No. 12919

Supreme Court of Illinois

Adams et al.

vs.

Shepard

194

12919

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

MICAJAH L. ADAMS and PHILANDER BUTTERFIELD
vs.
BOHAN S. SHEPARD.
} *Error to Cook Circuit Court.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

WALTER B. SCATES,

Of Counsel for Plaintiffs.

Filed May 5. 1860

L. Leland

Clerk

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

MICAJAH L. ADAMS and
PHILANDER BUTTERFIELD
vs.
BOHAN S. SHEPARD.

} *Error to Cook Circuit Court.*

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

An issue of property in the plaintiff in error, Adams, was submitted to and tried by the Court, in an action of replevin, on the 5th March, 1860, and taken under advisement until the 14th March. On that day the Court found the issue for the plaintiff in error, Adams, and the following minutes were made:

By the Court:

"March 14—Judgment for defendant, with *retorno habendo*. Motion for new trial overruled—suspend till to-morrow, because question of damages not determined."

By the Court:

"March 14—Judgment for defendant with *retorno habendo*.

Damages assessed at $——. Motion by plaintiff for new trial overruled. Excepted."

The following entry was also drawn up at large upon the order book.

"This day again came the said parties in person and by their respective attorneys, and the Court being now sufficiently advised of and concerning the matter submitted, doth order and consider, that the issue of property herein be found for the defendant, and that he have return of the property described in the declaration, and that defendant's damages for the detention of said property be assessed at *seven hundred* dollars."

Thereupon defendant objects to the amount of damages assessed by the Court as insufficient; whereupon the Court directs the Clerk not to enter the said judgment until the subject of damages shall be further considered, and said cause is again taken under advisement, with a view to reconsider the subject of damages.

After this the parties separate, and plaintiff below, by his counsel, without any notice to defendants or their counsel, returned into Court and entered a motion for leave to enter a non-suit; which was allowed on the 30th March, and defendant in error entered a non-suit in the cause.

This order of the Court is erroneous.

I.

The power of the Court to order a non-suit, or allow a non-suit to be entered by plaintiff, is limited as to the point of time before the jury retire from the bar, and before the Court *decides and announces his decision* upon the *facts.*

The non-suit in this case was allowed upon the case of *Howe* vs. *Hanoun*, 17 Ill. R. 494.

The statute has modified the common law, (Cooke's Stat., p. 261, sec. 29,) by limiting the right to suffer non-suit before the jury retire. By analogy, the right is gone at all events when the judge has announced his decision upon the facts.

The rule in 17 Ills. 494, does not sanction the entry after a cause is decided by the Court and before an entry of a minute by the Judge or Clerk. There were no such facts in that case. On the contrary, the plaintiff's counsel made affidavit that he still occupied the floor and had not concluded his argument of the cause at the time he entered the non-suit.

Theargument of the Judge was simply to show, by the making of *minutes* of a decision, that it had been so made; whereas, until the making of such minutes by the Court or Clerk, there might be room left for dispute whether the cause had yet been decided.

This argument never was intended as laying down a rule to be determined by that fact.

But even on that illustration, this case falls within it, because such minutes were made by both the Judge and Clerk, that the issue had been found for the defendant below, and a *retorno* awarded.

This decision and entry were not suspended by what occurred in relation to the amount of damages.

The right of recovery was fully determined in relation to both questions. The only question under advisement was as to the amount of damages.

Courts should not favor a rule that is intended to keep questions open after they have once been fairly and fully investigated and decided. On the contrary, the law favors the rule which puts an end to litigation.

There is no case where its application is more strongly and justly demanded.

All the proofs in the power of each party had been introduced, heard, weighed, and decided. Defendant had more; he had excluded Butterfield from the witness stand by a technical rule, because he was a party, though he had disclaimed. Having thus a full and fair hearing and a just adjudication against him, he should be left to abide it as final, unless revised by appeal or writ of error.

WALTER B. SCATES,
Of Counsel for Plaintiffs in Error.

194

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

APRIL TERM, 1860.

MICAJAH L. ADAMS and
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vs.
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There is no case where its application is more strongly and justly demanded.

All the proofs in the power of each party had been introduced, heard, weighed, and decided. Defendant had more; he had excluded Butterfield from the witness stand by a technical rule, because he was a party, though he had disclaimed. Having thus a full and fair hearing and a just adjudication against him, he should be left to abide it as final, unless revised by appeal or writ of error.

WALTER B. SCATES,
Of Counsel for Plaintiffs in Error.

194

Supreme Court of Illinois--April Term, A. D. 1860.

MICAJAH L. ADAMS, AND
PHIRANDA BUTTERFIELD,
Plaintiffs in Error.

VS.

BOHAN S. SHEPARD,
Defendant in Error.

Error to Cook County.

ABSTRACT OF RECORD.

This was an action of Replevin, commenced in the Circuit Court of Will County, on the 24th day of October, 1857, by the Defendant in Error against the Plaintiffs in Error, to recover possession of a Canal Boat called "L. Hatton Jr.," and formerly known as the "G. W. Shepard."

Rec. p. 2 The writ was issued on the day aforesaid, and returned by the Sher-
3 iff of Will County, duly executed on the same day.

4 The Declaration is in the usual form, alleging the wrongful detention of the Property by the Plaintiffs in error—and the Pleas filed in the Court below by Plaintiffs in error, were *non detinet*, and a plea of Pro-
5 perty in Micajah L Adams.

The case was then by change of venue from said Will County, brought into the Circuit Court of Cook County, where the subsequent proceedings were had.

May 26th, 1858, defendant in error, filed in the Court below his Replication in due form.

6 On the 2d day of March, 1860, the plaintiffs in error withdrew their plea of *non detinet*, and by consent of the parties, a jury is waived, and the cause submitted to the Court for trial upon the issue of property.

7 The testimony and arguments of counsel were concluded on the 5th day of March, 1860, and the cause taken under advisement by the 8 Court.

On the 14th day of March, 1860, the following order was made and entered of record in said cause, to wit :

"This day again come the said parties in person, and by their respective attorneys, and the Court being now sufficiently advised of and concerning the matter submitted, doth order and consider that the issue of property herein be found for the defendant, and that he have return of the property described in the declaration, and that defendant's damages for the detention of said property be assessed at *seven hundred* dollars.

Thereupon the defendant objects to the amount of damages assessed by the Court as insufficient, whereupon the Court directs the Clerk not to enter the said judgment until the subject of damages shall be further considered and said cause is again taken under advisement, with a view to reconsider the subject of damages, and said cause is again taken under advisement with a view to reconsider the subject of damages, and after the entering of said order the said parties thereupon separate, and afterwards on this day come the plaintiff by his Counsel and states to the Court that he designs to take a non-suit, and moves that a judgment of non-suit be entered herein—which said motion is now taken under advisement by the Court

9 On the 30th of March, 1860, the Court entered an order granting the motion of the defendant in error for leave to take a non-suit—dismissed the suit at his costs—awarded a writ of *retorno habendo*, and assessed the damages for detention of the property at $800.

The bill of exceptions in the cause shows the following state of facts :—

That this cause was tried below by the Court, a jury being waived —upon the issue of property in Adams, one of the plaintiffs in error— the issue of *non detinet* having been withdrawn. That full proofs under
11 the issue were introduced by both parties, also proof of the value of the use of the property since the same was replevied. That after the evi-evidence had all been introduced, and the case fully argued on both sides,—both upon the law and the facts, and upon the question of damages, the Court took the case under advisement for several days. That o. the 14th day of March, 1860, the Court being fully advised in the premises proceeded to pass upon the law and the facts in detail, and then and there found and announced the issue in favor of the defendants below, and decided the same in their favor, and rendered a judgment in favor of the defendants below, and the Judge made a note of the same upon his docket as follows :—

"March 14.—Judgment for defendant with *retorno habendo* motion for new trial overruled,—suspended till to-morrow because question of damages not determined."

