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COURT OF ERRORS AND APPEALS.

JOHN PETTY AND JOSEPH I. THOMPSON *vs.* JOHN N. CONOVER. } Writ of Error to Supreme Court.

Returnable to Tuesday, the 22d of March, 1864.

J. D. BEDLE, *Att'y.*

STATE OF NEW JERSEY, *ss.*

The State of New Jersey to our Justices of our Supreme Court of Judicature of the State of New Jersey, greeting:

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Court, before us by our writ, between John Petty and Joseph I. Thompson, plaintiffs, and John N. Conover, defendant, in a plea of trespass on the case, as it is said manifest error hath intervened, to the great damage of the said John Petty and Joseph I. Thompson, as by their complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in their behalf, do command you, that if judgment be thereupon given, then without delay you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to us, in our bond of Error and Appeal in the last resort, on Tuesday, the twenty-second day of March, in the present term of March, upon said bond and this writ, that the record and proceedings aforesaid being inspected, it may further cause to be done thereupon what of right and according to the laws and constitution of this State ought to be done.

Witness, Henry W. Green, Esq., Chancellor and Judge of our said bond of Error and Appeal, the eighth of March, one thousand eight hundred and sixty-four.

W. S. JOHNSON, *Clerk.*

J. D. BEDLE, *Att'y.*

The answer of the Justices of the Supreme Court within mentioned.

The record and proceedings within mentioned, as fully as the same remain before us, we certify and send to the Court of Errors and Appeals, as within we are commanded.

M. BEASLEY, [L. S.]
Chief Justice.

NEW JERSEY SUPREME COURT.

JOHN N. CONOVER, *ads.* JOSEPH I. THOMPSON AND JOHN PETTY.	In Trover. On Error to Monmouth Circuit. Affirmance. A. C. MCLEAN, *Att'y.*

As yet of the Term of June, A. D. eighteen hundred and sixty-two.

Witness, E. W. Whelpley, Esq., Chief Justice.

CHAS. P. SMITH, *Clerk.*

New Jersey, *ss.*—Be it remembered, that heretofore, to wit, on the first day of February, A. D. eighteen hundred and sixty-two, the State of New Jersey sent its writ to the Judges of the Circuit Court of the County of Monmouth, in these words, to wit:

"NEW JERSEY, to wit.—*The State of New Jersey to Peter Vredenburgh, Judge of our Circuit Court of the County of Monmouth, greeting:*

Because in the record and proceedings, and also in the giving the judgment in a plaint which was in our said Court before you at Freehold, in and for the County of Monmouth, between John N. Conover and Joseph I. Thompson and John Petty, in a plea of trespass on the case, in trover and conversion, as is said, which said record and proceedings now remain before you, manifest error hath intervened to the great damage of the said Joseph I. Thompson and John Petty, as by their complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then without delay you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Supreme Court of Judicature, to be holden at Trenton on the fourth Tuesday of February next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to the laws and customs of New Jersey ought to be done.

Witness, Edward W. Whelpley, Esquire, Chief Justice of our said Supreme Court, at Trenton, this first day of February, A. D. eighteen hundred and sixty-two.

CHAS. P. SMITH, *Clerk.*

J. D. BEDLE, *Att'y.*

Which said writ the said Judges afterwards, pursuant to the command thereof, returned to our said Supreme Court, with a schedule annexed thereto, which schedule is in the words and figures following, to wit:

MONMOUTH CIRCUIT, December Term, 1861.

JOHN N. CONOVER
vs.
JOSEPH I. THOMPSON AND JOHN PETTY.

In Case for Trover and Conversion. On Verdict.

Pleas before the Circuit Court holden at Freehold, in and for the county of Monmouth, of the sixth day of December, of the Term of December, A. D. eighteen hundred and sixty-one.

HOLMES W. MURPHY, *Clerk.*

Monmouth County Circuit Court of the tenth day of May, in the Term of April, in the year of our Lord one thousand eight hundred and sixty-one:—

Monmouth County, *ss.*—Joseph I. Thompson and John Petty, the defendants in this suit, were summoned to answer unto John N. Conover, plaintiff therein, of a plea of trespass on the case for trover and conversion; and thereupon the said plaintiff, by Amzi C. McLean, his attorney, complains for that whereas the said plaintiff heretofore, to wit, on the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and sixty-one, at the township of Manalapan, in the said county of Monmouth, and within the jurisdiction of this Court, was lawfully possessed as of his, in property of certain goods and chattels, to wit: two hundred and seventy-two bushels of corn of great value, to wit, of the value of four hundred dollars, and being so possessed, the said plaintiff afterwards, to wit, on the day and year last aforesaid, at the said township of Manalapan, in the said county of Monmouth, and within the jurisdiction aforesaid, casually lost the said corn out of his possession, and the same afterwards, to wit, on the day and year last aforesaid, at the said township of Manalapan, in the said county of Monmouth, and within the jurisdiction aforesaid, came to the possession of the

said defendants by finding; yet the said defendants, well knowing the said corn to be the property of the said plaintiff and of right to belong and appertain to him, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said corn or any part thereof to the said plaintiff, although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, at Freehold aforesaid, in the said county of Monmouth, and within the jurisdiction aforesaid, converted and disposed of the said corn to their own use, to the damage of the plaintiff four hundred dollars, and therefore he brings suit, &c.

