

12038

No. _____

Supreme Court of Illinois

Cook

vs.

Thayer

71641  7

United States of America
State of Illinois }
County of Cook } ss

Pleas before the
Honorable Giles Spring Judge of the Cook County
Court within and for the County of Cook and State
of Illinois aforesaid at a regular term of said Court
begun and holden at the Court House in the City of
Chicago in said County and State on the first Monday
being the seventh day of May in the year of our Lord
one thousand eight hundred and forty nine and of
the Independence of the United States the Seventy Second

Present the Honorable Giles Spring Judge
Patrick Ballingall Prosecuting Att,
Isaac Cook Sheriff

Attest James Curtiss Clerk

Be it Remembered that heretofore to wit on
the Tenth day of December in the year of our Lord
one thousand eight hundred and forty seven came
William H. Wynn Attorneys for Cynthia Thayer and
Giles in the office of the Clerk of the Cook County
Court a Declaration, which is in the words and fig-
ures following to wit,

Cynthia Thayer } Cook County Court
October 20 1847

Isaac Cook } State of Illinois County of Cook of

Isaac Cook Defendant in this suit was summoned
to answer Cynthia Thayer Plaintiff in this suit of a
plea whereof he has not answered and unlawfully took
the goods and chattels of the said Cynthia Thayer

and wrongfully and lawfully detained the same
against surties and pledges until He And thereupon
the said Cynthia Thayer by Skinner & Morgan her
Attorneys complains, For that the said defendant
on the day of A.D. 1847. in the City of Chicago
County of Cook and State of Illinois in a certain
dwelling House in said City belonging to one Allen
Porter, wrongfully and unlawfully took the said
goods & Chattels to wit. = One hard seated Sofa, one
Beanso, ^{one mahogany Rocking Chair}, ^{one com. Rocking Chair}, eighteen, small ma-
hogany hard seated chairs, Two parlor tables, one
wash stand, four ham crickets, one feather bed, eight-
een prs. of Sheets, eight prs of pillow cases, five table cloths
twenty towels and napkins, one set of China, Two
sets of Plates, three & one half dozen China plates, one
dozen Tumblers, one dozen wine glasses, three glass
dishes, one glass butter tub, two Astor lamps, one
pair of girandoles, one pair of brittania lamps with
shades, six vases, two motto card racks, three looking
glasses, two large picture frames gilt, six silver table
spoons, sixteen tea spoons, one sugar tongs & creamer,
one brass Kettle, two pair of Shovel & tongs, two pair of
and irons, eleven hearth rings, seventy five yards
of Brussels Carpeting, six small 2 hand Carpets, twenty
yards of Oil Cloth, two dozen Iron Hairpins & forks, one
table spread, one set of Bed curtains, one hall lamp,
one round table, six leather trunks, two parlor stoves,
one bedstead, one black tin pitcher, ten small picture
frames & five large mirrors, Whereof the said plaintiff
was then lawfully entitled to the possession of
great value to wit - of the value of three hundred

and thirty five dollars and fifty cents and wrongfully detained the same against Sureties and pledges Hoo. And for that whereas also the said defendant heretofore to wit = on the same day and year aforesaid and at the place last aforesaid wrongfully and unlawfully detained the goods and chattles of the said plaintiffs to wit, One hard seated sofa, one bureau, two Mahogany rocking chairs, one Secretary, one cane rocking chair, 18 small Mahogany hard seated chairs, Two parlor tables, one wash stand four hair crickets, one feather bed, Eighteen prs of Sheets, eight pr of pillow cases, five table cloths, twenty towels & napkins, one set of china, two sets of plates, three & one half dozen china plates, one doz tumblers, one doz wine glasses, three glass dishes, one glass butter tub, two arbor lamps, one pair gerandoles, one pair of brittania lamps with shades, Six vases, two metal card racks, three looking glasses, two large picture frames gilt, six silver table spoons, Sixteen tea spoons, one sugar tongs & creamer, one brass Kettle, two pairs of Shovel stings, two pair Andirons, Eleven hearth rings, seventy five yards of brand Carpeting, Six small 2 hand carpets, twenty yards of Oil Cloth, two doz Ivory Knives & forks, one table spread, one set of bed curtains, one hall lamp, one round table, Six leather trunks, two parlor Stoves, one bedstead, one black tin pitcher, ten small picture frames, & five large mirrors. Whereof the said plaintiff was lawfully entitled to the possession of great value to wit, of the value of three hundred and thirty five dollars and fifty cents, and wrongfully and unlawfully detained the same against Sureties and pledges until &c

Wherefore the said Plaintiff says she is injured
and has sustained damages to the amount of one
hundred dollars, and therefore brings suit.

Skinner & Hogue
Plff atty

And afterwards to wit on the third day of May
in the year Eighteen hundred and forty eight came
Scammon & Sudd Defendants Attorneys and filed
in the office of the Clerk of said Court their Pleas
which are in the words and figures following to
wit,

Coos County Court

Isaac Coos

ads

Lynethia Thayer

And the said defendant by Scam
mon & Sudd his Attorneys comes and defends the force
and injury, when &c and says that he did not take
or unlawfully detain the goods and chattels in said
declaration mentioned and of this he puts himself
upon the Country &c

And the said defendant for a further plea in
this behalf says, actio non, because he says that the
said goods & chattels in the said declaration mentioned
at the said time when &c were the property of him
the said defendant, and not of the said plaintiff
as by the said declaration is above supposed and
this he the said Defendant is ready to verify where
fore he prays judgment & return of the property &c

And the said defendant for a further plea in this
behalf says, actio non, because he says that the said goods

& Chatter in the said declaration mentioned at the time when &c. were the property of Allen Porter, and not of the said plaintiff, as by the said declaration is above supposed, and this the said defendant is ready to verify, wherefore he prays judgment &c and a return of the property &c

And the said defendant for a further plea in this behalf, well avows the taking of the said goods and Chatter in the said declaration mentioned became that before and at the time when &c he the said Defendant was and ever since continually has been and now is Sheriff of the County of Cook and State of Illinois and being such Sheriff, afterwards and before the time when &c to wit, on the thirteenth day of July 1847, a certain execution was issued out of, and under the seal of the Cook County Court, and directed to the Sheriff of Cook County aforesaid, and which said execution was afterwards then and there delivered to this defendant so being Sheriff as aforesaid to be served and executed according to law, and by which said Execution said Sheriff was in the name of the people of the State of Illinois commanded that of the lands & Tenements, Goods & Chatter of Allen Porter in his County, he make the sum of Two hundred and three dollars and eighty cents which Edward Winslow lately in the Cook County Court at a term thereof begun and held at Chicago in said County on the first Monday of February (then) last past recovered against the said Allen Porter and which by the said Court was adjudged to the said Edward Winslow for his damages, and also the further sum of Four dollars & Ninety three

& $\frac{3}{4}$ cents which were adjudged to the said Edward Winslow for his costs and Charges in the same matter. And the said Execution further commanded the said Sheriff that he have those money ready to render to the said Edward Winslow for his said damages & costs, and that he make return of said writ with an endorsement thereon in what manner he shall have executed the same in ninety days from the date of said Writ, to wit, in ninety days from the thirteenth day of July A.D. 1847, - as by the said execution sealed with the seal of the said Court, tested in the name of the Judge thereof signed by the Clerk and bearing date ^{on} of the day and year aforesaid, may more fully appear, reference being ^{here} thereto had, and which execution the Defendant brings ^{here} into this Court, and the Defendant being so Sheriff as aforesaid, after the delivery of the said execution to him as aforesaid for service according to law, and before the expiration of the time limited in the same for the execution thereof, at the time and place when &c as he well and lawfully might and as it was his duty to do, laid upon and took the said goods, and chattels in the said declaration mentioned, by virtue of the said execution, and then and there as he lawfully might, held the same in his hands by virtue thereof, until &c. And the said defendant avers that the said goods & chattels at the time when &c, were the proper goods and chattels of the said Allen Porter, and lawfully liable to be taken by this defendant as aforesaid of and upon the said execution, and not the property of the said plaintiff as is supposed in said plaintiff's declaration, and this the said Defendant is ready

to verify; wherefore he pray judgment and a return
of the said goods & Chattels, together with his damages
according to the form of the Statute in such case made
and provided &c

