

No. 14553 $\frac{1}{2}$

Supreme Court of Illinois

Warner

vs.

Cushman et al

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STATE OF ILLINOIS
SUPREME COURT
Third Grand Division.

No. 40

Warner
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Cushman

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Warren

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Customs & als

depts brief

Filed May 5, 1863

J. Selman

clerk

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

FRANCIS WARNER

vs.

CUSHMAN, TRUE & WATERMAN. }

BRIEF OF DEFENDANTS IN ERROR.

The facts are these :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GLOVER, COOK & CAMPBELL,
For Defendant in Error.

Warner
Cushman

delivered the opinion of the Court.

Mr. Chief Justice Catron

~~delivered~~ - We can see no pretence
for holding that this corn was ~~per se~~
subject to the execution against Fairfield
~~Abitor~~^{Weld}. When the corn was purchased by
them, with the money obtained from Cush-
mon, Truoc & Co., it was expressly agreed, that
the title to the corn should remain
in the latter firm till it should be
sold ~~and~~^{and} converted into money; and long
before these Creditors of Fairfield &
~~and Weld~~^{Weld} had acquired any lien upon
it, Cushmon Truoc & Co. had reduced the
corn into their actual, physical possession.
If they also took possession of ~~and other~~ corn
belonging to Olmsted and others, who stored
with ~~Weld~~^{Weld} Fairfield & ~~Weld~~^{Weld}, this was no business
of the Creditors of this house. It did not subject
the corn to their execution, and if taken and
applied to the payment of their debt, Cushmon
Truoc & Co. are responsible to the real owners.

The case is so plain that we can see no
real question in it.

The judgment is affirmed.

The whole Court concurred.

Judgment affirmed.

Warner
in

Cushman Truck & Co

Opinion
Linton

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

FRANCIS WARNER

vs.

WILLIAM H. W. CUSHMAN.

} *Brief of Plaintiffs in Error.*

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

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

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

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

LELAND & BLANCHARD,
For Plaintiff in Error.

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Harrison
vs
Cushman et al
Brief

Filed Apr 21. 1843
Leland
clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1862, AT OTTAWA.

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

ABSTRACT OF RECORD.

PAGE
Of Record.

Action—Replevin—begun March 17, 1860.

- 2 Affidavit filed March 17, 1860—That William H. W. Cushman, Isaac V. Waterman, and William M. True, defendants in Error, were partners under the firm-name of Cushman, True & Co., and justly entitled to the possession of seven thousand bushels of corn, in the ear, situated in four cribs, standing on Lot Four and the west half of Lot Three, in Block No. Thirteen, in original town of Ottawa; that said corn was unjustly and unlawfully detained from the possession of Cushman, True & Co., by Francis Warner (plaintiff in Error).
- 3 Complaint filed March 17, 1860, by defendants in Error—That plaintiff in Error, March 15, 1860, unlawfully and unjustly took seven thousand bushels of corn, in the ear, of 75 pounds to the bushel—value \$2,800.00—the property of said defendants in Error, and unjustly detained the same.
- 4-5 Affidavit filed March 17, 1860—That Warner (plaintiff in Error) was Sheriff, &c.
- 5 Summons, issued March 17, 1860, directed to Coroner of La Salle County, commanding him to take the corn described in the Affidavit and Complaint, &c.

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

8 Bond filed March 17, 1860.

Pleas filed June 7, 1860.

10 1ST. General issue.

11 2^D. Property in defendant (Warner).

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

12 4TH. Was not property of plaintiff.

12 5TH. On the twentieth day of December, 1859, at the December term of the Superior Court of Chicago, William Martin recovered judgment *vs.*

13 Micaiah F. Fairfield and John D. Weld in the sum of \$9404.50 and costs.

Execution issued on said judgment December twentieth, 1859, directed to Sheriff of La Salle County, and came into the hands of defendant (plaintiff in Error), as Sheriff, December 22d, 1859; that on the 9th day of March, 1860, said defendant, as Sheriff, did levy upon, seize and take the said corn, in the declaration mentioned, as the property of said Fairfield and Weld; that said defendant (plaintiff in Error) was Sheriff of La

14 Salle County, duly elected and qualified; that at the time said execution came into his hands, and levied upon said corn, it was the property of said Fairfield and Weld, liable to be taken and sold upon said execution.

14 6TH. Prior to the commencement of this suit, said Fairfield & Weld were engaged as warehousemen, in the business of receiving from divers per-

15 sons, corn and other grain, in Ottawa, La Salle County, to be stored, and also in the purchase for themselves of corn and other grain, which said corn (as well that purchased as stored) was so received by them with the understanding, on the part of the storers and Fairfield & Weld, that the same should not be kept separate, but should be mixed, and a like quantity and quality (but not the same corn as that stored) should be delivered to the storers thereof; that at the time of the receipt and levy of the execution hereinafter mentioned, there was in the three corn cribs, hereinafter mentioned, a quantity of corn composed partly of corn stored and partly of corn purchased, and owned by said Fairfield & Weld, all mixed together by consent of the storers and of said Fairfield & Weld; that while said corn

15 was so mixed in said crib, said Fairfield & Weld, for the purpose & of securing plaintiffs (defendants in Error) for an indebtedness

16 due them from said Fairfield & Weld, and without receiving in store any corn from said plaintiffs (defendants in Error), issued certain fictitious grain receipts, falsely purporting to be for corn stored with said

16 Fairfield & Weld by the plaintiffs (defendants in Error), said Fairfield & Weld not owning the amount of corn mentioned in said receipts, and

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

19 Replications filed June 18, 1860.

Similiter to first plea.

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

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

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

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

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

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

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

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

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

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

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

26. Rejoinder to second replication to sixth plea:

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

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

BILL OF EXCEPTIONS.

Plaintiffs' Evidence:

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

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

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INSTRUCTIONS GIVEN FOR PLAINTIFF.

- 60 1st. If the jury believe, from the evidence, that Olmstead, Umlauf, and Herford, or either of them, or other parties than the plaintiffs, stored corn with Fairfield & Weld, and consented that said Fairfield & Weld might mix said corn in one mass with all the corn held in store by said Fairfield & Weld, and not owned by them, and that they the said storers would receive from said Fairfield & Weld a like quantity and quality of corn from the mass so mixed, in lieu of the amount so stored for them, as aforesaid; and if they further believe, that said Fairfield & Weld did so mix said corn of said storers in one mass with the consent of the plaintiffs, without the plaintiffs' consent, then said storers would thereby lose their right to any portion of the identical corn so stored by them; and if Fairfield & Weld, while in the possession of all of said corn, and before the levy of the execution was made by the defendant upon the same, delivered said corn to the plaintiffs, such possession of said plaintiffs is sufficient to enable them to maintain this action, if they believe that defendant took the corn, as stated in plaintiffs' declaration.
- 61 2d. If defendant took the corn mentioned in the declaration, before this suit was commenced, they must find the issue on the first plea for plaintiffs, no matter who owned the corn.
- 62 3d. Unless the corn in controversy was the property of defendant (Warner), or that it was the property of Fairfield & Weld, and levied upon by Warner, the jury should find the issue on the second plea for plaintiffs.
- 62 4TH. Unless the jury believe, from the evidence, that the corn in controversy was the property of Fairfield & Weld when the same was replevied, they must find the issue, on the third plea, for plaintiffs.
- 62 5TH. Unless the jury believe, from the evidence, that when the execution read in evidence came to Warner's hands, and afterwards was levied