And the said defendants, by J. D. Bedle, their attorney, come and defend the wrong and injury, when, &c., and say that they are not guilty of the said supposed grievances above laid to their charge, or any or either of them, in manner and form as the said plaintiff hath above thereof complained against them; and of this the said defendants put themselves upon the country, &c.

And the said plaintiff, as to the plea of the said defendants by them above pleaded, and whereof they have put themselves upon the country, doth the like.

Therefore, let there come a jury thereof before the Court aforesaid, at Freehold aforesaid, on the first Tuesday of September, A. D. eighteen hundred and sixty-one, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. The same day is given to the parties here, &c.

At which day, before the Court aforesaid, at Freehold aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the sheriff hath not sent the writ to him in that behalf directed, nor hath he done anything thereupon; therefore, the sheriff is commanded, as before he was commanded, that he cause a jury thereof to come before the Court aforesaid, at Freehold aforesaid, on the first Tuesday of December, A. D. eighteen hundred and sixty-one, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., and the same day is given to the parties here, &c.

At which day, before the Court aforesaid, at Freehold aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury whereof mention is within made, being duly summoned, also come, who, to speak the truth of the matters within contained being chosen, tried and sworn, say upon their oath that the said Joseph I. Thompson and John Petty are guilty of the premises within laid to their charge, in manner and form as the said John N. Conover hath within complained against them; and they assess the damages of the said John N. Conover by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to one hundred and eighty-four dollars and seventy-five cents.

Therefore it is considered that the said John N. Conover do recover against the said Joseph I. Thompson and John Petty his said damages to one hundred and eighty-four dollars and seventy-five cents, by the jurors aforesaid, in form aforesaid assessed, and also seventy dollars and nine cents for his said costs and charges by the Court now here adjudged of increase to the said John N. Conover, and with his assent; which said damages, costs and charges in the whole amount to two hundred and fifty-four dollars and eighty-four cents. And the defendants in mercy, &c.

Judgment signed this sixth day of December, A. D. eighteen hundred and sixty-one. P. VREDENBURGH.

Afterwards, that is to say, on the fourth Tuesday of February, eighteen hundred and sixty-two, before the Supreme Court of the State of New Jersey, come the said Joseph I. Thompson and John Petty, by J. D. Bedle, their attorney, and say that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in the same, to wit:

1. That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said John N. Conover to have or maintain this aforesaid action thereof against them the said Joseph I. Thompson and John Petty.

2. And also there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for

the said John N. Conover against the said Joseph I. Thompson and John Petty, whereas by the law of the land the said judgment ought to have been given for the said Thompson and Petty against the said John N. Conover.

3. And also there is error in this, that the evidence produced on the part of the plaintiff, John N. Conover, is insufficient in law to sustain his action, and yet the Circuit Court refused to non-suit, and the judgment is in favor of John N. Conover.

4. And also there is error in this, that the Court charged the jury that as soon as Cornelius Petty, on the 18th of March, refused to receive the yellow corn and sent the teams back, the contract, at the option of Mr. Conover, was annulled, the white corn belonged again to Mr. Conover as much as it was before it went out of his own granary; he owned it again as he did on the 14th, before it left his barn; the property in the white corn, then, as Mr. Conover has by this suit elected to go for the corn, never passed out of Mr. Conover; it always did and has belonged to Mr. Conover, and never did pass to Cornelius Petty.

5. And also there is error in this, that after the corn of Mr. Conover became mixed with the corn in the mill or ground Mr. Conover could not recover in this suit of the said Joseph I. Thompson and John Petty, and yet the judgment is in favor of Mr. Conover.

6. And also there is error in this, that on the sixteenth day of March, eighteen hundred and sixty-one, at the time of the levy thereon, the white corn, whether in the grain or ground, was the property of Cornelius Petty and not of John N. Conover, and yet the judgment is in favor of John N. Conover.

And that plaintiffs in error pray that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled and altogether holden for nought, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

J. D. Bedle, *Att'y of Pl'ffs in Error.*

And the said John N. Conover, by his attorney aforesaid, also comes and says there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid, and therefore he prays that the judgment aforesaid, in form aforesaid given and rendered, may by the Court here be in all things affirmed.

But because our said Court here are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, to wit, until, &c., to hear judgment thereon.