The Clerk of the Court also entered upon his docket a note of said trial and judgment as follows :—

"March 14.—Judgment defendant with a *reterno habendo*,—damages assessed at $,—motion by plaintiff for new trial overruled. Excepted."

That after the Judge had announced his opinion and the note of
11 judgment was entered and the damages for the detention of the property fixed by the Judge at $700, the defendant's Counsel remarked to the Court, that that was the lowest sum fixed upon by any of the four or five witnesses sworn on that point. And the Court then said, that
12 as the amount of damages was objected to, he would not enter the amount then, but would re-examine the testimony on that point, and the matter there ended at that time,—the Court taking the subject of damages again under advisement, and directing the Clerk to suspend

an entry of the judgment which had been pronounced, and the Counsel for the Plaintiff and defendant left the Court House, and the Court proceeded with other business.

That afterwards and on the same day, the Counsel for the defendant in error, without the plaintiffs in error, or their Counsel, or any notice to them, or either of them, returned to the court room, and entered a motion for leave to suffer a non-suit, and thereupon under the direction of the Court the Clerk entered upon the order book, the order above set forth at large, finding the issue for the defendants below, ordering a return of the property described in the declaration, assessing the damages at
13 $700,—reciting the objections of defendants below to the amount of damages, the reconsideration of that matter by the Court, the separation of the parties, the return of the Counsel for the defendant below and his motion for leave to take a non-suit, and the taking of said motion under advisement by the Court.

That on the 30th day of March, 1860, the following order was entered of record in said cause, to wit:—

"And now on this day again come the said parties by their respec-
14 tive Attorneys, and the plaintiff insists upon his right to take a non-suit, and the defendants resist the same. And the Court being now sufficiently advised concerning said application, doth order and consider that the Plaintiff have leave to submit to a non-suit, and that this suit be and the same is hereby dismissed at said plaintiff's cost, and that a writ of *retorno habendo* issue herein to which said order of Court allowing said plaintiff to submit to a non-suit, the said defendants by their Counsel now here except. And thereupon the defendants ask that their damages for the detention of said property be assessed by the Court, and the Court being now sufficiently advised from the evidence hereto fore submitted by the parties, doth asssess the defendant's damages for such detention at the sum of eight hundred dollars.

"Thereupon it is considered by the Court that said defendants do have and recover of the said plaintiff their damages of eight hundred dollars in form as aforesaid assessed, together with their costs and charges by them about their defence in this behalf expended and have execution therefor."

That the plaintiffs in error duly excepted to the ruling, opinion and decision of the Court below in allowing the defendant in error to enter
15 a non-suit at that time, and that their bill of exceptions was duly signed and sealed by the Court.

The record contains a stipulation on the part of the defendant in error to waive the issuing and service of *scire facias*, and to enter his appearance in this cause in the Supreme Court at the present term.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in allowing the defendant in error to enter a non-suit, and in dismissing said suit.

SCATES, McALLISTER & JEWETT,
Attorneys for Plaintiffs in error.

194

Bellows Dal

to

Shepard

Abstract

Filed Apr 24. 1860

H Leland

Clerk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

A. ADAMS, et. al.
vs.
~~BUTTERFIELD~~ Shepard,

ERROR TO COOK.

Should the Court overrule the motion to dismiss the writ of error, we contend there was no error in the order of the Court allowing the plaintiff below to dismiss his suit in a *case submitted to a Court waiving a jury.*

The right of the plaintiff to dismiss after *the opinion* of the Court has *been declared, and all questions at issue decided by such opinion* has been settled by this Court

In 17th Illinois, p. 494, this point was determined. In that case no entry had been made and the precise state of facts occurring here did not exist. But the reasoning of the Court is clearly in support of the right we claim–i. e.–before a recorded determination of the merits of a case, where the questions, both of law and fact, are submitted to the Court, waiving a jury, the right to dismiss his suit remains to the plaintiff. It recognises the common law rule that before *verdict rendered–the final determination of the questions submitted to the* jury the plaintiff could suffer a non-suit. It is upon this principle, even under our Statute, when a case is submitted

to a jury, a party can dismiss after the decision of the Court upon the question of law vital to his success. Where the Court sits as judge and jury, it is only in the very act of *delivering* judgement that a party can have any knowledge of the *opinion* of the Court upon a point of law. There must be some point, we admit, at which this right ceases to be operative. We say it is when the functions of the judge or jury as the case may be, cease, when the verdict is rendered, or final judgement rendered and recorded.

The jury have no more to do with a case after their verdict is rendered, the rest is for the Court. The Court has a large power which we shall subsequently advert to, of control over its own judgement—but we may admit here for the argument, that in this particular case the functions of the judge cease when final judgment is rendered and recorded—until recorded it is *in fact*, though not *in form*, nothing more than *opinion*, for it is conceded that before entry is made a party may dismiss though the decisive *opinion* has been given. When recorded it passes from opinion into judgment and the simple question remains, when was final judgment entered *even upon the minutes of the Court.* We say not until the day of final action. Until then *it was suspended* in *fact* as well as in terms, and was not a final determination of the case. This suspension was at the instance of the plaintiffs in error.

The amount of damages to be assessed under the Statute was an essential part of the judgment. The motion for new trial was necessarily withdrawn, when the Court suspended its judgment upon this point, the very assessment of damages might have been the strongest ground for the motion if not supported by the evidence.

The direction of the Court to suspend entry of judgment necessarily withdrew the whole decision from record. Under the Statute of March 1st, 1857, when the merits of the cause have not been *determined*, the question of property may be raised in an action on the bond. Now a determination of the merits of a cause is nothing more than a final decision upon them, a dismissal of a cause is *no determination* of it as to the merits involved. 15 Illinois, 622. Was this suspended judgment a final decision? the materal question of damages was left unsettled. Again by way of analogy, suppose a verdict rendered by a jury, a new trial granted, another

jury empanelled, can it be doubted that non obstante the first verdict, the party might in the second trial dismiss his suit before the jury retired. What was this but a new trial at the instance of the present appellant. He was dissatisfied with the *verdict of the Court*, the damages were too low; he asked for a new trial, it was granted, and before the decision pronounced in the new trial our motion was made. Suppose in this very case the jury had rendered the verdict assessing damages according to the first estimate of the Court and the defendant had asked and obtained a new trial upon this ground, can it be contended that we might not before the second jury retired have dismissed our suit. In the case put the new trial must have been on all the issues, property as well as damages. Not as is wished here upon a part only of the verdict of the Court ~~reasoning~~ reserving a right to the rest of which he does not complain.

One of the clearest tests of the finality of a judgment is the right of appeal. Could we have appealed from the suspended judgment? Certainly not, and for the very reason that it was not in that shape, a final *determination* of the case.

Can the right of the Court be questioned, even supposing a full entry of judgment had been made in the minutes to erase it or suspend it? It was during the same ~~time~~ term the same day, the direction to enter judgment and the direction to suspend such entry were almost simultaneous. The motion for dismissal was made within a few hours after the delivery of the Court's opinion. As to the full power of the Court so to deal with the ~~payment~~ judgment it is only necessary to refer to the case in 11 Illinois 515.

What would be the result of a reversal of the judgment of the Court below?—ordinarily a new trial of the case—it is sent back to be tried *de novo*. If such result should attend the success of this writ of error we would cheerfully accede to a reversal, but we are free to confess that we are not clear what would be the future proceedings to be taken on a reversal.

The only *judgment* now of record in the Court below is a judgment of non suit. If this is reversed, *its* consequence, the order for return of

property and assessment of damages for detention would fall with it as it appears to us, and the case would then stand as if untried and undecided

It will scarcely be urged that this Court could pronounce a final judgment of the merits of the case below without having before it one particle of evidence or one single distinct ruling of the Court.