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

- 63 7TH. If the plaintiffs loaned money to Fairfield & Weld to buy corn, with the agreement that the corn, when purchased, should be the corn of plaintiffs, and subject to their control, and to be disposed of by plaintiffs, and that Fairfield & Weld should have for their services, in buying the corn, all that the corn was sold for over thirty cents per bushel, and interest at one and a half per cent. per month, from the time the money was advanced, the corn purchased under said agreement with the money furnished by plaintiffs, would be the corn of plaintiffs.
- 63 8TH. If plaintiffs had a right to hold the corn in question, as collateral security for a debt that Fairfield & Weld owed them, that is sufficient ownership of the corn to enable plaintiffs to maintain this action, so far as the question of ownership was concerned.
- 64 9TH. The execution, when it came to the hands of Warner, was not a lien upon any corn in the cribs except the corn which was actually owned by Fairfield & Weld, or one of them.
- 64 10TH. If the corn in controversy belonged partly to the plaintiffs and the residue to parties other than Fairfield & Weld, who had stored the same with Fairfield & Weld; and if said corn was mixed by the consent of the owners, such mixing would not make the corn the property of Fairfield & Weld, but the corn would belong to plaintiffs and the other parties storing the same, in common, according to their respective portions mixed in the mass, and in such case, an execution against Fairfield & Weld would not be a lien on said corn, and if, before the corn was levied upon, Fairfield & Weld had delivered the possession of said corn to the plaintiffs, were in the actual and peaceable possession thereof, defendant had no right to take the corn out of plaintiffs's possession to satisfy an execution against Fairfield & Weld, and if he did so, then plaintiffs have a right to replevy the corn as against him, and the jury should find for the plaintiffs.
- 65 11TH. If Fairfield & Weld purchased the corn in question with money furnished by plaintiffs, and it was the agreement at the time the money was advanced, that the corn, when purchased, should be plaintiffs' corn, to be sold by them, and to be under their control from the time it was purchased, then, even if Fairfield & Weld did issue warehouse receipts to plaintiffs for the corn as it was received in store, the defendant would have no right to levy on the corn by virtue of an execution against Fairfield & Weld.

To the giving of each of said instructions defendant excepted.

INSTRUCTIONS ASKED BY DEFENDANT.

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

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

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

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

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

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

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

- 70 6TH. If Fairfield & Weld, being warehousemen, engaged in purchasing grain for themselves or others, and in storing such grain, either purchased the corn, in plaintiffs receipts mentioned, for plaintiffs, or gave them said receipts as security for their indebtedness to them, and said corn was mixed by Fairfield & Weld with that stored by others, by consent of the latter, said other storers being ignorant of any directions having been given by plaintiffs to Fairfield & Weld to keep plaintiffs' corn unmixed, and the defendant, being the Sheriff of La Salle County, did, as such Sheriff, by virtue of the execution issued on the judgment, before said corn was delivered to the plaintiffs, take the whole of said mixed mass of corn, the plaintiffs cannot recover in this action.
- 70 7TH. Though the Sheriff may not have taken actual possession of the corn till the 9th of March, 1860, the execution became a lien upon Fairfield & Weld's corn from the time it was placed in his hands, and a delivery of the corn by Fairfield & Weld to plaintiffs of their corn between that time and the time the Sheriff made the levy, would not prevent the defendant from taking and selling any interest which Fairfield & Weld had at the time when said execution went into the hands of said defendant, as Sheriff.
- 71 8TH. If the jury believe, from the evidence, that the plaintiffs were, at the time this suit was commenced, merely the owners of an undivided interest in the corn replevied, or of an undivided interest in a larger amount of corn, which included that from which the corn in controversy was separated from, by the coroner, in executing the writ of replevin in this case, and that they were not the sole owners of the replevied corn not then mixed, with the other corn, or unless they were the sole owners of the whole of the corn of which the replevied corn formed a part, the verdict of the jury should be for the defendant.
- 71 9TH. If the jury believe, from the evidence, that the plaintiffs loaned money to Fairfield & Weld, the said Fairfield & Weld being warehousemen, and Fairfield & Weld gave Cushman warehouse receipts for a number of bushels of corn, undivided, in a mass of corn stored by others, as collateral security for the loan of money, and if, before the commencement of this suit, the plaintiffs had consented to the mixture, and the same was so mixed when the receipts were given, when the suit was brought, the jury should find for the defendant.
- 72 10TH. Will the Court instruct the jury, on behalf of the defendant, that if Fairfield & Weld, being engaged in the business of warehousemen, purchasing for themselves and others, grain, and storing grain for others,

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

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

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

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

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

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

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

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

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

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

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

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

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

77 Verdict for plaintiffs.

77 Motion for new trial.

77 Overruled. Judgment. Exception.

ERRORS ASSIGNED.

In rendering judgment for the plaintiff.

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

In refusing a new trial.

In not giving judgment for defendant (below).

LELAND & BLANCHARD,
Attorneys for Plaintiffs in Error.

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Hansen

as

Cushman et al

Abstract

Filed April 22nd 1862

L. L. Lander

Clerk

STATE OF ILLINOIS, }
SUPREME COURT,

ss. The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of La Salle Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between William H. W. Bushman, William M. True and Isaac R. Waterman plaintiffs, and Francis Warner

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

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plea aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law!

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 17th day of March in the Year of Our Lord one thousand eight hundred and fifty six, two
L. Leland

Clerk of the Supreme Court,
J. S. Rice Deputy

Miss Warner
as

Miss H. B. Cushman

to

Miss F. C. Cushman



State of Illinois }
Safall County }^{ss} Plw before The Honorable
Madison E. Hollister the
Judge of the Ninth Judicial
District of the State of Illinois and the pre-
siding Judge of the Safall County Circuit
Court in Said State, at a term of Said Court
Commenced and held at the Court House in
Ottawa in Said County and State on the
Second Monday in the Month of June the
Same being the Eleventh day of June in the
year of Our Lord One Thousand Eight Hun-
dred and Sixty, and of the Independence
of the United States of America the Eighty
Fourth

Present, The Honorable Madison
E. Hollister Presiding Judge
John F. Nash Clerk
Washington Bushnell, States Attorney
Francis Warner Sheriff.

Be it remembered, That here-
-tofore To Wit: On the 14th day of March
1860, an affidavit was filed in the office
of the Clerk of Said Court, which affidavit
is in the words and figures following
To Wit:

State of Illinois } William M. True
 Safer County } of said County
 being duly sworn
 Saith that William H. W. Cushman, S-
 Erac & Waterman and this affiant
 are copartners under the name and
 Style of Cushman True & Co., that the
 Said Cushman True & Co. are now just-
 -ly entitled to the possession of Seven thou-
 -sand bushels of Corn in the Ear, which
 is now in four Cribes, which are now stan-
 -ding on Lot Four & the West Half of
 Lot Three in Block A-0 Thirteen
 in the original Town of Ottawa
 That the Said Corn is now unjustly
 & unlawfully detained from the pos-
 -session of the Said Cushman True
 & Co. by Francis Warner, that the value
 of Said Corn is Two Thousand Eight
 Hundred Dollars, And affiant further
 Saith that Said property has not been
 Taken, for any Tax, assessment or fine
 levied by virtue of any law of this
 State, nor seized under any execu-
 -tion or attachment against the
 goods & Chattels of Said Cushman
 True & Co. or either of them liable
 to Execution or attachment.

Wm M. True

Subscribed and Sworn to before me this
17th of March 1860.

John F. Nash Clerk
C. H. Hook Deputy

Be it remembered that heretofore
To Wit: on the 17th day of March
1860, a "Plaint" was filed in the office
of the Clerk of Said Court, which is
in the words and figures following
To Wit:

" State of Illinois
Lafayette County & Circuit Court thereof
To June Term 1860

William H. H. Cushman, William
M. True, and Isaac B. Waterman
Partners under the name & style
of Cushman True & Co, Plaintiffs in
this Suit by Glover & Cook their attys
complain of Francis Warner, defen-
dant Summoned &c of a plea of
Replevin, For that the said defendant
heretofore To Wit: on the Fifteenth
day of March AD 1860, unlawfully
and unjustly took Seven Thousand

bushels of Corn in the ear of 75 lbs
to the bushel of the value of Two
Thousand Eight Hundred dollars
of the property of Said Cushman True
& Co, and unlawfully and unjustly
detained the same untill &c against
gages & pledges to plaintiffs damage
the sum of Three Thousand dollars
and therefore they bring their Suit:
Glover & Cook Pltfs attys.