And now, to wit, at the term of November, A. D. eighteen hundred and sixty-three, to which time this cause has been continued from Term to Term, before our said Supreme Court at Trenton, come the parties aforesaid, by their attorneys aforesaid, and hereupon all and singular the premises being seen and fully understood by our Court here, and mature deliberation being thereupon had, it appears to our said Court here that there is no error either in the proceedings aforesaid or in giving the judgment aforesaid.

Therefore, it is considered that the judgment of the said Circuit Court, in form aforesaid given, be in all things affirmed, and that the same do stand in full force and effect, anything above for error assigned to the contrary notwithstanding; and that the said John N. Conover do recover against the said Joseph I. Thompson and John Petty, as well the damages and costs in said judgment mentioned as also the sum of forty-five dollars and fifty-eight cents for his double costs and charges by him sustained and expended in this behalf, by the Court now here adjudged to him, and with his assent, and that he have execution thereof, according, &c.

Judgment signed the twenty-seventh day of November, A. D. eighteen hundred and sixty-three, (1863.)

By the Statute.

M. Beasley, *Chief Justice.*"

NEW JERSEY SUPREME COURT.

JOSEPH I. THOMPSON AND JOHN PETTY *vs.* JOHN N. CONOVER.	In Trover. Writ of Error to Monmouth Circuit.

IN MONMOUTH CIRCUIT COURT.

JOSEPH I. THOMPSON AND JOHN PETTY *ads.* JOHN N. CONOVER.	In Trover.

Be it remembered, that on the day of December, in the term of December, A. D. 1861, before the Hon. P. Vredenburgh, Judge of the Circuit Court held at Freehold, in and for the County of Monmouth, and a jury duly empanelled and sworn, the above cause came on to be heard and tried upon the issue joined *pro ut* the same, whereupon the plaintiff, to maintain and prove the issue on his part, gave in the following evidence:

JOHN N. CONOVER, the plaintiff, being duly sworn, on his oath saith:—I know Cornelius Petty; he was in the milling 10
business at Englishtown; he rented a mill there of Jacob Keeler; he came there about March 1, 1860; I never knew him until the day I sold him the corn; I saw him in the mill March 1, 1861; I went and asked him if he was buying corn and he said he was every day; he asked me if I had some for sale; I told him I had about 600 bushels; he asked me what I asked for it; I told him 65 cents a bushel; then he asked me if it was white or yellow; I told him part of each, nearly

half and half; he said I can give you 65 cents for the white, but not for the yellow; then he said I can give you 62½ cents for the yellow; I said make it 63 cents and you shall have it; he agreed to it; he agreed to give 65 cents for white and 63 for yellow; he asked me when I would like to deliver it; I told him about the middle of March; then I told him I will call and see you again and see when you will have it. I called there on town meeting day, two weeks afterwards; I stopped at the mill door and asked him if he was ready for my corn; he asked me if I had it shelled; I told him no, but I expect to shell it to-morrow or next day, and bring it here on Friday, if you are ready for it. Then I asked him which he would have first, the white or the yellow; he said he did not know if it made much difference, but better bring the white. So I did deliver him the white on Friday, the 15th day of March. At the day I sold the corn I said, Mr. Petty there is something else to be said—how about the payment of the money? and he said, when would you like to have it. I said by the 25th day of March. He said I can pay you all your money as soon as you get it delivered—all of it—just as leave do it as not; he said, I have money in the bank. That was all that passed that day. When he said he would pay me when all the corn is delivered, I replied I would like to have it so. John Petty was by on town meeting day. He asked me what do the boys give you for your corn, and I told him; he said you must not be hard on the boys, for they will do what they agree. John is a brother; he stood in the mill door side by Cornelius when I said I would deliver some on Friday. I suppose he heard it. The corn was to be 56 lbs. to the bushel; a part was weighed in the mill, a bag or two at a time, and Isaac (a brother of Cornelius, who tended the mill,) said it run so even there was no use of all being weighed. He weighed a bag or two at each load. Cornelius was not by then. A bushel by measure over-ran a bushel by weight. On Friday, March 15, 1861, I delivered 272 bushels of white corn at the mill; on Monday, March 18, 1861, I sent two more loads, that was yellow corn, to the mill—68 bushels. I met my corn coming back. I also took a load of corn part

of the way, and stopped. Hearing of this transaction, I went to the mill that morning and I saw an advertisement on the door of the mill in front, of a sheriff's sale. I did not deliver any corn on that day. I do not recollect when the sale was to take place. There was a sale of the corn at the mill March 28th, 1861; I was there. I served a notice on Joseph I. Thompson, sheriff, that day; that was served before the sale. (*Pro ut*, the notice offered in evidence.) I saw John Petty there that day; he told the sheriff to go ahead. I think he was by when the notice was read. All the corn in the mill was sold; I was at the mill when the sale took place; I put my corn in the elevator box and it went up stairs; that is the last I saw of it. There was yellow and white corn sold that day—800 bushels of white as near as I can tell. John Petty bought all the corn, I think. I had besides the 272 bushels delivered between 200 and 300 bushels left; a little over 300 bushels to be delivered; I expected to deliver it on Monday. I have never been paid for the 272 bushels, nor any part thereof. All of the white corn was delivered.