And afterwards to wit on the Ninete day of May
in the Eighteen hundred & forty nine the same being
one of the days of the May Term of the Cook County
Court for the year aforesaid the following order
& proceedings were had in said Case and entered
of record to wit,

Cynthia Thayer
as
Isaac Cook } Replevin

On Motion of the said defend-
ant it is ordered that the said plaintiff reply
to the said defendants plea herein by the coming
in of the Court to morrow morning

And afterwards to wit on the fifteenth day of May
in the year aforesaid, the following proceedings
were had in said Case and entered of record to wit,

Cynthia Thayer
as
Isaac Cook } Replevin

This day comes the said defend-
ant by Sudd & Wilson his Attornies and enters his motion
herein to vacate the order made herein at the last
term of this Court excluding the deposition of Allen
Porter

And afterwards on the sixteenth day of May in the

year aforesaid the following proceedings were had in
said cause and entered of Record to wit,

Cynthia Thayer
vs
Isaac Cook } Replevin

This day again came the said parties
by their Attornies and after argument heard on the said
defendants motion to vacate the order excluding the
depositions of Allen Porter taken herein, the Court
being now fully advised in the premises doth order
that the said motion be sustained.

And afterwards to wit on the twenty third day of May
in the year aforesaid the following proceedings were
had in said cause and entered of Record to wit,

Cynthia Thayer
vs
Isaac Cook } Replevin

This day again came the said parties
by their Attornies and ipse being joined herein by
their agreement this cause is submitted to the Court
for trial without the intervention of a jury and after
hearing the evidence adduced and argument of Counsel
the Court not being fully advised in the premises, takes
the matter under advisement

And afterwards on the twenty eighth day of May
in the year aforesaid the following order and pro-
ceedings were had in said cause and entered of Record
to wit,

Lyntha Thayer
 as
 Isaac Cook } Replevin

This day again came the said parties by their Attornies, and the Court being now fully advised in the premises finds the issue for the plaintiff and assesses her damages to one cent, To which decision and finding of the Court the said Defendant by his said Attorney enters his exceptions and prays an appeal which is granted upon his entering into Bond in the sum of Two Hundred dollars with J. J. Scamman as security, conditioned according to law and filing the same by the second Monday in June next.

Therefore it is considered that the said Plaintiff recover of the said defendant her damages of one cent in form aforesaid assessed and also her costs and charges in this behalf expended and have execution therefor.

And afterwards to wit on the twenty ninth day of May in the year aforesaid came Judah Wilson attorney for the said defendant and filed in the office of the Clerk of the Cook County Court their Bill of Exceptions, which is in the words and figures following to wit,

Cook County Court
 Lyntha Thayer
 as
 Isaac Cook }

Be it remembered that on this twenty third day of May 1849 of the May term of said Court this cause came on for trial and by agreement

the same was submitted to the Court for trial and
the Plaintiff to maintain the case on his part read
the deposition of Allen Porter in the words and
figures following.

Cynthia Thayer
vs
Isaac Cook } Replevin

The deposition of Allen Porter of Racine County, Wisconsin, taken before Thomas S. Emann, Justice of the Peace in & for said County, by virtue of a commission from the Cook County Court, of the State of Illinois hereto annexed, this 1st day of May A.D. 1848, at his office in Racine in said County.

Allen Porter, a witness, produced, & first duly sworn according to Law makes answer to the annexed Interrogatories as follows.

1st Interrogatory. What is your age & occupation and where do you reside?

Answer. My age is about 48 years, have formerly engaged in the Mercantile business. Now reside in Racine, Wisconsin.

2nd Interrogatory. Are you acquainted with the parties in the above entitled cause, if so, state how long you have known them respectively?

Answer. I have known the plff. about 18 years. I do not know the defendant.

3rd Interrog. Did you ever execute a Mortgage to the Plaintiff of certain goods & chattles in Chicago, if so state what was the conditions moving you thereto when you made it, the amount thereof, when payable, and all you know about the execution, delivery and consideration of said Mortgage, state fully?

Answer - I executed a Mortgage, to the plff. on or about the 25th of January 1847, in Chicago, in certain goods & chattles, being principally household furniture, to secure to her the payment of one thousand five hundred & seventy six & 1/80 Dollars, that I owed her. The amount was in a note which I received at the time of executing the Mortgage

made payable in three years with interest.

4 Interrog. Did the plaintiff at any time advance you money as a loan ~~belong~~ to her? if so, the amount of the loan, the consideration thereof, the terms upon which such loan was made, the times when payable, and whether the repayment was ever secured, state the nature of the security, at whose instance the same was taken, and every thing you know connected with the nature and manner of said indebtedness.

answer. I borrowed money of the plff. at various times. She loaned me January 28th 1838. \$ 698⁵⁰/₁₀₀. & since then & up to Jan'y 1st 1846 she loaned me money at several times, at which last time I was indebted to her for loaned money, & for which I gave her my note at Hartford Connecticut for \$1576¹³/₁₀₀. For several years the plff. a part, of the time resided in my family. She loaned me the money for the interest, - I paid her 6 per cent. for it. I always kept a book account with her, at times paid her money, as she wanted it. - We generally settled once a year, & I paid her the interest on the money, or renewed my note to her & added the interest to the principal. I generally gave her my note on demand up to the time of securing her by mortgage. The plff. realized the money she loaned me from the estate of her husband after his death, she lived with her children & clothed herself from the interest of the money. The money she had loaned me was about all the property she had. In October 1846 I returned from Hartford Ct. to Chicago, Illinois & engaged in business in the latter place & while at Chicago I met with a reverse in business and became ~~embarrassed~~ when the plff. requested me to pay her, which I was unable to do. She being somewhat alarmed, ^{wanted} ~~requested~~ to be secured. And I gave her a mortgage as before stated on my furniture and a couple of Carriages being the only available property I had to secure her with. She at the time was residing in my family, at the time of the execution of the mortgage, the property was turned

out to her, and she consulted Counsel whether her security would be good to let the property remain, she took possession & exercised entire control over the property as far as the nature of her situation would admit of. And only by her permission was any control of the family exercised over it. When I executed the note & mortgage to the plff. I owed her every dollar for loaned money that the note called for. no part of which had been paid.

5th Interrog. — Who retained possession of the goods & chattels described in the mortgage (if you answer that any was given) was the possession ever in the plff. if so state when she obtained such possession, and all you about her being in such possession at the time the defendant took them in execution?

Answer. After executing the mortgage I considered that I had surrendered possession of the property to the plff. & that she had exercised control over it up to the time that it was taken in execution before the plff. or my family left Chicago. She directed and assisted in packing up the property — I was not in Chicago when the property was taken by Deft. in execution & cannot give from my own knowledge, the situation of it, but have been informed that part of it was in the house packed up when the plff. & my family had resided & part stored in the barn and that for several days before Deft. took said goods & chattels in execution they were not used by any one.

6th Interrog. — If you know of any other matter or thing that will be of any benefit or advantage to said plaintiff, please state the same as fully as if particularly interrogated thereto?

Answer,

Cross Interrogations propounded to witness

No 1. What connexion or relationship exists between the said plaintiff Cynthia Thayer and yourself?

Answer. I married the daughter of Plff.

No 2. What is the age of said Plff? state as near as you can.

Answer. She is about 78 years old.

No 3. How long has the Plaintiff resided with your family?

Answer. She has resided in my family about one half the time in time for the last 16 years & the other half she has resided with her other daughters.

No 4. How long has the plaintiff at any time made it her home at your house? Did she come to Chicago with your family when you removed there. And did she reside with your family from the time they came to Chicago, until the family went East?

