was keeping bar and Harrison & Bennett went on selling which Father knew of - knew nothing about what the contract between Father & Harrison & Bennett was.

Re examined by Defendant

I dont know anything about the contract between Amsler & Harrison & Bennett

Defendant then called Joseph Willis who testified -

I know Amsler - Ogden & Harrison & Bennett - I helped take the liquors out of the cellar of H & B & put them in Ogdens cellar - took & delivered them to Ogden on Adams Street - The house where A

did business was on Water Street in this city. Ogden said Amsler did have a mortgage on the liquors sold 31 to Harrison & Bennett at the time they took the house. There was something said about the mortgage having run out. We did not hasten about delivering the liquors - It was at the time we were delivering the goods to Ogden that the conversation took place.

Cross Examined

It was after the goods were delivered that the conversation took place about the mortgage - That was before Amsler came - That was before Amsler came That the liquors that were mortgaged were sold and that there were other liquors sold to Ogden besides those mortgaged - I did not mean to say that all the liquors sold to Ogden were mortgaged to Amsler - There were some of these liquors they said were bought of Amsler and some of others that were not - I did not notice marks on the barrels - Some of the goods were same that were mortgaged to Amsler but Ogden said Mortgage was run out. That there was no danger as it had not been closed & could not hold the liquors - I was there when Amsler and his son came up The conversation took place before they came half an hour - I do not know that Harrison was there - Amsler said he had a mortgage on the goods & he did not want them just in the cellar - The last load of goods had been delivered half hour before the conversation

took place about the mortgage which was half an hour before Amsler came Bennett said something about taking the empty barrels to the vinegar factory. I left then called Peter Baccus who testified I live near Layfayette House kept by H & B. Saw the goods nearly all out of the house at 7 O'clock in the morning - Saw two drays in the road - dont know how many loads there were Dont know whether any had been taken away, they were nearly all old barrels - Know nothing about mortgage - the liquors in cellar were taken out two days after fire in July last.

This was all the Evidence in the cause

The Plaintiff then asked the Court to instruct the Jury as follows.

Plaintiffs Instructions 1 The Jury are instructed that if they believe from the Evidence that Amsler took a mortgage of the liquors or any part in controversy of Harrison & Bennett, and at the same time of taking the mortgage or at any time after permitted the said Harrison & Bennett to sell the same in the usual course of trade that would make the mortgage void as to the creditors or subsequent purchasers and you will find for the plaintiff.

2 If a person sell goods to another but does not deliver possession and afterwards sell to another person and

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deliver possession the last purchaser will hold the property because he first took possession and if they find that the mortgage was void and that the plaintiff got possession first of the goods then they will find for the plaintiff.

3 If the jury believe from the evidence that the liquors replevied by the plaintiff Ogden are not the identical liquors mortgaged by Harrison & Bennett to Amsler they will find property of said liquors in controversy in the Plaintiff.

Refused

4 The jury may find the property of said liquors in controversy in the plaintiff, though they at the same time may believe that the vessels which contain said liquors are the property of Amsler

Given

5 The jury are instructed that every purchase of property is presumed to be in good faith until the contrary is proven.

6 The Jury are instructed that if they believe from the evidence that there was a contest between the parties to this suit as to the ownership and right to possession of the property and they thereupon agreed that a writ of Replevin shall issue & be levied upon the property & the title thereof tried this agreement is binding and the defendants cannot

Given

34 object in the trial that the property was not really taken from the possession of the party.

But the court modified the instructions as follows to which modification of said instructions the plaintiff then & there excepted & objected

1 The Jury are instructed that if they believe from the evidence that Amsler took a Mortgage of the liquors or any part in controversy of Harrison & Bennett and at the same time of taking the mortgage or at any time after permitted the said Harrison & Bennett to sell the same in the usual course of trade that would make the mortgage void as to creditors or subsequent bona fida purchasers who had no actual notice of the mortgage at the time of the purchase and you will find for the plaintiff provided you believe this state of facts and that defendants took & detained the goods.

Given

2 If a person sell goods to another but does not deliver possession and afterwards sell to another person and deliver possession the last purchaser will hold the property because he first took possession and if they find that the mortgage was void and that the plaintiff got possession under a sale first of the goods then they will find for the plaintiff provided the defendants took and detained the goods.

Given

5 The Jury are instructed that every Purchase of Property is presumed to be in good faith as between the parties to the Purchase until the contrary is Proven.