Cross-examination.—I had never seen Cornelius Petty till I went to the mill; when I first went there a few days before he was not at home. I saw Isaac Petty then and spoke to him about selling corn; I asked him about the price; he said Cornelius was not at home. I recollect that I said I wanted more than the price he named; I wanted 65 cents; he said they were not paying that then; he said he could not take it in the absence of Cornelius, and if they concluded to take it would let me know, or if I came to town to call; they did not let me know and I called. At the time I sold the corn I think Isaac was not present, but am not positive he was in the mill and might have been close by. Cornelius said he could pay me when the corn was all delivered; I asked to be paid by the 25th day of March, 1861. When I delivered the first lot the corn was not all shelled; the white was all shelled but not the other. I expected to deliver the rest of the corn on Monday. I intended to have it in on Monday and started for that purpose on Monday morning. I agreed to be paid when the corn was all delivered. The corn was all shelled on Monday. I de-

livered three loads on Friday, the 15th of March, between breakfast and dinner—34 bushels a load; and five loads in the afternoon, same number of bushels. I had three teams delivering that day; some of them went two loads; the last two loads got to the mill about sunset, between sundown and dark. On March 12, 1861, the day of town meeting, John Petty was there at the mill; I saw him; I did not see Isaac. I was not out of the wagon by the door; Cornelius was at the door. I went there to see when the grain should be brought in. I asked Cornelius if he was ready for it. Cornelius did not ask me if I could not hold off until after the 1st of April. He did not ask me not to bring it on Friday. He did not tell me then not to bring it then, for he could not pay for it by the 1st of April. I might have said that a bargain is a bargain, and that there is no use of living in this country without you come up to it; I said somewhat, don't remember. I think at that time corn might have fallen a penny or two. The corn was brought partly in my bags and partly in theirs; they lent me some of their bags, and I had some of mine. I was not there when all the loads went; my men went; I went with the third load. The two first were not weighed in my presence; Isaac Petty said it ran even. It was put in the stock hopper or elevator box and taken up stairs. I was present at two loads being delivered. I have got a day-book with the account in. I have the corn charged to Cornelius Petty. Isaac Petty sent me the figures of the quantity of corn delivered, on a piece of paper, the same evening, and I charged it to Cornelius Petty that same evening. I don't remember of having a memorandum book. The statement came back with the men of the amount of corn, that evening, and the men brought home the bags in which the corn was. What corn I emptied I took the bags away. Isaac took in the corn; Cornelius was not at home. I could not tell my white corn from anybody else's, after it was delivered; if the sheriff had wanted to deliver me my corn I could not have selected it. The mill was running at the time the corn was taken in. I did not expect to deliver any corn on Saturday; I shelled corn then. At the time the corn was put in the elevator box

I understood that it took it up to the main bin which connected with the hopper. I do not think I went up stairs in the mill on Friday; I think I was up the day the sale was to have been, April 23, 1861. I could not tell whether any of my corn was there or not. I saw a large bin with corn in when I was up, not full; I suppose there were 800 bushels in the bin of white corn.

In chief.—The sale was adjourned and the notice was prepared for the first day. Sheriff Thompson and John Petty were both there the first day sale was advertised. I could have picked out 272 bushels of white corn such as I delivered.

JOHN P. BERGEN, a witness for the plaintiff, being duly sworn, on his oath saith:—I was at Englishtown on the day of sale of property, the 28th of March, 1861. I was present when the notice was read to the sheriff; John Petty was present and said to the sheriff go ahead; the sheriff did go ahead and sold the corn, white and yellow. The corn was in the loft of the mill. John Petty was the purchaser. I was at the mill on the morning of the 18th of March, between eight and nine o'clock. Cornelius Petty was there. I saw an advertisement on part of the mill door—sheriff's advertisement of sale of Cornelius Petty's property at suit of John Petty. Corn, &c., was advertised. I saw two of John N. Conover's teams by the mill, loaded with corn. Cornelius did not receive the corn; he said they did not take any more corn, and told them to go home with the corn; they turned and went away. White corn was then more saleable at 65 cents than yellow was at 63 cents.

JOHN YOUNG, a witness on the part of the plaintiff, being duly sworn, on his oath saith:—As the agent of the sheriff I levied on all the corn in the mill, flour and ground feed, bran, rye, &c. I did it on the 16th day of March, 1861, about 3½ o'clock, P. M. Isaac Petty was there; Cornelius was not there.

Cross-examination.—The levy is dated the 15th, yet it was not made till the 16th, at 3½ o'clock, P. M.

In chief.—John Petty told me to levy on all in the mill.