Answer. Since Plff. resided in my family she has usually spent her winters with me, and the other parts of the year with her other daughters. She came to Chicago with my family and remained there up to about the time they left.

No 5. When did you purchase or obtain the furniture described in the said Mortgage, and how long previous to the execution of the Mortgage did you purchase or obtain the whole or any portion of said furniture?

Answer. I bought some of the furniture 18 years since, in Connecticut & have replenished it since from time to time, till I came to Chicago. Several months previous to the execution of the Mortgage, I purchased a few articles & added to it in Chicago.

No 6. Was not the furniture described in said Mortgage the same that your family kept house with?

Answer. A part of the furniture was used by my family by the consent and permission of Plff.

No 7. How long had you kept house with said furniture previous to the execution of said Mortgage? state the time ^{as near} as you can.

Answer. The furniture was mostly used in my family from the time of purchase, as stated in my answer to the 5th interrogatory.

No 8. Did your family continue to use said furniture to keep house with until you left Chicago? if not state what furniture they used, and when the same was obtained.

Answer. A part of said furniture was used in my family after the execution of the Mortgage, while they kept house in Chicago by permission of the Plff. but for several days previous to the goods being taken in execution by Deft. they were by the direction of the Plff. and ^{by} the assistance packed up, and at the time of being taken in ex. were in her possession and wholly under her control.

No 9. How large a family have you? give the names of all the members of it.

Answer. My family consists of three children, C. B. W. A. & A. D. Porter & wife.

No 10. Were you indebted to any person or persons at the time of the execution of said Mortgage? if so state the amount, as near as you can, and has the said indebtedness been paid?

Answer. At the time of the execution of the Mortgage I was indebted to various persons, the exact amount I am unable to give not having with me all my books and papers, but should think it was over \$10,000. A

small part of which has since been settled.

No. 11. Did your indebtedness exceed ten thousand Dollars? if so, about how much over that sum? and does not more than ten thousand Dollars of said indebtedness remain unpaid?

Answer. I have answered the 11th Interrog, in the 10th as fully as I can.

No. 12. To whom were you indebted and for what, and where did you take the goods to, that you purchased upon credit?

Answer. I was indebted to Merchants and Manufacturers in the State of Maine, Massachusetts, Connecticut, New York & Pennsylvania, a part of the debts were for stock to make into goods, in part, & a part was for goods that I ~~bought~~ brought to Chicago.

No. 13. At what time, about what time did you sell out your stock of goods in Chicago?

Answer. I think it was in the month of November 1846.

No. 14. Did you take any of the pay in Securities upon such sale in any other persons name than your own? if so, in whose name and what property did you take in such other persons name?

Answer. I took the pay and Securities in my own name.

No. 15. When did your creditors reside, about how much were you indebted to New York Merchants, about how much to Boston Merchants, about how much to Philadelphia Merchants, about how much to Merchants in Hartford, and in what other Cities were you indebted?

Answer. Answered in the answer to the 12th Interrogatory.

No. 16. About what time did you commence business in Chicago.

and about what was the value of your different stocks of goods that you took to Chicago?

Answer. I commenced business in Chicago, I think in Oct^r 1846. the amount goods were from \$20,000 to \$28,000, when purchased. They were purchased August & Sept^r 1846.

No. 17. About what time did you sell out your stock of goods, and quit Merchandizing in Chicago?

Answer. Answered in answer to 13th Introq.

No. 18. About what amount do you owe at the present time? State as near as you can.

Answer. Answered in my answer to No. 10.

No. 19. About what amount is still due from you upon the purchase of said stock of goods, how much in New York, how much in Boston, how much in Philadelphia, how much in Hartford?

Answer. Answered in Nos. 10 & 12.

No. 20. Do you owe any thing on account of the said stock of goods? if so. about how much?

Answer. Answered in No. 10.

No. 21. How long previous to leaving the City of Chicago did you execute said Mortgage to your Mother in Law?

Answer. About two months.

No. 22. Have you not kept yourself secreted since you left Chicago, so that your creditors could not find you?

Answer. I left Chicago about the first of May 1847, to see my Creditors, and did while absent settle about all my Creditors in New York & Connecticut.

No. 23. Did any of your creditors know where you were for six months after you left Chicago? if so, name who knew it?

Answer. During the time of my absence I saw most of my creditors in New York & Connecticut.

No. 24. State the time at which you left Chicago, and in what different places you have been since that time, state fully where you spent all of your time, since you left Chicago.

Answer. I left Chicago in May 1847. My time was occupied in seeing my creditors & in visiting my friends.

No. 25. Did you not direct your attorneys & your family, & did you not write to your attorneys in Chicago, & to your family, not to let any one of your creditors know where you were?

Answer. I have no recollection of so writing either to my attorneys or family, as to my creditors, I may have written something of the kind about a requisition got up by Gamell & other of my ~~creditors~~ enemies.

No. 26. Did you on the 28th day of January 1847, borrow any money of Cynthia Thayer, if so, how much, and from whom did she obtain that money?

Answer. I did not.

No. 27. Had not Cynthia Thayer lived in your family and been supported by you for at least ten years preceding the 25th day of January A.D. 1847.

Answer. She lived in my family for about one half of the time for the last 16 years, but she supported herself.

No. 28. How much of the time for ten years immediately

preceding the 25th day of January A.D. 1847, had the said
Cynthia Thayer lived in your family & been supported by you
Answer. Answered in No. 27.

No. 29. Have you at any time or times within the last ten
years borrowed any money of said Cynthia Thayer, if so.
Expt. State the date or dates of such borrowing, and the amount
or amounts, give the several times & places where & when
Cynthia Thayer lent you any money.

Answer. I have not my Books & papers here, they now remain in Counsel-
-or's hands. Cannot answer more definitely than I have answered
in my direct examination to the 1st Interrogatory.

No. 30. Have you been informed or do you know what your sis-
-ter-in-law has sworn in this cause about Cynthia Thayer
loaning money to you?

Answer. No.

No. 31. At what time did your family remove from Chicago
and where are they residing now?

Answer. In September 1847, and are now residing in Racine, Wis.

No. 32. Does Cynthia Thayer still live with your family, or
has she been living with them any portion of the time since
they left Chicago, if so, what portion of the time?

Answer. No, she has not been in my family since they left Chicago.

No. 33. If your family have been keeping house since you left
Chicago, did they not use the furniture mentioned in said
Mortgage to keep house?

Answer. The most of the furniture is stored for plff. and to her
order.

No. 34. Had you not stopped payment and failed in business before you gave the said Mortgage to said Cynthia Thayer?
answer. No, at the time, I did not consider that I had failed or stopped payment. I have made such a disposition of my business, that I expected without any difficulty to pay all my debts, but in the man to whom I sold met with a heavy loss & disappointed me.

No. 35. Before whom was said Mortgage acknowledged?
answer. I do not now recollect, not having the Mortgage.

No. 36 Who took the said Mortgage to the Recorder's office, and paid the fees for recording?
answer. I think, it was either myself or son.

Allen Porter

State of Wisconsin }
Racine County, fs }

I do hereby certify that the above deponent Allen Porter was produced before me this 4th day of May A.D. 1848, and by me was sworn to testify the truth, the whole truth, and nothing but the truth relating to the matter in controversy, so far as he may be interrogated in the cause of Replevin now depending in the Cook County Court in the State of Illinois, in which Cynthia Thayer is plaintiff and Isaac Cook is defendant in the trial of which this deposition is to be used, and I do further certify that his answers to the as given to the foregoing Interrogatories, were by me reduced to writing and then carefully read to the witness, who in my presence subscribed his name to the same

Justin Jus. p. 450

Thomas S. Cream
Justice of the Peace

preceding the 25th day of January A.D. 1847. had the said
Cynthia Thayer lived in your family & been supported by you
Answer. Answered in No. 27.

No. 29. Have you at any time or times within the last ten
years borrowed any money of said Cynthia Thayer, if so.
Capt. State the date or dates of such borrowing, and the amount
or amounts, give the several times & places where & when
Cynthia Thayer lent you any money.

