

13976

No. _____

Supreme Court of Illinois

Karr et al

vs.

Barstow

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 216.

Karr

21

1892

1893

1894

1895

1896

p1

The People of the State of Illinois

To all whom these presents shall
come touching

Know Be it that we having caused to
be inspected the Records and proceedings of our
bicent Court in and for the County of Ingham
do find certain Records and proceedings in the words
and figures following to wit:

United States of America, Ingham bicent Court April
Term A D 1858

State of Illinois }
Ingham County } ss

Pleas before the Hon Charles
R Starr Presiding Judge of the twentieth judicial
bicent in the State of Illinois at a term of bicent
Court of said County begun and held at the
Court House in said County on Tuesday the 30th
day of April A D 1858

Present Hon Charles R Starr Presiding Judge
Harrison Loring State Attorney For the
James A Kara Sheriff
Thomas Beaman bicent Clerk

Be it remembered that heretofore to wit:
on the second day of April in the year of our
Lord one thousand eight hundred and fifty eight

there was filed in the office of the clerk of the
Soyueis County, heretofore a certain
Receipt which reads in the words and figures
following to wit:

State of Illinois
Soyueis County ss

Wiram C Barstow

vs

James S. Kase, Cyrus R.
Brown and Michael B White

The clerk will issue
a Summons returnable according to Law in an
action of Trespass to the damage of the plaintiff
of five thousand dollars

S. G. Horie

for Plff

And afterwards to wit: on the Second
day of April in the Year of our Lord one thousand
eight hundred and fifty eight there was issued
out of the office of the clerk of the Soyueis County,
heretofore a certain Writ of Summons
which reads in the words and figures following
to wit.

h 3

State of Illinois
Inglewicz County ss

The People of the State of Illinois
to the owners of said County Greeting:

We command you that you Summon
James S Harr Cyrus R Brown and Michael B White
if to be found in your County personally to be
and appear before the Circuit Court of said County
on the first day of the next term thereof to be holden
at the Court House in the Town of Middleport on
the 19th day of April inst to answer William E.
Barstow in an action of Trespass to the damage
of him the said Plaintiff in the Sum of five
thousand dollars and have you there and there
this Writ -



Witness Thomas Bennett Clerk of our
said Court and the Seal thereof at
Middleport this 2nd day of April
A D 1858

Thomas Bennett, Clerk

On the back of which Writ appears the follow-
ing indorsement to Wit:

William E Barstow

vs

James S Harr, C R.
Brown & M B White

Summons

Served this writ by reading the same to the within named James H Harr and Michael B White on April 9th 1858 because R Barron not found in my County.

Fees & Services 1.00

32 miles travel 1.00

Return 1.10

\$ 2.70

John Stearns, Coroner

S. G. Bowie & Randall

Attorneys

And afterwards to wit: on the Second day of April in the Year of our Lord one thousand eight hundred and fifty eight there was filed in the office of the Clerk of the Sangamon County, Circuit Court a certain declaration which reads in the words and figures following to wit:

State of Illinois } Sangamon County Circuit Court
Sangamon County vs April Term AD 1858

William E. Barrett

vs

James H. Harr

h 5

Byrnes R Brown and

Michael B White

The Plaintiff Wiram C Barstow
by S G. Bowie his Attorney complains of James
Starr, Byrnes R Brown, and Michael B White
defendants in an action of Trespass

For that the said def-
endants heretofore to wit on the twenty third
day of January in the year of our Lord one thou-
sand eight hundred and fifty seven with force
and arms &c to wit at the Town of Loda in the
County of Joquias aforesaid certain goods and
chattels of the said plaintiff to wit goods Wares and
Merchandise dry goods crockery Sugar Molasses
tea Groceries Hardware Tin ware Liquors Medicines
Glassware Boots and shoes of great value to wit
of the value of five thousand dollars took and
carried away and to their own use converted
to the damage of the said plaintiff of five thou-
sand dollars and therefore he sues

For that also the said
defendants heretofore to wit on the day and
year aforesaid with force and arms at the Town
of Loda to wit at Joquias County aforesaid
unlawfully took and carried away certain
goods and chattels of the said plaintiff of the

like numbers quantity quality description and
 value as the said goods wares & merchandise in the
 first count of the said declaration mentioned then
 there found and being and converted &c of the said
 plaintiff of great value to wit of the value of five
 thousand dollars then and there found and
 being and converted and disposed of the same
 to their own use to the damage of the said plain-
 tiff of five thousand dollars & therefore he sues

S. G. Bowie

Atty for plff

And afterwards to wit: on the 20th
 day of April in the Year of our Lord one thousand
 eight hundred and fifty eight there was filed in
 the office of the clerk of the Morgan's County cir-
 - cuit Court aforesaid a certain demurrer which
 reads in the words and figures following to wit:
 State of Illinois } Morgan's Circuit Court
 Morgan's County, ss April Term AD 1858.

Hiram E. Barrett

vs

James H. Kerr Et al

And now at this time

W 7

comes the said defendants Kerr & White by joining
 their attorney and defend the force and injury
 when &c and say that the said declaration and
 the matters ~~and things~~ therein contained in
 manner and form as the same are above stated
 and set forth are not sufficient in law for the
 said plaintiff to have and maintain his aforesaid
 action thereof against the said defendants and
 the said defendants are not bound by law to
 answer the same and this he is ready to verify.
 Wherefore he prays judgment &c

Geo B Joiner

Atty for depts

And afterwards to wit on the twenty-
 eight day of April in the year of our Lord one
 thousand eight hundred and fifty eight it being
 one of the regular days of the April Term of said
 Court for said year A D 1858 and the said Court being
 then duly organized and sitting ^{for the transaction of business} as aforesaid the
 following proceedings were had and entered of
 Record by said Court to wit:

" Hiram E Barstow

"306

vs

James A Kerr, by and

" R Brown & Michael B White

" Surpass

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And now comes the parties to this cause by their Attorneys and by agreement thereof this cause is continued till next term

Comes the defendant and withdraws his demurrer and on motion the time is extended till the first day of August for the defendants to plead

And afterwards to wit: on the fourteenth day of January in the Year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the January Special Term of said Court for said year AD 1859 and the said Court being then duly organized and sitting the following proceedings were had and entered of Record by the said Court To wit

Miriam E Barstow

80

vs

} Surpass

James H Karr. by us

R Brown. & Michael B White

}

This day comes the plaintiff by Bowie his Attorney on whose motion this cause is continued till next week

And afterwards to wit on the eighteenth day of January in the Year of our Lord one thousand eight hundred and fifty nine it being one

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of the regular days of the January Special Term
of said Court for said Year A D 1859 and the said
Court being then duly organized and sitting as
aforesaid the following proceedings were had and
entered of Record by the said Court to wit
Hiram E Barstow

80

vs

} Trespass

James H Harr. byas R
Brown. and Michael B White

This day comes the
plaintiff by Bowie his Attorney and the defendants
by Joiner and Blades their Attorneys and by agree-
ment this cause is continued till next term

And afterwards to wit: on the
Seventh day of June in the Year of our Lord one
thousand eight hundred and fifty nine it being
one of the regular days of the June Term of said Court
for said Year A D 1859 and the said Court being
then duly organized and sitting as aforesaid the
following among other proceedings were had and
entered of Record by the said Court To wit:

Hiram E Barstow

"31

vs

} Trespass

James H Harr. byas R
Brown. and Michael B White

And now come the

the defendants by Joiner and Blades their Attorneys
and withdrew the demurrer filed herein to the
declaration in this cause and file pleas to said
declaration

Which said pleas read in the words
and figures following to wit

State of Illinois)
Sagevies Circuit Court
Sagevies County ss June Term A D 1859

Hiram E Barstow

vs

James H Harr, Cyrus R
Brown and Michael B White

1st

And the said defendants
by Joiner & Blades their Attorneys come and defend
the force and injury when &c and say that they
are not nor are either of them guilty of the said
supposed trespasses above laid to their charge
or any or either of them or any part thereof in
manner and form as the said plaintiff hath
above complained against them and of this the
said defendants put themselves upon the country
And the plaintiff doth the like

Joiner & Blades
Atty for depts

And for a further plea in this behalf the said
 defendants say actio non because they say that
 the said plaintiff heretofore to wit: at the April
 Term A D 1857 at &c to wit at the County of Inyo
 -mis aforesaid by his certain Writ of Replevin &
 declaration therein impleaded said James St
 Harr one of these defendants in an action of
 Replevin for the recovery of the same goods the
 taking of which said goods are the same supposed
 -used trespasses in the said declaration above
 mentioned which said writ of Replevin was re-
 -turned into Court at said April Term endorsed
 served by sending to said James St Harr & delivering
 the said goods and chattles to Charles O Barstow
 agent of Hiram & Barstow & which said writ of
 Replevin was at the April Term A D 1857 con-
 -tinued and afterwards to wit at the October
 Term A D 1857 of said Court the said defendants
 James St Harr pleaded that he did not take or
 detain the goods and chattles of the plaintiff in
 his said declaration specified or any part there-
 -of in manner and form as is therein alleged and
 for a further plea in said Replevin suit the
 said James St Harr pleaded that at the time of
 of the said supposed wrongful taking and deten-
 -tion of the goods and chattles in the said declaration

in reply mentioned the property in the said
 goods & chattles was in the said defendant and
 not in the said plaintiff and issue was there-
 upon joined upon said pleas between the said
 plaintiff and the said James H Harr one of
 these defendants and thereupon to Wit at the
 said October Term A D 1857 of the said Superior
 Circuit Court at &c to wit: at the County afore-
 said the said issues came on to be tried and
 were then and there tried in due course of
 Law by a jury of the County duly summoned
 tried chosen and sworn in that behalf between
 the said plaintiff and the said James H Harr
 which jury upon the said trial then and there
 upon their oaths found that the said James H
 Harr guilty of said supposed taking and assess-
 ed the plaintiffs damages at one thousand eight
 hundred and fifty dollars and thereupon the
 said James H Harr moved the said Court at said
 October Term A D 1857 to grant unto him the said
 James H Harr a new trial of said issues and
 thereupon the said plaintiff entered a written
 of all the damages so found ^{and} assessed as aforesaid
 except the sum of five cents and such proceed-
 ings were afterwards had in the premises that

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the said court at the said term overruled the said motion of the said James H Harr for a new trial & further ordered that the plaintiff have & recover of ^{& from} the said defendant the said sum of five cents damages together with his costs and charges therein expended & that he have execution therefor as by the records and proceedings thereof still remaining in the said court of the said county more fully and at large appears while said judgment still remains in full force and effect not in the least released or made void and this the said defendants are ready to verify by the said records wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them &c

Joiner & Bladen

Attys for Defts

3rd

And for a further plea in this behalf the said defendants say actio non because they say that the said plaintiff heretofore to wit on the thirtieth day of March A.D. 1857 sued out of the office of the clerk of the Supreme Circuit Court in the State of Illinois at &c to wit at the County of Sangamon aforesaid his writ of Replevin against the said James H Harr one of