Richard S. Hartshorne, a witness on the part of the plaintiff, being duly sworn, saith:—I delivered the corn for the sheriff after the sale; there were 1251 bushels of white corn; it brought 60 cents a bushel—about a fair price at that time; there were 622½ bushels of yellow corn.

The execution under which levy was made and the levy attached were offered in evidence by the plaintiff, with the consent of the defendants.

After which evidence the plaintiff rested and the counsel for the defendants moved the court to non-suit the plaintiff, upon the ground that the evidence was insufficient to sustain the plaintiff's action. Which motion the court refused, and the counsel of defendants excepted thereto and prayed a bill of exceptions, which is signed and sealed accordingly.

P. Vredenburgh, [L. S.]

Whereupon the defendants, to maintain and prove the issue on their part, gave in the following evidence:

DEFENDANTS' EVIDENCE.

The day-book of plaintiff, in which is the following entry: "1861, March 15.—Mr. Cornelius Petty, to 272 bushels of corn at 65 cents, $176.80."

This item is a regular entry, and between two other charges, one dated March 12 and the other March 16, 1861. (*Produces* the book.)

The original judgment papers and the record of a judgment in the Court of Common Pleas of Monmouth County, as follows:

John Petty vs. Cornelius Petty. Judgment entered March 15, 1861. Penalty of bond, $5,448.20. Real debt, $2,724.10. Costs and Expenses, $5.00. Interest from March 15, 1861.

Execution issued same day against goods and chattels, &c. of defendant. The above judgment was entered by confession.

Levy made March 16, 1861, at 3½ o'clock, P. M.

ISAAC PETTY, a witness on the part of the defendants, being duly sworn, on his oath saith:—I worked for Cornelius Petty last spring, attending mill at Englishtown; I worked for him there over a year, ever since he came there. He took the mill March 1, 1860. I had not any interest in the business; I was hired by the day. The plaintiff first came last spring, in February, to see about selling his corn. Cornelius was away. He asked me what we were paying for corn. I told him 60 cents. He said he wanted more than that for his. I asked him how much he had. He said between 500 and 600 bushels; he said he wanted 68 cents for his, the same as Mr. Van Doren got. I told him Cornelius was not at home, and I could not give him an answer. He said he would call again; he said if Cornelius concluded to give him that for his corn he could write him at Manalapan post office. Cornelius came home that evening. Conover called again just before March 1st, five or six days before; Cornelius was then at home. Conover came to the mill and got out of his wagon. I heard the conversation that took place between them. He came to me and asked if Cornelius Petty was at home. I told him that he was about the mill. I called Cornelius to him and he came. *Mr. Conover said to Cornelius that he had* 600 *or* 700 *bushels of corn to sell and asked him what he would give for it.* Cornelius said corn was dropping a little; he said he had paid 68 cents for some, but did not pay that any more. Cornelius *asked him if it was white or yellow. Plaintiff said part white and part yellow.* Plaintiff asked the most he would give him for it, and Cornelius said he ought to buy corn at that time for 60 cents. Plaintiff said he would take 65 cents for the white and 63 cents for the yellow. *Cornelius offered* $62\frac{1}{2}$ *cents for the white and yellow together, and Conover refused to take it.* Plaintiff said he could have the white at 65 cents and the yellow at 63 cents, and Cornelius agreed to give him 65 cents for his white corn and $62\frac{1}{2}$ or 63 cents for the yellow, not positive which. *Cornelius asked him when do you want the money for it?* Plaintiff said between 25th of March and April 1st, and Cornelius said he thought he could have it. Plaintiff said he would let him know when he commenced

shelling it and he would then send it all right in. Cornelius said very well, or something to that effect. He did not say when he would bring it in, but would let him know. He said he was going to shell it pretty soon. I heard the whole conversation between Cornelius and Conover. I was there when Conover left. I do not recollect of hearing Cornelius say anything about having money in bank. I did not hear him say he would just as leave pay when he got it all in; if such remarks had been made I think I would have heard them. There was no other time mentioned than between March 25th and April 1st. I did not hear any other time for payment. The plaintiff came afterwards, March 12th, day of town meeting. He drove up to the mill and called for the miller. I went to the door and saw it was Conover, and I called to Cornelius, who came, and Conover said to him he was going to shell his corn off and wanted to cart it right in. Cornelius asked him if he could not hold off until after April 1st. Plaintiff said he did not know as he could; that he was going to have the sheller there and wanted to get it off as soon as possible. Cornelius said he was afraid he would get more corn than he could pay for. Conover said a bargain is a bargain, there is no use of a man's living in this country unless he lives up to it. I think Cornelius asked him if he could not wait until after the 1st of April for the money. Plaintiff said he wanted his money between the 25th of March and 1st of April. Cornelius then agreed to let him send his corn in. I believe John Petty stood by, and I suppose could hear. I don't recollect of hearing the expression "don't be hard with the boys, they pay what they agree to." When plaintiff used the expression a bargain is a bargain, plaintiff asked John if that was not so. John then said, do not be hard with the boys, or something like that. I was at the mill when plaintiff's corn came on Friday, the 15th of March. Plaintiff came just before noon with part of a load; two of his teams had been there before. Plaintiff helped unload and weigh it. The first two loads I weighed and gave the weight to his men. I weighed the corn that the plaintiff brought; he helped me. We weighed two or three bags to get the average. I think