Had the Circuit Court refused our motion, we could have appealed upon the law, and the fact from their judgment. Can this Court dictate the judgment the Circuit Court should render? Certainly not, as it is wholly ignorant of the character of the respective claims to the property in suit, or the evidence on either side in support of them.

The utmost, it seems to us, that this Court can do, is not to disturb the judgment of the Court below, but if it dissents from the opinion of the Circuit Court upon the propriety of the order of dismissal, it might ex gratia and in view to the government of the Court below, in future express that dissent, but still affirm the judgment for want of power to correct it, unless, as we have intimated, this is to be considered an appeal from the *whole judgment and not merely from the order of dismissal* in which case, we contend, the effect of a reversal would necessarily be a trial de novo in the Court below.

To reverse the decision of the Court below upon the order of dismissal and not ~~upon~~ the *judgment*, might be considered a somewhat anomalous decision, but it is respectfully submitted, that the present in the shape in which it is presented to the Supreme Court is an anomalous assignment of error—a part of an entire judgment only objected to.

We omitted in its proper place to argue the construction which it seems to us it was designed to bear upon this sentence of the opinion of the Court in Howe et. al. vs. Haroun, 17 Illinois, p. 498, "the plaintiff must have a right to enter a new suit after the Court has announced its opinion, *and before a note thereof is entered.*" We respectfully submit that in this expression the Court was simply announcing the law upon the facts of the particular case before them, but not as intending to be understood that if a single entry or note of the *opinion was made the right to dismiss the suit was*

lost. On the contrary we read the opinion as clearly evincive of the design to extend the common law right" in its application to juries, to the cases submitted to this Court and thus to secure the privilege of the plaintiff of a dismissal of his suit at any time before judgment of the Court, quoad, the Court, has assumed the same condition of finality as the verdict of a jury. The functions of the jury cease with the rendition of the verdict—of the Court, so far as right to dismiss is concerned, with the recognized entry of judgment.

J. M. S. CAUSIN,

Attorney for Appellees.

No 194

Adams appl
v
B. S. Shipard

Brief of Defendant
in Error

Filed May 16. 1846
L. Lemmon
Clerk

Marquis L. Adams &
Philander Brittingham
v
B. S. Shepard

} Error to Circuit Court of Cook County

The defendant in Error by John M. S. Cousin his attorney moves the Court that the Writ of Error heretofore sued out in the above entitled cause be dismissed & assigns for the motion the following reasons

1st Because the order of the said Circuit Court of Cook County granting leave to the plaintiffs to submit to a non-suit and that the suit be & the same is hereby dismissed is no such final judgment in the case as under the Statutes of Illinois alone authorizes the suing out of a Writ of Error

2nd

Because the writ of error is only sued out upon a part of an entire judgment

of the said Court — towit

such part as authorizes
the plaintiff to submit to
a new suit & orders the
suit to be dismissed —
While that balance of the
judgment towit — the order
for a reference[?] to Labor &
the final assessment of
damages, are not only
not appealed from but
the assessment, was made
by the Court on the de-
mand of the Defendant
by his counsel after objection
taken & noted to the order
dismissing the suit —

Pages — 8 — 9 — 10 of record

For these reasons we move
to dismiss the writ of error
sued out in this case

John H. S. Ca[illegible]

Atty for Defendant in Error

194

Recapt L Adams
& Philander Billings
v
B. S. Shepard

Motion to Dismiss
Bill of Review

Filed April 20, 1866
L. Lelan

194

Supreme Court of Illinois--April Term, A. D. 1860.

MICAJAH L. ADAMS, AND
PHIRANDA BUTTERFIELD,
Plaintiffs in Error.

vs.

BOHAN S. SHEPARD,
Defendant in Error.

Error to Cook County.

ABSTRACT OF RECORD.

This was an action of Replevin, commenced in the Circuit Court of Will County, on the 24th day of October, 1857, by the Defendant in Error against the Plaintiffs in Error, to recover possession of a Canal Boat called "L. Hatton Jr.," and formerly known as the "G. W. Shepard."

Rec. p. 2 The writ was issued on the day aforesaid, and returned by the Sher-
3 iff of Will County, duly executed on the same day.

4 The Declaration is in the usual form, alleging the wrongful detention of the Property by the Plaintiffs in error—and the Pleas filed in the Court below by Plaintiffs in error, were *non detinet*, and a plea of Pro-
5 perty in Micajah L Adams.

The case was then by change of venue from said Will County, brought into the Circuit Court of Cook County, where the subsequent proceedings were had.

May 26th, 1858, defendant in error, filed in the Court below his Replication in due form.

6 On the 2d day of March, 1860, the plaintiffs in error withdrew their plea of *non detinet*, and by consent of the parties, a jury is waived, and the cause submitted to the Court for trial upon the issue of property.

7 The testimony and arguments of counsel were concluded on the 5th day of March, 1860, and the cause taken under advisement by the 8 Court.

On the 14th day of March, 1860, the following order was made and entered of record in said cause, to wit :

"This day again come the said parties in person, and by their respective attorneys, and the Court being now sufficiently advised of and concerning the matter submitted, doth order and consider that the issue of property herein be found for the defendant, and that he have return of the property described in the declaration, and that defendant's damages for the detention of said property be assessed at *seven hundred* dollars.

Thereupon the defendant objects to the amount of damages assessed by the Court as insufficient, whereupon the Court directs the Clerk not to enter the said judgment until the subject of damages shall be further considered and said cause is again taken under advisement, with a view to reconsider the subject of damages, and said cause is again taken under advisement with a view to reconsider the subject of damages, and after the entering of said order the said parties thereupon separate, and afterwards on this day come the plaintiff by his Counsel and states to the Court that he designs to take a non-suit, and moves that a judgment of non-suit be entered herein—which said motion is now taken under advisement by the Court

9 On the 30th of March, 1860, the Court entered an order granting the motion of the defendant in error for leave to take a non-suit—dismissed the suit at his costs—awarded a writ of *retorno habendo*, and assessed the damages for detention of the property at $800.

The bill of exceptions in the cause shows the following state of facts :—

That this cause was tried below by the Court, a jury being waived —upon the issue of property in Adams, one of the plaint ffs in error— the issue of *non detinet* having been withdrawn. That full proofs under
11 the issue were introduced by both parties, also proof of the value of the use of the property since the same was replevied. That after the evi- evidence had all been introduced, and the case fully argued on both sides,—both upon the law and the facts, and upon the question of damages, the Court took the case under advisement for several days. That o . the 14th day of March, 1860, the Court being fully advised in the premises proceeded to pass upon the law and the facts in detail, and then and there found and announced the issue in favor of the defendants below, and decided the same in their favor, and rendered a judgment in favor of the defendants below, and the Judge made a note of the same upon his docket as follows :—

"March 14.—Judgment for defendant with *retorno habendo* motion for new trial overruled,—suspended till to-morrow because question of damages not determined."

The Clerk of the Court also entered upon his docket a note of said trial and judgment as follows :—

"March 14.—Judgment defendant with a *reterno habendo*,—damages assessed at $,—motion by plaintiff for new trial overruled. Excepted."

That after the Judge had announced his opinion and the note of
11 judgment was entered and the damages for the detention of the property fixed by the Judge at $700, the defendant's Counsel remarked to the Court, that that was the lowest sum fixed upon by any of the four or five witnesses sworn on that point. And the Court then said, that
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an entry of the judgment which had been pronounced, and the Counsel for the Plaintiff and defendant left the Court House, and the Court proceeded with other business.

That afterwards and on the same day, the Counsel for the defendant in error, without the plaintiffs in error, or their Counsel, or any notice to them, or either of them, returned to the court room, and entered a motion for leave to suffer a non-suit, and thereupon under the direction of the Court the Clerk entered upon the order book, the order above set forth at large, finding the issue for the defendants below, ordering a return of the property described in the declaration, assessing the damages at
13 $700,—reciting the objections of defendants below to the amount of damages, the reconsideration of that matter by the Court, the separation of the parties, the return of the Counsel for the defendant below and his motion for leave to take a non-suit, and the taking of said motion under advisement by the Court.