~~the defendant~~
 herein for the recovery of the same goods the
 taking of which said goods are the same trespasses
 complained of in this suit ^{and} by his declaration there
~~in filed on~~ which said writ afterwards to wit at
 the said April Term A D 1857 was returned into court
 by John Stearn who was then ^{the} coroner of said
 County that he had served said writ of Replevin
 by reading the same to the within named James
 H Harr and by delivering the property therein
 named to Charles O Bartow agent of said Hiram
 E Bartow: and by his declaration therein filed
 impleaded the said James H Harr in said suit
 of Replevin for the recovery of the very same
 goods & chattles wares and merchandise upon
 which and which were the subject of the said
 supposed trespasses in the said declaration above
 mentioned which said suit of Replevin was at
 the April Term A D 1857 generally and afterwards
 to wit: at the October Term A D 1857 of said Circuit
 Court the said James H Harr pleaded that he
 did not take or detain the said goods & chattles
 of the plaintiff in said declaration specified or
 any part thereof in manner and form as was
 therein alleged and for a further plea in that
 behalf in said Replevin suit the said James H

pg 15

Harr pleaded that at the time of said supposed wrongful taking &c of the said goods and chattles in said declaration in replevin mentioned the property in said goods & chattles was in said defendant James H Harr and not in said plaintiff & for a further plea in said replevin suit ^{at &c aforesaid} said James H Harr pleaded that ^{at} the time of taking said goods &c they were the property of John Barlow and Charles O Barston & not the property of the said plaintiff and for a further plea in said replevin suit the said James H Harr at &c to wit at the County aforesaid pleaded that the property in said goods & chattles at the time of the taking as aforesaid was in one Andrew L Fuller & not in said plaintiff and issue was thereupon joined upon said several pleas between the said plaintiff & the said James H Harr one of these defendants and thereupon at the said October Term A D 1857 of said Circuit Court the said issues came on to be tried and were tried then & there in due course of law by a jury of the County duly summoned tried chosen & sworn in that behalf between the said plaintiff and the said James H Harr which jury upon the said trial then and there upon their oaths found the defendant James H Harr guilty of said supposed taking & detaining and

assessed the said plaintiffs damages at one thousand eight hundred and fifty dollars & thereupon the said James H. Kars entered a motion for a new trial of the said issues and thereupon the said plaintiff by Randall his attorney entered a remittitur of all damages so found ^{and} assessed as aforesaid except the amount of five cents & such proceedings were thereupon afterwards had in the premises that the said court at the said October Term A D 1857 overruled the said motion for a new trial and further ordered that the said plaintiff have and recover of and from the said defendant James H. Kars the said sum of five cents damages together with his costs & charges therein expended & that he have execution therefor as by the Records and proceedings then still remaining in the said court more fully and at large appears which said judgment still remains in full force and effect not in the least reversed or made void and this the said defendants are ready to verify by the said Records Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them &c

Joines & Blades
Atty's for depts

And afterwards to wit: on the eight day of June in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the June Term of said Court for the year 1859 and the said Court being duly organized and sitting as aforesaid the following proceedings were had and entered of Record by the said Court to wit:

Hiram E Baretan

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vs

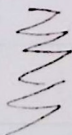
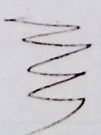
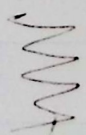
) Surpass

James H Harr, byans

R Brown, and Michael B White

And now come
joiners and Bludes Attorneys for defendants on
whose motion it is ordered that the defendants
be permitted to file additional pleas to those
already filed to the plaintiffs declaration

And afterwards to wit: on the
eight day of June in the year of our Lord one
thousand eight hundred and fifty nine there
was filed in the office of the Clerk of the pro-
priois Circuit Court certain pleas which read
in the words and figures following to wit:

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James H Karr, byas

R Brown, and M B White

ats

Wiram E Barstow

In the Superior Court

last June Term A D 1859

4th

And for a further plea in this behalf the said defendants by leave of the Court first had and obtained according to the form of the Statute in such case made and provided says that the said plaintiff ought further to have and maintain his aforesaid action against three of them the said defendants because they say that the said plaintiff before the commencement of this suit to wit on the 30th day of March A D 1857 in the County aforesaid did by his certain suit of Replevin recover of and from the defendant Karr all and every the said goods in the plaintiffs declaration mentioned and the said defendants aver that the said plaintiff did then and there accept said goods ~~without~~ in full satisfaction and discharge of the said supposed trespasses and of all damages incurred in consequence of the taking of said goods by the said defendants and thus they are ready to verify wherefore they pray judgment &c

James & Blakes atty for depts

h20 5th

And for a further plea in this behalf by leave
of the Court first had and obtained the said defen-
dants say that the good said plaintiff ought not
further to have or maintain his aforesaid action
thereof against the said defendants because they
say that after the committing of the said sup-
posed trespasses in the said declaration mentioned
and before the commencement of this suit to
wit on the 30th day of March A.D. 1857 or thereabout
in the County aforesaid it was agreed between
the said plaintiff and the said defendant Karr
that the said Karr should deliver over to the
said plaintiff all and every the said goods in
the said declaration mentioned in full satisfaction
and discharge of the said supposed trespasses
and of all damages by the said plaintiff sustain-
ed by reason of the committing thereof and
the said defendants further say that in pursu-
ance of said agreement the said Karr there and
there delivered over to Charles O. Barstow agent
of the said plaintiff all and every the said goods
in the said declaration mentioned and he the
said plaintiff by his agent as aforesaid there and
there accepted the same in full satisfaction
and discharge of the said supposed trespasses and

damages as aforesaid the receipt whereof he
there acknowledged by his certain writing signed
by his agent as aforesaid and this they the said
defendants are ready to verify whereupon they
pray judgment &c.

Joiner & Blades
Attys for depts

And afterwards to wit on the tenth
day of June in the year of our Lord one thousand
eight hundred and fifty nine it being one of
the regular days of the June Term of said Court
for the year A D 1859 and the said Court being
then duly organized and sitting as aforesaid the
following proceedings were had and entered of
Record by the said Court to wit:

Hiram E Baretan

vs

Trispass

James H Harr. byrus

R Brown & Michael B White

This day come the
parties by their Attorneys the plaintiff by Randall
and Worrie his attorneys and the defendants by
Joiner and Blades their Attorneys and by agree-
ment of parties this cause is continued till next

Term ~

And afterwards to wit: on the fifteenth day of November in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the November Term of said Court for said year A D 1859 the said Court being then duly organized and sitting in open Court for the transaction of business the following proceedings were had and entered of Record by the said Court in the words and figures following to wit:

211	Hiram E Barstow	) Jurors
	As	
	James H Harr. Esq	)
	R Brown, & Michael B White	

And now come the defendants by ^{James} Marshall, and ^{Blades} ~~Boice~~ Attorneys on whose motion it is ordered by the Court that the plaintiff file applications or demurrers to defendants pleas by nine o'clock tomorrow morning ~

And afterwards to wit: on the sixteenth day of November in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the Clerk of the Court

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aforesaid a certain demurrer in the words & figures following to wit:

State of Illinois } November Term of the
Inyoquois County } ss Inyoquois Circuit Court AD 1859

Hiram E Barstow

vs

James H Harr. Cyrus R
Brown & Michael B White

And the plaintiff as to the plea of the said defendants secondly by them above pleaded says the same is not sufficient in law to bar the said plaintiff from having and maintaining his aforesaid action against them and thus he the said plaintiff is ready to verify wherefore he prays judgment &c

Bowie & Loring

Attys for plaintiff

And the said plaintiff as to the third plea by the said defendants above pleaded says that the same is not sufficient in law to bar the said plaintiff from having and maintaining his aforesaid action against them and thus he is ready to verify wherefore he prays judgment &c

Bowie & Loring. Attys for plaintiff

And afterwards to wit: on the sixteenth day of November in the Year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of the Court aforesaid a certain replication in the Words and figures following to wit: -

State of Illinois } Circuit Court November
Jesse's County } ss Term AD-1859

Hiram E. Barstow

20

vs

} Trespass

James H. Karr, by us

R. Brown & Michael B. White

And the said Plff to the plea of said defts by them fourthly above pleaded says precludi now because he says he did not accept the said goods and chattles in manner and form & in full satisfaction and discharge of said trespass and of all damage incurred in consequence of the taking of said goods and chattles as is by the defts in said fourth plea by them avowed and of that he puts himself upon the country.

And the defendants doth the like

Now, former & Pleades
Atty's for defts

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And said plaintiff as to the plea of the depts
by them fifthly above pleaded says preclude not
because he says that it was not agreed by and
between the said plff and dept Harr that said
Harr should deliver over to said plaintiff said
goods & chattles in manner & form and for the
purpose in said fifth plea alleged & of this the
plff puts himself upon the country &

And the defendants doth the like

Joines Blakes & Wood

Attys for depts

And this opt to the plea of the depts by
them fifthly above pleaded says preclude not
because he says said goods & chattles were not
delivered up to plff in manner & form as the
said depts hath in their said fifth plea above
Supposed and averred & of this the plff puts him-
-self upon the country

L. G. Bowie

Plffs atty

And the defendants doth the like

Joines, Blakes, & Wood

Attys for depts

And afterwards to wit on the sixteenth
day of November in the year of our Lord one
thousand eight hundred and fifty nine it being

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one of the regular days of the November Term
of said Court for said year A D 1859 The said Court
being then duly organized and sitting as aforesaid
the following proceedings were had and entered
of Record by the said Court to wit: -

20

Hiram E. Barstow	}	Juspross
No. 3		
James H. Harr. by and	}	
R. Brown and M. B. White		

This day comes the
said plaintiff by Randall and ^{his attorney} ~~Bornie~~ on whose
motion it is ordered by the Court that the
demurer to the 1st and 2nd special pleas be
and the same is hereby sustained

And afterwards to wit. on the
eighteenth day of November in the year of our Lord
one thousand eight hundred and fifty nine it being
one of the regular days of the November Term of
said Court for said year A D 1859 and the Court being
then duly organized and sitting as aforesaid
the following proceedings were had and entered
of Record by the said Court to wit: -

20

Hiram E. Barstow	}	Juspross
No.		
James H. Harr. by and R. Brown	}	
and M. B. White		

This day comes the plaintiff by Randall and
Bowie his Attorneys and also come the defendants
by Joiner & Blades their Attorneys and by agree-
ment of parties this cause is by the Court ordered
set for hearing at ten o'clock on Monday
morning next.