Answer. I have not my Books & papers here, they now remain in Court-
house. Cannot answer more definitely than I have answered
in my direct examination to the 4th Interrogatory.

No. 30. Have you been informed or do you know what your dis-
-tinction-law has sworn in this cause about Cynthia Thayer
loaning money to you?

Answer. No.

No. 31. At what time did your family remove from Chicago
and where are they residing now?

Answer. In September 1847, and are now residing in Racine, Wis.

No. 32. Does Cynthia Thayer still live with your family, or
has she been living with them any portion of the time since
they left Chicago, if so, what portion of the time?

Answer. No, she has not been in my family since they left Chicago.

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Chicago, did they not use the furniture mentioned in said
Mortgage to keep house?

Answer. The most of the furniture is stored for plff. and to her
order.

No. 34. Had you not stopped payment and failed in business before you gave the said Mortgage to said Cynthia Thayer?
answer. No, at the time, I did not consider that I had failed or stopped payment. I have made such a disposition of my business, that I expected without any difficulty to pay all my debts, but in the men to whom I sold met with a heavy loss & disappointed me.

No. 35. Before whom was said Mortgage acknowledged?
answer. I do not now recollect, not having the Mortgage.

No. 36 Who took the said Mortgage to the Recorder's office, and paid the fees for recording?
answer. I think, it was either myself or son.

Allen Porter

State of Wisconsin }
Racine County, fs }

I do hereby certify that the above deponent Allen Porter was produced before me this 4th day of May A.D. 1848, and by me was sworn to testify the truth, the whole truth, and nothing but the truth relating to the matter in controversy, so far as he may be interrogated in the cause of Replevin now depending in the Cook County Court in the State of Illinois, in which Cynthia Thayer is plaintiff and Isaac Cook is defendant in the trial of which this deposition is to be used, and I do further certify that his answers to the as given to the foregoing Interrogatories, were by me reduced to writing and then carefully read to the witness, who in my presence subscribed his name to the same.

Justin Jus. \$4.50

Thomas S. Cramer
Justice of the Peace

Territory of Wisconsin }
Racine County, } ss.

LES

I Albert G. Knight, Clerk of the District Court
of Racine County, in the Territory aforesaid, do
hereby certify, that Thomas J. Emerson whose
name is subscribed to the Certificate of Acknowledgment
or proof of the annexed Deposition and thereon written, was
at the time of taking the same an acting Justice of the
Peace in and for said County duly elected and sworn
and authorized to take the same, that his signature thereto
is genuine, and that full faith and credit are due and
of right should be given to all his official acts as such
and that the same is executed in conformity with the
laws of this Territory.

In Testimony whereof I have hereunto set my hand and
seal of office this sixteenth day of May A.D. 1848

Seal

Albert G. Knight
Clerk

pus/- paid

The Plaintiff also read in evidence the deposition
of Theresa Porter, as follows

Copy

Thayres

ves

Cook

Cross Interrogatories

Allen Porter

Handwritten notes in cursive script, including names and dates, located in the upper right margin of the page.

Cook County Court

Cynthia Thayer

vs.

Isaac Cook

In Ephraim

The Deposition of Theresa H.
Porter of the City of Racine & State of Wisconsin
taken before Thomas J. Emerson by virtue
of a commission hereto annexed, the ~~first~~ fifth day
of May 1849

Theresa H. Porter being first duly
sworn does make answer to the following
interrogatories

Interrogatory 1st What is your age, and occupation
and where do you reside?

Answer I am now 48 years of age, house
keeper and reside in the City of Racine, Wisconsin

Interrogatory 2nd Are you acquainted with the parties
to the above entitled suit or either of them, if
so, state how long have you known them res-
pectively?

Answer I have always known the P^{ff}
Cynthia Thayer she is my mother.

Interrogatory 3rd Do you know anything of a loan of

money made by the Plaintiff to Allen Ponten?
if so, state where it was, the amount of money
so loaned and also what you know about
the security which was taken by said
Plaintiff for the payment thereof

Answer

A short time after the death of
my Father, who died Oct. 1829, my Mother sold
all her property; the real estate was sold on
time and secured by notes & mortgage on the
same. The notes as they became due principal
& interest were collected by and paid to Allen
Ponten and which I find by referring to states
amounted Jan'y 28th 1838 to \$698 ⁸⁰/₁₀₀ &
up to Jan'y 6th 1846. The amount Allen Ponten
had received of my Mother's money principal
and interest was \$1578 ⁵⁰/₁₀₀ for which he
gave when in Hartford Connecticut his note
and no part of the principal of said note
has he ^{ever} paid. In January 1847. A. Ponten
being embarrassed my Mother became alarmed
and requested him to pay the note, the principal
of which was still due & secure it as the
amount he owed her was all she depended
upon for her support

Interrog'y

4th Do you know any thing of a mort-
gage on note given by one Allen Ponten to the
Plaintiff, if you answer, yes, state the con-
sideration of said note & mortgage, upon what
property said mortgage was given, when it

was executed for what amount of money on
Consideration and State all you know about
the consideration being actually given by
Plaintiff for said note and mortgage?

Answer

Yes. A. Porter executed a mortgage
to my mother, Cynthia Hayer, the Pff. on
his house hold furniture, the carriages and
other goods to secure the payment in
part of a note of \$1546 ⁵⁰/₁₀₀ which he owes
her. the mortgage was given in January 1867
in Chicago.

Interrogatory

5th

Do you know anything of
money advanced by the Plaintiff to one
Allen Porter? if so state whether said advance
of money ~~in~~ the repayment thereof has been
secured by any instrument, or instruments
in writing, if so state what instrument or
instruments were made. State the sum you
know to have been actually advanced, and
the sum secured by such instrument where
it was, how the Plaintiff procured the money
and all you know about such advance of
money & security?

Answer

The amount of money advanced
by Pff. to A. Porter was \$1546 ⁵⁰/₁₀₀ dollars
which he now owes to the Plaintiff with
interest and for which the Pff. now holds
A. Porter's note secured by a mortgage.

on his house hold goods & furniture, then
in Chicago Illinois, executed in January
1847. The P^{ff}. received the money advanced
to A. Porter from the sale of property left
her by her husband who died Oct. 1829.
The money advanced to Porter by P^{ff}. &
the interest on the same is all the re-
sourced then for support.

Interrog^y 7th If you know any other matter
on thing that will be of benefit or advan-
tage to said Plaintiff, please state the same
as fully as if particularly interrogated thereunto?

Answer to 6th Interrog^y I know that every dollar
of the money for which the mortgage was
given to secure was advanced to A. Porter
by P^{ff}. more than three months previous
to January 1847 no part of which has even
been paid

Theresa H. Porter

Cross interrogatories proposed to
witness, by Defendant

Cross Interrog^y 1st What connexion or relationship
exists between yourself and the Plaintiff Cynthia
Thayer, and between yourself and Allen Porter?

Answer Cynthia Thayer the P^{ff}. is my mother

And Allen Porter is my husband.

Cross Interrogatory 2nd If in answer to the direct interrogatory you say that you know of a loan of money from Plaintiff to Allen Porter, state when the loan was made, give the date - where it was made was it in specie or bills, and how much was loaned - did you count the money or see it delivered, if in bills what were their denominations & on what bank if specie was it in gold or silver, or both, show much of either & how much of both;

Answer

Cynthia Thayer, my mother loaned Allen Porter in Jan'y 1838 \$698⁰⁰/₁₀₀ in Hartford Ct. the money was the avails of notes taken by her for the sale of her real estate after the death of her husband & was paid to said Porter in a draft on Graupfield Bank, I saw no money delivered to Porter but saw the draft and have repeatedly seen the notes that Plff. received for the sale of her property - and the last payment on the notes for the sale of the Real estate was made in 1842 which Allen Porter received in a draft on the Green Field Bank for \$477⁰⁰/₁₀₀

Cross Interrogatory 3rd Have you any knowledge of any loan of money except what you claimed from conversation

with the Plaintiff and Allen Ponten, one on both
of them or with some other person, if so, in
what other manner than from such conversation
did you derive your information about any
loan?