That on the 30th day of March, 1860, the following order was entered of record in said cause, to wit:—

"And now on this day again come the said parties by their respec-
14 tive Attorneys, and the plaintiff insists upon his right to take a non-suit, and the defendants resist the same. And the Court being now sufficiently advised concerning said application, doth order and consider that the Plaintiff have leave to submit to a non-suit, and that this suit be and the same is hereby dismissed at said plaintiff's cost, and that a writ of *retorno habendo* issue herein to which said order of Court allowing said plaintiff to submit to a non-suit, the said defendants by their Counsel now here except. And thereupon the defendants ask that their damages for the detention of said property be assessed by the Court, and the Court being now sufficiently advised from the evidence hereto fore submitted by the parties, doth asssess the defendant's damages for such detention at the sum of eight hundred dollars.

"Thereupon it is considered by the Court that said defendants do have and recover of the said plaintiff their damages of eight hundred dollars in form as aforesaid assessed, together with their costs and charges by them about their defence in this behalf expended and have execution therefor."

That the plaintiffs in error duly excepted to the ruling, opinion and decision of the Court below in allowing the defendant in error to enter a non-suit at that time, and that their bill of exceptions was duly signed and sealed by the Court.

The record contains a stipulation on the part of the defendant in error to waive the issuing and service of *scire facias*, and to enter his appearance in this cause in the Supreme Court at the present term.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in allowing the defendant in error to enter a non-suit, and in dismissing said suit.

SCATES, McALLISTER & JEWETT,
Attorneys for Plaintiffs in error.

194

Adams Dol

vs

Shepard

Abstract

12919

Filed Apr 24. 1860

A. Leonard

Clerk

12919

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, 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 term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third Monday, (being the Nineteenth day) of March in the year of our Lord one thousand eight hundred and [illegible] and of the Independence of the said United States the Eighty-Fourth

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

Carlos Haven States Attorney.

John Gray Sheriff of Cook County.

Attest: William L Church Clerk.

Be it remembered, that heretofore to-wit: On the Nineteenth day of March A.D. 1838. by virtue of an order changing the venue in a certain cause from the Circuit Court of Will County to that of the County of Cook, certain papers were filed in said Circuit Court of Cook County, in the words and figures following, to-wit:

"Writ of Replevin"

State of Illinois } ss.
Will County }

The People of the State of Illinois, to the Sheriff of said County: Greeting.

If Boham B. Shepard of the County of Cook, shall give you good and sufficient security to prosecute his suit with Effect and without delay, and to make return of the following described goods and chattels

2

the property of him the said Bolan B. Shepard, to-wit
She Canal Boat "B. Hatton Jr." formerly known as
the "G. W. Shepard" that said Bolan B. Shepard is
now lawfully Entitled to the possession of said Canal
Boat and that the same is unlawfully detained by
Miranda Butterfield Micajah B. Adams, that the
said Canal Boat is of the value of One thousand
dollars & that the same has not been taken for any tax
assessment or fine levied by virtue of any law of this
State, nor seized under any Execution or attachment
against the goods and chattels of said Bolan B.
Shepard liable to Execution or attachment which
Miranda Butterfield Micajah B. Adams of said
County forcibly and unlawfully took, and unjust-
ly detains, and return the said property & re-
turn thereof be awarded, and further to save and
keep you harmless in replevying said property.
then you are to cause the said goods and chattels
to be replevied and delivered to said plaintiff (personally)
without delay: And summon the said defendants, to be and
appear before our Circuit Court to be
holden at the Courthouse in the Town of Goldsboro said
County, on the first Monday of December A.D. 1854
to answer to the said plaint of the said plaintiff for
their unjustly detaining the goods and chattels afore-
said, And make due return of the Bond to be taken
of the said plaintiff as aforesaid, together with the
writ, to the Clerk of our said Court, with an En-

v

document thereon, as to your doings in the premises

Witness Alexander McNish. Clerk

13 Seal

of our said Court and the Seal thereof at Office in the City of Joliet in said County this 24th day of October A.D. 1854

A. McNish. Clerk

Endorsed "I have Executed this writ by taking the within named Canal Boat and delivering the same to Bolan B. Shepard, and reading the this writ to Mecajah B. Adams. the other defendants not found in my County. My fees $3.00

Oct 24th 1854.

G. R. Dyer. Shff

Declaration

"Will County Circuit Court

State of Illinois } ss. March Term A.D. 1858

Will County }

To Wit: Bolan B. Shepard plaintiff in this suit by McRoberts and Goodspeed his Attorneys, complain of Phiranda Butterfield and Mecahjah B. Adams defendants. in a plea of Replevin For that the said defendants on the Twenty fourth day of October A.D. 1854 at the City of Joliet in Will County and State aforesaid, were possessed of certain goods and chattels of the said plaintiff to-wit. The Canal Boat "T. Hatton Jr" formerly

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known as the H. W. Shepard, to be delivered to the said plaintiff when they the said defendants should be thereunto afterwards requested. Yet the said defendants, though requested so to do, have not delivered the said Canal Boat to the said plaintiff, and do the said defendants wrongfully detain the same from the said plaintiff to his said plaintiffs damage. One Thousand dollars, and therefore he brings this suit.

Mc Roberts Woodspeed
Pro plaintiff

Pleas.

Will Circuit Court. March T. 1858

Rhiranda Butterfield
&a Micajah B. Adams
ads
Bohan B. Shepard

And the said defendants by J. E. Streeter their attorney come & defend the wrong and injury when &c. and say that they did not detain the said Canal Boat in the said declaration mentioned in manner and form as the said plaintiff hath thereof above complained against them, and this the said defendants put themselves upon the Country &c

J. E. Streeter
Defts Atty

And for a further plea in this behalf the said defendants by J. E. Streeter their attorney say Actio non

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because they say that the said Canal Boat in the said declaration mentioned, at the said time when &c was the property of Micajah B. Adams one of the defendants in this suit, and not of the said plaintiff as by the said declaration is above supposed. And this they the said defendants are ready &c;
Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, and they also pray return of the said Canal Boat together with their costs in this behalf according to the form of the Statute in such case made and provided. To be adjudged to them &c

J. E. Streeter.

And afterwards, to-wit, on the Twenty sixth day of May A.D. 1858. there was filed in the Court aforesaid a certain Replication which is in the words and figures following to-wit:

"In the Circuit Court of Cook County
May Term 1858.

And as to the first plea of the said defendants in this case pleaded and which they put themselves upon the Country, the said plaintiff doth the like; And the said plaintiff by his Attorney aforesaid as to the second plea of the said defendants above pleaded saith that he by reason of any thing therein alleged to be prevented from having and maintaining his aforesaid action to be precluded

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ourselves. Because he saith that the property in the said Boat at the time of taking the same was in him the said plaintiff as by his declaration aforesaid thereof hath alleged and this he prays may be Enquired of by the Country &c

Cooper & Lawson
Attys for Plaintiff

And afterwards. to=wit. at the February Term of said Court. to=wit. on the 2d day of March. A.D. 1820. the following, among other proceedings, were had and Entered of Record. to=wit.

