

14484


No. _____

Supreme Court of Illinois

Hammond

vs.

People

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 10

PEOPLE'S CAUSES.

People's Causes

Hammond

vs

People's

4484

863

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Plas, before the Honorable George Manierre Judge of the Seventh
Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of
Cook County, in the State aforesaid, and at a trial thereof begun and held at the Court House
in the City of Chicago, in said County, on the 13th Monday, (being the
seventeenth day) of February in the year
of our Lord One Thousand Eight Hundred and forty three and of the
Independence of the said United States the eighty seventh

Present, Honorable George Manierre Judge of the 7th Judicial Circuit }
of the State of Illinois. }

Joseph Knopf States Attorney.

David S. Hammond Sheriff of Cook County.

Attest, William B. Church Clerk.

Be it remembered, that herebefore
to-wit: on the 13th day of March in the year aforesaid,
there was filed in said Court, a Certain Petition
for Habeas Corpus, which is in the words & figure
following To-wit:

"State of Illinois
Cook County ss

To the Honorable George Manierre Judge
of the Cook County Circuit Court-

Your Petitioner Paul Kella
respectfully represent to your Honor, that he is an
Italian by birth and has been for the last seven years
engaged in business on Clark Street in the City of
Chicago in said Cook County. That on the 12th day of
March 1863 William M. Douglas represented him-
self to be a Constable came to your petitioner place

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Business on paid black sheet and arrested your
petitioner and by force and against the will of
your petitioner compelled your petitioner to accom-
pany him to the Cook County Jail in said Chicago
and then and there delivered your petitioner
as a prisoner to David S. Hammond the Sheriff
of said Cook County as your petitioner is informed.
That your petitioner was then and there placed
within said jail and deprived of his liberty
and has ever since then so remained. That as
your petitioner is informed he is now in the custody
of said Sheriff and is by him deprived of his liberty
and confined in said jail. That as your petitioner
is informed he is so confined and imprisoned by
virtue of a certain writ issued on the 11th day of
March A.D. 1863 by one Galvin De Melf acting as
a Justice of the Peace in favor of one Peter Corbin
and against one Powell
Your petitioner further states that he is unable to
read or write in the English language and has no
knowledge of the contents or effect of said writ except
as he is informed by others, that he speaks & understands
the English language very indifferently but as he is
informed and believes the said writ is not issued
against your petitioner and does not warrant or
authorize the arrest and imprisonment of your
petitioner but was issued upon a judgment against
one Powell in favor of said Corbin entered
by said De Melf as Justice of the Peace

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Your petitioner further states that he was not present at the time of the rendition of said judgment and was not a party thereto, and as he is informed and believes is in no manner affected thereby.

Your petitioner further states that he has never been known by or used the name of — Powell either in the City of Chicago or elsewhere, and has never used or been known by any other than his real name Paul Bella.

Your petitioner further states that he is now and has been for years well known in said City of Chicago in the vicinity of his said place of business by the name of Paul Bella and is and has been known by no other name.

Your petitioner further states that he is confined and restrained as aforesaid, upon or by virtue of said writ aforesaid issued against said Powell and that his said confinement and restraint is illegal because the said writ under used by virtue of which he is so confined is not issued against your Petitioner and contains no warrant or authority for said Sheriff to so confine and restrain your petitioner.

Your petitioner attaches a copy of said writ to this his petition,

Your petitioner therefore prays that a writ of Habeas Corpus may be issued as provided

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by statute to the said David B. Hammond
and and that your petitioner may be dis-
charged from his said imprisonment and
returned to his liberty his

Paul X bella,

mark

Paul bella the above petitioner being duly sworn
on oath says that the foregoing petition has
been read to him, that he knows the contents
thereof, and that the matters therein stated
are true

Paul X bella
mark

Subscribed & sworn to before
me this 13th day of March

AD 1863. Heile Almy
Notary Public

Copy of Writ.