35 Given

The defendants then asked the following instructions which the court gave to the giving of which the Plff then & there Excepted & objected.

Defts. Instructions 1st

That under the Pleadings in this case, the burden of Proof is on the Plaintiff to show Property in the goods described in his declaration in himself, and also the wrongful taking of the same by the defendants, and unless he has Proved to the Satisfaction of the jury, not only, that he is or was at the Commencement of this Suit, the owner of said goods, but that these defendants wrongfully took the same from his Possession, they must find the defendants not guilty, provided there was no such agreement as is mentioned in Plffs 6 instruction.

Given

2d

If the Jury shall believe from the Evidence that said goods, or any Part of them, were, at the time laid in the declaration, the goods of Rudolphus Amster or of any other Persons than said Plaintiff, the Jury should find for the defendant as to such goods.

Given

36

3d

That the mortgage read in Evidence to the jury, from Charles Bennett and Charles Harrison to Rudolph Amsler, is, on its face a good & valid instrument, to Prove Property in the goods therein described, in said Amsler, for the Purposes of this suit, if given to secure a bona fide indebtedness from said Harrison & Bennett to said Amsler = And if the jury shall believe from the Evidence that said Harrison & Bennett were indebted to said Amsler, as recited in said mortgage, & that said mortgage was given to secure such indebtedness, And if they shall further believe from the Evidence that said indebtedness or any material portion of it, is yet unpaid, and that the goods named in plaintiffs declaration, or any part of them, are the same goods covered by or described in said mortgage, the jury should find for the defendants as to such goods, unless the jury shall further believe from the Evidence, that the said Amsler, by himself, or his agents, has done, or omitted to do some act which would in law discharge said mortgage or render the same inoperative, as to bona fide Purchasers & Creditors = The jury are further instructed that if they shall further believe from the evidence that any part of said goods in said declaration mentioned, are not the same goods described in said mortgage, yet if the same have been intermixed with the goods of said Amsler, covered by said mortgage, by the said Harrison & Bennet or said plaintiff, so that

Given

same cannot be distinguished therefrom, and
37 that such intermixture was without the knowledge
or consent of the said Amsler, the said goods
so intermingled, are made the property of said
Amsler under his said mortgage & the jury should
so find, as to these goods, as well as those actually
described in & covered by said mortgage -

4th If the Jury believe from the evidence that Ogden
knew of the existence of the mortgage to Amsler from
Harrison & Bennett, at the time of his purchase
of the goods in controversy or before the delivery thereof
to him was completed, and that these goods or
Given any of them, were included in said mortgage
and the said mortgage was bona fide, Ogden is not
in that case, a bona fide purchaser, within the
meaning of the law, and the mortgage will hold
all the goods embraced in it as against said
Ogden.

5 That if the mortgage in question is good as between
Amsler & Harrison & Bennett, and also good on its
Given face, it is als good as to all other persons who
purchase the goods mortgaged with actual notice
of the existence of the mortgage.

38 6 That if the jury shall believe from the Evidence that one of the defendants but not both of them wrongfully took the goods in Controversey from the possession of the Plaintiff, but the jury are unable to distinguish from the Evidence which of the defendants it was, that participated in such taking, the jury should find both said defendants not guilty, under this issue.

Given.

7 That Even if said Mortgage is invalid as to the liquors, this would not necessarily render it invalid as to the vessels Containing such liquors, and if the jury shall believe from the Evidence, that vessels or some of them, Covered by said Mortgage Contained the liquors in Controversey, the Plaintiff Could not take away these vessels, with their Contents; provided the Mortgage was good, as to such vessels, as against said Plaintiff.

Given.

8 That a mere Endorsement upon a writ of Replevin without any actual taking or removal of the property by the Sheriff, is not such a taking as will authorize the issuing of writ of Replevin to recover back the property.

Given.