And afterwards to wit: on the nine-
teenth day of November in the year of our Lord
one thousand eight hundred and fifty nine there
was filed in the Clerk's office of the Court afore-
said certain pleas in the words and figures
following to wit: -

James H. Kerr, by Geo R	In the Superior Circuit Court November Term A.D. 1859
Brown, & Michael B White	
at	
Hiram E. Baretow	

6th

And for a further plea in
this behalf the said defendants by Joiner, Blades
and Wood their Attorneys as to the taking of the
said goods wares and Merchandise in said de-
claration mentioned and as to damages for the
detention of the same say actio non because
they say that the said plaintiff heretofore to wit
at the April term A.D. 1857 at &c to wit at the
County of Sangamon and State of Illinois by
his certain writ of Replevin and declaration

therein impleaded James H Harr one of the above named defendants in an action of Replevin for the recovery of the same goods the taking of the said goods are the same supposed trespasses in the said declaration above mentioned which said writ of Replevin was ~~made~~ returned into court at said April Term indorsed served by reading to said James H Harr and delivering the said goods and chattles to Charles O Barstow agent of Hiram E Barstow plaintiff in this suit which said suit of Replevin was at the April Term A D 1857 continued and afterwards to wit at the October Term A D 1857 of said court the said defendant James H Harr pleaded that he did not take or detain the goods and chattles of the plaintiff in his said declaration specified or any part thereof in manner and form as therein alleged and for a further plea in said Replevin suit the said James H Harr pleaded that at the time of the said supposed wrongful taking and detention of the goods & chattles in the said declaration in Replevin mentioned the property in the said goods and chattles was in the said defendant and not in the said plaintiff and issue was thereupon joined upon said pleas between

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the said plaintiff and the said James H Harr
one of these defendants and thereupon to move
at the said October term A D 1857 of the ^{vain} "Progre-
ssive" Circuit Court at &c to wit at the County afore-
said the said issues came on to be tried and
were then & there tried in due course of law
by a jury of the County aforesaid duly sworn
-oned tried chosen and sworn in that behalf
between the said plaintiff and the said James
H Harr which jury upon the said trial then
and there upon their verdict found the said
James H Harr guilty of said supposed taking
and detaining of the said goods and chattles
and assessed the plaintiffs damages at one
thousand eight hundred and fifty dollars
and thereupon the said James H Harr moved
the said Court at said October Term A D 1857
to grant unto him the said James H Harr
a new trial of said issues and thereupon
the said plaintiff entered a remittitur of
all the damages so found and assessed as
aforesaid except the sum of five cents and
such proceedings were ^{afterwards} had in the premises
that the said Court at the said term overruled
the said motion of the said James H Harr for
a new trial and further ordered that the

plaintiff have and recover of and from the
said defendant Hare the said sum of five cent
damages together with his costs and charges
in that behalf expended and that he have
execution therefor as by the Records and
proceedings thereof still remaining in the
said court of the said County more fully and
at large appear which said judgment still
remains in full force and effect and not in
the least reversed or made void and as to
the residue of said supposed trespasses in
the said declaration mentioned the said
defendants say actio non because they say
that the said plaintiff did not sustain damage
other than have already been awarded to
the said plaintiff in the said Replevin suit
for the taking and detention of the said goods
and chattels and thus the said defendants
are ready to verify Wherefore they pray jud-
gment &c

Joinder. Blades & Wood
Attys for depts

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And afterwards to wit: on the twenty first day of November in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of the Court aforesaid a certain demurrer in the words and figures following to wit -

State of Illinois, Superior Court of
In Equity do hereby 100 the November Term A D 1859

William C. Barstow

vs

James St. Kerr. Rogers
R. Brown & Michael W. White

And the said plaintiff by Bowie and Fletcher his attorneys as to the said plea of the said defendants by them & sixthly above pleaded says that the matters and things in said sixth plea by them above pleaded are not sufficient in law for the said plaintiff to answer to and that he is not bound by law to answer the same he the said plaintiff does therefore demur thereto and prays judgment

&c

Bowie and Fletcher

Attys for plff.

And afterwards to Wit. on the twenty first day of November in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the November term of the said Court for said year AD 1859 The said Court being there duly organized and sitting as aforesaid the following proceedings were had and entered of Record by the said Court to Wit

Hiram E Barrett

20

vs

Trespass

James H Harr, by and
H Brown, & M B White

And now comes the plaintiff by Randall & Bowie his Attorneys and comes also the defendants by Joiner and Rhodes their Attorneys and after hearing the arguments of counsel the Court ordered that the demurrer to defendants sixth plea be and the same is hereby overruled —

And afterwards to Wit. on the twenty second day of November in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the Clerk of the Court aforesaid a certain Replication in the words and figures following to Wit —

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State of Illinois Sangamon County ss
Circuit Court November
term A D 1859

William C Barrett

vs

James H Carr. by us
Brown & Michael B White

And the said plaintiff
as to said plea of said defendants by them sixthly
above pleaded says preclude now because he
says said plff did not sue out of said Court a
writ of Replevin against said Deft Carr & after
sundry steps of procedure as supposed in said
plea recover a judgment against said Deft Carr
in manner and form & make return of said
goods and chattles in said declaration mention
ed as in said plea above supposed & of this
Plff puts himself upon the Country

And the defendants doth the like

J. B. & Padlock & Wood
for depts

And as to so much of said sixth plea
of said depts and ⁱⁿ which depts aver that all
damages mentioned by plff for said taking of
said goods and chattles said plff says preclude
now because he says the damage sustained

by said Plff for the wrongful taking and converting & disposing thereof to the use of said defts on different and other damages than that by said defts in their said plea above supposed and of this the plff puts himself upon the country

And the defendants doth the like
Joiner, Blakes, Paddock &
Wood, Attys for defts

And said plff avers so much of said sixth plea of said defts as said defts therein suppose all the damage sustained by Plff by reason of said wrongful taking & conversion of said goods was adjusted and adjudicated by said Court in said Replevin suit said plff says preclude now because he says said damage awarded and adjudged to said plff in said Replevin suit is not all the damage ^{sustained} ~~maintained~~ by plff by the said taking & conversion of said goods and chattles as is by said defts in their said plea supposed and plff avers that said defts so unskillfully carelessly & negligently handled said goods & chattles at the time of the taking thereof & so carelessly negligently packed said goods for the purpose of conveying

p35-
away the same and so carelessly stored said
goods and chattels for a long time to wit:
for the space of three months that said goods
and chattels became and were torn soiled and
otherwise greatly injured & deteriorated in value
and p^lff avers that he sustained great damage
by reason of the ~~said~~ ^{unprompt taking of the said} goods and chattels by
reason of being put to great expense in remov-
ing said goods and chattels from Middletown
in said County the place where said goods were
stored to aforesaid to Loda in said County the
place from which said goods & chattels were
taken by said depts & other damage sustained
by said p^lff which damage sustained and the
~~damage~~ ^{damage} named in the above averments are
different & separate damage from the damage
recovered by p^lff of deft Harr in said replevin
suit all of which p^lff is ready to verify where-
fore he prays judgment &c

Bowie Fletcher & Loring
P^lff Attys

And afterwards to wit on the twenty
second day of November in the year of our Lord one
thousand eight hundred and fifty nine there was
filed in the office of the clerk of the Court afore-
said a certain demurrer in the words and figures

following to wit

Soyevis County Circuit Court of
the November term A D 1859

James H. Harr & al
vs

Hiram E. Barstow

And the said defendants
say that the Replication of the said plaintiff
to the said sixth plea of the said defendant ^{indly} ~~tho~~
by him above replied to and the matters & things
therein contained in manner and form as the
same are above pleaded & set forth are not
sufficient in law for the said plaintiff to have
or maintain his aforesaid action thereof against
said defendant and that they the said defend-
ants are not bound by law to answer the same
and this the said defendants are ready to verify
~~wherefore~~ ^{for} by reason of the insufficiency of
the said Replication in this behalf the said
defendants pray judgment if the said plaintiff
ought to have or maintain his aforesaid action
thereof against him &c

And for special cause defendants say

1st It tends an issue matters not set forth in
said plea

p 37 2nd It sets forth damages in the new assignment which has already been disposed for the detention of said goods recorded in said action of Replevin &

3rd It presents immaterial issues and blends case with trespass in its new assignment for consequential damages &

4th It is double & alleges matters which could have been shown under the former replication &

5th It is otherwise insufficient in certain multifarious & imperfect

joinder & Blader, Wood
and Paddock

And afterwards to Wit on the twenty second day of November in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of the court aforesaid a certain rejoinder in the words and figures following to Wit.

In the Trovies Circuit Court
November term A D 1859

Kear, Brown, & White

vs

Barstow

}

And the said defendants
by joinder & Blader Wood & Paddock as to the

replication of the said plaintiff to the sixth
 plea of the said defendants by the said plaintiff
 thirdly above replied saith that the said
 plaintiff ought not by reason of any thing
 by him in that replication above alleged to
 have or maintain his aforesaid action against
 the said defendants in respect of the said
 supposed in the said third replication men-
 tioned because they say that at the time ^{of}
 of the committing of the said supposed tres-
 passes in the plaintiffs declaration and third
 replication mentioned was then and there
 acting as sheriff of said county of Sangamon
 in the State of Illinois and then and there
 took the said goods and carried the same
 away by virtue of and under color of his said
 office of sheriff of the county aforesaid as by
 law he was bound to do and that the defend-
 ants Brown & White acted under the authority
 and by the direction of the said defendant
 Karr who was then and there acting as
 sheriff as aforesaid and the defendants aver
 that they did not convert the same to their
 own use but ^{that} the said defendant Karr as such
 sheriff retained them in his own possession

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until the same were replenished solely under
and by order of his said office and not for his
own individual and private benefit nor for
the private and individual benefit of the
said defendants Brown and White and the def-
endants further aver that whatever injury
the said goods and chattles may have sustained
necessarily resulted from the necessary hand-
ling and packing and storing said goods and
chattles and not from any carelessness negle-
gence or other injurious act of the said def-
endants and the defendants further aver that
the said supposed expenses of the said plaintiff
incurred by him in removing said goods from
Middleport to Loda as alleged in said third
replication of the said plaintiff were unneces-
sarily and officiously incurred for that the
said defendant Kerr at the time of the removal
of said goods and chattles and the defendants
aver that they were ready and willing and
offered to deliver the said goods and chattles to
the said plaintiff at his place of business in
the said town of Loda in as good condition
as they were at the time of the taking of
said goods and chattles by the said defendants
but plaintiff refused to accept the same from

from the said defendant Karr at the town of
 Soda aforesaid but, the said, and the defendants
 further aver that the said plaintiff did heretofore
 to wit at the October term A.D. 1857 of the said
 Judge's Circuit Court in his certain suit of
 Replevin against the defendant Karr recover
 the said goods and chattles in as good condition
 as they were at the time of the taking of said
 goods and chattles the taking of which said goods
 are the same supposed trespasses in the said
 third replication mentioned and did also at
 the said October term aforesaid recover of and
 from the said defendant Karr all his damages for
 the detention of said goods and chattles and the
 defendants further aver that the said plaintiff
 did not sustain any damage whatever by the
 supposed unjust capture or taking of said goods
 and chattles, ^{all of which they are ready to accept of} ~~and of this they put themselves upon~~
 the country

And the plaintiff doth the like

Joines & Blades Wood and
 Paddock, Attys for depts

And afterwards to wit on the twenty
 second day of November in the year of our Lord
 one thousand eight hundred and fifty nine

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there was filed in the office of the clerk of
the Court aforesaid a certain demurrer in the
words and figures following to wit:

State of Illinois } Circuit Court November
Sangamon County } ss term A D 1859
Hiram E. Barstow

vs } In repress
James H. Carr et al }

And said Peff by saying
Bowie & Fletcher his attys says that the rejoinder
of said deft to Peffs application to set 6th plea is
not sufficient in law and shows to the Court
here the following counts 1st The said rejoinder
is a departure from the issue tendered by
the Replication

2nd said rejoinder sets up other and distinct
defence from the defence set up in sixth
plea in this that Defendant Carr was Sheriff
when goods were taken.

3rd said rejoinder seeks to set up a new matter
and also to make a repetition of the sixth
plea.