State of Illinois
Cook County ss

The People of the State of Illinois to
Any Constable of said County, Greeting

Whereas in a certain suit lately before me the under-
signed a Justice of the Peace in and for said County
depending, wherein Peter Corbin is plaintiff and
Pomell is defendant and wherein the amount claimed
and in controversy did not exceed One hundred dollars
judgment was rendered by me in said suit in a

5-3
plea of *Prova* and Conversion against said defendant
for the sum of fifty seven dollars - Cents besides
Costs of suit - which are herein endorsed and taxed
at three dollars; And whereas also the said plaintiff
has elected Execution to be issued on said judgment
- against the body of said defendant for the
Collection thereof, with Costs as provided by law
- You are therefore hereby Comanded that you
take the body of said defendant - and him safely
Keep so that you have him to satisfy unto the
said plaintiff the judgment aforesaid, and if
the same be not forthwith paid then you will
Commit said defendant to the Custody of the Sheriff
or Jailor of said County there to remain until
said judgment and Costs are fully paid and
satisfied or he become otherwise legally discharged
and hereof make due service and return as the
law directs, within seven days from the date
hereof - Given under my hand and seal
this 11th day of March 1863
Calvin DeMalt Seal
Justice of the Peace "

On the back of said petition appears the following Endorsement
Set a writ of Habeas Corpus to be issued
On the within petition, returnable according to law
March 13. 1863.
George Manierre
Judge re

And thereupon. to-wit: at the February Term of said Court. to-wit: On the said 13th day of March in the year aforesaid, the following proceedings, among others, were had and entered of record. To-wit:

"The People of the State of Illinois
at the relation of Paul Belle

David S. Hammond

Petition for Habeas Corpus

On reading and filing the Petition of the said Relator and on motion of Smith Hart and Clyde of Counsel it is ordered that a writ of Habeas Corpus be issued by the Clerk of this Court directed to the said David S. Hammond commanding him to forthwith bring the body of the said Relator Paul Belle into Court

And thereupon. to-wit: On the said 13th day of March in the year aforesaid, there was issued out of and under the seal of said Court the Peoples writ of Habeas Corpus, directed to David S. Hammond, in words and figures following. To-wit:

State of Illinois
County of Cook ^{ss}

The People of the State of Illinois
to David S. Hammond: Meeting
We command you that you do forthwith without

gt

excuse or delay. bring or cause to be brought before
our Circuit Court of Cook County, now sitting at
the Court House in Chicago, the body of Paul Bella
by whatever name or addition he may be known or
called, and who is unlawfully detained in your
custody as is paid, together with the day and
cause of his capture and detention, then and
there to abide such order and direction as my
said Circuit Court shall make in that behalf
whereof fail not and make due return forthwith
under penalty of what the law directs

Seal

Witness William L. Church Clerk of
said Court & the seal thereof at
Chicago aforesaid this 13th day of
March 1863.

Internal
504
Revenue

Wm L. Church Clerk

Endorsed

By the Writ of Habeas Corpus Act

And afterwards, to-wit: on the said 13th day of March
in the year aforesaid, said writ of Habeas Corpus was
returned into the Court aforesaid by said David S.
Wamman, & with the following return endorsed thereon
to-wit:

"To the Hon. George Wamman Judge of
the Circuit Court.

The undersigned Sheriff of Cook County
makes return to the within writ, that he holds the

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defendant Powell in custody, under and by virtue of a Cuda issued by Co. Wolf Justice of the Peace dated March 11. A.D. 1863 under and by virtue of which said defendant was arrested on the 12th day of March 1863. and committed to jail, and is now held by virtue of said Cuda, a copy of which is hereto annexed and made part of this return this 13th day of March A.D. 1863.

David S. Hammond Sheriff
By G. Fisher deputy

State of Illinois
Cook County ss

The People of the State of Illinois to any
Constable of said County, greeting

Whereas in a certain suit lately before me, the undersigned, a Justice of the Peace in and for said County depending, wherein Peter Corbin is plaintiff and Powell is defendant and wherein the amount claimed and in controversy did not exceed One hundred dollars, judgment was rendered by me in said suit in a plea of Trever and Conversion in favor of said plaintiff and against said defendant for the sum of Sixty seven dollars — Cents & costs, which are hereon endorsed and taxed at Three dollars, And whereas also the said plaintiff has elected execution to be issued on said judgment against the body of said def^t in the collection thereof with Costs as provided by law