Be it Remembered that hereto-
fore To Wit: On the 17th day of March
AD 1860. an affidavit was filed in
the office of the Clerk of Said Court
which affidavit is in the words
and figures following To Wit:

"State of Illinois
Safall County & Circuit Court thereof

William H. H. Cushman	}	Replevin
William M. True &		
Isaac V. Waterman		
no		
Francis Warner	}	

Isaac V. Waterman
one of the above named Plaintiffs, being

duly Sworn States on oath, that the above named, defendant Warner is now acting Sheriff of Said Seasalle County & as such is interest in this ~~Suit~~ Cause, for these reasons deponent prays the writ herein may be directed to the Coroner of Said County to execute

Isaac C. Waterman^{sr}

Subscribed and Sworn to before me this 17th day of March 1860-

Sam. L. Walker
Notary Public in
& for the City of Ottawa,

Be it remembered, that heretofore to Wit, on the 17th day of March 1860, a writ of replevin was issued out of, and under the Seal of Said Court, which Said Writ, and the endorsements thereon are in the words & figures following To Wit!

"State of Illinois } The People of the
Seasalle County }^{ss} State of Illinois
County; Greeting; To the Coroner of Said
J. W. H. W. Cushman
Wm. Mc. True & Isaac C. Waterman of Said

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County. Shall give you, good and Sufficient Security to prosecute his Suit to effect, and without delay, and to make return of the following described goods and Chattels the property of them the Said W. H. W. Cushman, Wm. M. True & Isaac V. Waterman To Wit;

Seven Thousand Bushels of Corn in the Ear of 75 lbs to the bushel which is now in four cribs, which are now standing on Lot Four & the West half of Lot Three in Block No. Thirteen in the original Town of Ottawa, Said corn being of the value of Two Thousand Eight Hundred Dollars, which Francis Warner, also of Said County, forcibly and unlawfully took and unjustly detains and return the Said property, if return thereof be awarded - and further to Save and Keep you harmless in replevying Said property, then you are to Cause the Said property above described to be replevied and delivered To Said W. H. W. Cushman, Wm. M. True & Isaac V. Waterman without delay. And Summon the Said Francis Warner personally to be and appear before Our Circuit Court in and for Said County, on the first day

Bail 50. Mileage 5. \$2.65

R. McArthur Coroner
Filed June 11, 1860. J. H. Nash Clerk

Be it remembered That
heretofore To Wit: On the 11th day of
June 1860. "a Bond" was filed in the
Office of the Clerk of Said Court, which
Bond is in the words and figures following
To Wit:

State of Illinois } Know all men
Safall County } ss By these presents
that we William
H. W. Cushman, William M. True & Isaac
W. Waterman and Samuel B. Gridley of
the County of Safall and State of Illinois
are firmly held and bound unto, Robert
McArthur Coroner of Said County, in
the penal sum of Five Thousand
Six Hundred Dollars, good and
lawful money of the United States
which sum well and truly to be made
we bind ourselves, our heirs, executors
and administrators firmly by these
presents, Witness our hands and
Seals, this 17 day of March AD 1860
The Condition of the above obli-

- gation is Such, that whereas the above named William H. W. Cushman, William M. True, and Isaac C. Waterman on the 17th day of March AD 1860. Sued out of the Circuit Court of Lafalle County, a writ of Replevin against One Francis Warner, for the following goods and Chattels viz: Seven Thousand Bushels of Corn in the ear which is now in four Cribbs now standing on Lot Number 4 in Block, # 13, in the Original Town of Ottawa & on the West half of Lot three Same Block, And Said writ is returnable at Ottawa, in Said County on the first day of the next Term of Said Lafalle County Circuit Court now if Cushman, True & Waterman Shall appear at the next term of Said Court, and prosecute Said Suit of Replevin to effect and without delay, and make return of Said property, if return thereof be awarded, and secure and keep harmless the Said Coroner in replevying Said property, then the above obligation to be null and void otherwise

to be and remain in full force and effect

Will H. W. Cushman

Wm. Mc. True

Isaac B. Waterman

Saml B. Gidley

Be it remembered that heretofore To
Ht. On the 7th day of June. 1860. The
Defendant filed his Pleas herein, in
Said Court, which Said Pleas are
in the words & figures following To
Ht.

" State of Illinois } Circuit Court
Safale County }⁸⁸ of Said County
June Term AD 1860

William H. W. Cushman }
William Mc. True & }
Isaac B. Waterman } Replevine
vs }
Francis Warner }

Now comes the Said defendant by
Dickey & Wallace & Eelard & Ireland
his attorneys & defends &c & Says
actio non &c, because he Says, that
he did not at the Said time.

11 when, where &c take & detain the said goods & chattels in said declaration mentioned or any part thereof in manner & form as therein alleged & of this he puts himself upon the Country &c

2 And for another & further plea in this behalf said defendant Says Actio non &c because he Says that the said goods & chattels in said declaration mentioned, at the said time when &c were the property of said defendant, and not of said Plaintiffs as by the said declaration is above Supposed, And this said defendant is ready to verify; - Therefore he prays Judgment &c

3. And for another & further plea in this behalf said defendant Says, Actio non &c, because he Says that the said goods & Chattels in said declaration mentioned, at the said time when &c were the property of Micajah S. Fairfield and John D. ~~W~~eld and not of said Plaintiffs, as by the said declaration is above Supposed - And this ^{said} defen

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dant is ready to verify: wherefore
he prays Judgment &c.

4.

And for another & further plea
in this behalf Said defendant
Says Actio non &c because he Says
that the Said goods & Chattels in
Said declaration mentioned, at the
Said Time, when &c were not the
property of Said Plaintiffs, and
of this Said defendant, puts himself
upon the Country.

And Plffs do the like. G. & C.

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And for another and further plea
in this behalf Said defendant Says
Actio Non &c because he Says, that
at the December Term, in the year
of Our Lord Eighteen Hundred
& fifty Nine of the Superior Court of
Chicago, within & for the County of Cook
in the State of Illinois, and on the
Twentieth day of Said December
(the Same being one of the days
of Said December Term) by the con-
sideration & judgment of Said Court
One William Martin recovered a-
gainst Micajah F. Fairfield & John

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I G Weld the Sum of Nine Thousand
Four Hundred and four Dollars
and fifty Eight Cents for the dama-
ges which the Said Martin had sus-
tained by reason of the non performance
by Said Fairfield & Weld of certain
promises & undertakings then lately made
to the Said Martin and also his costs
& Charges in that behalf expended
that on the Twentieth day of De-
cember AD 1839. an execution or writ
of fieri facias directed to the Sheriff
of Cass County was duly issued upon
Said Judgment, & on the Twenty second
day of December AD 1839, came to the
hands of this defendant as Sheriff
of Said Cass County, that on the
Ninth day of March AD 1860, by virtue
of Said Execution so issued upon
Said Judgment Said Francis Warner
the defendant in this Suit as Sheriff
as aforesaid, did levy upon, seize
& take, the Said corn in the declara-
tion mentioned, as the property of
Said Fairfield & Weld that at the
time Said execution so came to the
hands of this defendant & at the
time of Said levy, upon & seizure

taking of Said Corn, this defendant was the Sheriff of Said Safole County duly elected & qualified

And this defendant avers, that at the time Said Execution so came into his hands & when said corn was so levied upon seized & taken the same was the property of Said Fairfield & Weld, liable to be taken & sold on said execution and not the property of the plaintiffs. Wherefore Said defendant for the cause aforesaid took & detained said corn in the declaration mentioned, as he lawfully might. And this said defendant is ready to verify. Wherefore he prays judgment &c -

6. And for another & further plea in this behalf said defendant says, Actio non &c, because he says, that prior to the time of the commencement of this suit Micajah F. Fairfield and John D. G. Weld were engaged as warehouse men in the business of receiving from divers persons, corn & other grain in Ottawa in Safole County in the State of Illinois, to be stored, & also

in the purchase for themselves of Corn & other grain which Said Corn (as well that purchased as that stored) was so received by them with the understanding on the part of those who stored the Same & on the part of Said Fairfield & Weld, that the Same should not be kept separate, but should be mixed a like quality & quantity (but not the same corn as that stored) should be delivered to the storer thereof, or person to whom Said Fairfield & Weld might sell the corn so purchased by them.