4th The replication tenders a single issue
and the said rejoinder entirely departs from
the issue. And the said rejoinder is in other respects
informal insufficient & illegal

Saying Bowie & Fletcher
for Peffs

And after words to Wit. on the twenty second day of November in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the November term of the said Court for this year A D 1859 The said Court being then duly organized and sitting as aforesaid the following among other proceedings were had and entered of Record by the said Court to Wit -

Hiram E Barstow

20

vs

Trespas

James M Harr. by

R Brown & M B White

This day comes the said plaintiff by Randall & Bowie his attorneys and also come the defendants by Joiner & Blades their attorneys and after hearing the arguments of counsel the Court ordered that the demurrer to the third replication to 6th plea be sustained and on motion of plaintiffs attorneys it is ordered by the Court that plaintiff have leave to amend Replication by striking out that portion which claims damages for expenses in getting the goods back to Soda the place from whence the sheriff had taken them And on motion

of plaintiffs attorneys it is ordered by the court
that the demurrer to defendants rejoinder be
and the same is hereby sustained on motion
it is ordered that defendant have leave to amend
rejoinder by concluding with the words "to the
country" and now come joinder, Blades, Padlock
& Wood & represent to the court that their apper-
-ance for Brown one of the defendants to this
cause has been without his the said Browns, au-
-thority and the defendants by their attorneys
move the court to discharge the said defendant
Brown on the ground that he Brown had not
been served with process, which motion is by
the court overruled and the plaintiff by his
attorneys enters a Volle Prosequi as to Brown
Whereupon the court ordered that a jury come
& thereupon came the jurors of a jury to wit
James Bowen John Bradford George Boleford
Morgan L Young Putnam Gaffield, Dale Pierce
St N Lyman, Robert Hall, Thomas Mason, S D
Foster Thomas Burke and Darius Hartwell
twelve good and lawful men who were sworn
-in and sworn to well and truly try the issue
joinder between the parties according to the evi-
-dence

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And afterwards to Wit: on the twenty second day of November in the year of our Lord one thousand eight hundred and fifty nine it being one of the Regular days of the November term of said Court for said Year A D 1859 The said Court being then duly organized and sitting as aforesaid there was filed in said Court certain affidavits in words and figures following to Wit:

State of Illinois In Equity his Court For
Inguais County Term A D 1859

Wiram E Barlow

vs

James St Harr Et al

Personally appeared in open Court George B Joiner and after being duly sworn deposed and said that he was never employed or counseled on the part of Cyrus R Brown one of said defendants in this suit that he has never intended to enter an appearance for said Brown in this suit in any way whatever as he has no right to receive service of process for said Brown and ^{also} appearance for him and never intended so to do

Geo B Joiner

p 45
Subscribed and sworn to
before me this 22 day of
November A D 1859

Thomas Bennett clk

State of Illinois,
Shelby County ss.

Franklin Blades one of the
Attorneys on the part of the defence in the case
of Hiram E. Baretow vs James H. Harr Cyrus R.
Brown and Michael B. White in action of Trespass
being duly sworn saith that he was never
authorized by said Cyrus R. Brown to appear
for him in the aforesaid cause that he never
had any conversation with said Brown in re-
gard ^{to this case or in regard} to his connection with said cause until
since the commencement of the empanelling
of a jury in said case that he had all along labored
under the impression that said Brown had been
served with process and in drafting what pleas
he did in said case he labored under that im-
pression and that he did not know that said
Brown was not served with process until
the issues were made up in said case that
he never saw the return on the summons in
said cause until after the issues were made
up in said cause and further saith that he

p 46 never received intimation from any other per-
-son for said Brown that the said Brown des-
-ired him to appear for him and further with
not

Franklin Blades

Subscribed and sworn to
before me this 22 day of
Nov A D 1859

Thomas Bennett clk

State of Illinois } In Jayne's Circuit Court
Jayne's County } do of the November Term A D 1859

Charles H Wood one of the attor-
-neys in the above entitled cause being duly
sworn on his oath says that he had nothing
to do with this cause wherein Stram & Barton
is plaintiff and James H Kerr Michael B White
and Cyrus R Brown are defendants prior to
the 21st of November A D 1859 and was then
employed in the case by Joiner & Blades
and that he never had any conversation with
the said Cyrus R Brown in respect to said suit
and was never authorized to appear for him
in this cause in any manner nor by any per-
-son. Whatever

Charles H Wood

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Subscribed and sworn to
before me this 22^d day of Nov
A.D. 1859

Thomas Bennett clk

State of Illinois
Sangamon County } ss

John W Paddock being duly
sworn deposes & says that he was engaged on
the 19th instant in the case of Hiram E Burston
vs James W Harr M B White and Lyman R Brown
now on trial to assist Messrs Joiner & Blades in
conducting the trial of the same & first appe-
ared therein on the 21st day of November A.D. 1859
when the issues therein had been partly made
up & did not have occasion to look at the
summons to see who was or was not served
but has since learned that said Brown was
not served with process and further says that
he never was employed by said Brown but
in appearing he only appeared ^{as engaged to appear} for the purpose
of assisting as above set forth

J W Paddock

Subscribed and sworn to
before me this 22^d of Nov
A.D. 1859

Thomas Bennett clk

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State of Illinois
Madison County, ss

Leysus R Brown being duly sworn deposite and saith that he never authorized any attorney whatever to appear for him in the case entitled Wiram E Barstow vs James H Hara Leysus R Brown and Michael B White that in fact he never knew of the pendency of said suit so far as his connection with said suit is concerned until about five o'clock on the evening of the 22nd inst and when a jury was being empaneled in said suit

Leysus R Brown
Subscribed and sworn to
before me this 22^d day of
Nov A D 1859

Thomas Bennett clk

and afterwards to wit on the twenty sixth day of November in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of the November term of said Court for said year A D 1859 the said Court being then duly organized and sitting as aforesaid the following proceedings were had and entered of Record by the said Court to wit

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Therese E. Barstow

vs

Incepaes

James H. Harr and
Michael B. White

This day comes the plaintiff into court by Randall and Bowie his attorneys and comes also the defendants by Joiner & Bladen their attorneys and the jury heretofore impaneled in this cause having heard the evidence adduced by the parties the arguments of counsel and the instructions of the court retire in charge of an officer to consider of a verdict and afterwards come into court and say We the jury find for the plaintiff and assess the damage at six hundred dollars

Whereupon the defendants by their attorneys enter their motion for a new trial

And afterwards to wit on the fifth day of December in the year of our Lord one thousand eight hundred and fifty nine there was filed in the office of the clerk of the court aforesaid a certain motion in the words and figures following to wit -

James H. Harr &
White

vs

Therese E. Barstow
Nov Term 1859

Motion for new trial

Now comes the defendants by their attorneys & move this Honorable Court for a new trial in this cause for the following reasons

1st The verdict is against the law & evidence

2nd The Record of assignment & chattle mortgage having been allowed to go to the jury without objection on the part of the plaintiff & no motion made to take them out the Court should not have refused the instructions predicated on the force & effect of such evidence

3 The Court in giving the plaintiffs instructions virtually directed the jury to disregard the evidence of fraud claimed by the defendants as a legitimate matter of consideration by the jury

4th The Court in giving the plaintiffs instructions all of which were objected to by defendants really directed the jury that they must find for the plaintiff

5th The Replevin suit of Hiram E. Burston vs James H. Hare was a bar to this suit

6th The Replevin suit only determined the right of the possession of the property in controversy but did not preclude the defendants from disproving the title of the property in the plaintiff in this

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suit & the defendants had a right to have their instructions on this point given to the jury by the court -

7th While one of the defendants in this suit was no party to the Replevin suit & could not be concluded thereby from denying plaintiffs title to the property in question in this case

Joines Blades & Paddock

Attys for Defs

And afterwards to wit on the fifth day of December in the year of our Lord one thousand eight hundred and fifty nine it being one of the regular days of The November term of said court for said year or 1859 The said court being then duly organized and sitting as aforesaid the following proceedings were had and entered of Record by the said Court To wit:

Hiram E Barrett

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vs

Trespass

James H Harr, ~~legat~~
vs
H ~~Barrett~~ & M B White

This day comes the plaintiff by Randall Bovie Loring & Fletcher his attorneys and also comes the defendants James H Harr and M B White by Joines Blades Paddock and Wood their attorneys and after hearing the

argument of counsel on said defendants motion for a new trial heretofore entered in this cause it is ordered by the court that said motion be and the same is hereby overruled, to which ruling of the court the defendants by their attorneys enter their exceptions

It is therefore considered and ordered by the court that the said plaintiff have and recover of and from the said defendants James H. Karr & Michael B. White the said sum of six hundred dollars damages ^{The same being the amount assessed by the court heretofore entered in this cause} together with his costs & charges herein expended and that he have execution therefor against the said defendants Karr & White. Whereupon come the defendants by their attorneys and enter their exceptions and pray an appeal and upon due consideration the court ordered that an appeal be granted on the defendants Karr & White. filing a bond in the sum of twelve hundred dollars with Matthew Lufkin and Cyrus R. Brown or George B. Joiner as surety and that they present their Bill of exceptions within forty days from this date

And afterwards to wit on the seventeenth day of December in the year of our Lord one thousand eight hundred and fifty

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now there was filed in the office of the clerk of the court aforesaid a certain Bond in the words and figures following to wit:

Know all Men by these presents that we James H. Harr ~~James H. Brown~~ & John B. White of the County of Sangamon & State of Illinois are held and firmly bound unto Herman E. Barstow also of the County of Sangamon & same State in the penal sum of Twelve Hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ^{ourselves} our heirs executors and administrators jointly severally and firmly by these presents Witness our hands and seals this second day of December A.D. 1859.

The condition of the above obligation is such, that whereas the said Herman E. Barstow did on the ~~2nd~~ day of ~~Dec~~ A.D. 1859 in the Circuit Court in and for the County of Sangamon and State aforesaid and of the November term thereof A.D. 1859 recover a judgment against the above bounden Harr & White for the sum of six hundred dollars besides costs of suit: from which said judgment of the said Circuit Court the said Harr and White have prayed for and obtained an appeal to the Supreme Court of said State Now therefore if the

p 54

said Harr & White shall duly prosecute their said
appeal with effect and moreover pay the amount
of the judgment costs interest and damages render-
ed and to be rendered against them in case the
said judgment shall be affirmed in said supreme
court then the above obligation to be void other-
wise to remain in full force and virtue -

Approved by me this 17th
day of November A.D. 1859

Thomas Bertram Clerk

Signed & sealed by the
said Matthew Laplin in
presence of

A. B. Newman

James H. Harr

(Seal)

M. B. White

(Seal)

Matthew Laplin

(Seal)

Geo. B. Joiner

(Seal)

And afterwards to wit on
the seventh (7th) day of January in the year of
our Lord one thousand eight hundred and Sixty
there was filed in the office of the clerk of the
court aforesaid a certain Bill of Exception in the
Words and figures following to wit

State of Illinois } Trogue's Circuit Court

Trogue's County } ss November Term A.D. 1859

Wm. E. Barrett

vs

Jurpass

James H. Harr &

Michael B White

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Be it remembered that on the trial of the trial of the above entitled cause and after the parties had submitted all their evidence to the court & jury the defendants asked the court to give the following instructions to the jury and which instructions read in the words and figures following to wit:

1st The court will instruct the jury that the common law only authorizes the pursuit to judgment of one action for an injury to personal property and if the Legislature abridge a common law remedy for an injury and a party pursue that remedy to judgment that party is not allowed to bring a second action for that part of the remedy abridged without a special Statute long provision to that effect and if the jury believe from the evidence that the plaintiff Barstow has recovered the goods &c in this suit mentioned in an action of replevin against Harr one of these defendants and that the taking of said goods by said Harr are the same trespasses complained of in this suit the law is for the defendants —

2nd

If the jury believe from the evidence that the plaintiff Barstow has recovered the goods &c