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The People of the State of Illinois
at the relation of Paul Bella

vs
David S. Hammond

Habeas Corpus

And now on this day
 in obedience to the said writ of Habeas Corpus
 issued in this cause, comes the said David S. Hammond
 in his own proper person and by Bailey Gayle his attorney
 and makes due return to the said writ viz. "That
 he has brought the body of the said Paul Bella with
 him into Court, and sets forth in his return the
 Warrant and Authority by which he holds the said
 Bella in Custody, And the parties being now both
 in Court, upon their agreement it is ordered that this
 cause and the matters involved therein be heard and
 considered by the Court without the formality of plead-
 ings each party being permitted to introduce any
 Evidence which may be considered by the Court pertinent
 to the issues in the cause; And it appearing to the
 Court from the Petition and return of the said
 defendant to said Writ of Habeas Corpus and the
 Evidence adduced that the said Relator is held in
 Custody by said defendant under and by virtue of
 an Execution issued by Calvin D. Wolf, a Justice of
 the peace of said Cook County against the body
 of Powell upon a judgment recovered against
 Powell by one Peter Corbin in a suit wherein the
 summons was issued against Powell and it further
 appearing that the Relator's name is Paul Bella

and that he has never been known or called by the name of Powell, and that no appearance was made by him in the said suit after the service of said summons upon him and that said judgment was rendered by default. It is therefore considered and ordered by the Court, that the said arrest was and the same hereby is declared to have been and to be illegal, and that the said defendant be and he is hereby commanded to release the said Relator from Custody and for so doing this order shall be his sufficient warrant and protection; And it is further ordered by the Court that the said defendant pay the Costs of this proceeding and that the People on the relation aforesaid have execution therefor. Whereupon on motion of said defendant five days are given for the purpose of preparing and filing a Bill of Exceptions, and thereupon the plaintiff excepts to the filing of a Bill of Exceptions in said Cause upon the ground that no appeal or writ of Error will lie from a judgment in Habeas Corpus, which Exceptions are ordered to be entered of record.

And afterwards, to-wit: on the 17th day of March in the year aforesaid, said defendant by his said attorneys filed in said Court his certain Bill of Exceptions which is in the words and figures following, to-wit:

In the Circuit Court of Cook County -
February Term A.D. 1863.

The People of the State of Illinois
On the Relation of Paul Bella

vs

David B. Hammond Sheriff of Cook County -

Be it remembered that on the 13th day of March A.D. 1863 being one of the days of the February Term of said Court, this matter came on for hearing before said Court, the Relator being present in person and by Smith Waukelyde his attorney and the defendant by Bailey and Bar his attorney and by consent was heard by the Court without any formality of pleading upon the evidence, as follows. to-wit -

First the said Relator with the consent of the Court introduced and read as evidence the said affidavit of William Wright attached to the said petition as follows. to-wit -

State of Illinois
Cook County - ss

William Wright being first duly sworn on oath says that he resides in Chicago and does business at Number 219 South Clark Street, that he has known Paul Bella the Petitioner in the annexed Petition for about seven years, that said Paul Bella has never been known or called by any other name

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than his true name as this affiant believes and has never been known or called by the name of "Powell" to the knowledge or belief of this affiant. This affiant further states that said Paul Bella is an Italian by birth as this affiant is informed and believes, and that he speaks the English language very imperfectly and further deponent saith not.

Subscribed & sworn to before Me Wright
on this 12th day of March 1863

(Seal) Miles Almy .M.P.

and the said Petitioner with the consent of depts Council further introduced and read in evidence the said affidavit of John W. Helyde attached to said petition as follows to-wit

"State of Illinois }
Cook County }

John W. Helyde of the City of Chicago being duly sworn on oath says that he knows Paul Bella the Petitioner named in the annexed petition. That he has known him well for a period of about seven years. That said Paul Bella has only been known & called by his true name of "Paul Bella" and has never been known or called by any other name as this affiant believes. This affiant further states that said Paul Bella is well known by numerous persons in the City of Chicago, and has never been known or called by the name of "Powell" as this affiant

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Believes - That any person seeking to know the true name of said Petitioner could have learned the same by making inquiry in the vicinity of his place of business, as he is well known by many persons both American and Italian and further deponent faith not-

Subscribed + sworn to before John W. Kelly
me this 12th day of March
A.D. 1863. Miles Almy
Seal J.P.