And this defendant alleges that at the time hereinafter mentioned, when the execution hereinafter mentioned came into his hands as Sheriff & when the same was levied, there was in the three corn cribs herein after mentioned, a quantity of corn composed partly of corn stored & partly of corn purchased & owned by Said Fairfield & Weld all mixed together as aforesaid by the consent of the storers, & of Said Fairfield & Weld - That while Said corn was so mixed in Said cribs Said Fairfield & Weld for the purpose

of securing the Plaintiffs for an indebtedness due them from Said Fairfield & Weld and without receiving in store any corn from Said Plaintiffs, issued certain fictitious grain receipts falsely purporting to be for corn stored with Said Fairfield & Weld by the Plaintiffs - Said Fairfield & Weld, not owning the amount of corn mentioned in said receipts & having no corn out of which to pay them in full without using the corn stored by others or corn afterwards to be received by them while the corn which was afterwards replevied, was in this mixed condition by consent of Plaintiffs the Stovers & Said Fairfield & Weld & Wt. On the Twentieth day of December AD 1839 a judgment was rendered by the Superior Court of Chicago within and for the County of Cook & State of Illinois in favour of William Martin against Said Fairfield & Weld for the Sum of Nine Thousand four hundred and four Dollars and fifty eight cents & Costs & on the said twentieth day of said December an execution or writ of fieri facias was issued

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on Said Judgment, directed to the Sheriff of Lafalle County & on the Twenty second day of December AD 1859, the Same was placed in the hands of this defendant as Sheriff of Said Lafalle County, and on the Ninth day of March AD 1860, by virtue of Said Execution, Said defendant as such Sheriff levied upon, Seized & took as the property of Said Fairfield & Held all the Corn in Three certain Cribes contained, So being the Corn received in Store purchased & mixed as afore-
-Said by consent of all parties in inter-
-est - And this defendant further Says, that at the time Said Execution came into his hands & at the time of Said levy, he was Sheriff of Said Lafalle County, duly elected & qualified & that the Corn in the declaration mentioned was replevied & Separated by the Coroner from the mixed mass in Said Three Cribes, the whole of which this defen-
-dant had So Seized, as the property of Said Fairfield & Held, And this defen-
-dant further avers, that the Said Plain-
tiffs had no other claim to Said Corn replevied by them & Separated from

the mass aforesaid except the said receipts given as aforesaid to Secure said debt & defendant further alleges that no delivery of said Corn was made to said Plaintiffs by said Fairfield & Weld before said execution came to the hands of this defendant as aforesaid, Wherefore, for the Cause aforesaid, said defendant took & detained said Corn in said declaration mentioned as he lawfully might.

And this said defendant is ready to verify, Wherefore he prays judgment &c

Dickey & Wallace
Seeland & Seeland
defts. attys.,

Be it remembered, that heretofore to wit: On Monday June 18th AD 1860 the same being one of the days of the June Term of said Court, for said year, The following proceedings were had, and entered of record, viz:

"William H. W. Cushman, William M. True
& Isaac W. Waterman vs Replevin
Francis Warner

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This day the Plaintiffs come by Glover Cook & Campbell their attorneys, and the defendant by Sealand & Sealand his attorneys, and after hearing the arguments of Counsel, the Court sustain the Plaintiffs demurrer to defendants 4th plea

Thereupon on motion of defendants attorneys, it is ordered by the Court that they have leave to amend their fourth plea.

~~This~~ Be it remembered that heretofore To Wit: On the 18th day of June 1860, "replications" were filed in the office of the Saffolk County Circuit Court, which is in the words and figures following To Wit:

"H. H. H. Cushman	~	
William M. Ince	~	Saffolk County Circuit
Isaac C. Waterman	~	Court of June Term 1860
vs	~	
Francis Waterman	~	

And as to the 1st plea of defendant above pleaded in which he puts himself upon the Country juries do the like.
And as to the 2^d plea of de-

-pendant above pleaded Plaintiffs
 Say pre cludi non &c because they
 Say that the said goods & chattels
 in the declaration mentioned were
 at the said time when &c the property
 of said Plaintiffs and of this they
 put themselves upon the Country
 And dft doth the like

~~Wallace~~
~~Seland~~ & Seland for dfts.

And as to the 3^d plea of dft above
 pleaded pltps say pre cludi non &c be-
 -cause they say, that the said goods and
 Chattels in the declaration mentioned
 were not at the said time when &c
 the property of said Fairfield & Weld
 but was then & there the property of
 said Plaintiffs & of this they put them-
 -selves upon the Country

And dft doth the like

Wallace & Seland for dft.

And as to the 4th plea of defendant
 above pleaded plaintiffs say precludi
 -non &c because they say that the
 said plea, is not sufficient in law
 to bar Plaintiffs action and that they
 are not bound by law to answer

the Same and this they are ready to verify wherefore they pray Judgment &c. And for Cause of demurrer they shew that Said plea, does not tender a proper issue, that it concludes with a verification when it should tender an issue to the Country;

And as to the 5th plea of deft above pleaded pltps say preclude non &c because they say that the Said goods & Chattels were not, at the Said time when they were levied upon as stated in Said plea, or at the time when Said execution came into the hands of Said Warner the property of Said Stanfield & Held & of this they put themselves upon the Country and deft doth the like
Malice & Scandal for deft.

And for a further replication to Said 5th plea Plaintiffs say preclude non because they say that there is no such record of any Judgment and Execution as in Said plea is supposed and of this they put themselves upon

the Country;

And dfts doth the like
Wallace & Seland for dfts

And for a further replication to Said 5th plea Plffs say precludiⁿ non because they say that said dft was not at the times when said Execution is alledged to have been received and when said levy is alledged to have been made by him Sheriff of Said Lafalle County as in Said plea is alledged & of this he puts himself upon the Country:

And dft doth the like
Wallace & Seland

And for ~~further~~ replication to the 6th plea of dft above pleaded Plaintiffs say that long before the Said time when &c Co. Trs. on the 1st day of December AD 1839, they, Said Fairfield & Weld agreed to purchase corn with money furnished by plaintiffs for that purpose, and that ^{it was} a part of Said agreement that the Corn so purchased by Said Fairfield & Weld with the money

of Said Plaintiffs should become at the time of the purchase the corn of the Plaintiffs, and should be sold by Plaintiffs on their own account and a large quantity to wit; Seven Thousand Bushels was so purchased by Said Fairfield & Weld & then & there became & was the property of the Plaintiffs, and was placed by Said Fairfield & Weld in certain cribs & in which cribs Said Corn remained the property of the Plaintiffs until the execution of the ~~Writ~~ Writ of Replevin in this cause by which writ Seven Thousand bushels of Corn was taken by virtue of Said writ of Replevin and Said Corn while in Said cribs was never mixed with any other Corn by and with the knowledge and consent of these plaintiffs, But if said Fairfield & Weld did mix Said Corn with any other Corn, they did so of their own wrong and without the knowledge & consent of these Plaintiffs, and this they are ready to verify, whereupon they pray Judge & C.