plaintiff left me a little book to enter the weight on; he or his men took it home that evening. When weighed the corn was emptied into what we call sink or elevator box and the elevators take it up stairs into corn granaries. For the white corn we had a large bin up stairs; it would hold 3000 bushels; that bin connected with the hopper of the mill by a spout. While the mill was running the corn was going continually from the bin to the hoppers. The mill was running at the time the corn was delivered; the grinding was then out of that bin; the corn was grinding all the time as the elevators carried it up; the last corn thrown in would be likely to be ground first. The elevators throw the corn just where it enters the spout, so as to save the trouble of shovelling; the spout is at the bottom and one end of the bin. The mill would grind about 200 bushels per day; would grind more, but that was the average. The mill was then running as usual when Conover's corn came in. Plaintiff's corn was thrown over the spout. The mill was running on white meal when John Young came. We ran nights, had been for two or three weeks; we ran until twelve o'clock that Friday night. The mill was running on the corn brought there by Conover. I can't say that all that corn was ground; I can say that more than the quantity brought by plaintiff was ground between the time plaintiff's corn was brought and three o'clock next day. I think the biggest part of plaintiff's corn was ground. The usual time for taking the most grain in is in February and March. The mill could hold from 8000 to 9000 bushels.

Cross-examined.—Plaintiff was not there long on town meeting day. Cornelius wanted him to wait till after April 1st. I stood near the mill door when the corn was sold. Plaintiff came in the mill near the centre, twenty or thirty feet from the hopper, in February; he might have been there then half an hour. I was in the mill; I stood by the meal chest; the mill was running on meal. I think I was at the meal chest all the time, three or four steps from the burrs and five or six steps from the door of the mill. I can't say whether I was up stairs or not at any time while Conover was there. There

were two run of stone in the mill; only one run then going. I think the water was down. The conversation on March 12 was at the mill step. Conover was in his wagon and Cornelius on the step, and I stood by the door; John Petty came up and stood by the door. One run of stone can grind 200 bushels in twenty-four hours. It strikes me I sent a small bit of paper with the men with the amount on, or I put it on a little pass book.

JOHN PETTY, a witness on the part of defendants, and being one of the defendants, being duly sworn, on his oath saith I am judgment creditor of Cornelius Petty; judgment was obtained on Friday, 15th of March, at 6 or 7 P. M., at Mr. Bedle's office. We got there between 4 or 5 o'clock, P. M. I had been to see him (Cornelius) early in the morning; he was not at home. I saw him at his stable in Englishtown. I did not know that plaintiff was delivering his corn on Friday. I did not know he was to deliver it on Friday. The judgment was given through the advice of Mr. Bedle. After judgment was confessed Cornelius went out of the office and went home. He did not know I was going to make a levy on Saturday; I did not tell him I was going to levy at once; I did not tell him I was going to have the stuff seized and taken under the execution. I had no interest in the business at Englishtown. I was at the mill March 12th, and heard the conversation between plaintiff and Cornelius. Cornelius, Isaac and myself were in the office and I heard some one halloo for the miller; Isaac went, and said plaintiff wished to see Cornelius. He went out and so did I. Plaintiff said he came down to let him know he was going to shell his corn; Cornelius said no, he was not ready for it; he asked plaintiff if he would not hold on to his corn until after the first of April. Plaintiff said he could not, for he wanted the money for it between the 25th of March and April 1st. Cornelius said he did not know whether he could pay for it or not by that time. Plaintiff said a bargain is a bargain, there is no use of living in this country if you do not live up to it, and he said to me, "'Aint it so, Petty?" I think I told him it depended upon circum-

stances. That is all I heard. I do not recollect of saying not to be hard with the boys, or that the boys would pay for what they got. I did not hear anything more—I stepped back in the mill. Isaac and I were by the door. I have been frequently in this mill. The spout comes from the third floor down right upon the hopper.

Cross-examination.—On Tuesday morning I was at the mill only a few minutes, and a few minutes in the afternoon. The bond was explained to my brother Cornelius by Mr. Bedle, to secure me. He had promised me some money on the Tuesday before is the way I came there. I did not say the boys pay what they agreed.

After which, the defendants rested and the plaintiff produced the following evidence:—

David A. Craig, a witness on the part of plaintiff, being duly sworn, on his oath saith:—I delivered 81 bushels of corn at the mill on the 15th of March last. I noticed Mr. Conover's team there about 10 A. M. The corn was weighed and set one side in bags and was not emptied while I was there. After mine was weighed it was thrown into the elevator box. Plaintiff's two teams were ahead of me.