" Bohan B. Shepherd
Miranda B. Butterfield
" Micajah B. Adams

Replevin

17981

This day comes the said plaintiff by Mr Roberts Goodrich and Lawson his Attorneys and the said defendants by Beales Mr Allister Jarrett their Attorneys also come, and by leave of the Court the defendants now withdraw their plea of non detinet herein pleaded, And thereupon the consent of said parties given in open Court, said cause submitted to the Court for trial upon the issues joined therein, and the intervention of a jury waived, and the Court after hearing a part of the Evidence, the hour of adjournment having now arrived, doth order that the trial of said cause stand adjourned till nine O'clock tomorrow Morning

4

And afterwards, to=wit, at the same Term of said Court, to=wit on the 3d day of March in the year last aforesaid, the following proceedings, among others, were had and Entered of record, to=wit,

17981 | Bohan b Shepherd | Replevin
v
Rhianda b. Butterfield
and Micajah b Adams

This day again came the said parties by their Counsel, and the Court having heard further testimony in said Cause the same not being closed, and the hour of adjournment having now arrived it is ordered that the trial of said Cause stand adjourned till Monday morning nine Oclock

And afterwards to=wit, at the same Term of said Court, to=wit, on the 5th day of March in the year last aforesaid, the following, among other proceedings, were had and Entered of record, to=wit,

17981 | " Bohan b. Shepherd | Replevin
v
Rhianda b. Butterfield
& Micajah b Adams

This day again came the said parties by their Counsel, and the Court now having heard all the Evidence offered in said Cause and the arguments of Counsel as well on the part of the said plaintiff as of the said defendant, and not

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And afterwards, to=wit, at the same Term of said Court, to=wit on the 3d day of March in the year last aforesaid, the following proceedings, among others, were had and Entered of record, to=wit,

17981 | Bohan b Shepherd | Replevin
v
Rhianda b. Butterfield
and Micajah b Adams

This day again came the said parties by their Counsel, and the Court having heard further testimony in said Cause the same not being closed, and the hour of adjournment having now arrived it is ordered that the trial of said Cause stand adjourned till Monday morning nine Oclock

And afterwards to=wit, at the same Term of said Court, to=wit, on the 5th day of March in the year last aforesaid, the following, among other proceedings, were had and Entered of record, to=wit,

17981 | " Bohan b. Shepherd | Replevin
v
Rhianda b. Butterfield
& Micajah b Adams

This day again came the said parties by their Counsel, and the Court now having heard all the Evidence offered in said Cause and the arguments of Counsel as well on the part of the said plaintiff as of the said defendant, and not

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Being sufficiently advised in the premises, takes said cause under advisement;

And afterwards, to-wit, at the same Term of said Court, to-wit, on the 12th day of March in the year last aforesaid, the following, among other proceedings, was had and Entered of Record, to-wit

"Bolan b. Shepherd

17981 vs. Replevin

Rhoanda b. Butterfield
and Mariajah b. Adams

This day again come the said parties in person and by their respective attorneys, and the Court being now sufficiently advised of and concerning the matters submitted, doth order and consider that the issues of property herein, be found for the defendant and that he have return of the property described in the declaration, and that the defendants damages for the detention of said property be assessed at seven hundred dollars; Thereupon the defendant objects to the amount of damages assessed by the Court as insufficient Whereupon the Court directs the Clerk to enter the said judgment and the subject of damages shall be further considered, and said cause is again taken under advisement, with a view to reconsider the subject of damages, and after the Entering of said orders, the said parties thereupon separate, and afterwards on this day come again the said plaintiff by his counsel, and

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states to the Court, that he designs to take a non suit, and moves that a judgment of non suit be Entered herein, which said motion is now taken under advisement by the Court:

And afterwards, to-wit, at the March Term of said Court, to-wit, on the [illegible] day of March in the year last aforesaid, the following, among other proceedings, were had and Entered of Record, to-wit:

"Bohan B. Shepherd vs Phiraida B. Butterfield and Meciajah B. Adams	Replevin

12981

And now on this day again came the said parties, by their respective attorneys, and the plaintiff insists upon his right to take a non suit and the defendant resists the same, And the Court being now sufficiently advised concerning said application doth order and consider that the plaintiff have leave to submit to a non-suit, and that this suit be and the same hereby is dismissed at said plaintiffs cost, and that a writ of Retorno Habendo issue herein: To which said order of Court allowing the plaintiffs to submit to a non suit, the said defendants by their counsel now here except, And thereupon the said defendants ask that their damages for the detention of said property be assessed by the Court, And the Court being now sufficiently advised from the Evidence heretofore

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submitted by said parties. doth assess the defendants damages for such detention at the sum of Eight hundred dollars.

Therefore it is considered by the Court that said defendants do have and recover of the said plaintiffs their damages of Eight hundred dollars, in form as aforesaid assessed. together with their costs and Charges by them about their defense in this behalf. Expended and have Execution therefor.

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And afterwards. to-wit, on the 4th day of April in the year last aforesaid. there was filed in said Court a certain Bill of Exceptions which is in the words and figures following to-wit:

"Micajah B. Adams
Philander Butterfield
ads
B. B. Shepherd
} Replevin

Be it remembered that on the 4th day of March 1860 this cause came on to be tried and was submitted to the Court - waiving a jury. Whereupon plaintiff and defendants introduced full proofs of the rights to property in issue setting up property in the said defendant Adams, the other issue of Delivery having withdrawn before the trial commenced and full proof as to the value of the use of the Team since the same was replevied. was also introduced by defendants and plaintiff, after the

Evidence had all been received and the case fully argued by Counsel on both sides, both upon the law and the facts, and upon the damages by reason of the replevying said Boat. The Court took the Cause under advisement for Several days, whereupon the Court having fully decided the issues, afterwards on the 14th day of March 186[illegible] the Court proceeded to pass upon the law and facts in detail, and then and there found and announced the issue in favor of the defendants and decided the same in their favor and rendered a judgment in favor of the defendants. And the Judge Entered the following note of the same upon the docket of the Court, Namely: "March 14 Judg for dft with return habendo. Mo for new trial overruled Suspend till tomorrow because question of damages not determined"

The Clerk of said Court also Entered the following note or minute of said trial & judgment in his minutes namely—" Mch 14. Judg for dft with a Return Habendo damages assessed at $ Mo by plff for new trial Overruled Ex—D" But after the Judge had announced his opinion and after the note of judgment had been Entered and the amount of the damages for wrongfully suing out the replevin and the use of the Boat by the plaintiff had been found by the Judge at the sum of Seven hundred dollars the defendants Counsel remarked to the Court that that was the lowest sum fixed upon by any of the four or five witnesses

11

proven on that point. The Court then remarked that as the amount of damages was objected to he would not Enter the amount then but would re Examine the testimony on that point and the matter then ended at that time. the Court taking the subject of damages again under advisement and directing the Clerk to suspend an Entry of the judgment which had been pronounced, and the Counsel for the plaintiff and defendants thereupon left the Court House, and the Court proceeded with the other business of the Court.
Afterwards during the same afternoon the plffs Counsel without the defendants Counsel or any notice to def or or their Counsel returned to the Courtroom and Entered a motion for leave to suffer a non suit:
Thereupon under the direction of the Court the Clerk Entered upon the order book the following order &h

Large
Bohan B. Shepard

v

Rhoda B. Butterfield
& Micajah B. Adams

17981

Replevin

This day again Come the said parties in person and their Attorneys and the Court being now sufficiently advised of and concerning the matters submitted doth order and Consider that the issues of property herein be found for the defendant and that he have return of the property described in the declaration, and that the defendants

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damages for the detention of said property to be assessed at Seven Hundred dollars, Thereupon the defendant objects to the amount of damages assessed by the Court as insufficient, Whereupon the Court directs the Clerk not to enter the said judgment until the subject of damages shall be further co[illegible] and [illegible] is again taken under advis[illegible] under the subject of damages, and after the entry of the orders, the said parties thereupon separate, and afterwards on this day comes again the said plaintiff by his Counsel and states to the Court that he desires to take a non-suit and moves that a judgment of non-suit be entered herein, which said motion is now taken under advisement by the Court.

Afterwards on the 30th day of March 1860. the said motion was called up and thereupon the question of plaintiffs right to suffer a non-suit was argued before the Court, and the Court then gave plaintiffs leave, and the plaintiff then and there Entered his non-suit in said cause, the Court then fixed the amount of damages at the sum of Eight Hundred dollars as follows. namely

Bolan & Shepherd | Pltfs.