And for further replication to Said plea Plaintiffs Say

that it is not true that the only right which they had to the said Corn was by virtue of certain fictitious grain receipts issued by said Fairfield & Weld falsely purporting to be for corn stored with said Fairfield & Weld, but that they were, or the owners of the amount of Corn replevied in this suit which was in certain Crils where it had been placed by said Fairfield & Weld for these plaintiffs and from which Crils the Corn replevied was taken And they deny that said Corn was mixed with other corn with their knowledge & consent and they aver that if said Fairfield & Weld did mix said Corn with other Corn they did so of their own wrong without the consent of these Plaintiffs & this they are ready to verify wherefore they pray Judgment

Glover Cook & Campbell
For Pltffs. "

Be it remembered that heretofore
So vit! On the 19th day of June 1860

with the money of Said Plaintiffs should become, at the time of the purchase, the corn of the Plaintiffs & should be sold by Plaintiffs on their own account, nor is it true that Said quantity of corn was so purchased by Said Fairfield & Weld & so became & remained the property of the Plaintiffs until the corn was replevied in this Suit - Nor is it true that the corn so replevied was never mixed with any other corn by & with the knowledge & consent of the Plaintiffs, nor is it true that Said Fairfield & Weld mixed Said corn with other corn of their own wrong without Said knowledge & consent & of this Said defendant puts himself upon the Country &c

And for a rejoinder to the second replication to the sixth plea of the defendant, Said defendant says; that it is true that the only right which the Plaintiffs had to ~~the~~ Said corn was by Said fictitious grain receipts issued by Said Fairfield & Weld falsely purporting to be for corn stored with Said Fairfield & Weld, and it is not true that the Plaintiffs were

& are the owners of the corn replevied
 in this Suit - nor is it true that it
 was placed by Said Fairfield & Weld
 for the Plaintiffs in certain cribs from
 which it was replevied - and that it is
 true, that Said corn replevied was
 mixed with other corn with the know-
 ledge & consent of the Plaintiffs
 And the defendant denies that
 Said Fairfield & Weld mixed Said
 corn of their own wrong & without
 the consent of the Plaintiffs, and
 of this the defendant puts himself
 upon the Country, &c

Wm H. L. Wallace &
 Selond & Seeland
 defts attys "

Be it Remembered That
 heretofore to Wit! On the 16th
 day of November AD 1860. an addi-
 tional replication was filed in
 the office of the Clerk of Said County
 which is in the words and figures
 following!

To Wit!

Wm H. W. Cushman et al } In the
 vs } Circuit Court
 Frank Warner } of Saffell County
 To November Term
 AD 1860

And now come the said
 plaintiffs by Glover, Cook &
 Campbell their attys and for a
 further replication to the said
 6th plea of said defts by leave
 of the Court now replied say
 we chide now &c because they
 say that there is no such record
 of any judgment and execution
 as in said plea is supposed and
 of this they put themselves upon
 the Country

Glover Cook & Campbell
 attys for Pliffs.

And dft doth the like

Sickey Scotland & Wallace
 for defts.

Be it remembered that heretofore
 To wit: On the 14th day of February
 AD 1861. An affidavit was filed

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in the office of the Clerk of Said Court,
which affidavit, is in the words
& figures following To Wit!

"William H. W. Cushman } In the
us et al } Circuit Court
Francis Warner } of Saffell

Isaac V. Waterman being
first duly sworn Says on oath that
he is one of the Plaintiffs in two certain
causes now pending in the Circuit
Court of Said County which are each
entitled as above and that he is also
one of the defendants in a certain
Cause now pending on the Chancery
Side of Said Court, wherein Thomas
Heerford and others are Plaintiffs
and this affiant & others are defen-
dants that in each of Said Causes
this affiant is jointly interested
in the Subject matter of the Cause with
William H. W. Cushman and William
M. True who with this affiant
form the firm of Cushman True &
Co that each of Said Suits at Law
arise out of Separate portions of
the same general Subject matter,

To wit: The ownership & right to the possession of a large quantity of Corn, and that the subject matter of Said Suit in Chancery embraces the whole of the matter in controversy in both of Said Suits at law and for a full and perfect statement of the same, this affiant here refers to the answer of Said Cushman, True & Waterman now upon file in said Chancery Cause & makes the same a part of this affidavit. And affiant is informed by counsel and verily believes that the whole of Said Matter in controversy will be fully disposed of, in, and by the order of this Court in Said Chancery Cause, Which affiant shows to the Court stands for a hearing at the present term of this Court, and affiant therefore asks that each of Said Law Cases be continued till the next term of this Court in order that the Said Chancery Cause may be disposed of, and the rights of the several parties therein may be determined therein and the Said Plaintiff in Said Law Cases

he not subjected to the great expensive
trouble of litigating the same
subject matter in all of said Causes
at once. Affiant Says this
affidavit is not made for delay
but in order that Justice may be
done.

J. P. Waterman

Subscribed & Sworn to before me
this 13th day of February 1861.

A. B. Moore Clerk

C. H. Hook Deputy

Be it remembered that hereto-
fore to wit; On Thursday, the 14th
day of February 1861. The same
being one of the days of the
February Term of said Court
for said Year; The following
proceedings were had and entered
of Record To wit;

W. H. A. Cushman, Wm. No. 3

Geo & Isaac B. Waterman 3

Francis Warner 3

Replevin

By agreement

of parties it is ordered by the Court
that this Cause be continued at
Plaintiffs Costs;

Be it remembered that here-
-before To Wit; On ^{Tuesday} ~~Thursday~~ Febru-
-ary 18th 1862, the same being one of
the days of the February Term of
Said Court, for said year, an
order was entered of record, as
follows To Wit;

"Of H. W. Cushman & Wm. McTear
& Isaac A. Waterman }
Francis Warner } Replevin

This day come
the Plaintiffs by Glover Cook & Camp-
bell their attorneys, and the defendant
by Leland & Blanchard his attorneys
and thereupon come the following
jurors of a Jury De Wit! Henry A
Doty, George Bristol, William Cummings
William Gartman, William Patchen, John
R Poundstone, James A. Miller, James
C. Chase, J. McKee, John S. Miller
Joseph Mason & J. S. Howland who

are duly elected, tried and Sworn
to try the issues herein according
to the evidence, and after hearing
a portion of the Testimony adduced,
the further hearing of the Cause is
postponed untill the coming in of
the Court Tomorrow Morning:

Be it remembered that here-
-before To Wit: On Wednesday the
19th day of February 1862, the same
being one of the days of the February
Term of Said Court, for Said Year
the following further proceedings
were had and entered of record
as follows: To Wit:

"H. H. Cushman, Wm. Mc Inis	}	Replevin
& Isaac Waterman		
vs		
Francis Warner	}	

This day again
Came the parties hereto, together with
the Jury Sworn herein and after hearing
the balance of the evidence and the
arguments of Counsel, the Jury retire
to consider of their verdict and after

due deliberation thereon had return
into Court the following verdict To
wit; "We the Jury find that the Plain-
tiffs are entitled to the possession of
the property described in the writ in
this cause, and that the defendant
is guilty of withholding from Said
Plaintiff the possession thereof"

Defendant by his counsel moved
the Court for a new trial herein "

Be it remembered, that heretofore
to wit; on the 19th day of February
1862, the same being one of the days
of the February Term of Said Court
for said year, The following instruc-
tions on the part of Plaintiffs was
filed by the Clerk of Said Court,
which said Instructions are in the
Words and figures following To
wit;

"Mr H W Cushman et al } In the Circuit
no } Court of Sa-
Francis Warner } - said County

Instructions asked for Plaintiffs,

Given

"This is qualified in the next preceding instruction"

house receipts, purporting to be for corn in store and the corn purchased with Plaintiffs funds, had been when said receipts were issued to Plaintiffs, mixed with that of others, and so continued mixed till this suit was brought the jury should find a verdict in favour of the defendant though he may have seized all the corn which Fairfield & Weld so had in store including that so purchased with Plaintiffs funds or for them.