The Jury then retired and returned a verdict in favor of defendants The Plaintiff then moved to set aside the verdict and grant a new trial for

the following reasons

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Samuel Ogden }
vs. } Motion for new trial
James Stewart }
John A Murray }

And now comes the Plaintiff by M. Williamson, his attorney and moves the court to set aside the verdict and grant a new trial herein for the following reasons to wit;

1 Because the court Erroneously modified instructions asked by Plaintiff.

2 Because the court gave improper instructions on behalf of Defendants.

3 Because the verdict is against the law and against the instructions of the court.

4 Because the verdict is contrary to the Evidence

5 Because the the jurors tried the cause were not competent Jurors.

6 And also the Plaintiff asks the verdict to be set aside and a new trial granted as per affidavits on file

M. Williamson
his atty

affidavits Samuel Ogden }
vs } Replevin
Stewart & Murray }

Samuel Ogden being duly sworn deposes and says that H. E. Stillman who was on

of the Jurors in the above named cause has not resided in the state of Illinois until within about a week or ten days previous to this trial and that about that time he the said Stillman Emigrated to the state of Illinois & had never resided in the state of Illinois before that time & he further sweare he was not aware of that fact at the time of the trial nor until after the verdict was rendered

Samuel Ogden

Sworn to & Subscribed
before me this 22 Nov. 1861
E P Sloan Clk

affidavit

M Williamson being duly sworn deposes and says that he was attorney for Ogden in the above cause and that the foregoing affidavit is true and that affiant was not aware of the fact that said Stillman was a non resident of Illinois until after the trial and verdict

M Williamson

Sworn to before me this 22
day of Nov. 1861. E P Sloan Clk

[The following affidavit was produced & read by the defendant =]

affidavit

Samuel Ogden
vs.
James Stewart
John A J Murray

In the Circuit Court Peoria County Ills. Nov. Term 1861

The undersigned jurors who tried the above entitled cause being duly sworn

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State, that so far as we are advised or believe, the verdict of the jury in said case, did not turn in any manner on the question whether the defendants did or did not take & remove the goods in controversy, but wholly upon the ground that the jury were of opinion that said goods were not the goods of said Plaintiff, but were the goods of Rudolphus Amsler under his Mortgage read in Evidence to the jury, the jury being of the opinion that Plaintiff when he purchased the same, had actual knowledge of the Existence of said Mortgage and colluded with said Harrison & Bennett to defraud said Amsler.

Subscribed & Sworn to before me this 22d day of Nov. 1861. E. P. Sloan clk

B. White
Wm. Weis
G. S. McMackin
George Dieterlies

But the Court overruled the motion for a new trial and rendered Judgment on the verdict to which overruling of said motion & rendition of said judgment the Plaintiff then and there excepted & objected & prayed an appeal & for the Court to sign & seal this bill of exceptions which is accordingly done this 6th day of December 1861

S. L. Richmond
Judge &c.

State of Illinois
Peoria County SSS.

I, Enoch P. Sloan Clerk of the Circuit Court, within and for said County, do hereby certify, that the foregoing is a true and perfect copy, of all the papers filed in my office in the aforesaid cause, wherein Samuel Ogden was plaintiff, and James Stewart and John A. J. Murray were Defendants, and of the proceedings of said court therein, as the same appears on file and of record in my office,

Given under my hand and the seal of said Court at Peoria this 12th day of March A D 1862.

Enoch P. Sloan Clk

by Newton Dpt

Assignment of Errors

Samuel Ogden
vs
James Stewart &
John A J Murray

Supreme Court
April term 1862

And now comes the [illegible]

ASSIGNMENT OF ERRORS.

SAMUEL OGDEN
vs.
JAMES STEWART AND
JOHN A. J. MURRAY.

Supreme Court April Term,
1862.

And now comes the said plaintiff, by M. Williamson, his attorney, and says that in the record and proceedings aforesaid manifest error hath intervened in this, to-wit:

1. Because the verdict is against the law and the instructions of the court.

2. Because the verdict is contrary to the evidence.

3. Because the court erroneously modified instructions asked by the plaintiff.

4. Because the court gave improper instructions asked by defendants.

5. Because the verdict and judgment were given in favor of the defendants, when by the law of the land they should have been given in favor of the said plaintiff, Samuel Ogden.

6 Because the Court refused proper instructions asked by plaintiff

Wherefore he prays that a writ issue herein, and that the said judgment be reversed, annulled, and for naught held and esteemed, and that he may be restored to all things he has lost by reason thereof.

M. WILLIAMSON,
Attorney for Plaintiff.

And the said defendants say there is no such error as is above alleged in said Record & therefore they pray that the judgment of said Circuit Court be affirmed =

Cooper & Hall
attys for Defts =

~~Annulled and for naught held and esteemed and that he may be restored to all things he has lost by reason thereof~~

~~By M Williamson~~
~~Atty~~

271

Samuel Ogden
to
James Stewart &
John J Murray

Record & Mort

Filed Apl. 24. 1862
L. Leland
Clk.