17981

Miranda & Butterfield
& Micajah & Adams |

And now on this day again

13 come the said parties by their respective Attorneys, and

the plaintiff insists upon his right to take a non suit and the defendants resist the same. And the Court being now sufficiently advised concerning said application, doth order and consider that the plaintiff have leave to submit to a non suit and that the suit be and the same be dismissed at plaintiffs cost, and that a writ issue therein

To which said order of Court allowing said plaintiffs to submit to a non suit the said defendants by their Counsel now here Except. And thereupon the defendants ask that their damages for the detention of said property be assessed by the Court, and the Court being now sufficiently advised from the Evidence heretofore submitted by said parties doth assess the defendants damages for such detention at the sum of Eight hundred dollars

Therefore it is considered by the Court that said defendants do have and recover of the said plaintiffs their damages of Eight hundred dollars in form as aforesaid assessed together with their Costs and Charges by them about their defense in this behalf Expended and have Execution therefor, "

The defendants by their Counsel then and there Excepted to the ruling opinion and decision of the Court in allowing plaintiff to Enter a non suit at that time, and prayed this their Bill of Exceptions to the same, may be signed sealed and made a part of the Record, all which is

done Accordingly George Manierre Dea
Judge of 9th Judicial Circuit Illinois
And afterwards on the 5th day of April in the year last aforesaid there was filed in the Court aforesaid a certain Stipulation in the words and figures following, to wit.

"Supreme Court

Micajah L. Adams v Philander Butterfield Pltff in Error
vs Bolan B. Shepard. Deft.

It is hereby stipulated and agreed by Shepard
to waive the issuing and service of Sci Facias to
appear and answer Error in this Cause and that
his appearance be Entered in this cause, but that
such appearance shall not be deemed to waive
any right of said Shepard to move to dismiss this
suit or any other right Except such as may be
based on the non issuing or service of Sci
Facias

April 4th 1860 John M. B. Manierre
Atty for B. B. Shepard

15

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 the summons declaration pleadings Bill of Exceptions proceedings and Entries of Record in this Court in a certain cause lately pending in said Court on the Common Law side thereof, wherein Bolan B Shepard was plaintiff and Philander Butterfield et al Defendants.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Chicago, this fourteenth day of April A. D. 1860.

Wm L Church Clerk.

Supreme Court of Illinois
April Term A.D. 1860

Micajah L. Adams &
Philander Butterfield
Plffs in error
vs
Rohan S. Shepard
Defdt in error } Error to Cook County

And now comes the said Plaintiffs in error by Scates McAllister & Dent. their attorneys and say that in the Record & proceedings aforesaid & in the Rendition of Judgment aforesaid manifest error hath intervened. in this to wit:

That the said Circuit Court erred in allowing the defendant in error to enter a non-suit. and in dismissing this said suit — whereas and for other errors in said. and other errors appearing upon the Record and proceedings aforesaid. the said Plaintiffs in error. pray that the said Judgment of non-suit may be reversed. annulled and for nothing esteemed. and that the Judgment upon the issues tried and adjudicated, by said Court, in this cause as originally entered therein. may be reversed and conclusion between the parties. and that the said Plaintiffs in error may recover their costs.

Scates McAllister & Dent
Attys. for Plffs in error

Circuit Court Cook Co

194

Supreme Ct. of Illinois

Micajah L. Adams Etal

vs

Bohan S. Shepard

B. S. Shepard

— vs —

Butterfield Etal

Record

Filed April 17 1860
L. Leland
Clk

Fees 5 00
Rec'd Pay
Mc Church
Clk

Scates McAllister & Lemett
Attys for Appellees

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

A. ADAMS, et. al.
vs.
~~BUTTERFIELD~~ Shepard,

ERROR TO COOK.

Should the Court overrule the motion to dismiss the writ of error, we contend there was no error in the order of the Court allowing the plaintiff below to dismiss his suit in a *case submitted to a Court waiving a jury.*

The right of the plaintiff to dismiss after *the opinion* of the Court has *been declared, and all questions at issue decided by such opinion* has been settled by this Court

In 17th Illinois, p. 494, this point was determined. In that case no entry had been made and the precise state of facts occurring here did not exist. But the reasoning of the Court is clearly in support of the right we claim–i. e.–before a recorded determination of the merits of a case, where the questions, both of law and fact, are submitted to the Court, waiving a jury, the right to dismiss his suit remains to the plaintiff. It recognises the common law rule that before *verdict rendered–the final determination of the questions submitted to the* jury — the plaintiff could suffer a non-suit. It is upon this principle, even under our Statute, when a case is submitted

to a jury, a party can dismiss after the decision of the Court upon the question of law vital to his success. Where the Court sits as judge and jury, it is only in the very act of *delivering* judgement that a party can have any knowledge of the *opinion* of the Court upon a point of law. There must be some point, we admit, at which this right ceases to be operative. We say it is when the functions of the judge or jury as the case may be, cease, when the verdict is rendered, or final jndgement rendered and recorded.

The jury have no more to do with a case after their verdict is rendered, the rest is for the Court. The Court has a large power which we shall subsequently advert to, of control over its own judgement—but we may admit here for the argument, that in this particular case the functions of the judge cease when final judgment is rendered and recorded—until recorded it is *in fact*, though not *in form*, nothing more than *opinion*, for it is conceded that before entry is made a party may dismiss though the decisive *opinion* has been given. When recorded it passes from opinion into judgment and the simple question remains, when was final judgment entered *even upon the minutes of the Court.* We say not until the day of final action. Until then *it was suspended* in *fact* as well as in terms, and was not a final determination of the case. This suspension was at the instance of the plaintiffs in error.

The amount of damages to be assessed under the Statute was an essential part of the judgment. The motion for new trial was necessarily withdrawn, when the Court suspended its judgment upon this point, the very assessment of damages might have been the strongest ground for the motion if not supported by the evidence.

The direction of the Court to suspend entry of judgment necessarily withdrew the whole decision from record. Under the Statute of March 1st, 1857, when the merits of the cause have not been *determined*, the question of property may be raised in an action on the bond. Now a determination of the merits of a cause is nothing more than a final decision upon them, a dismissal of a cause is *no determination* of it as to the merits involved. 15 Illinois, 622. Was this suspended judgment a final decision? the materal question of damages was left unsettled. Again by way of analogy, suppose a verdict rendered by a jury, a new trial granted, another

jury empanelled, can it be doubted that non obstante the first verdict, the party might in the second trial dismiss his suit before the jury retired. What was this but a new trial at the instance of the present appellant. He was dissatisfied with the *verdict of the Court*, the damages were too low; he asked for a new trial, it was granted, and before the decision pronounced in the new trial our motion was made. Suppose in this very case the jury had rendered the verdict assessing damages according to the first estimate of the Court and the defendant had asked and obtained a new trial upon this ground, can it be contended that we might not before the second jury retired have dismissed our suit. In the case put the new trial must have been on all the issues, property as well as damages. Not as is wished here upon a part only of the verdict of the Court ~~reasoning~~ reserving a right to the rest of which he does not complain.

One of the clearest tests of the finality of a judgment is the right of appeal. Could we have appealed from the suspended judgment? Certainly not, and for the very reason that it was not in that shape, a final *determination* of the case.

Can the right of the Court be questioned, even supposing a full entry of judgment had been made in the minutes to erase it or suspend it? It was during the same ~~time~~ term the same day, the direction to enter judgment and the direction to suspend such entry were almost simultaneous. The motion for dismissal was made within a few hours after the delivery of the Court's opinion. As to the full power of the Court so to deal with the ~~payment~~ judgment it is only necessary to refer to the case in 11 Illinois 515.