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Given

If the jury believe from the evidence that Fairfield & Weld being the owners of the grain in controversy gave the plaintiffs in Aug, and Decr 1839. Warehouse receipts, purporting to be for corn in store as security for an indebtedness from Fairfield & Weld to plaintiffs, and the Plaintiffs did not take possession of said corn, but left the same in possession of Fairfield & Weld till the execution issued on the judgment against Fairfield & Weld was on the 22nd of December 1839. placed in the hands of the defendant then being Sheriff of Essex County, and the said defendant by virtue of said

execution on the 9th day of March 1860
as Sheriff seized said Corn & replied
the Jury should find for the defend-
-dant notwithstanding said Fairfield
& Weld may have delivered said Corn
to the Plaintiffs between said 22nd
of December and said 9th of March

- 13 If the Jury believe from the evi-
-dence that Fairfield & Weld bought
corn for plffs. The Plaintiffs furnishing
money for that purpose to Fairfield
& Weld, then Fairfield & Weld were
the agents of Plaintiffs, and if such
agents mixed the Corn bought for
plffs with other persons Corn, then
the plffs are as much responsible for
such mixture as though they did
the same themselves, in which
case they could not replevy the
corn and the Jury must find for
Defendants.

Refused

Be it remembered that heretofore
To Wit: On Thursday February 27th 1862, the same
being one of the days of the February Term of said
Court for said year, the following fur-

ther proceedings were had, and entered
of record in Said Cause viz:

"H. H. Cushman, Wm. M. No-	}	Replevin
Invs Isaac & Waterman		
vs		
Francis Warner	}	

This day again
come the parties hereto by their respective
attorneys, and after arguments of Coun-
-sel, it is ordered by the Court that
the motion for a new trial heretofore
entered be overruled.

It is therefore considered by
the Court that the Plaintiffs have &
recover of the defendant their costs
and charges by them herein expended
and that they have execution therefore.

Be it remembered that here-
-tofore To Wit: On the 27th day of
February, 1862, the same being one
of the days of the February Term for
Said Year, a "Bill of Exceptions" was filed
which is in the words and figures
following To Wit:

"State of Illinois } Circuit Court of
 LaSalle County }^{ss} Said County, February
 Term AD 1862.

William H. H. Cushman =

William McTear and =

Isaac W. Waterman = Be it remem

Francis Warner = bered that on
 the trial of this
 Cause the plaintiffs

to maintain the issue on their part in.
 introduced Micajah H. Fairfield as a
 witness who testified as follows that he and
 John D. G. Weld were partners in the busi-
 -ness of buying and storing grain in No-
 -vember and December AD 1859 in Ottawa
 that prior to December 1st 1859, they oc-
 -cupied a Ware House in Ottawa on
 the North Side of Madison Street
 having rented the Warehouse of John
 Armour, that their lease from Armour
 expired on the Said first of December
 and that they then moved their place
 of business and continued the same
 business on the opposite side of Madison
 Street, that on the premises being lot
 four, and the West half of lot 3 in block
 13 in the States addition to Ottawa
 there were three cribs for storing

ear corn, an office and other buildings and that on the 23^d day of said December there were in said three cribs about 14000 Bushels of ear corn, being the same corn in controversy & other corn, belonging to Keeford, Almstead, Umlauf, Harding and others, who had stored corn with them, and the corn of those persons was mixed by Fairfield & Held, by consent of Keeford, Almstead, Umlauf, Harding & others - So that the corn replevied, and that of said last named persons formed a mixed mass in said three cribs and that the fourteen thousand Bushels continued so mixed together till the 7000 Bushels were replevied and separated from the mass, and taken away by the Coroner by virtue of the writ of replevin in this case, said Fairfield further testified that in the latter part of November a small amount of ear corn was placed in some of said three cribs, but that the main portion of the 14000 bushels was placed in the three cribs between the 1st and 22^d of said December, that in the latter part of said November, it was agreed between said Fairfield for their form, and the plaintiff

Cushman for the firm of Cushman True
 & Co of which the Plaintiffs were the mem-
 bers, and who were bankers, that the lat-
 ter should furnish Fairfield & Weld
 money to the extent of Thirty cents a bush-
 el to be used in the purchase of Corn
 and that the Corn purchased with said
 money should be purchased for said
 Cushman True & Co & become when so
 purchased their Corn & that said Fair-
 field & Weld should store said Corn
 & pay all the expenses of taking care
 of and Shipping the Same, that upon
 the Sale of said Corn which should
 be shipped to such persons as said
 Cushman True & Co should direct
 & when they should direct, said
 Cushman True & Co should receive
 from the proceeds the money advanced
 by them together with 15 per cent thereon
 and said Fairfield & Weld the balance
 after paying all of said expenses & so
 Cushman True & Co were to be paid
 interest at one & a half per cent per
 month on the money advanced that
 Fairfield & Weld were to pay all expenses
 including insurance that Cushman
 True & Co were to be repaid the money

advanced and said interest on said money and nothing more and that all the profits were to be Fairfield & Held and that Fairfield & Held when money was advanced to them, gave their notes to the Plaintiffs for it and the interest that the corn purchased with the money advanced was to be considered the plaintiffs and shipped according to their directions that as Fairfield & Held already had business arrangements with C. S. Dole & Co of Chicago that they might ship to them. In November and December, Fairfield & Held gave the Plaintiffs warehouse receipts purporting to be for corn in store as described in the receipts mentioned hereafter dated Dec 22, 1839. that when they issued the warehouse receipts, one of the plaintiffs, objected to the phrase in the Warehouse receipts, "at Owners risk" and the same was stricken out. Fairfield also testified that the value of the corn in the warehouse receipts was about \$400. more than the money advanced, the amount of money furnished by Plaintiffs being about \$3800. when the arrangement

to advance money was made, Cushman requested Fairfield to keep the corn purchased with money furnished by Plaintiffs Separate, that Fairfield said it would be inconvenient to do so, and made no agreement that he would do so, and did not in fact do so but mixed the corn purchased with Plaintiffs money with the corn of the others who stored grain with them. Fairfield also stated that the corn purchased with Plaintiff funds and which went into the four cribs amounted to about 7000 bushels. Said Fairfield also stated that he did not remember ever having any conversation with John D. Olmstead on the subject of the arrangement between Fairfield & Weld and plaintiffs in relation to the terms upon which plaintiffs were to advance money. Said Fairfield also stated that on the 9th of March the defendant took possession as Sheriff of all the corn in the three cribs, and that on the 1st of March he Fairfield delivered the possession of the corn in the three cribs to plaintiffs and they put a fence around the

as the corn purchased for Plaintiffs and that for the purpose of satisfying said corn receipts & that Plaintiffs took possession of said cribs as before mentioned and they put a fence around the three cribs, and that the defendant broke the enclosure and took possession of the three cribs of corn. Plaintiffs here rested.

Defendants proved by said Fairfield the execution of a receipt by True one of the Plaintiffs and said receipt was introduced in evidence, the receipt is in the words and figures following:

Rec of Fairfield & Held the following grain receipts & notes as collateral security for the payment of their indebtedness to us:

Nov 23 ^d	Receipt for 3000 Bushels of corn at Ottawa
Nov 28	" " 2000 " " " "
Dec 5	" " 2000 " " " Utica
" 5	" " 2000 " " " at Ottawa
" 14	" " 1000 " " " "
" 19	" " 1000 " " " Morris

Dec 12 Notes of Sundry persons to the amount of \$882 $\frac{50}{100}$

Ottawa Dec 22, 1859,

Cushman & True & Co.