Copy for Recording Record
Rec'd by Chas. A. Williamson, C.C.C.C.

ABSTRACT.

In the Supreme Court of the State of Illinois, Third Grand Division, April Term, 1862.

SAMUEL OGDEN	Supreme Court.
vs.	
JAMES STEWART &	
JOHN A. J. MURRAY.	Error to Peoria.

Page of Record.

This was an action of Replevin commenced by Ogden against the defendants, Sheriff and Deputy Sheriff, of Peoria County. Writ directed to the Coroner.

5 Declaration, that on the 9th day of July, 1861, defendants took and detained 3 half-barrels of Brandy, 1 barrel Peach Brandy, 3 barrels Rye Whisky, 1 barrel Gin, 1 barrel Port Wine, 1 barrel Rum, 1 barrel Bourbon Whisky, 55 bottles Wine, and 8 gallons of common Whisky, property of Plaintiff.

6 First Plea, that defendants did not take the goods mentioned in Declaration.

6 Second Plea, that the goods were not the goods of Plaintiff.

Third Plea, property in Rudolphus Amsler.

7 Fourth Plea, that the property was the property of Rudolphus Amsler, and that the defendants were acting Sheriff and Deputy Sheriff, of

Peoria County, Ills., and as such held the goods for the purpose of delivering them to said Amsler, by virtue of a Writ of Replevin, issued, &c., in favor of Amsler against Charles Bennett and Charles Harrison.

8 Fifth Plea, property in defendants.

Issues were formed on all the pleas. To the 4th Plea Plaintiff replied that the goods were not the goods, &c., of Rudolphus Amsler as in said Plea alleged.

12 Trial by Jury, November 27, 1861.

13 The plaintiff proved by Charles Harrison as follows: My partner and myself sold the liquors in controversy to plaintiff, in July last; part of the liquors had been mortgaged to Rudolphus Amsler; had sold some of the liquors we had mortgaged to Amsler, and purchased others which were sold and delivered to plaintiff; had not been delivered to plaintiff a day before they were replevied; a bill of sale of the liquors we sold the plaintiff was made at the time of the sale, correctly describing the liquors; we purchased liquors of Amsler in the winter; he was
14 then keeping tavern and selling the liquor in the bar at time we purchased of him; the principal part of the liquors we had purchased of Amsler we had sold out again before we sold to Ogden; Amsler knew we were selling the liquors we had mortgaged to him; he was often there, and knew we were selling the liquors; we bought them of him to sell at the bar, which I told Amsler at the time of the purchase; don't know how much liquor we bought of Amsler; he had been selling and we bought him out; we also bought liquors in the spring of a man in St. Louis, also two or three barrels, of Miller, in Peoria; delivered the liquors to Ogden the day after he purchased them; Amsler was not there at the time they were delivered; after the goods had been delivered I went away, and then came back and saw Amsler there; we
15 bought the liquors of the St. Louis man two or three months after the mortgage was made; the liquors were delivered to us in Peoria from St. Louis; we put the liquors we purchased of other parties in the cellar with that purchased of Amsler; it remained in the barrels it came
16 in except what we sold at retail; when we purchased out Amsler we gave 5 notes and mortgage; Amsler was in when we were selling the liquor a number of times; they were replevied the same morning they

were delivered to Ogden; were delivered to Ogden at his house; when I first saw Amsler part of the goods were in the cellar at Ogden's; we did not say anything to Ogden about the mortgage at the time we sold to him; our place of business was burned out a day or two before we sold out to Ogden; (bill of sale shown witness and identified by him as the same in controversy); all the goods sold to Ogden by us were replevied by the Sheriff.

James Levi Sworn.

Reside in Cincinnati, Ohio; am in the liquor business; sold Harrison and Bennet liquors to the amount of $123 08, March 29, 1861; the goods were shipped them that day; all the liquors except absint was put up in barrels; was 1 barrel Bourbon Whisky, 1 barrel Port Wine, 1 barrel Gin, 2 boxes of Catawba Wine; a barrel contains 40 gallons of Whisky; the Whisky was $1 00 per gallon, Port Wine $1 50, Gin 75 cents, two boxes of Catawba wine at $7 50 per box, 2 boxes of bottles of Absint at $11 00 per dozen; the barrels were marked on one end
18 "Harrison & Bennett," and on the other end with the name of the liquor.