Cross-examination.—I was there long enough to unload two loads. Mr. Conover came up while I was there. I was ahead of Mr. Conover and behind his two teams. I saw some of his corn was weighed; mine was yellow corn.

John N. Conover, recalled—I was on the step or nearly on the ground when payment was talked of; I introduced the subject of money. They lent me fifty bags to bring corn in; in the afternoon my bags were not then emptied. I left the mill in the morning between 11 and 12 o'clock. I did not say the money would suit 1st of April.

Cross-examination.—The first loads of corn ahead of me were not emptied then; I helped empty in the afternoon in the elevator box; I emptied the load I took; all the rest was emptied; my bags came back.

Whereupon, the parties having rested and the respective counsel summed up, the Court charged the jury as follows:

"Was this 272 bushels of corn on the 16th day of March, 1861, the property of the plaintiff? Did it belong on the 16th day of March to Mr. Conover or to Cornelius Petty?

It is proved, and not disputed, that about the 1st of March, 1861, Cornelius Petty contracted with Mr. Conover to buy the corn. Mr. Conover had to sell about 600 or 700 bushels, partly white and partly yellow, the white at 65 cents per bushel, and the yellow at 63 cents per bushel; that the corn was to be delivered about the middle of March, but no precise time fixed; that the money was not to be paid before all the corn was delivered; that on the 12th of March Mr. Conover told Cornelius Petty he would bring the corn on Friday, the 15th of March; on Friday, the 15th of March, Mr. Conover did bring his white corn, 272 bushels, and delivered it in the mill; on Monday, the 18th of March, the plaintiff sent the balance of the lot he had sold, to wit, the yellow corn. The yellow corn was at the mill on Monday morning in plaintiff's wagons, ready for delivery. Here is the critical point of the case. What were at this instant of time the rights of the parties? Mr. Conover had agreed to sell his white and yellow corn. Cornelius Petty had agreed to buy it. The white had been delivered, the yellow was then ready to be delivered. Plaintiff could not make Cornelius Petty take the yellow if he refused. Cornelius Petty could take two courses. He could refuse to take the yellow or he could receive it. If he received it the controversy might arise whether the plaintiff could demand the cash on delivery or not. But the contract does not get so far. When Mr. Conover offered to deliver the yellow corn, Cornelius, instead of receiving it said, according to the testimony of John P. Bergen, to the teamsters, that he did not take any more corn, and told them to go home with the corn, and they went accordingly. Now, gentlemen, what is the law that arises upon this state of facts? The money was not to be paid until all of the corn was delivered, no one pretends. Neither Cornelius, Isaac nor John

Petty pretends that Mr. Conover could call for the money for the white corn before he had delivered the yellow. The plaintiff says he could call for the money when the last bushel was delivered. The Pettys say he could not call for it before the 25th of March, but neither pretends that the plaintiff could call for the money for each bushel as he delivered it, or could call for the money for the white before he delivered the yellow. So that, gentlemen, on Monday, the 18th of March, when Mr. Conover tendered the yellow corn, he could not demand his pay for the white without tendering the yellow, and this yellow Cornelius Petty refused to receive. Now, gentlemen, under these circumstances, when Cornelius Petty refused to receive the yellow corn he himself repudiated the contract. As soon as he did so, Mr. Conover could do so too. The moment Cornelius refused to receive the yellow Mr. Conover could say, you have repudiated the contract, and I will too. It gave the plaintiff the election either to affirm the contract and sue Cornelius for the price of the white corn and damages for not taking the yellow, or he could annul the contract and take his white corn back again. He has elected, and brought suit to recover the corn itself.

As a matter of law, gentlemen, it is my duty to say to you that as soon as Cornelius Petty, on the 18th of March, refused to receive the yellow corn and sent the teams back, the contract, at the option of Mr. Conover, was annulled. The white corn belonged again to Mr. Conover as much as it was before it went out of his own granary; he owned it again as he did on the 14th before it left his barn. The property in the white corn, then, as Mr. Conover has by this suit elected to go for the corn, never passed out of Mr. Conover; it always did and has belonged to Mr. Conover and never did pass to Cornelius Petty."

And the Court further charged the jury:

"But it is said that the white corn was ground up before the levy. It is in evidence that it was mixed by Cornelius Petty with other corn, so that it could not be distinguished. In this case it makes no difference if it was or was not ground. After so mixing of this corn by Cornelius Petty Mr. Conover

had a right to take his 272 bushels out of the 1250 bushels which Mr. Hartshorne says was in the same bin. But suppose this identical corn had been ground up, it did not change the title. If it was ground up the meal was there and levied on, and the plaintiff, if not entitled to it as corn, is entitled to it as meal, and if the plaintiff's declaration does not claim it as meal he can amend his declaration in that respect and put in a claim for the meal."