And the said Relator with the consent of depts Council further introduced and read in Evidence the said affidavit of Louis Bella attached to said petition as follows, to-wit -

State of Illinois }
Cook County }
} 11

Louis Bella of the City of Chicago being duly sworn on oath says that he is well acquainted with Paul Bella the Petitioner named in the annexed petition - That said Paul Bella has resided in the City of Chicago for about ten years last past and is well known by a large number of persons in said City - That said petitioner is well known in the City of Chicago by his name "Paul Bella" and is not now and never has been known or called by any other name - That he has never been known or called by the name "Powell" either here or elsewhere; and any person wishing to know

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his name could have learned it up on Enquiry at almost any place of business on Belmont Street in the vicinity of said Paul Bella's place of business. This affiant further says that said Paul Bella is in Italian by birth, and speaks + understands the English language very imperfectly, and that he is wholly ignorant of the laws of the Country or of the nature or effect of legal process, that he never was a party to a suit in this Country as this affiant believes and does not read or write the English language, and further depaunt with not subjected + sworn to before me Louis Bella

this 12th day of March A.D. 1863

Seal

Wm. Almy
J.P.

The said defendant then called as a witness Daniel W. Corbin, who testified that he was the agent of said Peter Corbin in said writ of Habeas ad Satisfaciendum mentioned, that said Peter Corbin was not a resident of Illinois, that he (witness) knew the Relator by sight, but did not know his name, that said Peter Corbin having, as witness believed, a Cause of action in Trover against the Relator, witness had a conversation with said Relator before any suit was commenced against him as to said Cause of action, and in said conversation witness asked the Relator his name but the Relator would not tell him what it was that the Relator spoke good English, that

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Witness afterwards commenced a suit in favor of Peter Corbin against the Relator by the name of Powell before Justice D Wolf + at the time + place of the trial one of the Relator was present but did not appear in said suit; and the witness caused said suit to be dismissed at the cost of said Peter Corbin as he had not filed security for costs therein that witness then said there asked relator what his name was but the Relator would not tell him and the witness then commenced another suit in favor of Peter Corbin before said Justice against the Relator by the name of Powell, in which suit the judgment was obtained, upon which said Case was issued, that the Relator was the person he intended to sue

Defendant also called as a witness William M. Douglass, who testified that he was the constable who served the summons on the relator in the last mentioned suit - as well as in the suit which was dismissed, that the Relator was the person on whom he intended to and did serve the summons.

The defendant further introduced in Evidence the docket of the said Justice and the original summons and the security for cost, showing a summons and service thereon upon Powell in a suit of Peter Corbin vs Powell and a judgment thereon by default conforming with the recitals in said Case in favor of Peter Corbin vs Powell

The foregoing was all the Evidence

15⁹

introduced and thereupon on the 14th day of March
being still one of the days of the February Term.
the said Court decided that the said Relator ought
to be discharged from under the said bonds and
did accordingly order him to be discharged, to which
decision and order of said Court the said defendant
then and there Excepted, and prays that this his
Bill of Exceptions may be signed and sealed by the
Court and recorded and made a part of the record
which is accordingly done this 14th day of March
1863.

George Manwaring Seal
Judge of 7th Judicial
Circuit, Ills

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I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All papers on file & all proceedings entered in a certain cause debt pending in said Court, on the Common side thereof, wherein Paul Della was Petitioner and David S. Hammond Respondent

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this Twenty fifth day of March A. D. 1863.

Wm L Church Clerk.



In the Supreme Court
Third Grand Division

David S. Hammond

The People of the State
of Illinois in the relation
of Paul Cella

And the said plaintiff
says that in the proceeding aforesaid
and in the giving of judgment
aforesaid, the said Circuit Court
of Cook County erred

First - In discharging the
said Paul Cella from the
custody of the said plaintiff.

Second - In adjudging the
costs against the said plaintiff

Wherefore he prays that
the judgment of the said Circuit
Court may be reversed &c

Bailey, Gay & Williams
Plff atty.