The defendant then introduced ^{in evidence} a judgment of the Superior Court of Chicago in favour of William Martin against Fairfield & Weld for \$9404.58 and costs rendered on the 20th of Dec 1839 an execution or fieri facias issued on said 20th of Dec proved that the Defendant was Sheriff of LaSalle County duly elected and qualified, and that said execution was placed in his hands on the 22^d of said Dec, and that the same was levied by defendant on all the corn in the Three Cribbs on the 9th day of March 1860

Defendant then introduced John D Olmstead as a witness who stated that he stored corn with Fairfield & Weld in November & Dec 1839. That the amount he stored was about 1500 bushels which was placed in the cribs out of which the corn was replevied ^{and knew when the corn was replevied} in said cribs mixed and that part of the corn he stored was taken by the Plaintiffs by virtue of the writ of Replevin, that he was the first one who put corn into the cribs out of which the corn was replevied and that he knew of no arrangement between plaintiff and Fairfield & Weld

by which the latter were to keep plaintiffs Corn unmixed with that of others, that Fairfield told him, that Fairfield & Weld were hiring money of the plaintiffs to use in the purchase of grain but said nothing about any arrangement that the Corn so purchased was to be considered Plaintiffs Corn, or that it was to be kept separate from other Corn, said Olmstead further testified that he was engaged in the Ware house business, and he had stored a good deal with others that the usual custom ~~was~~ in Ottawa ^{was} to mix the Corn of different owners together, they to receive a like quantity and quality but not the same Corn

Said Witness further testified that True one of the Plaintiffs passed the place of business of Fairfield & Weld daily, in going from his place of business to his dwelling House during November & December of 1839, and that the place of business of plaintiffs was on the Corner of Main & Lafitte Streets in Ottawa, That Fairfield & Weld in Nov & Dec of 1839, were warehousemen engaged in buying and storing grain, Corn Oats wheat &c

Defendant then introduced Harding who testified that he was a Farmer and that he stored corn with Fairfield & Weld in the winter of 1839, about December of that year, that the corn he stored went into the cribs from which the corn was afterwards replevied and that it was mixed with other corn therein

Fairfield recalled said that the arrangement ^{was} made between him and Cushman, before any corn was stored in the Cribs from which corn was afterwards replevied and that he built the cribs himself, this was all the evidence in the case

The Court was requested by the Plaintiff to give the following instructions to the Jury;

1 If the Jury believe from the evidence that Almstead, Wm. Lauf & Herford or either of them or other parties than the Plaintiff stored corn with Fairfield & Weld, and consented that said Fairfield & Weld might mix said corn in one mass with all

the corn held in store by Said Fairfield
And Weld and not owned by them
and that they the Said Storers would
receive from Said Fairfield and Weld
a like quantity and quality of corn
from the mass, so mixed in lieu of the
amount so stored for them as aforesaid
And if they further believe that Said
Fairfield & Weld did so mix Said Corn
of Said storers in one mass with the
corn of the Plaintiffs without the
Plaintiffs Consent then Said Storers
would thereby lose their right to any
portion of the identical corn so stored
by them, and if Fairfield & Weld while
in the possession of Said Corn, and before
the levy of the execution was made by
the defendant upon the same delivered
Said Corn to the plaintiffs, such possession
of Said Plaintiffs is sufficient to enable
them to maintain this action, if they
believe that defendant took the corn
as stated in Plaintiffs declaration.

2^d If Defendants took the Corn mentioned
in the declaration before this Suit was
commenced they must find the issue
on the first plea for plaintiff no matter who owned the corn.

- 3 Unless the corn in controversy was the property of defendant Warner or that it was the property of Fairfield & Held and levied upon by Warner the jury should find the issue on the second plea for plaintiffs
- 4 Unless the jury believe from the evidence that the corn in controversy was the property of Fairfield and Held when the same was replevied they must find the issue on the third plea for Plaintiffs
- 5 Unless the jury believe from the evidence that when the execution read in evidence came to Warners hands and was afterwards levied upon the corn in question, and that the same belonged to Fairfield & Held they must find the issue on the 5th plea for plaintiffs
- 6 Unless it is proven that at the time the execution read in evidence came to the hands of Warner or when the same was levied there was in the Cribbs mentioned in said plea a

quantity of corn, composed partly of corn stored and partly of corn purchased and owned by Fairfield & Weld which was all mixed together with the consent of the plaintiffs they should find the issue on the 6th plea for Plaintiffs

7 If the Plaintiffs loaned money to Fairfield and Weld to buy corn with the agreement that the corn when purchased should be the corn of plaintiffs and subjected to their control and to be disposed of by plaintiffs and that Fairfield & Weld should have for their services in buying the corn, all that the corn was sold for over 30 cents per bushel and interest at one & a half per cent per month from the time the money was advanced the corn purchased under said agreement with money furnished by Plaintiffs would be the corn of Plaintiffs

8 If plaintiffs had a right to hold the corn in question as collateral security for a debt that Fairfield & Weld owed them that is sufficient

ownership of the corn to enable plaintiffs to maintain this action so far as the question of ownership was concerned

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

10. If the corn in controversy belonged partly to the plaintiffs and the residue to parties other than Fairfield & Weld who had stored the same with Fairfield & Weld and if said corn was mixed by the consent of the owners, such mixing would not make the corn the property of Fairfield and Weld, but the corn would belong to Plaintiffs and the other parties storing the same in common according to their respective portions mixed in the mass, and in such case an execution against Fairfield and Weld would not be a lien on said corn, and if before the corn was levied upon Fairfield and Weld had delivered the possession of said corn to the Plaintiffs therein

the actual and peaceable possession thereof Defendant had no right to take the corn out of Plaintiffs possession to satisfy an execution against Fairfield and Held, and if he did do so then Plaintiffs have a right to replevy the corn as against him and the jury should find for the Plaintiffs

11 If a person ever purchased the corn in question with money furnished by Plaintiffs and it was the agreement at the time that the money was advanced that the corn when purchased should be Plaintiffs corn to be sold by them and to be under their control from the time it was purchased then even if Fairfield & Held did issue Ware House receipts to Plaintiffs for the corn as it was received in Store, the defendant would have no right to levy on the corn by virtue of an execution against Fairfield & Held

The Court gave the 1st, 2^d, 3^d, 4th, 5th, 7th, 8th, 9th, 10th, 11th and refused to give the 6th

And to the giving each of said instructions given the

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Defendant by his counsel then and there objected, the Court overruled the objection, and the defendant then and there excepted to the opinion of the Court in giving each of said instructions.

The Defendant requested the Court to give the following instructions:

1st The Plaintiffs in order to entitle themselves to a verdict must prove that the Identical Corn replevied was their property and proof that they owned Seven Thousand bushels or any other quantity undivided of a mixed mass containing a larger amount, the remainder of the mass being the property of others is not sufficient to entitle them to a verdict against the defendant and unless they have proved that the whole mixed mass was their property the verdict of the Jury should be for the defendant.

2^d If Fairfield & Held as Warehousemen at the time this Suit was commenced

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Had in store a mixed mass of Corn of about 14000 bushels of which about 7000 Bushels only, or any amount less than the whole belonged to the plaintiffs, they cannot maintain an action of replevin against the defendant for having taken the whole or any part thereof and unless all the other owners of the mixed mass have consented to the wrongful mixing of the Corn of the plaintiffs with their own against the will of the plaintiff so as to make the whole mixed mass the plaintiffs, or, have in some other way caused the Plaintiffs to become the owners of their respective undivided interests the verdict of the jury must be for the defendant.

3^d

If the jury believe from the evidence that Fairfield & Weld being Warehouse men buying grain for themselves and ^{and shipping for themselves and others} others, borrowed money of the Plaintiffs to use in the purchase of grain and as security for said indebtedness from time to time gave plaintiffs Warehouse receipts purporting to be for corn in store and if at the time

Said receipts were given, the Corn which Fairfield & Weld had purchased for themselves and that which others had stored with them was mixed together by Fairfield & Weld with the consent of Said Stors the Plaintiffs would have no such property in the Corn purchased by Fairfield & Weld with the money borrowed of them as would enable them to maintain this action of replevin against the defendant for the quantity of Corn in their warehouse receipts mentioned or any part thereof though the defendant may have taken all or any portion of the Corn which Fairfield & Weld had in store belonging to themselves and others.