To which charge upon the several matters above set forth the counsel of the defendants excepted and prayed a bill of exceptions, which is signed and sealed accordingly.

P. VREDENBURGH, [L. S.]

NEW JERSEY SUPREME COURT, June Term, 1863.

JOSEPH I. THOMPSON AND JOHN PETTY		In Trover.
vs.		In Error.
JOHN N. CONOVER.		

Conover agreed to sell Petty all the corn he had to sell, supposed to be in all about 600 bushels, the white at 65 cents and the yellow at 63 cents per bushel. Conover delivered the white and offered to deliver the yellow, which Petty refused to receive.

Held, that the contract was an entirety, and the refusal of Petty to receive the yellow was a repudiation of the contract, and that Conover could recover the value of the white in trover, and that he could do so even if before demand and refusal Petty had so mixed the white corn as that it could not be identified.

It was not error in the Court charging the jury that Conover could recover even if the corn had been ground before demand and refusal.

VREDENBURGH, J.—This was an action brought in the Court below by Conover against the defendants, to recover 272 bushels of white corn, and the question was whether it was the plaintiff's property on the 16th of March, 1861. The facts were as follows:—The plaintiff being a farmer and Cornelius Petty a miller, met on the 1st of March, 1861; Conover asked Petty if he was buying corn; Petty replied he was every day, and asked if he (Conover) had some for sale; Conover replied that he had about 600 bushels; Petty asked what he asked for it; Conover replied 65 cents a bushel; Petty asked if it was white or yellow; Conover replied nearly half and half; Petty said he would give 65 cents for the white but not for the yellow, and then said he would give 62½ cents for the yellow; Conover replied, make it 63 cents and you shall have it; it was then agreed between the parties that Petty should give Conover 65 cents per bushel for the white, and 63 for the yellow for all the corn Conover had to sell, supposed to be in all about 600 bushels; Petty then asked Conover when he would like to deliver it; Conover told him about the middle of March, and said he would call again and see when he (Petty) would have it; Conover then said how about the payment of the money; Petty said when would you like to have it; Conover said on the 25th of March; Petty said I can pay you all your money as soon as you get it delivered, all of it, just as leave do it as not; Conover replied he would like to have it so; Conover called again on Petty about two weeks after this bargain and asked him if he was ready for the corn and which he would have first, the white or the yellow; he said the white; in pursuance of which, Conover did deliver the white corn on Friday, the 15th of March, viz. 272 bushels at the mill; on Monday, the 18th of March, Conover sent two loads of the yellow to the mill, viz. 68 bushels, which were sent back by Cornelius Petty, saying that they did not receive any more corn; on Friday, the day the white corn was delivered, Cornelius Petty had confessed judgment to his brother, John Petty, for a large amount, and the white corn delivered by Conover to Cornelius Petty on Friday was seized on Saturday under the *fi. fa.* issued on his

brother's judgment and seized under his order by the sheriff. Whereupon Conover brought this action against the sheriff and the plaintiff in execution to recover the value of the white corn delivered as aforesaid.

The only question raised by this case is, whether this contract was an entirety. If it was, then when Cornelius Petty refused to take the yellow corn he himself repudiated the contract and the white corn belonged, as before, to Conover. And as the defendants seized this white corn, or corn with which it had been so mixed by Cornelius Petty as that it could not be identified again, the defendants are responsible.

The question of entirety is one of intent of the parties to be gathered from its terms. Was this one contract, or was it two? The defendants contend that here were two contracts, one to sell and deliver the white corn and another the yellow. But the bargain of Conover with Petty was to sell all his corn that he had to sell, supposed to be about 600 bushels, and to be paid for when all was delivered, and not before. What was said about the corn as white or yellow was only to regulate the price and to prevent any questions as to the fairness of the proportions. If they had agreed to sell all the corn, both white and yellow, and nothing further said, it would have been the interest of Conover to smuggle in as much yellow corn as possible. To prevent any such questions they agreed that as much of the whole amount of corn as was white should be paid for at 65 cents, and as much of the whole amount sold as was yellow should be paid for at the rate of 63 cents. It manifestly was not the intention of the parties if white corn should rise and yellow corn fall, that Mr. Petty could take the white and reject the yellow. The object of Mr. Conover was to sell his whole crop, and of Mr. Petty to buy it.

There was no error in the Court instructing the jury that whether the corn was ground up or not made no difference, for two reasons: first, because the evidence shows that if this identical corn had been ground there was enough left in the bin with which it had been mixed to answer for the 272 bushels; and in the second place, because if not there as corn it was as meal, and the plaintiff could amend if necessary, be-

cause if the one reason assigned by the Court was not good the other undoubtedly was.

I think the judgment below should be affirmed.

I, Charles P. Smith, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the record of judgment and proceedings in the case above stated, as fully as the same remain of record and affiled in my office.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said Court, at Trenton, this tenth 10
day of November, A. D. 1864.

CHAS. P. SMITH, *Cl'k.*