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in this suit mentioned in an action of replevin against Harr one of these defendants and that the taking of said goods &c by said Harr are the same trespasses complained of in this suit then the plaintiff in this suit is entitled to recover only such damages as he has sustained from the actual taking of said goods and not damages for the detention of said goods —

3 If the jury believe from the evidence that the defendant Harr took said goods by process of law and acted in the fair pursuit of his supposed legal rights and that the other defendants acted under his instructions in obeying the said legal process the only the defendants are bound to make to the said plaintiff is to place him as to said goods in the same situation that he was before the trespasses were committed —

4th If the jury believe from the evidence that the plaintiff has recovered said goods &c in this suit mentioned in an action of replevin against said Harr & that the taking of said goods &c in said replevin suit mentioned are the same trespasses complained of in this suit then the plaintiff in this suit is not entitled to recover damages for the detention or deterioration in value of

p 57 said goods while they were in the possession of said Harr ~

5th If the jury believe from the evidence that the said goods &c were at the time they were levied upon and taken by said Harr were the property of Andrew L Fuller & he has a right to the possession thereof then the law is for the defendants ~

6th That an agent cannot sell the property of his principal to himself unless the principal in some way recognize the sale and if the jury believe from the evidence that Hiram E Barstow the plaintiff purchased said goods &c of John Barstow who or G O Barstow for the benefit of A L Fuller then unless said plaintiff show a subsequent sale of said goods by said Fuller to said plaintiff and prior to the taking by said defendants the law is for the defendants ~

7th If the plaintiff recover at all in this case he must recover upon the strength of his own title or right and not from want or defect of right or title of defendants ~

" If the jury believe from the evidence that the plaintiff Barstow elected in the first place to proceed in an action of assumpsit to recover said goods &c and that the taking of said goods complete^{and}

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of in said replevin suit are the same trespasses
complained of in this suit that section precludes
the plaintiff in this action from recovering only
such damages as were sustained from the act of
taking and cannot recover in this suit damages
arising from detention or deterioration of the
value of said goods while in the possession of
said Harr -

That if they believe from the evidence
that Wm E Barstow the plaintiff purchased
said goods of L O Barstow or John Barstow & co
for the benefit of A L Fuller then unless said
plaintiff show a subsequent sale of said goods
by said A L Fuller to said plaintiff & prior to
said taking by said defendants the law is for
the defendants -

Which instructions and each and
every of them the Court then and there refused
to give to said jury to which ruling of said Court
refusing to give said instructions to said jury
the said defendants by their counsel then & there
and at the time of said refusal objected and
prayed that this then bill of exceptions may
be signed & sealed by this Honorable Court &
made a part of the record ^{of this case} which is accordingly

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done ~

Chas R Starr ^{Attorney}

Judge of the 20th Judicial Circuit
of the State of Illinois

State of Illinois } Inquest's Circuit Court
Inquest's County } Term A D 1859

Wm E Barstow

vs

Ex parte

James H Harr &
Michael W White

Be it remembered that
on the trial of the above entitled cause and
after the parties had submitted all their evidence
to the jury the plaintiff asked the court to
give to the jury the following instructions to wit

1st there is no question before the jury as to whether
the deft Harr was or was not justified
in taking the goods & merchandise in question
as Sheriff of Inquest's County & if the jury believe
from the evidence that the defts in the month
of January A D 1857 wrongfully took the goods
& merchandise in question of plff and that a
part of said goods & merchandise were replaced

It 60

from said Kars by plff that such goods and
merchandise replevied between the time they
were taken and the time they were replevied
~~and~~^{were} damaged by having become stained soiled
torn rusted wet eaten by mice or soiled by handling
then the plf is entitled to recover of the defts the
difference between the actual cash value of such
goods & merchandise so replevied at the time
they were so taken and the value of such goods
and merchandise so replevied at the time they
were so taken and the value of such goods and
merchandise at the time were replevied but
the jury should not in this case in ascertaining
the value of the goods replevied at the time of
replevying take into consideration the damage
that plf sustained by reason of such goods &
merchandise having become between the time
of taking & replevying such goods deteriorated
in value by reason of becoming unfashionable
or unsalable or any other depreciation which
was the necessary consequence of the deterioration
of said goods.

2nd

If the jury believe from the evidence that
defts took wrongfully the goods & merchandise
in question and that such goods & merchandise

h 61 were the property of Barston p^lff and that p^lff
has not been repossessed of a part of the goods
& merchandise in question then the p^lff is entitled
to recover of d^{ft}s the actual value of the goods not
returned to p^lff at the time they were taken ~

3rd If the jury believe from the evidence that d^{ft}s
wrongfully took the goods & merchandise of
plaintiff it is no excuse to d^{ft}s for actual dam-
age to such goods that d^{ft} Harr took such
goods & merchandise as Sheriff on a writ of ex-
ecution or attachment against J Barston & Co
But if the jury believe that in taking said goods
Harr was acting as Sheriff & lived an Execution on
the goods in good faith believing them to be the
goods of J Barston & Co and that he exercised
proper care and skill in taking handling packing
removing & storing said goods then Harr is not
liable for any thing more than the actual damage
done the same while in his possession and the
jury should not allow exemplary or vindictive
damages ~

4th That if the jury believe from the evidence
that J Barston and company sold and delivered
the goods in question to Anne E Barston the
plaintiff in the forepart of December 1856 and that
she afterwards made an assignment of all their

h 62 goods wares merchandise notes bonds and accounts
or to Hiram E Barstow the plaintiff for the benefit
of their creditors that such assignment did not
carry with it the goods in question -

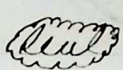
5th That the assignment of J Barstow & company
in evidence is an assignment of no other goods or
chattles wares and merchandise except such as is
named in the Schedule referred to in said assign-
ment and that if no goods chattles wares or mer-
chandise are named in said Schedule to said
assignment then it carries no goods ^{chattles} wares and
merchandise with it -

6th If the jury believe from the evidence that de-
fendants wrongfully took the goods & merchandise
of plaintiff & should believe that he used all the
care he could in packing and handling such
goods and merchandise such care does not excuse
defendants for answering to plaintiff for damages
to plaintiff for actual injury to such goods &
merchandise -

And the Court did thereupon give said
instructions and each of them to said jury and to
which ruling of said Court and giving said inste-
ctions to said jury the defendants by their counsel
then & there at the time of the giving the same

p 63

to said jury excepted and prayed that this their Bill of exceptions might be signed and sealed by this Honorable Court and made a part of the Record which is accordingly done

Chas R Starr 

Judge of the 20th Judicial
Circuit of the State of Illinois

State of Illinois
Inyoquois County } ss

I Thomas Bennett Clerk of
the Circuit Court in and for said County in the State
aforesaid do hereby certify the above and foregoing
to be a full true & complete transcript of the Record
of the proceedings of the Inyoquois County Circuit Court
and the papers now on file in my office in a cer-
tain cause wherein Hiram E Barlow was plain-
tiff and James H. Karr, Cyrus R. Brown, and
Michael B. White, were defendants

Witness my hand and the Seal of
said Court hereto affixed at my
office in the Town of Middleport
in said County this 3rd day of April
A.D. 1860

Thomas Bennett
Clerk

In the Supreme Court
Third Hand Division
April Term A.D. 1860

James H. Karro
Michael B. White
vs
Hiram E. Barstow &
appellee

And now before
the Justices of the said Court at Ottawa came
the said appellants by Van Buren & Gay their
attorneys & say that in the record and pro-
ceedings aforesaid and in giving the judgment
aforesaid there is manifest error in this
to wit.

- 1st The Court erred in sustaining the
Demurrer to the 2nd plea of said appellants.
- 2nd The Court erred in sustaining the
Demurrer to the 3rd plea of said appellants.
- 3rd The Court erred in giving to the jury
the several instructions asked by the
said appellee
- 4th The Court erred in refusing the
several instructions to the jury asked
by the said appellants.
- 5th The Court erred in overruling the

Motion for a new trial.

6th The Court gave judgment in favor of appellee against said appellants whereas by the law of the land said judgment should have been given in favor of appellants.

Wherefore for the said errors and other errors in the record and proceedings aforesaid the said appellants pray that the said judgment may be reversed annulled &c. and they restored to all they have lost by reason thereof &c.

Van Buren Gary
Atty for appellants.

And the appellees by Dickey their atty come & say there is no such error as appellants allege & pray that said judgment may in all things be affirmed
Looffis Thomas & Robert
Dickey
for appellees

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Kerran & Barston

^{vs}
James Mc Karr
Michael S White

Transcript

5 Gilt 186

Filed Apr. 18. 1860
L.eland
Clerk.

No 99

SUPREME COURT OF ILLINOIS.

Third Grand Division, }

APRIL TERM, A. D. 1860.

JAMES H. KARR and
MICHAEL B. WHITE,
vs.
HIRAM E. BARSTOW.

} APPEAL FROM THE
IROQUOIS CIRCUIT
COURT.

I.

The second and third pleas of defendants below were insufficient, and the demurrers thereto were properly sustained, because :

1. They do not show the defense which they attempt to show.

1 Chit. Pl. 545 and note 1, ib. 539.

Steuben County Bank vs. Matthewson, 5 Hill 249.

Moors vs. Parker, 3 Mass. 310.

2. Admitting the facts sought to be pleaded to be well pleaded, still they are insufficient in law, because they show a former recovery against one of three trespassers without showing execution or satisfaction, which is not a good bar.

Livingston vs. Bishop 1 Johns. 290.

Osterhout vs. Roberts, 8 Cow. 43.

Thomas vs. Rumsey, 6 Johns. 26.
Hepburn vs. Sewell, 6 Har. & J. 214.
Marsh. vs. Berry, 7 Cow. 344.
Campbell vs. Phelps, 1 Pick. 62.

3 On the principle stated in the 2d point, the pleas are bad ; because the three defendants joined in them, when they were a defense only as to one ; a plea in bar must show a good defense as to all for whom it is pleaded or it will be good for none.

1 Chit. Pl. 546.
Schermerhorn vs. Tripp, 2 Caines 108.
Marsteller vs. McLean, 7 Cranch 158.
Bradley vs. Hunt, 7 Cow. 330.

4. The appellant's position, that the statute limits the damages in replevin to those for *mere* detention, is unsound. It rather enlarges the rule of damages. At common law, damages were recoverable in replevin for the unlawful taking, and they may have been exemplary. For the original trespass, Brown and White show no defense by these pleas.

R. S. 1858, p. 226, s. 6.
Morris on Replevin, 139.
McCabe vs. Moreland, 1 Watts and Serg. 515.
Dorsey vs. Gassaway, 2 Harr. and J. 413.
Cable vs. Dakin, 20 Wend. 172.
Hopkins vs. Hopkins, 10 Johns. 370.

II.

Errors cannot be assigned for refusing the instructions prayed by the defendant, the evidence not being in the record.

State vs. Wilson, 2 Scam. 226.
G. & C. U. R. Co. vs. Jacobs, 20 Ill. 478.
Coughlin vs. The People, 18 Ill. 266.
Abrams vs. Smith, 8 Blackf. 95.

III.

No point is made by appellant upon the instructions given on behalf of the plaintiff which extends to any but the first; that was correct, because the defendants by their sixth plea tendered an issue which was joined by the plaintiff, under which evidence would have been admissible to which the instruction would have been applicable. He cannot complain of an issue tendered by himself, and the appellant having omitted to set out the evidence it must be presumed that such was given as was applicable to the issue.