Answer

I know of the loan from the con-
versation of the Plff. & Allen Ponten ^{a conversation} together & by
with them separately I also know from the
personal knowledge I had of my Mother's
affairs that she owned the property that it
was sold on credit & have ^{seen} the notes payable to
her have seen the drafts given for the
payments of said notes & do know
that Allen Ponten had the drafts &
converted them to his use without
paying her any consideration therefor

Cross Interrog. 4th Have you seen Cynthia May
the Plaintiff and Allen Ponten any money
within the last six ~~months~~ years, if so
when was it, where was it, what was the
amount, was it bills or specie?

Answer

The last money the Plff. loaned
Allen Ponten was \$477.⁰⁰ in a draft on the
Green Field Bank & dated in 1862 in
Newport Ct.

Cross Interrog. 5th If in answer to the fourth
direct interrogatory you say you saw

a note and mortgage executed did Cynthia Thayer lend Allen Ponten any money at the time said note and mortgage was executed, if so when was the money, when was it loaned and what was the amount so loaned, did you see her deliver to ~~Allen~~ Ponten any money at the time of the execution of the note & mortgage

Answer

At the time the mortgage was executed I did not see Plff. deliver to Ponten any money & know she did not

Cross Interrogatory 6th Is the family of Allen Ponten now using the furniture on any portion of it mortgaged by Allen Ponten to Cynthia Thayer, if so where and at what place are they using it? . . .

Answer

The family of Allen Ponten are now using as near as I can tell about one fourth part of said furniture mortgaged by Allen Ponten to Plff. in Marine Wisconsin

Cross Interrogatory 7th How long has Cynthia Thayer been a member of Allen Ponten's family and what proportion of the time for the last ten years has she lived in said Ponten's family?

Answer

She has resided a part of the time in his family for the last 16 years. the last 10 nearly one half of the time

Cross Interrog. 8th How long is it since the Plaintiff went East and is she now absent East, if not when did she return ^{to the West}?

Answer

She went East in Sept. 1847 and has remained there ever since

Cross Interrog. 9th Did the Plaintiff go with Allen Ponten's family at the time the family left Chicago, if so, how long did she stay with the family before going East, if she did not go with the family when did she go when she left Chicago?

Answer

She did not go with Allen Ponten's family when they left Chicago she went to Madison Ohio & has resided in Ohio ever since

Cross Interrog. 10th Does not Allen Ponten's family now use the furniture on some part of it included in the mortgage if not the whole of it name the articles of furniture that they now use and has not the family used said furniture on a part of it for the last two years

Answer

They are using as near as I can tell about $\frac{1}{4}$ part of it & have been using it for the last two years by the consent of the Plaintiff consisting of some of the beds & kitchen furniture

Cross Interrog'y 11th Is Cynthia Thayer now living with Allen Porter's family if so how much of the time since the family left Chicago has she been living with them if she is not now so living with the family where has she been living for the last two years and since the family left Chicago?

Answer

She has not, she has been living in Ohio.

Cross Interrog'y 12th What time did W. Porter's family leave Chicago where did they go to and where did the family reside ever since they left Chicago?

Answer

They left Chicago in September 1847 & came to Racine & have resided in Racine ever since

Cross Interrog'y 13th Has the Plaintiff lived with Porter's family any part of the time since the family has lived in Wisconsin, if so how long and at what time state the various times when she came to Wisconsin

in a stone here for her husband when his family came to Racine & I have not seen it since it was put in stone nor do I know who has the charge of the stone house except from report

Cross Interrogatory 19th In what house is the furniture mortgaged by Allen Ponten to Cynthia Thayer and whose family resides in the house where said furniture is?

Answer

The house I think is not occupied by a family, but is a business house & ~~there~~ is used for a store

Theresa H. Ponten

State of Wisconsin }
County of Racine } I, Thomas J. Emerson Commissioner
do hereby certify that the above defendant Theresa
H. Ponten was produced before me on the fourth
day of May A.D. 1849 between the hours of one &
six o'clock P. M. of said day at the dwelling
house in the City of Racine of said defendant
and by me was sworn to testify the truth,
the whole truth and nothing but the truth
relating to the cause now pending in the
Cook County Court in the State of Illinois
in which Cynthia Thayer is Plaintiff and
Isaac Cook is defendant and that the an-
swers of the said witness as made to the
interrogatories in chief & cross interrogatories

under oath, contained in the foregoing de-
position was by me reduced to writing, and
then carefully read to said witness, and corrected
who in my presence subscribed her name
to the same

Thomas J. Emerson
Commissioner

Compens \$5.00

These depositions were read subject to all legal
objections to Interrogatories

Lewis Le Merchier was then sworn as witness on
the part of the plaintiff and testified that he was
a justice of the peace that the acknowledgment
endorsed upon the Mortgage shown to him was
made by him and that the Mortgage was ac know-
ledged before him by Allen Porter

Henry W. Clark was then sworn as a witness for
the plaintiff and testified that he was a subscri-
bing witness to the Mortgage shown to him and
that he signed the same as a subscribing witness
at the request of Allen Porter.

The Plaintiff then offered in evidence the Mort-
gage named by the two preceding Witnesses which
Mortgage was in the words and figures following

Cynthia Thayer

no.

Isaac Cook

Copy Deposition of
Thames & H. Porter

Chicago January 25th 1847

Three years from date I promise
to pay Cynthia Thayer, on order Fifteen
hundred ~~dollars~~ and seventy six $\frac{13}{100}$ dollars
for value received the interest to be payable
Semiannually
\$1576 $\frac{13}{100}$ dollars in interest

Allen Porter

Know all men by these presents that
I Allen Porter, for and in consideration of the
sum of Ten dollars to me in hand paid by
Cynthia Thayer, the receipt whereof I do hereby
acknowledge for the further further consid-
eration of securing the payment of the
following described promissory note; one
note dated January 25th A.D. 1847 to Cynthia
Thayer on order for the sum of Fifteen hundred
and seventy six $\frac{13}{100}$ Dollars, payable in three years
from date as above interest Semiannually for
value received. Signed Allen Porter

I do hereby sell and convey to the said Cynthia
Thayer, her Executors, Administrators the following
described personal ~~personal~~ property, to wit;
one hair seat sofa, 1 Bureau, 2 Mahogany
1 Secretary Rocking chairs, 18 small Mahogany
hair seat chairs, 2 Painted ~~Tables~~, 2 mahogany
tables, 1 dining table, 1 work table, 1 wash stand

2 Hair Combeds & common Combeds 1 Mattress
7 Feather beds, 30 pair Sheets, 20 pair Pillow Cases
2 white Counterpanes, 8 woollen blankets, 6 Com-
forters, 14 table cloths, 40 towels, 0 napkins, 2 set
of china 2 1/2 do china Plates, 12 do plates,
1/2 do covered dishes, 1 do Platters, 2 do
Coffee & tea Cups, 1 do tumblers, 1 do wine
glasses, 3 do tumblers, 2 stands for Cestons
3 glass dishes, 1 Black Pitcher, 1 glass butter
tub, 4 black tin tin pails, 1 Coffee pot, 1/2 do
large water, 2 Astial lamps, 1 pair yowdals
1 pair Britannia lamps with shades
8 pair Britannia lamps, 6 noses, 2 metal
Cord ~~Hooks~~, 7 looking glasses, 12 large
Jubilee frames, 5 silver table spoons, 15
tea spoons, 1 sugar tong, 1 Cream
2 salt spoons, 2 do corns, 2 Brass plates
3 pair Shovel & tongs, 3 pair Andirons, 12
beach rugs, 75 yards Brussels Carpets,
6 small 2^d hand Carpets, 20 yards oil
cloth, 4 do ivory knives & forks, 1 table
spoon, 1 set of best curtains, 1 hand
lamp, 1 round table, 6 leather benches,
2 Harbour stones, 2 gold watches, 4 best
black Covered Benches

To have and to hold the above
personal property to her Cynthia Mayers
then executors, Administrators and assigns
and provided always and it is agreed that
if the said Allen Power shall will and

truly pay said promissory note according
to the tenor and effect thereof, then this bill
of sale is to be void and of none effect; And
promised also, and it is agreed between said
parties that the said Peter is to have and
retain possession of said property until de-
fault is made in the payment of said
note

In testimony whereof we have this
day set our hands and seals

In presence of }
Henry W. Clarke } Allen Peter { Seal }

State of Illinois }
Cook County } ss.