Hammond

vs

The People vs.
rel. Cella

Transcript and
Assigt. of Errors

Filed April 23^d 1863
L. Deland
Clerk

(Copy)

" Plaintiff
vs
Hyeringer & Co

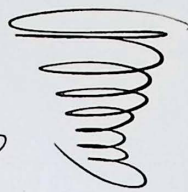
Defendant

And the said Plaintiff says that his said writ by reason of anything by the said Defendant in his said plea alleged, ought not to be quashed, because he says that the said Defendant is the same person against whom the said Plaintiff recovered the said Judgment on the said declaration mentioned by the name of Parent Hyeringer, and not another and different person, and that he is ready to verify, wherefore he prays judgment that the said Defendant may answer over.
D. M. Palmer, p. q.

Same
vs
Same

And the said Plaintiff for further replication to the said plea of the said Defendant by leave &c. says that the said Defendant ought not to be admitted or received to plead the plea by him above pleaded, because he says that the summons and copy of the Declaration in the said record set forth were duly delivered to, and served upon the said Defendant by the name of Parent Hyeringer, as is therein recited and set forth, and that the said Plaintiff thereupon by the consideration of the said Supreme Court of the State of New York, in the City and County of Albany in the third Judicial District of said State recovered against the said Defendant the said Judgment in the said Declaration mentioned, and that he is ready to verify by the record &c. wherefore &c.
Palmer, p. q.

State of Illinois
Supreme Court
Second Grand Division



D,

William A. Turney, Clerk of said Supreme Court, hereby certifies that the foregoing is a true copy of the Replication to the plea in abatement in the Case of *Hubert Guinand vs Saunt Hysinger, et al.*, reported in 15th volume of Illinois Reports at pages 286 & 289, as appears from the record on file in my Office.

In Testimony whereof I
haveunto set my name & the
Seal of said Court at
Springfield the 23^d
day of March A.D. 1863.

W. A. Turney

Clerk Supreme Court



Hammond

The ^{on} Proper
ex rel. Cella
and Vacaro

Copy of Replikations
from Springfield



Filed Apr 23. 1863

S Seland M

In the Supreme Court
David S. Hammond
Plff. in Error

vs
The People ex rel.
Paul Cella
Def't in error
and

Same

vs
Same ex rel.

Joseph Vacaro

As these two cases are
precisely alike we shall
reply to the Defendants brief
in both cases at once.

The only point to which
we wish to call attention
is the first one made by Def't.
i.e. will a writ of error lie
to a final decision made
on a writ of Habeas Corpus?
In Yates v. The People 6
Johns. R. 335. the Court of Errors
in New York decided the question
affirmatively.

In the matter of Negus 10
Wend. 35-39 The Chancellor/Wallcutt
says "In England it is still an open
question whether a writ of error
will lie on the refusal to grant

a habeas Corpus, although upon the decision made when the prisoner is brought up, it does lie" —

That is an error — The prisoners were brought up and discharged, which prevents a new arrest upon another Ca. Sa. on the same judgment. R. S. Ch. 48. Sec 7. & operates as a final decision upon a right of property, as well as personal liberty.

In Holmes v. Jenison 14 Peter 540 a writ of error was prosecuted from a final order a judgment of the Supreme Court of Vermont, and though no decision was made, because the Court was equally divided, yet the point on which they divided was not the one in question in this case, but four of the Judges at least (p. 561) upon all the points were in favor of reversing the judgment below, & another (p. 597) held that a judgment upon a writ of Habeas Corpus could

be reviewed by writ of error
Upon this point we have the
authority therefore of the names
of Taney, Story, McLean, Wayne
Caton, as well as the decisions
of the New York Court of Errors.

To which add the reasoning
contained in the cases of
Slow vs. The State Bank of Illinois
1 Scam. 428. and Stuart
vs. The People 3 Scam 395 &
the analogies to be drawn
therefrom, and the decision
must be in favor of the
jurisdiction of this Court.

Bailey, Gay & Williams
Cly. atty.

10 Peoples

David S. Hammond
Puff in Evr

ⁱⁿ
The People Exp
relations &c

Puff points in
reply —

Filed May 8. 1863.
Island
C. K.

Bailey, Gary & Williams
Puff attys.

David S. Hammond *vs* The People of the State of Illinois
in the Supreme Court of the State of Illinois
on the relation of Third Grand
of Paul Cella *vs* Division
April Term
A.D. 1863

Error to the Circuit Court
of Cook County.

Judgment at March Term
A.D. 1863 - in favor of Defendants
in Error against Plaintiff in Error.

Clerk of the Supreme Court
will please issue writ of Error
and *scire facias* as above.