Abrams vs. Smith, 8 Blackf. 95.
Rising Sun, &c. T. Co. vs. Conway, 7 Ind. 187.
Ketchum vs. N. A. & S. R. Co. ib. 391.
Low vs. Getty, 18 Ill. 493.

GOOKINS, THOMAS & ROBERTS.

Attorneys for Appellee.

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Herum C. Barton

at

Kan & White

Abulles Buef.

Field 1

Field May 2^d - 1860

L. Island

Ch.

State of Illinois Supreme Court
April Term. 1860

James H. Karr &
Michael B. White } Appeal from the
vs } Illinois Circuit
William E. Barstow } Court.

Appellee's Brief.

Trespass de bonis asportatis by
Barstow, against the appellants
and one Cyrus R. Brown. The three
defendants joined in pleading.
~~The~~

II.

The first question arising upon this
record is as to the sufficiency of the
2^d and 3^d pleas, to which the plain-
tiff interposed a general demurrer,
which was sustained by the Circuit
Court.

They allege that the plaintiff sued
out a writ of replevin against the
defendant Karr for the recovery of
the same goods for the taking of which
this action was brought, which writ
was returned endorsed "served by

"reading to said James H. Karr and
"delivering said goods and chattels
"to Charles O. Barstow agent of,
"Miriam E. Barstow;" that the plain-
tiff declared in replevin for the same
goods, for the taking of which this
action was brought, that Karr
pleaded to the action non cepit;
property in himself, property in John
and Charles O. Barstow, and property
in one Fuller, on which pleas issues
were joined which were tried by
jury, who found Karr guilty of
taking and detaining the goods,
and assessed the plaintiffs damages
at \$1850; that Karr moved for a
new trial; that the plaintiff remitted
the damages except 5 cents, where-
upon the motion for a new trial
was denied; that Karr recovered
a judgement for 5 cents damages
and costs, which judgement is in
full force.

We insist that these pleas were
insufficient. As we understand
them they only show that three per-
sons committed a trespass by

seizing and carrying away and ~~destroying~~ the plaintiff's goods, (which they admit) that the owner sued out a writ of replevin for the goods against one of them, and declared against him; that appropriate pleas were filed; that the plaintiff obtained ^{that he was guilty of} a verdict ~~of~~ both taking and detaining the goods, and a judgement for damages and costs.

1. Our first objection to these pleas is that they do not show what they assume to show. They assume to show that the plaintiff by means of his action of replevin got back the property. They fail in this. An averment that the Sheriff made a return upon the writ of replevin that he had delivered the goods to the plaintiff's agent is no averment that he took them, or that he delivered them to any body, much less to the plaintiff. Pleadings are to be construed most strongly against the pleader. These are not pleas of justification, but of satisfaction, and it may be very in-

portant therefore to ^{enquire} whether they show
 a satisfaction, in whole or in any part,
 of the trespass committed. Had the
 pleader desired to aver that the plain-
 tiff got the property back it was
 very easy for him to have said so.
 Facts should be stated, and not the
 evidence of them. True the stating
 of the evidence is sometimes an argu-
 mentative statement of the fact as-
 sumed, and so good against a
 general demurrer, as in stating a
 contract ^{of a particular description} to have been made by set-
 ting it out. But if the fact assumed
 be not a necessary inference from
 the evidence stated the pleading is
 bad on general demurrer. The
 proper test is, may the pleading be
 true and yet the fact not be as
 assumed. We submit that it by
 no means follows, because such a
 return was made that it was neces-
 sarily true that the ^{sheriff} did ~~do~~ as he says.
 More yet, it was not competent for
 the Sheriff, by his return to decide
 who was the plaintiff's agent. By
 no possible construction can that be

considered
any legitimate part of his return,

A plea must be more certain than a declaration. Would a plea that 20 years had elapsed since a bond became due be a good bar? We think not. The plea should ^{aver} ~~be~~ payment, and the lapse of 20 years, would be evidence of payment, by raising a presumption to that effect, and this allegation, to make the most of it, does no more. We refer to

Chit. Pl. 545, and note 1, id. 539

Sturben County Bank v Mathewson 5 Hill, 249,

Moon v Parker 3 Mass, 310,

2, Suppose we are wrong in this, and that the statement is equivalent to an averment that the property was delivered to the plaintiff still the pleas are insufficient. Here are two men White and Brown, admitting that the plaintiff has an action against them for seizing & carrying away, ~~their~~

his goods, How do they attempt to answer ~~for~~ the action thus admitted. They say that the goods were replevied from their co-trespasser. Mr. Kerr, and that a judgement has been obtained against him for damages, but they do not pretend that the damages have been paid or satisfied. We submit that this is no answer; that a recovery in any form of action without satisfaction. ~~cannot~~ cannot be set up by a co-trespasser as a reason why no recovery should be had against himself.

Livingston v Bishop. 1 Johns 290

Asterhout v Roberts 8 Leon, 43

Thomas v Rumsey 6 Johns, 26.

Hepburn v Serrell 6 Har. & J., 214

Marsh v Berry 7 Leon, 344

Campbell v Phelps, 1 Pick, 62.

Some of the cases go so far as to hold that judgement and execution in the first action will bar the second.

but the weight of authority is, perhaps, the other way. However that may be, nothing less will do, ^{and} ~~for~~ here nothing of the kind is pretended.

This plea of satisfaction must stand on the same footing as pleas of the same nature in other actions. Suppose the payee of a joint and several obligation brings an action against one, and afterwards sees another obligor, and he pleads that his co-obligor has discharged the bond all but five cents, no body would pretend that the plea would bar the action. Our position is that no satisfaction is shown in any part, for this trespass; but even admitting that we got the goods back and that we recouped \$1799 ⁹⁵/₁₀₀ of the damages we recovered, still the stream is not bridged. They have undertaken to ferry it. The boat might have carried Mr Karr over safely, but his extra passengers, Messrs White and Brown have overloaded the craft. Their weight will carry it to the bottom, and he cannot escape their fate, for,

3. A plea in bar must be a good defence as to all who plead it, or it will be good for none.

1 Reput. Pl., 456.

Schermerhorn v Tripp, 2 Cowen, 108.

Marsteller v McLean, 7 Branch, 158.

Bradley v Hunt, 7 Conn, 330.

4. Before leaving this general head we will notice the appellants' argument. Their position is this. The plaintiff had his election to sue in trespass or in replevin; that he elected the latter remedy; that in that action ^{recoverable} under the statute there are no damages, except simply for detention, and that such election is a bar.

We will premise, that however conclusive that answer might be for Mr. Kerr, it is, as we have already shown, no answer at all for Messrs White and Brown, nor have the appellants attempted to show that it is. They seem to have forgotten that the "terrors of the

law" were ^{im}pending over them, and that they needed a better protection than the partial satisfaction offered by Mr. Kerr.

But we do not admit ~~this~~ construction claimed for the statute. It provides, that if the defendant succeeds in the action he may recover damages for the use of the property while held by the writ, an instance of which occurred in the case of *Butler v Inehrling*, 15 Ill. 488. If the plaintiff succeeds he shall recover damages for the detention of the property while in the defendants possession. It is a great mistake ^{to suppose} that this statute restricts the common law remedy, as assumed in appellants' first instruction, it rather enlarges it. Replevin was originally used almost exclusively for the recapture of a wrongful distress, and the damages were recoverable for an unlawful taking, but since, in practice it has become the common remedy for the reclaiming of chattels, whether taken, or detained unlawfully, and since both parties have become actors, and each may re-

cover damages against the other, the statutes in almost all the states have somewhat enlarged the rule of damages. It could never have been intended by the legislature by this statute to take away the damages for the unlawful taking. We think it settled that for an unlawful taking, exemplary damages may in proper case be recovered. But even admitting their construction of the statute, detention must be deemed to include all its incidents, all its immediate consequences, which will include deterioration while in the hands of the defendant. This action is extremely analogous to the action of trespass de bonis asportatis and is in the main governed by the same principles.

R. S. 1858, p. 226, § 6.

Morris on Replevin, 139.

McCabe v. Moulton 1 Matt. & Serg., 515

Lorsey v. Gasaway 2 Har. & J., 413.

Cable v. Dohin, 20 Wend., 172.

Hopkins v. Hopkins, 10 Johns., 370

Now, nothing appears in these pleas, nor in any part of this record to show the nature of the original taking. It may have been done under circumstances of the greatest outrage. How long the property was detained, or how much or in what manner it was deteriorated in value or otherwise damaged by the defendants while they had it in their possession we are not informed. We claim that we have a right to the damages for the taking, and the consequent injuries, unless they have been satisfied, in some way, and that these pleas show no satisfaction or discharge of the trespass, and it is no difference how near they approach to it. If they stop short of this they are logically no better, as a bar, than if they showed a discharge or satisfaction to the amount of five cents, instead of a satisfaction of all except five cents.

I anticipate an objection which may occur to the mind of the court as it has
(over).

my own. It is, that because the plaintiff re-
mitted a portion of the damages in the
former suit he thereby concluded himself
from recovering the same damages against
the co-trespassers. This objection, though at
first sight plausible is not valid. There
is no contribution among trespass-
ers. The plaintiff's right of election
de melioribus damnis is absolute.
He may think a verdict against a
trespasser who has acted with less violence
or outrage than his fellows ought not to
be enforced, and the Court may think so
too, and he may of his own accord, or
under compulsion from the Court remit
his damages, but he thereby takes away
no right which the co-trespassers have
in those damages. They have no interest
in them. And he may prosecute the guilty
parties until they are adequately punished
or he satisfied. Perhaps a remission
of an entire verdict might be a technical
satisfaction but that question does not
arise here.

III

No question can arise upon the refusal of the defendants instructions, a party cannot assign for error the refusal to give instructions without setting out the evidence.

Hosley v Brooks 20 Ill, 115

Is v L. N. R. Co., v Jacobs, 20478

Coughlin v The People 18 Ill, 266.

Albans v Smith 8 Blackf, 95.

III

The only instruction given on behalf of the plaintiff, to which any exception could be taken under any circumstances is the first; and none can, upon this record, be taken to that.

By the 6th plea (recd. p. 30) the defendants chose of their own accord to put in issue the precise question they now ignore. They then say (after setting forth the replication and the proceedings as in the 2^d and 3^d "as

"to the residue of the said supposed
"trespasser in the said declaration
"mentioned. the said defendants say
" actio non. because they say that the
"said plaintiff did not sustain
"damages other than have already
"been awarded to the said plaintiff
"in the said rehearing suit for the
"taking and detention of the said
"goods and chattels, and this they
"the said defendants are ready to
"verify." This plea was put in
issue by a replication.

We submit that after the defend-
ants have of their own motion put
this question upon the record they
must take the consequences, and
cannot now be heard to object. All
we need to show is that evidence
might have been received under it
to which the instruction would have
been pertinent, and as all presump-
tions are in favor of the action of the
court below. (possibly a strained
presumption in this case, for there
can be no doubt but that the de-
pendant and the court above

the plaintiff into the position he now occupies in respect to the damages in the first action,) it must be presumed that such evidence was adduced. If in any imaginable state of the evidence the instruction would have been proper the judgment should not ~~have been reversed~~, be reversed. The appellant has made his own bed, and it is no hardship that he should be compelled to lie in it.