This Mortgage was acknowledged
before me by Allen Peter the Mortgager
this 25th day of January 1847

L. E. Kenehan J. P.

Which was objected to by Defendants counsel and
the objection overruled by the Court, and the Mortgage
received - To which decision defendant excepted
The Plaintiff also gave in evidence a promissory note
as follows,

Chicago January 25, 1847

Three years from date I promise to pay, to your order
Mayor or order Fifteen hundred and seventy six
1700 Dollars for value received, The interest to be
paid semi annually
\$ 1576. $\frac{43}{100}$ Dollars on interest

Allen Porter

Allen Porter

To

Cynthia Mayne

Copy Charles Montjoy

By agreement of parties it was admitted that the goods mentioned in the Mortgage were the same goods and chattels levied upon by virtue of an execution, which is correctly set forth in the fourth plea of the Defendants. The said execution and the judgment upon which it was founded and the return of the Defendant as Sheriff showing a levy upon the goods and Chattels mentioned in the Mortgage, and for which this Replevin was brought were then given in evidence. It was admitted that Defendant was Sheriff that by virtue of such execution he seized and levied upon the goods replevined and that thereupon this Replevin was brought and that such levy was the taking complained of by Plaintiff and for which this suit was brought.

The Plaintiff rested his case. Defendant then called as a witness John A. Richant who being sworn testified that he was a Deputy Sheriff, that he made the levy upon the property Replevined, that the levy was made at the house occupied by Allen Porter's family on the North Side of the River in Chicago, that at the time he went to make the levy he found Allen Porter's family, and a man by the name of Porter engaged in packing up the furniture to remove the same out of this State. Allen Porter was absent from home that a part of the goods were packed & was stored in a Barn, that immediately after such levy and Witness thought on the same day this Replevin suit brought and goods taken from him.

On Cross examination this Witness testified that the Plaintiff was at the house at the time he

made the levy and forbid his making it and claimed the property, that part of the property was in boxes in the barn adjoining Allen Porter's house.

The Defendants then called Elisha T Madenwath as a Witness, who being first duly sworn testified that he was the surety of the plaintiff in this suit in the replevin Bond, and that Orrin Porter, one of the brothers of Allen Porter indemnified him by a Mortgage upon some land in Wisconsin.

The Defendants Attorney then offered to show by said Witness that the land upon which he had security was conveyed to said Orrin Porter in payment for goods purchased by said Madenwath of said Allen Porter while he was doing business in Chicago, in the name of S M Porter, and the brother of said Allen, and to show by said Witness that Allen Porter carried on business in Chicago in the name of S M Porter, who was never there, and controlled and managed the business as his own. The Court rejected this testimony & the defendant excepted.

This was all the testimony in the case. The Court found the issue for the Plaintiff & gave judgment against the defendant. To which finding and judgment the Defendant excepts and prays the Court to sign & seal this his bill of exceptions, which is done.

Dated May 29. 1849.

Giles Spring 

And afterwards to wit, on the tenth day of June in the year aforesaid there was filed in the office of the Clerk of said Court a Bond in the words and figures following, to wit

Know all men by these presents, that we Isaac Cook and I. Young, Scammard of the County of Cook and State of Illinois, are held and firmly bound unto Cynthia Thayer in the penal sum of Two Hundred dollars for the payment of which well and truly to be made to the said Cynthia Thayer her executors and administrators firmly, by these presents, Sealed with our seals and dated this tenth day of June in the year of our Lord one thousand eight hundred and forty nine.

The condition of the above obligation is such that whereas a suit was pending in the Cook County Court in the said County of Cook and State of Illinois, at the May Term thereof last past wherein the said Cynthia Thayer was plaintiff and the said Isaac Cook was defendant in which said suit a judgment was rendered in favor of said plaintiff and against the said defendant, and whereas the said Isaac Cook has prayed for and obtained an appeal from the said judgment of the said Cook County Court to the Supreme Court of the State of Illinois, Now therefore if the said Isaac Cook shall duly prosecute his said appeal with effect and shall moreover pay and satisfy the judgment costs and interest and damages rendered and to be rendered against him in case said judgment shall be affirmed in the Supreme Court that then

and in that case the above obligation is to be void
otherwise to be and remain in full force and virtue
Sealed & Delivered I Cook Seal
In presence of J. Young Scamman Seal

State of Illinois
Cook County

J. Walter Kimball Clerk
of the Cook County Court of Common Pleas
within and for the County of Cook & State
aforesaid do hereby Certify that the foregoing
is a true and correct copy and Transcript
from the papers, and of the Records of said
Court now on file in my office in the case
of Cynthia Shagin vs Isaac Cook

In Witness whereof I have hereunto
set my hand and the Seal of said
Court at the City of Chicago this 5th
day of June A.D. 1856

Walter Kimball
Clerk

I do Certify that the costs of this Transcript is Fifteen
Dollars & Eighty-five Cents.

\$13.85

Walter Kimball
Clerk

50
Cook Co. Ct. from Recd

Cynthia Thayer

vs
Isaac Cook

Transcript

Filed June 11. 1880.
L. Keland Clk.

J. B. Lumsden
J. B. Lumsden

\$5.00 Clk. = \$13.85

Isaac Cook
as appellant
Cynthia Thayer.

In Supreme Court June 5, 1850
3rd Grand Division.

Petition for a rehearing

The appellant in this cause respectfully petitions for a rehearing. The case was submitted without the knowledge of the appellants counsel and upon an argument made ~~with reference to the facts~~ ^{on the assumption} that the mortgage had not been recorded, as exhibited by the record, when by an amendment of the record this point was obviated and the argument on this point answered. The appellants counsel relying upon this error in the record, satisfied of its sufficiency, were not so careful to present the other points to the Court which are made in the assignment of errors. In addition to this the counsel were not aware that this Court would adjourn until a week from this time, having been so informed by the Counsel of the appellee, but although they were misled by those statements they do not think they were made with such intention, though such has been their effect. For these reasons the Counsel for appellee respectfully ask the indulgence of this Court for the purpose of a more full and satisfactory argument of the case, and would assign the following ^{additional} reasons which were not considered by the Court in its opinion, for the proposed course.

The 5th assignment of errors is as follows:
5th There was no legal evidence of any title whatever to said goods or any right to possession in the appellees.

The appellants respectfully submit

that the plaintiff had no right to the possession of the goods at the time the suit was instituted. She claims title under the Mortgage. By the terms of the Mortgage Porter the Mortgagee is entitled to retain possession (it is "agreed" that he shall) until default is made in the payment of the debt which it is given to secure. There is no evidence of any subsequent agreement between the parties in relation to the possession. The Mortgage is therefore the measure of her legal rights in the premises. Then as by the terms of the Mortgage she is not entitled to possession, and not being entitled cannot maintain an action of Replevin.

Rev Stat. 1845: Title Replevin. The remedy of a party not entitled to possession is care for injury to the reversion and not replevin, which is founded upon the right of the party to immediate possession.

The case of Hill vs Snowhill & Green N.J. is a case in point. That was an action against ^{an} officer taking goods under execution precisely as in this case, and it was there held that as the party was not entitled to immediate possession, care was the proper remedy. And in that case as in this the goods had been converted by the officer by a sale.