4th If Fairfield & Weld instead of borrowing money of the plaintiffs and securing it as mentioned in the last instruction, as the agents of the Plaintiffs purchased corn ^{for} the plaintiffs with the money of the latter, and as such agents of the plaintiffs being also at the time Warehouse men received the corn so purchased

6th

If Fairfield & Weld being Ware Housemen engaged in purchasing grain for themselves or others and in storing such grain, either purchased the Corn in plaintiffs receipts mentioned for Plaintiffs, or gave them said receipts as Security for their indebtedness to them and said Corn was mixed by Fairfield & Weld, with that stored by others by consent of the latter said other Storers being ignorant of any directions having been given by Plaintiffs to Fairfield & Weld to keep plaintiffs Corn unmixed and the defendant being the Sheriff of Lafalle County, did as such Sheriff by virtue of the execution issued on the judgment, before said corn was delivered to the plaintiffs, take the whole of said mixed mass of Corn, the plaintiffs cannot recover in this action

7th

Though the Sheriff may not have taken actual possession of the corn till the 9th of March 1860. the execution became a lien upon Fairfield & Weld's corn from the time it was placed in his hands and a delivery of the corn by Fairfield & Weld to plaintiffs.

7th

of their corn between that time and the time the Sheriff made the levy, would not prevent the defendant from taking and selling any interest which Fairfield & Wild had at the time when said execution went into the hands of said defendant as Sheriff

8th

If the Jury believe from the evidence that the plaintiffs were at the time this Suit was commenced merely the owners of an undivided interest in the corn replevied or of an undivided interest in a larger amount of Corn which included that from which the Corn in controversy was separated by the Coroner in executing the writ of replevin in this case, and that they were not the sole owners of the replevied corn nor then mixed with other corn, or unless they were the sole owners of the whole of the Corn of which the replevied Corn formed part, the verdict of the Jury should be for the defendant.

9th

If the Jury believe from the evidence that the Plaintiffs loaned money to Fairfield & Wild the said Fairfield & Wild

being Warehousemen, and Fairfield & Weld gave Cushman warehouse receipts for a number of Bushels of Corn undivided in a mass of corn stored by others as collateral security for the loan of money and if before the commencement of this Suit the plaintiffs had acquiesced in the mixture and the same was so mixed when the receipts were given and when the Suit was brought the Jury should find for the defendant.

10th Will the Court instruct the Jury on behalf of the defendant, that if Fairfield & Weld being engaged in the business of warehousemen purchasing for themselves and others, grain, and storing grain for others, borrowed of the plaintiffs, a sum of money to be used in the purchase of Corn, and in order to secure the payment of the money to the plaintiffs issued to them Warehouse receipts purporting to be for corn in store for this amount or more than this amount of corn purchased with the money so loaned them by plaintiffs, the said corn so purchased being at the time when

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Said receipts were issued actually mixed with the corn of others who had stored corn ~~with~~ with said Warehousemen the same having been mixed by the said Warehousemen, with the consent of the other persons so having stored the corn. The plaintiffs cannot recover if at the time of the commencement of this suit the corn replenished still continued mixed with that of said others, though before the warehouse receipts were issued to the plaintiffs, they may have requested Fairfield & Weld not to mix the grain purchased with their money with that of others so storing

11th

Though the plaintiffs may have required Fairfield & Weld not to mix the corn purchased with their funds or for them, with the corn of other storers yet; if after Fairfield & Weld had purchased, and mixed said corn with the corn of others storing with them they issued to the plaintiffs, warehouse receipts purporting to be for corn in store and the corn purchased with plaintiffs funds had been when said receipts were issued to plaintiffs mixed with

that of others, and so continued mixed till this suit was brought the jury should find a verdict in favour of the defendant though he may have seized all the corn which Fairfield & Weld so had in store including that so purchased with plaintiffs funds ^{or} for them.

12th

If the jury believe from the evidence that Fairfield & Weld being the owners of the grain in controversy gave the plaintiffs in Nov & Dec 1839 warehouse receipts purporting to be for corn in store as security for an indebtedness from Fairfield & Weld to plaintiffs, And the plaintiffs did not take possession of said corn but left the same in possession of Fairfield & Weld till the execution issued on the judgment against Fairfield & Weld was on the 22^d of December 1839, placed in the hands of the defendant then being Sheriff of Eschelle County, and the said defendant by virtue of said execution on the 9th of March 1860 as Sheriff seized said corn & pleaded. The jury should find for the defendant, notwithstanding said Fairfield and Weld may have delivered said corn to the plaintiffs between said 22^d of December and said 9th of March.

25-13th

If the jury believe from the evidence that Fairfield & Weld bought Corn for plaintiffs the plaintiffs furnishing money for that purpose to Fairfield & Weld ^{then} ~~the~~ Fairfield & Weld were the agents of plaintiffs, and if such agents mixes the Corn bought for plaintiffs with other persons Corn then the plaintiffs are as much responsible for such mixture, as though they did the same themselves, in which case they could not replevy the Corn and the jury must find for ~~the~~ defendants.

The Court refused to give the 5th and 13th instructions.

And to the opinion of the Court in refusing such instructions and each of them ^{the} defendant then and there excepted.

The Court gave the 3^d 4th, 7th, & 12th, instructions as asked and the 1st, 2^d, 6th, 8th, 9th, 10th & 11th as qualified.

The Court qualified the 1st instruction as follows, by adding the words "as qualified by plaintiffs 1st instruction". The Second by adding

the words "but qualified by plain-
-tiffs 1st instruction" the 6th by
adding the words "with this quali-
-fication that the Jury believe Fair-
-field & Held were the agents of plain-
-tiffs in Storing the Corn" The 8th
by adding the following words
"As qualified by Plaintiffs 1st
instruction & 10th instruction"

The 10th by adding the following
"This is the law if the Jury be-
-lieve that Fairfield & Held at the
time the execution was received
by the Sheriff and the levy there-
-of owned any part of the Corn
in controversy or were the agents
of Plaintiffs in Storing Said
Corn"

The 11th by adding the
following:

"This is qualified
as in the next preceding instruc-
-tion"

And to the opinion
of the Court in so qualifying said
instructions and each of them and
refusing to give them in the terms
asked the defendant then and

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there excepted. The foregoing were all the instructions asked in the Case.

The Jury found for the plaintiffs. The defendant moved for a new trial, the Court overruled the motion and to the opinion of the Court in so doing, defendant then and there excepted, And defendant now prays the Court to Sign and Seal this his bill of exceptions which is done,

M. E. Hollister Seal
Judge.

State of Illinois }
Safallie County } ss

J. Asaelom B. Moore, Clerk
of the Circuit Court in & for
Said County in Said State, do hereby Certify
that the foregoing, is a full, true & perfect
copy of papers on file in my office, in
Said Cause, also as appears of record, in
the Books of my office, in Said Cause
In testimony whereof I have
hereunto set my hand & the
Seal of Said Court at Ottawa
this 21st day of March 1862
A B Moore
Clerk

State of Illinois
Suprem Court - Third Grand Division

April Term 1862

Francis Warner

vs

William H W Bushman Assignment of Errors

William M. True

Isaac B. Waterman

Now comes Francis Warner

Plaintiff in Error of Leland & Blanchard his
attorneys and says there is manifest Error
in the Record and proceedings of the
Circuit Court in the above entitled
cause - and assigns for ~~Special~~ Error the
following

1st The Court Erred in rendering judgment for
Plaintiffs (below)

2nd The Court Erred in giving instructions which
ought not to have been given - also in
refusing instructions which ought to have
been given - also in modifying instructions
which should have been given without modifica-
-tion

3rd In not rendering judgment for defendant (below)
wherefore he prays the judgment of this Court
and that said cause be reversed and
remanded in pursuance of law.

Leland & Blanchard
for Plff in Error

C. W. Spence
\$16.00

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Francis Warner
v3

Wm H. W. W. W. W.
Et al

Green to Leland

Filed April 22 1862

L. Leland
clerk