This case furnishes another proof of the doctrine of "foreordination," the justice of which this court has often seen exemplified, although they may not take judicial cognizance of it. That a verdict for \$1850 damages was remitted, notwithstanding a state of facts upon which the plaintiff ultimately recovered \$600, shows that it was done upon the idea, urged by the defendant, and enforced by the court, that damages for detention strictly were all that could be recovered under the statute in

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Hiram C. Barstow

at }
James H. Carr &
Michael B. White

Michael B. White

Appellee's argument

Filed May 10. 1860
L. Leland

Gordon Thomas Roberts
Atty for appellee

SUPREME COURT OF ILLINOIS.

Third Grand Division, . }

APRIL TERM, A. D. 1860. }

JAMES H. KARR, Et Al,

Appellants.

v s. *Brewster*

HIRAM E. BREWSTER,

Appellee.

APPELLANTS' POINTS.

The point presented by the decision of the Court below sustaining the demurrer to the second and third pleas of the defendants, as well as in the instructions given and refused by the Court below, is whether a judgment for the plaintiff in an action of replevin, with nominal damages, is a bar to an action of trespass subsequently brought by the same plaintiff against the same defendant, and another for the same taking of the same goods and chattels.

The case of *Phillips vs. Berryman*, 3 Douglas' R. 286, S. C. 26 E. C. L. 193, is in point. It was an action in the statute of Marlbridge for taking an excessive distress. The defendant pleaded a former recovery by the plaintiff in an action of replevin for the same taking for the same goods. Demurrer by plaintiff. The

plaintiff argued that the object of the two actions was different, and the damages in one are given for a different cause from the damages in the other. That in replevin the plaintiff declares for the unjust taking and detention, and not for the excess.

Yet the Court decide for the defendants. Lord Mansfield said, "the plaintiff has already recovered his goods and damages, for the taking and detaining of them." Buller J. said, "a recovery in one personal action, is a bar to all other personal actions, upon the same subject matter." Citing *Kitchen vs. Campbell* 2 Blackstone R. 827 S. C., 3 Wilson R. 304, in which last report the Court, say, (it being an action of assumpsit by assignees in bankruptcy for money had and received,) "We are of opinion that the plaintiffs having brought trover in this Court, in Michaelmas term, 1796, against the Sheriff of Surry, and the now defendant, to recover the value of the goods of the bankrupt taken in execution (which action well laid) have made their *election*; and there being a verdict and judgment in that action against the plaintiffs, they are bound forever from having the present or any other action: for you shall not bring the same cause of action twice to a final determination; *nemo debet bis vexari*, upon this we found our judgment."

Yet the damages in trover for the goods and in assumpsit for money had and received as the proceeds of those goods are not the same. For, says Buller J., in *King vs. Leith*, 2 Durnford and East R. 141, "In *trover* the plaintiff may recover the full value of the goods, though the sale may not actually have produced more than half their worth; -but in *assumpsit*, the assignees are only entitled to recover what the party really received, which is only what the sale of the goods produced."

The plaintiff in this case seems to have proceeded upon the assumption that, if in the exercise of his election he chose the form

of action less beneficial to himself, he might afterwards pursue the other form for the residue of what he might have been entitled to.

The cases are all the other way.

In *Hite vs. Long*, 6 Rand. R. 457, it is decided that after an action of trover for a horse, the plaintiff cannot maintain trespass for the injury which plaintiff sustained by having his team stopped, and by being delayed at the time of the taking of the horse which formed part of the team.

In *Kendall vs. Stokes et al*, 3 Howard R. 87, C. J. Taney delivering the opinion of the Court, says : (pp. 99-100) "Where a party has a choice of remedies for a wrong done to him, and he elects one and proceeds to judgment and obtains the fruits of his judgment, can he, in any case, afterwards proceed in another suit for the same cause of action? It is true, that in the suit by mandamus the plaintiffs could recover nothing beyond the amount awarded. But they knew that, when they elected the remedy. If the goods of a party are forcibly taken away under circumstances of violence and aggravation, he may bring trespass and in that form of action recover not only the value of the property but, also, what are called vindictive damages—that is, such damages as the jury may think proper to punish the wrong doer. But, if instead of an action of trespass, he elects to bring trover where he can recover only the value of the property, it never has been supposed that after having prosecuted the suit to judgment and received the damages awarded him, he can then bring trespass on the ground that he could not, in the action of trover, give evidence of the circumstances of aggravation which entitled him to demand vindictive damages. The same principle is involved here. The plaintiffs show that they have sued for and recovered in the mandamus suit the full amount of the award; and, having recovered the debt, they now bring another suit upon the same cause of ac-

tion because in the former one they could not recover damages for the detention of the money. The law does not suffer a party to be twice harrassed for the same cause of action" — and cites the same case of *Kitchen vs Campbell, Supra*

In *Marsh vs. Pier*, 4 Rawle R. 285, the Court, after announcing the rule, "that the plaintiff cannot have a second investigation of the same *original matter* when it has passed once *in rem judicatum*;" and, citing many cases, say "that the plaintiff may, frequently, at his election, bring either trespass, trover, *replevin*, *detinue* or *assumpsit* to recover compensation for his loss of his goods."

In *Bendernagle vs. Cocke*, 19 Wend. 207, Cowen J. at the close of one of his exhaustive opinions, says: "It (the rule we contend for) goes against several actions for the same wrong, and against several actions on the same contract. All damages occurring from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule that if a party will sue and recover for a *portion*, he shall be barred of the residue."

The case of *Nolte vs. Lowe*, 18 Ill. 437, is to the same effect. If a party elects the less favorable action of those to which he is entitled, he is, after recovery, barred from the other. After recovering upon an award, he cannot maintain an action on the bond of submission for damages resulting from the failure to abide by the award.

So in *Farrington vs. Smith*, 15 Johns. R. 432, it was decided that an action of trover for a bed, was barred by a judgment for the plaintiffs, in a previous action of trover against the same de-

fendant for the bed quilts taken at the same time. "The seizure of the bed and bed quilts which then lay on the bed, was one single, indivisible act, and the plaintiff ought not to be permitted to vex the defendant by splitting up his claim for damages into separate suits for each article so seized."

So in *Cunningham vs. Harris*, 5 California R 81, the plaintiff having sued for twenty-two cattle and two wagons and recovered twelve cattle and the wagons, was barred in a subsequent action for the remainder of the cattle against one who held them under the original defendant.

If, as is implied by the instructions, a part of the goods were not returned to the plaintiff on the writ of replevin, he might have added to the declaration in the replevin suit, a count in trover.

Dart vs. Horn, 20 Ill. 212.

But whether he could add such a count or not, he could not split up the cause of action so as to maintain two suits.

15 Johns., 432. 5 California, 81.

VAN BURENS & GARY,

Of Counsel for Appellants.

The point raised by appellee 2nd & 3rd points, is not in this case for the reason that the plaintiff had obtained satisfaction - only nominal damages were recovered in the Replevin suit. The substance of that suit was the goods & those the plaintiff received - Even if the damages had been real & substantial, the plaintiff whether he received them or not, could not split up his cause of action & recover the goods & receive them

in one suit, but refuse the damages,
& then in a separate suit proceed
again for damages only.

The issue as to plaintiff having sustained damages
other than those recovered in the Replevin suit were
unnatural & all evidence upon that subject should
have been excluded & having been admitted
the jury should have been instructed to
disregard it - The plffs. instruction to the
Court was error -

Buckmaster v. Beames 5 Gil. 443 & see
especially pp. 449-50 - S.C.

210 70B
Sup Court

James W. Kane
et al

App No

vs
Norman C. Dunston

App No

Dunston

Paul J. Jones & Son
for App No

Filed Apr 28. 1865.

A. L. Leonard

Attorney

SUPREME COURT OF ILLINOIS.

Third Grand Division, }

APRIL TERM, A. D. 1860. }

JAMES H. KARR and
MICHAEL B. WHITE,
vs.
HIRAM E. BARSTOW.

APPEAL FROM THE
IROQUOIS CIRCUIT
COURT.

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The second and third pleas of defendants below were insufficient, and the demurrers thereto were properly sustained, because :

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Steuben County Bank vs. Matthewson, 5 Hill 249.

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2. Admitting the facts sought to be pleaded to be well pleaded, still they are insufficient in law, because they show a former recovery against one of three trespassers without showing execution or satisfaction, which is not a good bar.

Livingston vs. Bishop 1 Johns. 290.

Osterhout vs. Roberts, 8 Cow. 43.

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Marsh. vs. Berry, 7 Cow. 344.

Campbell vs. Phelps, 1 Pick. 62.

3 On the principle stated in the 2d point, the pleas are bad ; because the three defendants joined in them, when they were a defense only as to one ; a plea in bar must show a good defense as to all for whom it is pleaded or it will be good for none.

1 Chit. Pl. 546.

Schermerhorn vs. Tripp, 2 Caines 108.

Marsteller vs. McLean, 7 Cranch 158.

Bradley vs. Hunt, 7 Cow. 330.

4. The appellant's position, that the statute limits the damages in replevin to those for *mere* detention, is unsound. It rather enlarges the rule of damages. At common law, damages were recoverable in replevin for the unlawful taking, and they may have been exemplary. For the original trespass, Brown and White show no defense by these pleas.

R. S. 1858, p. 226, s. 6.

Morris on Replevin, 139.

McCabe vs. Moreland, 1 Watts and Serg. 515.

Dorsey vs. Gassaway, 2 Harr. and J. 413.

Cable vs. Dakin, 20 Wend. 172.

Hopkins vs. Hopkins, 10 Johns. 370.

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Errors cannot be assigned for refusing the instructions prayed by the defendant, the evidence not being in the record.

Thomas vs. Rumsey, 6 Johns. 26.

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Marsh. vs. Berry, 7 Cow. 344.

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Dorsey vs. Gassaway, 2 Harr. and J. 413.

Cable vs. Dakin, 20 Wend. 172.

Hopkins vs. Hopkins, 10 Johns. 370.

II .

Errors cannot be assigned for refusing the instructions prayed by the defendant, the evidence not being in the record.

State vs. Wilson, 2 Scam. 226.
G. & C. U. R. Co. vs. Jacobs, 20 Ill. 478.
Coughlin vs. The People, 18 Ill. 266.
Abrams vs. Smith, 8 Blackf. 95.

III.

No point is made by appellant upon the instructions given on behalf of the plaintiff which extends to any but the first ; that was correct, because the defendants by their sixth plea tendered an issue which was joined by the plaintiff, under which evidence would have been admissible to which the instruction would have been applicable. He cannot complain of an issue tendered by himself, and the appellant having omitted to set out the evidence it must be presumed that such was given as was applicable to the issue.

Abrams vs. Smith, 8 Blackf. 95.
Rising Sun, &c. T. Co. vs. Conway, 7 Ind. 187.
Ketchum vs. N. A. & S. R. Co. ib. 391.
Low vs. Getty, 18 Ill. 493.

GOOKINS, THOMAS & ROBERTS.

Attorneys for Appellee.

210 - 108

Hiram C. Barston
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Kun & White

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Filed May 2^d 1860
L. Island
Ch.

STATE OF ILLINOIS.
SUPREME COURT.

THIRD GRAND DIVISION.

JAMES H. KARR,

AND

MICHAEL B. WHITE,

APPELLANTS,

VS.

HIRAM E. BARSTOW,

APPELLEE.

APPEAL.

Record page 3 Suit was commenced by Hiram E. Barstow against James H. Karr, Cyrus R. Brown and Michael B. White, on 2d of April, 1858, in the Circuit Court of Iroquois County, returnable on the 19th day of April, 1858.