The reason of the rule is obvious: the Mortgagee having the right to the possession, ^{has} a certain legal interest in the goods, his creditor ^{is} at liberty to sell that interest, and if he ^{thinks} proper to do so pay the debt mentioned in the Mortgage and ^{hold} the goods himself. This principle ^{is} ^{well} ^{settled} ^{to} ^{be} too well settled to need the citation of authorities.

The Counsel would, however, respectfully refer
to authorities. It is held in ⁴5 Ala. ~~664~~ U.S. Digest
vol 1, page 751, No 342, 3, that the right of a
mortgagor of a chattel before default made,
may be sold on execution. 4 Ala 469. Personal
property under mortgage may be sold specif-
ically under execution against the mortgagor
but such sale will not prejudice the rights
of the mortgagee. 5 Ala 664.

~~This Court is of the opinion~~

Pet. for re-hearing

Filed July 25. 1850.
L. Ireland Clk.

In Supreme Court
3rd Grand Division

Isaac Cook

14

Cynthia Thayer.

The defendant will please
take notice that I shall on filing petition
move for a rehearing in this cause to day
at 10 o'clock

July 25. 1850.

Samuel & Maria
pro appellee.

accept notice

Week

pro appellee.

Cook

vs

Thayer

instn of Plt.

Filed July 25. 1880.
L. Sel and Clerk.

Isaac Cook }
vs } Appeal from Cook County Court of common
Cynthia Thayer } Pleas -

Mos. for rehearing denied - July 26. 1850.

Attorney for appellant -

Peck for appellee -

The Supreme Court.

Of June term 1857.

Isaac Cook, appellant;

vs

Guthrie Thayer appellee.

Appeal from Cook.

And this day comes the appellant by Collins & Mariner his attorneys, and says that there is manifest error in the records and proceedings of this case, in this to wit:

1st The Court erred in not excluding the Mortgage of Allen Porter to the appellee and in receiving the same in evidence, because the said Mortgage providing for a continuance of possession in the mortgagee for a period exceeding two years was void in law.

2nd The Court erred in refusing to permit the appellee to show by the testimony of the witness Wadsworth that the land upon which he had been secured by ~~Allen~~ ^{Orrin} Porter, was conveyed to said Orrin Porter in payment of goods purchased by said Wadsworth of said Allen Porter whilst said Allen was doing business in Chicago in the name of S. W. Porter, the brother of said Allen, and also that Allen Porter carried on business in Chicago in the name of S. W. Porter who was never here and who controlled and managed the business as his own.

3rd

The Court erred in rendering judgment for the appellee because the evidence shows

a case of fraud in law arising from the evidence that possession in & by the deed was to continue in the Mortgagor for a period of three years. And also because

2nd The Mortgage given in evidence was fraudulent and void as to creditors the same providing for the continuance of possession in the Mortgagor, and the Mortgage itself not having been recorded in pursuance of the Statute. And also

3rd Because possession after the conveyance continued in the Vendor, And also

4th Because the Vendor after the ~~sale~~ Mortgage continued in the joint possession of said goods with the Mortgagee, And

5th Because there was no legal evidence of any title whatever to said goods, ^{or right to possession} in the appellee. Therefore the Appellant prays said judgment be reversed.

Collins & Marione
for appellants.

In nullo est erratum —

J. K. Arnold & Wick for Appellee.

The Supreme Court.
Of June 7, 1888.

Isaac Cook
Appellant

vs
Cynthia Thayer
appellee.

Assign. of error.

assigned
by the
court
as
per
the
record

Filed June 17, 1888.
H. Keland Clk.

Collins & Moring
for appellee.

Cook
as
They

The case would add to what
has been already stated:

Chattel subject to a mortgage may be
sold on execution against the mortgagor and
the purchaser will take them subject to
the mortgage.

1 Barb. (N.Y.) 542.

Then as by the terms of the mortgage
in this case Porter was entitled to the ^{pos.} ~~pos.~~
and was in the actual possession ^{at the time of the levy} of the goods,
the officer (Cook) had a right to take
pos. of them under an execution against
him, and the pos. has no claim upon
them until default in the pay. of the deb.

While the property was thus subject
to execution against the mortgagor, the
mortgagor had no interest himself
which was subject to execution, that
interest being merely equitable in its
nature. ~~and~~ Equities are not subject
to levy. ~~That this was~~

back
Thayer

supp pet. for
re-hearing.

[Faint, illegible handwritten text, likely bleed-through from the reverse side of the page.]

In Supreme Court 9th Grad Div.
June 1. 1850.

Isaac Cook
appellant

Cynthia Thayer.

appellee.

Appeal from Cook.

George Maniener submits the following
on the part of the appellant.

The proof recited in the bill of exceptions in this cause shows, that being judgment creditors of one Allen Porter, caused an execution to be levied by the appellant, then being Sheriff of Cook County, on the goods and chattels in question. The appellee, W^{rs} Thayer (the mother in law of Porter) replevied the goods, and on the ~~trial~~ trial, in support of her title, gave a Mortgage in evidence executed to her by Porter two months prior to the sale day, to secure a debt payable three years after the date thereof, and providing for the continuance of possession in Porter until the payment of the debt. There was no other evidence of title than the Mortgage, proven; and the Mortgage was never recorded.

On the trial the appellant excepted to the introduction of the Mortgage on the ground that it was fraudulent and void as to creditors. The Court received it and overruled the objection. The Mortgage was not recorded. If a Mortgage is not recorded and possession of the property shall thereafter continue in the Mortgagor, it is void as to creditors though the conveyance may provide for the continuance of his possession. Sec 1. Rev. Stat: Title Chatter Mortgages. Ordinarily the title to personal property is evidenced by possession; and the policy of the Statute is to enforce the principle that possession must accompany and follow the deed, or such public notice of it given as will apprise third persons of its existence. To constitute that notice it must be recorded; no other act will relieve it from the statute. If not recorded and the possession continue in the vendor or Mortgagor, it is void in law and cannot be rendered valid by the proof of a valuable

for its execution. This is not a rule of evidence merely but of policy. 14 Conn ²²⁵ 240; 9 do 68;

But as this principle does not apply where a change of the possession takes place at the time of the execution of the Mortgage, though the deed be not recorded, it becomes material to enquire whether there was such a change of possession as will take the case out of the statute. The evidence shows conclusively that there was no such change; on the contrary, that the possession did actually remain in the Mortgagee after the execution of the Mortgage, and to the time of the levy and even to the time of the trial of this suit; a period exceeding two years. These facts are disclosed by Porter himself and also by his wife. Both state that the property remained in the family as it had previously to the execution of the Mortgage; that it was used by Porters family, and that Mrs Thayer was a dependent member of it having no control over the household. Porter says that the only possession taken by her "was such as the nature of her situation would admit of"; that is to say as a member of his family in which she had lived "for about half the time for a period of sixteen years." There was nothing in the conduct of these parties after the Mortgage was given, evidencing a change in their relations to the property: nothing calculated to apprise the world that any change in the title had taken place. Mrs Thayer continued to occupy her dependent position, and Porters family continued to use and enjoy the property as they had done from the time of its purchase. This was the condition of things at the time of the levy: the officer found the property in Porters house and barn adjoining. The family was engaged in packing it up; it is true Mrs Thayer was there, but in no other character than as a member of the family. There is no proof

that she was giving directions to have it packed on her account and for her own personal benefit. If ~~the~~ ^{On the contrary} of this the evidence establishes irrefutably that she was not exercising any acts of ownership at that time over the property and that after it had been explored by her in this suit, it was taken by Porter's family to Racine, ~~and that Mrs. Thayer~~ ^{while she} went to the State of Ohio where she continues to reside. The evidence goes farther; it shows that Mr. Thayer never was in Racine, and that the goods have continued in possession of Porter's family to this day, partly in use and partly stored in a ware house in the town where they reside.