Bailey, Gay & Williams
Plff. attys.

\$10
D. S. Hammond
7
The People's ex. ed.
Receipts

Filed April 14, 1863,
L. Island
Ck.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

DAVID S. HAMMOND, Sheriff of Cook County,
Plaintiff in Error,

vs.

The People of the State of Illinois on the Relation of
PAUL CELLA,
Defendant in Error.

} ERROR TO COOK COUN-
TY CIRCUIT COURT.

ABSTRACT OF RECORD.

Rec. p. 1 **Petition** by the relator for a writ of habeas corpus; showing that
2 he was arrested on the 12th of March, 1863, by a constable, and put in
the jail of Cook county, in the custody of defendant below. That the
imprisonment was under a *ca. sa.* issued by a Justice of the Peace,
against one Powell. That relator cannot read or write English, and
knows nothing of the contents of the writ, except as he is informed by
others, he being an Italian; but is informed that the *ca. sa.* is not against
him, and does not warrant his arrest, but was issued upon a judgment
against one Powell.

3 That he was not present when the judgment was rendered, and was
not a party thereto, and believes that he is in no manner affected there-
by. That he has always been known by his true name, Paul Cella.

4 **Copy** of *ca. sa.* upon a judgment in an action of *Trover and Conver-*
sion, in favor of Peter Corbin, and against Powell.

6 **Writ** of habeas corpus.

7 Return of defendant below thereon that he holds the relator by virtue
of the said *ca. sa.*

8 **Copy** of *ca. sa.* again.

10, 11. **Decision** of the court reciting that it appears that the relator is
held in custody by defendant below by virtue of an execution issued by
a Justice of the Peace against the body of Powell upon a judgment re-
covered against Powell by Peter Corbin, in a suit wherein the summons
was issued against Powell. That the relator's name is Paul Cella ;
that he has never been known or called by the name of Powell ; that no
appearance was made by him in said suit *after the service of summons*
upon him, and that said judgment was rendered by default ; therefore
discharging relator from custody, and adjudging the costs against de-
fendant below.

12 **Bill of Exceptions** by defendant below, containing the evi-
dence.

12, 13, 14 **1st.** That relator's name is Paul Cella, and he was never known
or called by any other, and knows but little English ; that he has lived
in Chicago many years, and his name could be readily ascertained by
any body.

15 **2d.** Testimony of Daniel W. Corbin, that he was the agent of said
Peter Corbin in said writ of *capias ad satisfaciendum* mentioned ; that
said Peter Corbin was a non-resident of this State ; that he (witness),
knew the relator by sight, but did not know his name ; that said Peter

Corbin having, as witness believed, a cause of action in trover against the relator, witness had a conversation with the relator before any suit was commenced against him as to said cause of action; and in said conversation witness asked the relator his name, but the relator would not tell him what it was; that the relator spoke good English; that witness afterwards commenced a suit in favor of Peter Corbin, against the relator, by the name of Powell, before Justice D'Wolf, and at the time and place relator was present, but did not appear in said suit, and the witness caused said suit to be dismissed at the costs of said Peter Corbin, as he had not filed security for costs thereon; that witness then and there asked relator what his name was, but relator would not tell him, and the witness then commenced another suit in favor of Peter Corbin, before said Justice, against the relator, by the name of Powell, in which suit the judgment was obtained upon which said *ca. sa.* was issued; that the relator was the person he intended to sue.

Also, testimony of William M. Douglass; that he was the constable who served the summons on the relator in the last mentioned suit, as well as in the suit which was dismissed; that the relator was the person upon whom he intended to and did serve the summons.

Also, the docket of the Justice, and the original summons, and security for costs, showing a summons and service thereon upon Powell, in a suit of *Peter Corbin vs. Powell*, and a judgment thereon by default, conforming with the recitals in said *ca. sa.* in favor of Peter Corbin against Powell.

This was all the testimony.

Exception to the decision of the court discharging relator from custody.

ERRORS ASSIGNED.

1. That the Court erred in discharging relator from custody.
2. That the Court erred in adjudging costs against defendant below.

POINTS FOR PLAINTIFF IN ERROR.

The summons having been served upon the relator, and he being the person intended, the misnomer was matter in abatement only, and the validity of the judgment is not affected thereby.