" 5 & 6 Narr, in Trespass, for taking merchandise, dry goods, &c.

" 7 Defendants demurred generally to the declaration.

" 10 Demurrer withdrawn.

" 10 Defendants pleaded, 1st, not guilty, 2d, special pleas, alledging
" 11 to 12 that plaintiff, at the April term of said Court, 1857, commenced an action of replevin against James H. Karr, one of the defendants, for the recovery of the same goods, the taking of which are the same supposed trespasses in the declaration in this suit mentioned. That the writ of replevin was returned served, and delivering the goods and

Page 13 chattels to Charles O. Barstow, agent of Hiram E. Barstow. To the declaration in that suit, James H. Karr pleaded *non cepit*, and title of the property in Karr, issue was joined, and the cause was tried, and a verdict was found for the plaintiff, Barstow, and the jury assessed his damage at \$1,800. The defendant, Karr, moved for a new trial, thereupon Barstow, the plaintiff, entered a remittitur of all the damages, except five cents. The Court then overruled the motion for a new trial, and a judgment was entered upon the verdict for the property and for five cents damages, which judgment is still in full force.

" 13 to 17 The commencement and prosecution of the action of replevin, substantially as in the first special plea, and that in that suit defendant pleaded *non cepit*, also property in John Barstow and Charles O. Barstow, also property in Andrew J. Fuller, that issue was joined, caused tried in October term, 1859; verdict for plaintiff and damages assessed at \$1,800. Motion for new trial remittitur by plaintiff of all the damages, except five cents. Motion for new trial overruled and judgment perfected for plaintiff for the property and for the damages.

" 19 Fourth plea alleges that the plaintiff did, on the 30th of March, 1857, by his suit in replevin, recover from defendant, Karr, all and every the goods and chattels in plaintiffs' declaration mentioned, and did then and there accept said goods, in full satisfaction and discharge of said trespass.

" 20 Fifth plea, alleges that after the committing of the supposed trespasses, and before the commencement of the suit, to wit, on the 30th of March, 1857, it was agreed that Karr should deliver over to plaintiff the goods and chattels in satisfaction, &c., of the trespass, and that the goods were delivered in pursuance of such agreement in full satisfaction, &c.

" 24 & 25 General demurrer to the 2nd and 3d pleas,
Replication to 4th and 5th pleas,

" 26 The demurrers to the 2nd and 3d pleas were sustained.

" 27 & 30 On the 19th of November, 1858, an additional special plea was filed, alleging as to the taking of said goods, *actio non*, and setting up the replevin suit, the pleadings, trial and verdict of the jury for plaintiff, and assessing the plaintiffs' damages at \$1,800, which were remitted to five cents, and that judgment was rendered for plaintiff and for the damages and costs, and as to the residue of said trespass, *actio non*, because plaintiff did not sustain damage other than have already been awarded to said plaintiff in the replevin suit, &c.

To the last plea plaintiff interposed general demurrer.

" 31 The demurrer was overruled.

- P. 33 to 35 Replication to 6th plea.
- " 36 Demurrer to 3d replication to 6th plea. Joinder in demurrer.
- " 37 to 41 Rejoinder to replication to 6th plea.
- " 41 Demurrer to rejoinder.
- " 42 Demurrer to 3d replication to 6th plea sustained and leave given to plaintiff to amend replication.
- " 43 Demurrer to rejoinder sustained and leave given to amend rejoinder by concluding to the country.
- " 43 23d Nov., 1859. Motion to discharge defendant, Brown, on ground " that he has not been served with process."
- Motion overruled and plaintiff entered *nolle prosequi* as to Brown.
- " 43 Cause tried by Jury, Nov. term, 1859. Verdict for plaintiff ;
- " 49 damages assessed at \$600.
- " 49 to 51 Motion for new trial.
- " 51 to 52 Motion overruled, and judgment for plaintiff.
- " 52 to 53 Appeal prayed and bond given.
- " 55 to 63 Bill of exceptions.
- " 55 Defendants asked the Court to give the following instructions, to wit :

1st. The Court will instruct the jury, that the common law only authorizes the pursuit to judgment of one action for an injury to personal property, and if the Legislature abridge a common law remedy for an injury, and a party pursue that remedy to judgment, that party is not allowed to bring a second action for that part of the remedy abridged, without a special statutory provision to that effect, and if the jury believe from the evidence, that the plaintiff, Barstow, has received the goods, &c., in this suit, mentioned in an action of replevin against Karr, one of these defendants, and that the taking of said goods by said Karr, are the same trespasses complained of in this suit, the law is for the defendants.

- " 56 2nd. If the jury believe from the evidence that the plaintiff, Barstow, has recovered the goods, &c., in this suit mentioned in an action of replevin against Karr, one of these defendants, and that the taking of said goods, &c., by said Karr, are the same trespasses complained of in this suit, then the plaintiff in this suit is entitled to receive only such damages as he has sustained from the actual taking of said goods.

Page 56 3d. If the jury believe from the evidence that the defendant, Karr, took said goods by process of law, and acted in the fair pursuit of his supposed legal rights, and that the other defendants acted under his instructions, in obeying the said legal process, the only restitution the defendants are bound to make to the said plaintiff, is to place him as to said goods in the same situation that he was before the trespasses were committed.

“ 56 4th. If the Jury believe from the evidence, that the plaintiff has recovered said goods, &c., in this suit mentioned, in an action of replevin against said Karr, and that the taking of said goods, &c., in said replevin suit mentioned, are the same trespasses complained of in this suit, then the plaintiff in this suit is not entitled to recover damages
“ 57 for the detention or deterioration in value of said goods while they were in the possession of said Karr.

“ 57 5th. If the jury believe from the evidence, that the said goods, &c., were, at the time they were levied upon and taken by said Karr, the property of Andrew J. Fuller, and he had a right to the possession thereof, then the law is for the defendants.

“ 57 6th. That an agent cannot sell the property of his principal to himself, unless the principal in some way recognize the sale, and if the jury believe from the evidence, that Hiram E. Barstow, the plaintiff, purchased said goods, &c., of John Barstow & Co., and C. O. Barstow, for the benefit of A. J. Fuller, then unless said plaintiff show a subsequent sale of said goods by said Fuller to said plaintiff, and prior to the taking by said defendants, the law is for the defendants.

“ 57 7th. If the plaintiff recover at all in this case, he must recover upon the strength of his own title or right, and not from want or defect of right or title of defendants.

If the Jury believe from the evidence, that the plaintiff, Barstow, elected, in the first place, to proceed in an action of replevin to recover said goods, &c., and that the taking of said goods complained of
“ 58 in said replevin suit, are the same trespasses complained of in this suit, that the election precludes the plaintiff in this action from recovering only such damages as were sustained from the act of taking, and cannot recover in this suit damages arising from detention, or deterioration of the value of said goods while in the possession of said Karr.

“ 58 That if they believe from the evidence, that Hiram E. Barstow, the plaintiff, purchased said goods of C. O. Barstow or John Barstow & Co., for the benefit of A. J. Fuller, then, unless said plaintiff show a subsequent sale of said goods by said A. J. Fuller to said plaintiff, and prior to said taking by said defendants, the law is for the defendants.

Which instructions, and each and every of them, the Court then and there refused to give to said jury, to which ruling of said Court, and refusing to give said instructions to said jury, the said defendants by their Counsel, then and there and at the time of said refusal, excepted.

Page 59 The Plaintiff asked the Court to give the following instructions, to wit :

“ 59 1st. There is no question before the jury, as to whether the defendant, Karr, was or was not justified in taking the goods and merchandise, in question, as Sheriff of Iroquois County, and if the jury believe from the evidence, that the defendants, in the month of January, A. D. 1857, wrongfully took the goods and merchandise in question of plaintiff, and that a part of said goods and merchandise were replevined
“ 60 from said Karr, by plaintiff, that such goods and merchandise replevined, between the time they were taken, and the time they were replevined, were damaged by having become stained, soiled, torn, rusted, wet, eaten by mice, or soiled by handling, then the plaintiff is entitled to recover of the defendants, the difference between the actual cash value of such goods, and merchandise, so replevined, at the time they were so taken, and the value of such goods and merchandise, at the time they were replevined ; but the jury should not, in this case, in ascertaining the value of the goods replevined, at the time of replevying, take into consideration the damage that plaintiff sustained, by reason of such goods and merchandise having become, between the time of taking and replevying such goods, deteriorated in value, by reason of becoming unfashionable, or unsaleable, or any other depreciation, which was the necessary consequence of the detention of said goods.

2d. If the jury believe from the evidence, that defendants took wrongfully the goods and merchandise in question, and that such goods
“ 61 and merchandise were the property of Barstow, plaintiff, and that plaintiff has not been repossessed of a part of the goods and merchandise in question, then the plaintiff is entitled to recover of defendants, the actual value of the goods not returned to plaintiffs, at the time they were taken.

“ 61 3d. If the jury believe from the evidence, that defendant wrongfully took the goods and merchandise of plaintiff, it is no excuse to defendants for actual damage to such goods, that defendant, Karr, took such goods and merchandise as Sheriff, in a writ of execution or attachment against J. Barstow & Co. But if the jury believe that in taking said goods, Karr was acting as Sheriff, and levied an execution on the goods in good faith, believing them to be the goods of J. Barstow & Co., and that he exercised proper care and skill in taking, hand-

ling, packing, removing and storing said goods, then Karr is not liable for any thing more than the actual damage done the same, while in his possession, and the jury should not allow exemplary or vindictive damages.

Page 61 4th. That if the jury believe from the evidence, that J. Barstow & Company sold and delivered the goods in question, to Hiram E. Barstow the plaintiff, in the fore part of December, 1856, and that

“ 62 they afterwards made an assignment of all their goods, wares, merchandise, notes, bonds and accounts, &c., to Hiram E. Barstow, the plaintiff, for the benefit of their creditors, that such assignment did not carry with it the goods in question.

“ 62 5th. That the assignment of J. Barstow & Company, in evidence, is an assignment of no other goods or chattels, wares and merchandise, except such as is named in the schedule referred to in said assignment, and that if no goods, chattels, wares or merchandise are named in said schedule to said assignment, then it carried no goods, chattels, wares and merchandise with it.

“ 62 6th. If the jury believe from the evidence, that defendants wrongfully took the goods and merchandise of plaintiff, and should believe that he used all the care he could in packing and handling such goods and merchandise, such care does not excuse defendants for answering to plaintiff for damages to plaintiff, for actual injury to such goods and merchandise.

“ 62 And the Court did thereupon give said instructions, and each of them to said jury, and to which ruling of said Court, and giving said instructions to said jury, the defendants, by their Counsel, then and there, at the time of the giving the same to said jury, excepted.

The jury found a verdict for the plaintiff, and the Court rendered judgment thereon.

The defendants appealed to this Court and assign for Error :

1. The sustaining the Demurrer to the 2nd plea.
2. The sustaining the Demurrer to the 3rd plea.
3. The refusing of the Instructions asked by defendants.
4. The giving of Instructions asked by the plaintiff.
5. The rendering judgment for the plaintiff.

VANBURENS, & GARY,
Attorneys for Appellants.

210
Sup Court

James W. Kane
Orystal B. White
App^t

vs
Hiram E. Packman
Opp^r

Abstract

13076

Wm. D. Brown & Son

Atty for Opp^r

Filed Apr 21, 1860

L. L. Smith
Clerk

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