What would be the result of a reversal of the judgment of the Court below? —ordinarily a new trial of the case—it is sent back to be tried *de novo*. If such result should attend the success of this writ of error we would cheerfully accede to a reversal, but we are free to confess that we are not clear what would be the future proceedings to be taken on a reversal.

The only *judgment* now of record in the Court below is a judgment of non suit. If this is reversed, *its* consequence, the order for return of

property and assessment of damages for detention would fall with it as it appears to us, and the case would then stand as if untried and undecided

It will scarcely be urged that this Court could pronounce a final judgment of the merits of the case below without having before it one particle of evidence or one single distinct ruling of the Court.

Had the Circuit Court refused our motion, we could have appealed upon the law, and the fact from their judgment. Can this Court dictate the judgment the Circuit Court should render? Certainly not, as it is wholly ignorant of the character of the respective claims to the property in suit, or the evidence on either side in support of them.

The utmost, it seems to us, that this Court can do, is not to disturb the judgment of the Court below, but if it dissents from the opinion of the Circuit Court upon the propriety of the order of dismissal, it might ex gratia and in view to the government of the Court below, in future express that dissent, but still affirm the judgment for want of power to correct it, unless, as we have intimated, this is to be considered an appeal from the *whole judgment and not merely from the order of dismissal* in which case, we contend, the effect of a reversal would necessarily be a trial de novo in the Court below.

To reverse the decision of the Court below upon the order of dismissal and not ~~upon~~ the *judgment*, might be considered a somewhat anomalous decision, but it is respectfully submitted, that the present in the shape in which it is presented to the Supreme Court is an anomalous assignment of error—a part of an entire judgment only objected to.

We omitted in its proper place to argue the construction (which it seems to us it was designed to bear) ~~upon~~ to this sentence of the opinion of the Court in Howe et. al. vs. Haroun, 17 Illinois, p. 498, "the plaintiff must have a right to enter a new suit after the Court has announced its opinion, *and before a note thereof is entered.*" We respectfully submit that in this expression the Court was simply announcing the law upon the facts of the particular case before them, but not as intending to be understood that if a single entry or note of the *opinion was made the right to dismiss the suit was*

lost. On the contrary we read the opinion as clearly evincive of the design to extend the common law right " in its application to juries, to the cases submitted to this Court and thus to secure the privilege of the plaintiff of a dismissal of his suit at any time before judgment of the Court, quoad, the Court, has assumed the same condition of finality as the verdict of a jury. The functions of the jury cease with the rendition of the verdict—of the Court, so far as right to dismiss is concerned, with the recog~~nizan~~ rdict entry of judgment.

J. M. S. CAUSIN,

Attorney for Appellees.

No 194

Adams et al

v.

B. S. Shepard

Brief of Defendants
in Error

Filed May 16. 1860
Coleman
Clerk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

A. ADAMS, et. al.)
vs.)
~~BUTTERFIELD~~,)
Shepard

ERROR TO COOK.

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In 17th Illinois, p. 494, this point was determined. In that case no entry had been made and the precise state of facts occurring here did not exist. But the reasoning of the Court is clearly in support of the right we claim–i. e.–before a recorded determination of the merits of a case, where the questions, both of law and fact, are submitted to the Court, waiving a jury, the right to dismiss his suit remains to the plaintiff. It recognises the common law rule that before *verdict rendered–the final determination of the questions submitted to them,* the plaintiff could suffer a non-suit. It is upon this principle, even under our Statute, when a case is submitted

to a jury, a party can dismiss after the decision of the Court upon the question of law vital to his success. Where the Court sits as judge and jury, it is only in the very act of *delivering* judgement that a party can have any knowledge of the *opinion* of the Court upon a point of law. There must be some point, we admit, at which this right ceases to be operative. We say it is when the functions of the judge or jury as the case may be, cease, when the verdict is rendered, or final judgement rendered and recorded.

The jury have no more to do with a case after their verdict is rendered, the rest is for the Court. The Court has a large power which we shall subsequently advert to, of control over its own judgement—but we may admit here for the argument, that in this particular case the functions of the judge cease when final judgment is rendered and recorded—until recorded it is *in fact*, though not *in form*, nothing more than *opinion*, for it is conceded that before entry is made a party may dismiss though the decisive *opinion* has been given. When recorded it passes from opinion into judgment and the simple question remains, when was final judgment entered *even upon the minutes of the Court.* We say not until the day of final action. Until then *it was suspended* in *fact* as well as in terms, and was not a final determination of the case. This suspension was at the instance of the plaintiffs in error.

The amount of damages to be assessed under the Statute was an essential part of the judgment. The motion for new trial was necessarily withdrawn, when the Court suspended its judgment upon this point, the very assessment of damages might have been the strongest ground for the motion if not supported by the evidence.

The direction of the Court to suspend entry of judgment necessarily withdrew the whole decision from record. Under the Statute of March 1st, 1857, when the merits of the cause have not been *determined*, the question of property may be raised in an action on the bond. Now a determination of the merits of a cause is nothing more than a final decision upon them, a dismissal of a cause is *no determination* of it as to the merits involved. 15 Illinois, 622. Was this suspended judgment a final decision? the materal question of damages was left unsettled. Again by way of analogy, suppose a verdict rendered by a jury, a new trial granted, another

jury empanelled, can it be doubted that non obstante the first verdict, the party might in the second trial dismiss his suit before the jury retired. What was this but a new trial at the instance of the present appellant. He was dissatisfied with the *verdict of the Court*, the damages were too low; he asked for a new trial, it was granted, and before the decision pronounced in the new trial our motion was made. Suppose in this very case the jury had rendered the verdict assessing damages according to the first estimate of the Court and the defendant had asked and obtained a new trial upon this ground, can it be contended that we might not before the second jury retired have dismissed our suit. In the case put the new trial must have been on all the issues, property as well as damages. Not as is wished here upon a part only of the verdict of the Court ~~reserving~~ preserving a right to the rest of which he does not complain.

One of the clearest tests of the finality of a judgment is the right of appeal. Could we have appealed from the suspended judgment? Certainly not, and for the very reason that it was not in that shape, a final *determination* of the case.

Can the right of the Court be questioned, even supposing a full entry of judgment had been made in the minutes to erase it or suspend it? It was during the same ~~time~~ term the same day, the direction to enter judgment and the direction to suspend such entry were almost simultaneous. The motion for dismissal was made within a few hours after the delivery of the Court's opinion. As to the full power of the Court so to deal with the ~~payment~~ judgment it is only necessary to refer to the case in 11 Illinois 515.

What would be the result of a reversal of the judgment of the Court below?—ordinarily a new trial of the case—it is sent back to be tried *de novo*. If such result should attend the success of this writ of error we would cheerfully accede to a reversal, but we are free to confess that we are not clear what would be the future proceedings to be taken on a reversal.

The only *judgment* now of record in the Court below is a judgment of non suit. If this is reversed, *its* consequence, the order for return of

property and assessment of damages for detention would fall with it as it appears to us, and the case would then stand as if untried and undecided

It will scarcely be urged that this Court could pronounce a final judgment of the merits of the case below without having before it one particle of evidence or one single distinct ruling of the Court.

Had the Circuit Court refused our motion, we could have appealed upon the law, and the fact from their judgment. Can this Court dictate the judgment the Circuit Court should render? Certainly not, as it is wholly ignorant of the character of the respective claims to the property in suit, or the evidence on either side in support of them.

The utmost, it seems to us, that this Court can do, is not to disturb the judgment of the Court below, but if it dissents from the opinion of the Circuit Court upon the propriety of the order of dismissal, it might ex gratia and in view to the government of the Court below, in future express that dissent, but still affirm the judgment for want of power to correct it, unless, as we have intimated, this is to be considered an appeal from the *whole judgment and not merely from the order of dismissal* in which case, we contend, the effect of a reversal would necessarily be a trial de novo in the Court below.