Charles Bennett Sworn.

Had principal charge of the bar and liquor business; we sold the liquors to Ogden contained in this bill of sale; (See bill of sale page
19 18); they were delivered to Ogden before they were replevied; a little of the liquor mortgaged to Amsler was remaining; don't know how much; was perhaps two or three barrels sold to Ogden of the liquor mortgaged to Amsler; had been selling the liquor we got of Amsler all the time; did not fill up the same barrels with other liquor; bought liquors of a man in Cincinnati, and 3 barrels of Whisky of Miller; the understanding was at the time we made the mortgage to Amsler that we were to sell the liquors; he knew we were selling all the time; the

goods sold to Ogden were the same replevied; they were in the cellar when the Coroner replevied them from the Sheriff; when the Sheriff went to Ogden's for the goods Ogden was going to prevent his taking them by force, and the Sheriff and Ogden then locked up the goods in the cellar and both went to the office of Plaintiff's attorney, and it was agreed that the goods should remain in the cellar till Ogden could get out a writ of replevin and try the right to the liquors in question; the empty barrels were at Ogden's house when the Sheriff replevied and took them away; saw the same man acting as Sheriff here to-day that took the property from Ogden.

Cross Examined.

Don't know how much brandy we bought of Levi; were same kind we bought of others in the summer; did not mix the liquors together; they were in same cellar; delivered liquors to Ogden about 6 or 7 o'clock in morning after daylight; the 5 notes we gave to Amsler were part of the consideration for liquors and furniture; on failure to pay either note all were to become due; had two fires when doing business; received $100 insurance money on first fire, and paid $200 for repairs; paid Amsler $700 down on purchase; he staid with us about a week after we bought him out; we were selling the liquors all the time he staid with us, and he knew it; after he moved away he frequently came back and saw us selling the liquor; we bought the liquors of him in February, 186[illegible].

Re-Examined.

21 Was 8 or 10 empty barrels up at Ogden's out of which we had sold the liquors mortgaged to Amsler; he took these away; there were two other barrels of liquor we mortgaged to Amsler burned at last fire; the liquor was delivered to Ogden next day after we sold to him.

The Plaintiff then rested his case.

Defendants then called Rupelius who testified.

Insurance money to the amount of $100 was paid to Harrison & Bennett; saw notes and mortgage signed by Harrison & Bennett; were 6 notes; all given for part of the purchase money due Amsler from Harrison & Bennett, and to secure which the goods were mortgaged back to Amsler; note of $100 was paid to Amsler, and he received $206 insurance money.

Defendants then offered in evidence the notes and mortgage, and entry on justice's docket; see pages 22, 23, 24, 25, 26, 27 and 28; the mortgage, amongst other property, was upon 119 gallons Cogniac Brandy, 264 gallons Rye Whisky, 41 gallons Peach Brandy, 12 gallons Rum, 21 gallons Gin, 2½ gallons Bourbon Whisky, 120 gallons Whisky, 40 gallons common Brandy, 42 gallons Wine, 10 gallons one keg Kummel, 10 gallons Prune Brandy, 12 bottles Catawba, 47 bottles Wine. It provides that on default to pay either all shall become due, and that if the mortgagors sell or attemp to sell, &c., mortgagee may take possession, and is to secure the sum of $793 25.

28 Witness then further stated that he knew the goods described in the mortgage, and that Amsler had taken furniture, &c., under mortgage to value of $30 to $40.

Defendants then called Henry Amsler, who testified.

29 Am son of mortgagee; know the goods; was living at the house with father; the liquors were in barrels and half barrels, some in bottles; consisted of Wine, Whisky, Brandy, Peach Brandy and Rum; saw the goods said to be sold to Ogden; was there at the time they were unloading; saw Harrison & Bennett there; father demanded the goods of Harrison & Bennett; Ogden was there then; the goods were all off the drays and on the sidewalk; was some empty barrels Harrison & Bennett told father he might take, but could not have the liquor; the barrels that had the liquor in; they were same mortgaged to father; marked with Haungs name; had liquor; were 2 barrels Peach Brandy, 1 of wine; were about 14 barrels there besides the empty ones; part of

them in the cellar; saw Harrison & Bennett taking furniture from house same day goods were delivered to Amsler; don't know of Amsler making any demand except as above stated.

Cross Examined.