But it is said that at the time of the levy, Mrs. Thayer gave notice that the property was hers. ~~But that~~ ^{the language of the officer is that she forbade him to take it.} But, ^{But, really these words the most liberal construction as amounting to notice,} it is not sufficient; there must be an actual, exclusive, and continued, change of possession to support the declaration of the party, at the time they are made. Otherwise the statute provision will prevail over the conveyance; ~~that~~ "no mortgage on personal property shall be valid as against the rights of any third person unless possession shall be delivered to and remain with the mortgagee; or the mortgage be acknowledged and recorded as hereinafter directed." The only notice the statute recognizes in such cases is the legal notice arising from the record of the deed. Without the record (the possession not being changed) the deed was void; made void by the statute and if the officer knew of it ~~not~~ he knew that it was a nullity, and not binding on third persons. 9 Conn. 70. On this point all the authorities concur; that notice of the existence of the deed will not affect the rights of creditors.

It will not avail the appellee that she was living in the family of Porter after the execution of the mortgage; that would at ~~best~~ ^{most} only establish that she was in the conjunct or concurrent possession of the

property at the time of the levy, and that is not sufficient to uphold the deed as ~~to~~ ^{against} creditors. The possession must be public, exclusive and continued. In the language of the statute, possession must not only be delivered but remain with the Mortgagee, or it is fraudulent. A concurrent possession will not satisfy the law. Exp. Camp. 14 Conn.

But even if it were conceded that at the particular moment of the levy Mrs Thayer was in possession of the property; (which the evidence does not establish) yet as that possession was only temporary and not continuing, the property ^{returning to} ~~being~~ the possession of Porter immediately thereafter, and ~~is~~ continuing therein the present time, is not sufficient to take the case out of the statute: but on the contrary, serves to show the fraudulent character of the transaction in stronger light. If Mrs Thayer had been acting in good faith, would she have permitted her security to be removed out of the state or suffered it to follow the precarious fortunes of a fraudulent bankrupt?

There was then no change of possession such as the law requires, and the deed not having been recorded, is void as to creditors: And the Court erred in giving judgment for the appellee.

There is another consideration growing out of the evidence which is equally fatal to the appellant's right of recovery in this suit. It is this. She claims title under and in virtue of the Mortgage. By the terms of the Mortgage Porter is entitled to retain possession (it is "agreed" that he shall) until default is made in the payment of the debt which it is given to secure. There is no evidence of any subsequent agreement between the parties in relation to the possession. The Mortgage is therefore the measure.

other legal rights in the premises. Then by the terms of the conveyance she is not entitled to possession, and not being entitled cannot maintain an action of Replevin. Rev. Stats. 1845: Title Replevin. If she had any other rights than those created by the instrument she should have shown what they were. Not having done so the deed must be taken as ^{the evidence of} their extent as it is of their origin. The remedy of a party not entitled to possession, is case for injury to the reversion and not trover, trespass or replevin which are founded upon the right of the party to immediate possession.

On this ground also the judgment of the Court below should be reversed.

The Court also erred in not permitting the appellants to show by the witness Wadsworth that he was in reality indemnified by Allen Porter, the Mortgagee; in cases of fraud the utmost latitude is allowed for the detection of fraud and this evidence tended to show collusion and fraud between the parties to the Mortgage. If the mistress had been in reality indemnified by Porter and Porter immediately after the goods were replevied, regained possession thereof and removed them to Racine, would not the conclusion of fraud be doubly strong from this circumstance. Though aside from this proof there ~~was~~ ^{is} enough in the case to fix the character of fraud indelibly upon it. Especially when it is considered that after the property was replevied as W^m Thayer, in this suit, it was placed in the custody of Porters family, and by them taken to Racine, whilst she proceeded to Ohio where she has continued to reside, the property meanwhile continuing with Porter, and partly in use by his family.

On this ground also, in excluding the evidence

Cook vs Thayer

Argument for Appellant

Filed June 22, 1850.
 Meland Clk.

alluded to, the Court erred and its judgment should
 be reversed.

If a case so strongly marked by fraud
 as this can be upheld there is no one in trying to
 prevent fraud and bringing the most aggravated
 cases to the attention of Courts of law.

Isaac Cook appellant
vs
Cynthia Hayes appellee

Supreme Court

We do hereby consent & agree that the
Instrument in writing hereto attached, is the original ~~instrument~~ instrument in writing
offered & given in evidence by the appellee on the trial below, & the same
may be used in the same manner in the Supreme Court, as though it was
correctly set out in the bill of Exceptions in this cause

June 28th 1850

Young Lammon, appellant's
attorney.

Shuman & Hayes - attys for appellee

Chicago January 25th 1847

Three years from date I promise to pay
Cynthia Thayer or order Fifteen hundred
and seventy six $13/100$ Dollars for value Received
The Interest to be paid semiannually
\$157 & $\frac{13}{100}$ Dollars on Interest

Allen Porter

Know all men by these Presents
That I Allen Porter for and in consideration
of the sum of Ten Dollars to me in hand paid
by Cynthia Thayer the Receipt whereof I
do hereby acknowledge for the further
considerations of securing the payment
of the following described promissory Note
One Note dated January 25th 1847 to Cynthia
Thayer or order for the sum of Fifteen hundred
and Seventy five ¹³/₁₀₀ Dollars payable in three years
from date as above interest Semiannually for
Matur Primes

Signed Allen Porter
I do hereby sell and convey to the said Cynthia
Thayer her executors administrators and assigns
the following described Personal property to wit
1 Hair Seat Sofa 1 Bedstead 2 Mahogany
1 scented Rocking Chair 18 small Mahogany
Hair Seat Chairs 2 Parlor Tables 2 Mahogany
Tables 1 dining Table 1 Work Table 1 Work Stone
4 Hair Crickets 4 Common Crickets 1 Mattress 7 Feather
-ed Beds 30 pair Sheets 20 pair Pillow Cases
2 white Counter Pains 8 woollen Blankets
6 Comforters 14 table Cloths 40 towels & Napkins
2 set of China 2 1/2 do China Plates 12 do
plates 1/2 do covered dishes 1 do Platters
2 do Coffee & tea Cups 1 do Tumblers 1 do
Wine Glasses 3 do tumblers 2 stands for Crockery
3 glass dishes 1 Baking Pitcher 1 glass Butter
tub 4 Black Tin tea Pots 1 Copper Pot
1/2 do Large Kettle 2 cast-iron Lamps 1 pair Grand
dials 1 pair Britannia Lamps with shades
8 pair Britannia Lamps 6 vases 2 Metal Cereal
Measures 7 Looking Glasses 12 large Picture Frames
6 silver Table Spoons 16 tea Spoons 1 sugar tong
1 Carver 2 salt Spoons 2 do Bowls 2 Brass Kettles
3 pair shovel & Tongues 3 pair Axes
12 hearth Rugs 75 yards Marbled Carpets
6 small 2 small Carpets 20 yards of Oil Cloth
4 do heavy Knives & Forks 1 table Spoon 1 set
of Bed curtains 1 Hair Lamp 1 Round Table

A. Porter
To
C. Thayer
N. 160th

State of Illinois
County of Cook

On the 2nd day of February
A.D. 1847 this deed was filed
for record and duly recorded
in Book 22, page 65

W. J. Rogers

Recd
Filed July 5. 1880.
A. C. and Ck.

paid
Filed Aug 2nd 49

6 Leather Trunks 2 Parlor Stoves
2 Gold Watches 4 Bed Stacks 2 Coverlets
Covers

To Have and to hold the above
person at Property to her Executor ^{and} Assign
~~assign~~ Executors Administrators and assigns
and provide always and it is agreed that if
the said Allen Porter shall well and truly
pay said promissory Note according to the
tenor and effect thereof then this bill
of sale is to be void and of none effect
and provide also and it is agreed between
said parties that the said Porter is to have
and retain possession of said property
until default is made in the payment
of said Note

Our testimony whereof we have
this day set our hands and seals

In the presence of
Henry W. Clark,

Allen Porter
J

State of Illinois
Cook County } ss.

This Mortgage was acknowledged
before me by Allen Porter the Mortgagor this
25th day of January 1847

W. H. Churchill J. R.

50

Isaac Cook

Eynthia Thayer

350

Prepared

12028