To reverse the decision of the Court below upon the order of dismissal and not [redacted] the *judgment*, might be considered a somewhat anomalous decision, but it is respectfully submitted, that the present in the shape in which it is presented to the Supreme Court is an anomalous assignment of error—a part of an entire judgment only objected to.

We omitted in its proper place to argue the construction (which it seems to us it was designed to bear) ~~upon~~ this sentence of the opinion of the Court in Howe et. al. vs. Haroun, 17 Illinois, p. 498, "the plaintiff must have a right to enter a new suit after the Court has announced its opinion, *and before a note thereof is entered.*" We respectfully submit that in this expression the Court was simply announcing the law upon the facts of the particular case before them, but not as intending to be understood that if a single entry or note of the *opinion was made the right to dismiss the suit was*

lost. On the contrary we read the opinion as clearly evincive of the design to extend the common law right" in its application to juries, to the cases submitted to this Court and thus to secure the privilege of the plaintiff of a dismissal of his suit at any time before judgment of the Court, quoad, the Court, has assumed the same condition of finality as the verdict of a jury. The functions of the jury cease with the rendition of the verdict—of the Court, so far as right to dismiss is concerned, with the recorded entry of judgment.

J. M. S. CAUSIN,

Attorney for Appellees.

No 1947

Adams et al

v

B. L. Shepard

Brief of Defendants

in Error

12919

Filed May 16. 1840

R. Sullivan

Clerk

194

Supreme Court of Illinois--April Term, A. D. 1860.

MICAJAH L. ADAMS, AND
PHIRANDA BUTTERFIELD,
Plaintiffs in Error.

vs.

BOHAN S. SHEPARD,
Defendant in Error.

Error to Cook County.

ABSTRACT OF RECORD.

This was an action of Replevin, commenced in the Circuit Court of Will County, on the 24th day of October, 1857, by the Defendant in Error against the Plaintiffs in Error, to recover possession of a Canal Boat called "L. Hatton Jr.," and formerly known as the "G. W. Shepard."

Rec. p. 2 The writ was issued on the day aforesaid, and returned by the Sher-
3 iff of Will County, duly executed on the same day.

4 The Declaration is in the usual form, alleging the wrongful detention of the Property by the Plaintiffs in error—and the Pleas filed in the Court below by Plaintiffs in error, were *non detinet*, and a plea of Pro-
5 perty in Micajah L Adams.

The case was then by change of venue from said Will County, brought into the Circuit Court of Cook County, where the subsequent proceedings were had.

May 26th, 1858, defendant in error, filed in the Court below his Replication in due form.

6 On the 2d day of March, 1860, the plaintiffs in error withdrew their plea of *non detinet*, and by consent of the parties, a jury is waived, and the cause submitted to the Court for trial upon the issue of property.

7 The testimony and arguments of counsel were concluded on the 5th day of March, 1860, and the cause taken under advisement by the
8 Court.

On the 14th day of March, 1860, the following order was made and entered of record in said cause, to wit :

"This day again come the said parties in person, and by their respective attorneys, and the Court being now sufficiently advised of and concerning the matter submitted, doth order and consider that the issue of property herein be found for the defendant, and that he have return of the property described in the declaration, and that defendant's damages for the detention of said property be assessed at *seven hundred* dollars.

Thereupon the defendant objects to the amount of damages assessed by the Court as insufficient, whereupon the Court directs the Clerk not to enter the said judgment until the subject of damages shall be further considered and said cause is again taken under advisement, with a view to reconsider the subject of damages, and said cause is again taken under advisement with a view to reconsider the subject of damages, and after the entering of said order the said parties thereupon separate, and afterwards on this day come the plaintiff by his Counsel and states to the Court that he designs to take a non-suit, and moves that a judgment of non-suit be entered herein—which said motion is now taken under advisement by the Court

9 On the 30th of March, 1860, the Court entered an order granting the motion of the defendant in error for leave to take a non-suit—dismissed the suit at his costs—awarded a writ of *retorno habendo*, and assessed the damages for detention of the property at $800.

The bill of exceptions in the cause shows the following state of facts :—

That this cause was tried below by the Court, a jury being waived —upon the issue of property in Adams, one of the plaint ffs in error— the issue of *non detinet* having been withdrawn. That full proofs under
11 the issue were introduced by both parties, also proof of the value of the use of the property since the same was replevied. That after the evi- evidence had all been introduced, and the case fully argued on both sides,—both upon the law and the facts, and upon the question of damages, the Court took the case under advisement for several days. That o the 14th day of March, 1860, the Court being fully advised in the premises proceeded to pass upon the law and the facts in detail, and then and there found and announced the issue in favor of the defendants below, and decided the same in their favor, and rendered a judgment in favor of the defendants below, and the Judge made a note of the same upon his docket as follows :—

"March 14.—Judgment for defendant with *retorno habendo* motion for new trial overruled,—suspended till to-morrow because question of damages not determined."

The Clerk of the Court also entered upon his docket a note of said trial and judgment as follows :—

"March 14.—Judgment defendant with a *reterno habendo*,—damages assessed at $,—motion by plaintiff for new trial overruled. Excepted."

That after the Judge had announced his opinion and the note of
11 judgment was entered and the damages for the detention of the prop-. erty fixed by the Judge at $700, the defendant's Counsel remarked to the Court, that that was the lowest sum fixed upon by any of the four or five witnesses sworn on that point. And the Court then said, that
12 as the amount of damages was objected to, he would not enter the amount then, but would re-examine the testimony on that point, and the matter there ended at that time,—the Court taking the subject of damages again under advisement, and directing the Clerk to suspend

an entry of the judgment which had been pronounced, and the Counsel for the Plaintiff and defendant left the Court House, and the Court proceeded with other business.

That afterwards and on the same day, the Counsel for the defendant in error, without the plaintiffs in error, or their Counsel, or any notice to them, or either of them, returned to the court room, and entered a motion for leave to suffer a non-suit, and thereupon under the direction of the Court the Clerk entered upon the order book, the order above set forth at large, finding the issue for the defendants below, ordering a return of the property described in the declaration, assessing the damages at
13 $700,—reciting the objections of defendants below to the amount of damages, the reconsideration of that matter by the Court, the separation of the parties, the return of the Counsel for the defendant below and his motion for leave to take a non-suit, and the taking of said motion under advisement by the Court.

That on the 30th day of March, 1860, the following order was entered of record in said cause, to wit:—

"And now on this day again come the said parties by their respec-
14 tive Attorneys, and the plaintiff insists upon his right to take a non-suit, and the defendants resist the same. And the Court being now sufficiently advised concerning said application, doth order and consider that the Plaintiff have leave to submit to a non-suit, and that this suit be and the same is hereby dismissed at said plaintiff's cost, and that a writ of *retorno habendo* issue herein to which said order of Court allowing said plaintiff to submit to a non-suit, the said defendants by their Counsel now here except. And thereupon the defendants ask that their damages for the detention of said property be assessed by the Court, and the Court being now sufficiently advised from the evidence hereto fore submitted by the parties, doth asssess the defendant's damages for such detention at the sum of eight hundred dollars.

"Thereupon it is considered by the Court that said defendants do have and recover of the said plaintiff their damages of eight hundred dollars in form as aforesaid assessed, together with their costs and charges by them about their defence in this behalf expended and have execution therefor."

That the plaintiffs in error duly excepted to the ruling, opinion and decision of the Court below in allowing the defendant in error to enter
15 a non-suit at that time, and that their bill of exceptions was duly signed and sealed by the Court.

The record contains a stipulation on the part of the defendant in error to waive the issuing and service of *scire facias*, and to enter his appearance in this cause in the Supreme Court at the present term.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in allowing the defendant in error to enter a non-suit, and in dismissing said suit.

SCATES, McALLISTER & JEWETT,
Attorneys for Plaintiffs in error.

193-176

Adams et al

vs

Shepard

Abstract

Filed Apr 24, 1860

L. Lemon
Clerk