30 The goods were unloaded when he got there; some of them were in the cellar; Ogden was in the house; Amsler went in the house and showed him the mortgage; did not read it to him nor hand it to him; I heard them talking but did not distinguish what they said; half the liquors were in the cellar when I got there; did not see the liquors that were in the cellar; was 6 or 7 barrels on the sidewalk, which I saw; don't know what kind of liquors were in the cellar; don't know what marks were on the barrels in the cellar; two half barrels were on sidewalk with Peach Brandy in; 2 or 3 barrels of Whisky were on sidewalk; father was keeping bar when he sold to Harrison & Bennett, and they went on selling and father knew it; know nothing about the contract between father and Harrison & Bennett.

Joseph Willis testified.

31 Helped to take liquors to Ogden; put them in Ogden's cellar; Ogden said Amsler did have a mortgage on the liquors sold to Harrison & Bennett at the time they took the house; something was said about the mortgage having run out; did not hasten about delivering the liquors to Ogden.

Cross Examined.

The conversation was after the goods were delivered and before Amsler came; did not mean to say that all the goods sold to Ogden had

been mortgaged to Amsler; they said some of the liquors were bought of Amsler and some were not; did not notice marks on the barrels; Ogden said mortgage had run out and there was no danger; was there when Amsler and his son came; the last load of goods had been delivered half hour when they came; Amsler said he had a mortgage on the goods and did not want them put in the cellar; the last load had been delivered half an hour before the conversation took place about the mortgage; Bennett said something about taking the empty barrels to vinegar factory.

Peter Baccus Called.

Live near house kept by Harrison & Bennett; saw the goods nearly all out of the house at 7 o'clock, A. M.; saw drays; don't know how many loads; the liquors in the cellar were taken out two days after the fire in July last

See instructions pages 34, 35, 36, 37 and 38.

38 Verdict not guilty.

39 Motion for a new trial:

1. Because the court erroneously modified instructions asked by plaintiff.

2. Because the court gave improper instructions asked by defendants.

3. Because the verdict is against law and the instructions of the court.

4. Because the verdict is contrary to evidence.

5. Because the jurors were not competent.

6. Plaintiff asks verdict set aside and new trial as per affidavits on file.

40 Affidavits that one of the jurors was a non-resident of the State.

9. Affidavit of one of defendants as to the agreement to levy on and

not remove goods until title could be tried, and repudiating that portion of the defence as unauthorized

The court overruled the motion for new trial, and rendered judgment for the defendants, to all of which the plaintiff excepted.

M. WILLIAMSON,
Attorney for Plaintiff.

ASSIGNMENT OF ERRORS.

SAMUEL OGDEN
vs.
JAMES STEWART AND
JOHN A. J. MURRAY.

Supreme Court April Term, 1862.

And now comes the said plaintiff, by M. Williamson, his attorney, and says that in the record and proceedings aforesaid manifest error hath intervened in this, to-wit:

1. Because the verdict is against the law and the instructions of the court.

2. Because the verdict is contrary to the evidence.

3. Because the court erroneously modified instructions asked by the plaintiff.

4. Because the court gave improper instructions asked by defendants.

5. Because the verdict and judgment were given in favor of the defendants, when by the law of the land they should have been given in favor of the said plaintiff, Samuel Ogden.

Wherefore he prays that a writ issue herein, and that the said judgment be reversed, annulled, and for naught held and esteemed, and that he may be restored to all things he has lost by reason thereof.

M. WILLIAMSON,
Attorney for Plaintiff.

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Ogden

to

Stewart & Murray

Abstract

Filed Apl 24 1862

L Leland

Clerk

Samuel Ogden
vs
James Stewart &
John A. Murray
} Error to Peoria

Argument of plaintiff

The evidence in this cause shows that one Ansley sold out a lot of liquors to Harrison & Bennett with the express understanding that they should carry on the business and sell out the liquors in the course of trade. The seller at the time of the sale to Harrison & Bennett took a Chattel mortgage on the liquors sold to secure the purchase money for the same. The mortgage as is usual provides that in case the mortgagors should sell or attempt to sell the mortgaged property then the Mortgagee should have the right to take possession of the same The mortgagors carried on the business sold the liquors and replaced them with others and continued to do so from February 7 1861 the date of their purchase until the last of July 1861 with the knowledge and consent of

the mortgagee. & then sold out to the plaintiff

There can be no doubt but if the power to sell the liquors was inserted in the body of the mortgage that the mortgage would be fraudulent and void as to creditors and subsequent purchasers - Then the question arises whether it is not equally fraudulent when it is the agreement and understanding of the parties to the mortgage at the time of the execution of the mortgage or at any subsequent time