Guinard vs. Heysinger, 15 Ill., 288, is in point. In the court below, it was doubted whether it sufficiently appeared, from the report, that the judgment there in controversy was by default. But we now have a certified copy of the replications then before the court, which we file with the record in these two cases, which replications are as follows :

“ GUINARD,
 vs.
“ HEYSINGER, &c. } *Debt.*

“ And the said plaintiff says that, his said writ, by
“ reason of any thing by the said defendant, in his said plea alleged,
“ ought not to be quashed because he says that the said defendant is the
“ same person against whom the said plaintiff recovered the said judg-
“ ment on the said declaration mentioned by the name of Barent Hy-
“ singer, and not another and different person ; and this he is ready to
“ verify, wherefore he prays judgment that the said defendant may an-
“ swer over.

“ SAME, }
 vs. }
“ SAME. }

“ And the said plaintiff, for further replication to the said plea
“ of the said defendant by leave, &c., says that the said defendant ought
“ not to be admitted or received to plead the plea by him above pleaded,
“ because he says that the summons and copy of the declaration in the
“ said record set forth were duly delivered to and served upon the said
“ defendant by the name of Barent Hysinger, as is therein recited and
“ set forth, and that the said plaintiff thereupon, by the consideration of
“ the said Supreme Court of the State of New York, in the city and
“ county of Albany, in the third judicial district of said State, recovered

“ against the said defendant the said judgment in the said declaration mentioned, and this he is ready to verify by the record, &c., wherefore,” &c.

Certified by Wm. A. Turney, Clerk, with seal of the Court, March 23, 1863.

Certainly a judgment by default is to be intended from this last replication, as the pleading will be construed most strongly against the pleader.

By suffering the judgment to pass against him by the wrong name, the relator is estopped from availing himself of the misnomer.

Conclusion of opinion 15 Ill. 289.

All the cases which have been heretofore cited by the relator's counsel were cases of mesne, not final process, except the case in 6 Cowen. And though the court there say that they see no distinction between mesne and final processes, yet the case called for no remark on that point, as the process before them was an attachment for contempt, which varied in name from the order adjudging the party guilty of a contempt; so there was a clear departure in the process from the authority under which it was issued. While in *Reeves vs. Slater*, 7 B. & C. 486, (14 E. C. L. R. 220), the court fully recognizes and declares such a distinction in a case which did call for remark on the point.

The name by which the relator was sued might be a surname as well as any other; and there is no law requiring any person to have two names, or a baptismal name, or to be baptized at all, and in fact a large portion of people never are baptized in this country; so that the name by which the relator was sued, might, for any law or binding usage to the contrary, have been his only and true name. If he had, from the time he settled in Chicago, called himself by that name only, the courts would never require him to affix another to either end of it.

In *Nelson vs. Highland*, 13 Cal. R. 74, where one of the plaintiffs was described as Doble, on demurrer the court say, “ We cannot judicially know that one of the plaintiffs had either a Christian or heathen name.”

Smith vs. Bowker, 1 Mass. R. 76, is also in point, though that was a question of wrong addition instead of name: and the court, in 6 Cowen, are mistaken when they say that the party had appeared and waived an objection; for, as will be seen by the report, "no person appearing to answer," the plaintiff "was regularly called and defaulted." And as the court say in that case, so in this: "There is neither law nor honesty" in this method of proceeding.

The relator was twice summoned by the same name, and on the first occasion attended at the time and place to which he was summoned.

Twice he refused to tell his name, (page 15 of the record).

In his petition for the writ of habeas corpus, he does not pretend that the judgment is unjust, or that he did not have due notice of the suit, but only alleges that "he was not present at the time of the rendition of the judgment." (Page 3 of the record).

In Chitty Pl. 245, it is said: "Though the *plaintiff* appeared for and declared against the defendant in the *wrong name*, as mentioned in the writ, that would warrant him, in proceeding to judgment and *execution*, if he omitted to object to the irregularity in due time."

Citing *inter alia*, 6 Taunton, 115, (1 E. C. L. R. 534), *Smith vs. Patten*, q. v. See, also, *Oakley vs. Giles*, 3 East. 167.

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Hammond

^{vs}
The People
Ex rel. Cella

Abstract &
Pffs points

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