The parties themselves might be concluded by the terms of the mortgage but third persons would not be

The Statute (Scates Comp page 813) provides that "no mortgage on personal property shall be valid as against the rights and interests of any third person or persons unless possession of such property shall be delivered to and remain with the mortgagee or the or the mortgage shall be acknowledged and recorded as therein directed"

The third section then provides that such mortgage if bona fide as shall be good and valid from the time it is recorded notwithstanding the poss

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erty mortgagee shall remain with the mortgagor provided the mortgage provides for its so remaining with the mortgagor

The sixth section then provides a penalty in case the mortgagor shall sell the mortgagee property

The evident meaning of the legislature here is that the property was to remain with the mortgagor as security for the mortgagee = To make a mortgage on property and at the same time give the mortgagee power to sell the same or dispose of it in the usual course of trade was never the intention of the legislature - It was however the intention of the parties that the mortgagor should sell the mortgaged property - the mortgagee authorized him to do so and he ought not to be heard to complain that his authority had been followed Either the sale must be held to be good or the purchaser must be defrauded If any person must be defrauded it should be the one that caused the fraud to be perpetrated and not the one who seeing the mortgagor clothed with all the indicia of ownership to

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The spirit and intention of the law is that the mortgaged property should remain with the mortgagor as security

18 All 402

If held for the purpose of sale it is then held for a different purpose not contemplated by the statute - It is inconsistent with the terms of the mortgage and held for a different purpose. The possession is therefore fraudulent as to creditors and purchasers - All of the authorities hold that the possession must be consistent with the mortgage. In 23 All 384 the Court say "Upon a default in payment the title vests absolutely in the mortgagee and to permit it afterwards to remain in the custody of the mortgagor is equally a fraud upon Creditors and purchasers as if it had remained in his possession Contrary to the terms of the mortgage" They further say "It would thereby enable the mortgagor as the apparent owner of the property to acquire credit by means of its possession, sell it to innocent purchasers and perpetrate the very frauds which the law designed to prevent"

It is needless to multiply authorities to prove that the possession of the property must be held consistent with the terms

the purchaser to seek his redress off the man selling the goods - My answer would be read the mortgage - It does not provide for the sale of the property and I am going to be tried by that alone although I authorized the sale - all the while the man making the sale may have been acting strictly honest and not intending any wrong to any one The fraud is in me I am the guilty party and if this is to be the law I am only asserting my legal rights and no one can complain - The law protects me in it =

In Read trad vs Wilson 22 Alls 380 the Clause in the mortgage allowed the mortgagor to hold possession of the property mortgaged for two years and use and enjoy the same according to the usual course of retail trade unless the mortgagee should deem the property mortgaged in danger of being sold removed or wasted - in which case the mortgagee might take possession

The Court there say " The clause allowing the mortgagor to retain possession is inadequate to the purpose designed and so far as it was designed to effect that purpose it was fraudulent and void as to subsequent Creditors and purchasers "

If the mortgage provides that the property shall remain in the possession of the mortgagor and at the same time there is a secret understanding between them that it shall be sold and not held according to the terms of the mortgage it is only a subterfuge to evade the law and renders the mortgage even more odious in the eye of the law than if the obnoxious portion was embraced in the mortgage - On the detection of fraud like the detection of Usury the Court even if all is fair on the face will look beyond to the real transaction and judge the transaction upon the real intent and understanding of the parties although clothed in a saintly garb

"The evidence shows that the mortgagor purchased and mortgaged to Amsden this stock of goods ~~the~~ February 7th 1861 and that from that time the mortgagor continued to sell until the last of July 1861 when their place of business was destroyed by fire and a few days afterwards they sold out their remaining stock to the plaintiff and delivered it to him the next day after the sale and then

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defendants went and took possession of the goods under the Chattel mortgage to Cussler - and the plaintiff replevied back the goods which is the present suit

But the mortgagors have been selling out of that stock of mortgaged liquors for six months - It would be a rash presumption of law to suppose that in the city of Peoria any liquors would be left after that time - The Court can almost judicially know that bad as the liquors probably were they had all been sold out and consumed by the using long before six months - No city of its size consumes more bad liquor in the same space of time than Peoria Nor is this without proof to sustain it even if it is not so notorious a fact as to be judicially known by the Court Harrison and Bennett the mortgagors swore that nearly all the liquors were sold and that they had replenished their stock from St Louis - Cincinnati and from Peoria and that the liquors in controversy in this suit were not the same described in the mortgage - Also Mr Levi a liquor dealer in Cincinnati testified that

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he had sold them liquors so their statement was not without confirmation - Further Ansley the mortgagee must have known this to be true that his liquors had already been sold for as testified by Bennett on page 21 of the Record Ansley took 8 or 10 empty whiskey barrels from Ogdens out of which the liquor had been sold by Harrison & Bennett and one or two more barrels of the mortgaged liquors were destroyed at the fire when they were burned out This then accounts very satisfactorily what has become of Ansleys liquor We proved an alibi of the liquors very successfully

According to the testimony of Levi a barrel will hold from 40 to 42 gallons of whiskey - If we count 10 empty barrels and one more destroyed at the fire that would make vessels holding 440 gallons of the Ansley whiskey accounted for The mortgage covers only 386½ gallons of whiskey and 119 gallons of Cognac brandy So that at the outside there could not have been more than from 50 to 60 gallons of the mortgaged whiskey left

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The liquors ~~were taken~~ in controversy in this suit were taken by the defendants from the plaintiff and he replevied them back - Under this state of facts the plaintiff would be entitled to the possession of the liquors against all the world unless they were the identical liquors described in the mortgage and therefore the Court erred in refusing the fourth instruction That if the liquors in controversy in this suit were not the identical liquors mortgaged to Amsler the jury would find property in the liquors in the plaintiff

It is not the law that any person can take property from another and hold it against the whole world except the legal owner - A bailee or custodian of property may maintain the action of replevin if any one takes it from his possession and as between the parties to the suit the bailee is the owner of the property and entitled to the possession of it - This instruction under such evidence the Court refused to give but gave one asked for by the defendants just the reverse which was that if the jury believed that Rudolph Hues Amsler or

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any other person" than plaintiff was the owner of the goods at the time laid in the declaration they would find for the defendants

This was equivalent to telling the jury that although the defendants went to the plaintiffs house and took away the goods and ~~the plaintiff~~ without any pretence of ownership or claim to the property yet if they believed that any body but the plaintiff was the owner they would find for the defendants Under this instruction a plaintiff could never recover property taken from him unless he were the absolute owner for if the title were in a stranger any body would have a right to go and take it from him

The fifth instruction asked by the plaintiff was erroneously refused by the Court There certainly is no better settled principle of law than that every purchase of property is presumed to be in good faith until the contrary is shown but the Court modified the instruction so as to tell the jury that this presumption was only as between the parties to the sale and therefore it was equivalent

to telling them that in this case the law presumed the sale to be in bad faith and fraudulent - the defendants not being parties to the sale of the goods in controversy - It has been supposed by some that the law was well settled that he who alleges fraud must prove it and that every presumption of law was in favor of the good faith of a transaction not only that fraud must be alleged and proved but that the party setting up fraud will be held to strict proof of the fraud - It can not require authority to show the fallacy of this instruction as modified by the Court

I shall not in this argument say anything further upon the instructions, but merely that I believe that I have pointed out briefly my objections to them in the brief believe the objections to be well taken under the evidence in this cause and respectfully ask the Court to Consider the instructions excepted to

It was objected to on the trial of the cause below that the taking was not sufficient - On this point the witness testifies that the Sheriff who

was one of the defendants came to Ogdens levied on the goods in controversy and locked them up in the cellar and then went up town when the arrangement was made that the goods would be replevied without being removed and that the title to the goods should be tried in that way without any question of the removal or taking in order to save expense and trouble

On this question when the point was raised in the court below one of the defendants repudiated the act of his Counsel and filed affidavit of the contract as above stated which was also sworn to by another witness And which affidavit is copied in the record -

But independent of the agreement the action of replevin might have been maintained - Any interference with the possession of property that would render the officer a trespasser if not protected by the writ will suffice to maintain trespass or replevin

And so far as the agreement is concerned I believe it to be settled in 16 Illinois Reports page 464 the court held the title of a horse not taken to be adjudicated in an action of replevin under agreement and pleading of the parties. This being on the same principle settles this point

M Williamson

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To

Samuel Ogden

vs

Stewart & Murray

Argument of Plff

Filed May 2 1862

L. Leland

Clerk