

14476

No. _____

Supreme Court of Illinois

Hammond

vs.

People

71641  7

126

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 11

PEOPLE'S CAUSES.

Stammond
vs

People

1476

Supreme Court of Illinois
Third Grand Division
April Term. A. D. 1863

David S. Hammond
Sheriff &c.

Reffin Error
vs.

Paul. Cella.

Defendant in Error

Defendants Suggestions
on

Motion to dismiss writ of Error

This is a writ of Error. Issued out from
this Court to review the decision of
the Creek County Circuit Court on
a Habeas Corpus. The defendant
excepted to the signing of the bill
of exceptions

A writ of Error will not lie

The order on Habeas Corpus is not a
final judgment. - To give it that
effect the prisoner must be deprived

of the right of repeated applications for the writ, a right which has never yet been denied in this State

There is no question but that the Cook County Circuit Court had jurisdiction to hear and determine the matter, nor but that there was a full and fair hearing of the case.

The right to sue out writs of Error in such cases is not conferred by statute. And it cannot otherwise exist

Thus in Hurd on Habeas Corpus p 562. it is said "It has never been decided in England that a writ of Error will lie to a final order made on a Habeas Corpus; but it has repeatedly been held that it would not" And again "The current of Authority in the State Courts is that a review of a decision on a Habeas Corpus independent of statutory provisions cannot be had on writ of Error or Appeal, and that on the ground that the decision is not a final judgment" and in support of this doctrine the Author cites the following Authorities

Bell vs. The State 4 Gill 304. Russell
vs. The Commonwealth 1 Penrose 44 80.
Wade vs. Judge 5 Ala 18. Howe vs
The State 9 Miss 69. Matter of Perkins
2 Cal 424. Ex parte Mitchell 1 Sa
 Am. 413. - And again he says "The
 testimony of the practice in England
 of renewing the application for
 the writ as often as the party desires
 is inconsistent with the supposition
 that a decision upon it is understood
 to be of that conclusive character
 which is necessary to support a
 writ of Error".

It would seem clear that
 neither by the statutes of this state
 nor at common law, will a writ
 of Error lie to a final order made
 on a habeas corpus, and the writ
 should therefore be dismissed

C. A. Downs
 Counsel for Defts in Error

10-11-79.
Superior Consular
Third Ward Division

Deane S. Hammond

vs.

Reeve, Charles

~~~~~

Suggestions on matters to

be done, under Envy

Filed May 11, 1863,  
Belmont  
Ch.

Edw. Jones  
Consul at Dept. Envy

STATE OF ILLINOIS,  
SUPREME COURT

} ss. The People of the State of Illinois,

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between The People of the State of Illinois on the relation of Joseph Vacaro

plaintiffs, and

David S. Hammond

defendant, it is said that manifest error hath intervened, to the injury of the said

Hammond

as we are informed by his complaints the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Joseph Vacaro

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April 1862 next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Joseph Vacaro

notice, together with this writ.

Witness, The Hon. John T. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 14<sup>th</sup> day of April in the year of our Lord One Thousand Eight Hundred and Sixty-three.

L. Island  
Clerk of the Supreme Court.



11-126

David S. Hammond

No. vs.

The People, et. al.  
Joseph Vaccaro

SCIRE FACIAS.

FILED Apr 23 ..... A. D. 186 3

L. Selond Clerk.



STATE OF ILLINOIS,  
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Circuit Courts of Cook County, before the Judge thereof, between The People of the State of Illinois in the relation of Paul Bella

plaintiff's, and David S. Hammond

defendant, it is said that manifest error hath intervened, to the injury of the said Hammond

as we are informed by his complaint the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Paul Bella

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April 1863 next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Paul Bella

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 14<sup>th</sup> day of April in the year of our Lord One Thousand Eight Hundred and Sixty-three.

S. Island  
Clerk of the Supreme Court.



David S. Hammond

No.                      vs.

The People ex. rel.  
Paul Cella

SCIRE FACIAS.



FILED..... A. D. 186

..... Clerk.



# SUPREME COURT OF ILLINOIS,

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

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

vs.

The People of the State of Illinois on the Relation of  
PAUL OELLA,

*Defendant in Error.*

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ERROR TO COOK COUNTY  
CIRCUIT COURT.

## ABSTRACT OF RECORD.

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

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

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

6           **Writ** of habeas corpus.

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

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

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

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

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

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

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

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

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

**This was all the testimony.**

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

## ERRORS ASSIGNED.

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

## POINTS FOR PLAINTIFF IN ERROR.

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

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

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

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

“ SAME, }  
    *vs.*  
“ SAME. }

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

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

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

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

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

Conclusion of opinion 15 Ill. 289.

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

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

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

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

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

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

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

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

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

BAILEY, GARY & WILLIAMS,

*Attorneys for Plaintiff in Error.*

Hammond

<sup>24</sup>  
The People

ex rel. Cella

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abstract and  
plffr points

Filed Apr 23. 1963

S. S. Landwehr

Baily Gay Williams  
Plffr attys

# SUPREME COURT OF ILLINOIS,

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“fore,” &c.

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

Twice he refused to tell his name, (page 14 of the record).

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Citing *inter alia*, 6 Taunton, 115, (1 E. C. L. R. 534), *Smith vs. Pat-*  
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BAILEY, GARY & WILLIAMS,

*Attorneys for Plaintiff in Error.*

Hammond

vs

The People

of the County of Vacarro

Contract &  
Receipts

To A/c 23 1863

Edward M

By Gary Williams  
att'y

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof legal and held at the Court House in the City of Chicago, in said County, on the Seventeenth day of February in the year of our Lord One Thousand Eight Hundred and Eighty and of the Independence of the said United States the Eighty ~~Seventeenth~~

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

Joseph Knox States Attorney. }

David S. Hammond Sheriff of Cook County.

Attest, William L. Church Clerk.

Be it remembered, that heretofore to-wit: On the 13<sup>th</sup> day of March in the year aforesaid, Joseph Vaeus, by his attorney, filed in said Court his Petition for Habeas Corpus, which is in the words and figures following. To-wit:

State of Illinois }  
Cook County }

To the Hon George Manierre Judge of the Cook County Circuit Court

Your Petitioner Joseph Vaeus, respectfully represents to your Honor that he is an Italian by birth and for the last five years has been living and in business in Chicago in said County of Cook. That on the 12<sup>th</sup> day of March A.D. 1883 one William M Douglas pretending to be a Constable, came to your petitioner

2.

place of business on Lake St in Chicago and arrested your petitioner and by force and against your petitioners will compelled your petitioner to go with him to the jail of said Cook County situated in said City of Chicago and there and there delivered your petitioner as a prisoner to David S. Hammond who is Sheriff of said Cook County as your petitioner is informed. That your petitioner was then and there placed within said jail and deprived of his liberty and has ever since so remained in said jail. That as your petitioner is informed he is now in the Custody of said Sheriff and is by him deprived of his liberty and confined in said jail. That as your Petitioner is informed he is so confined and imprisoned by virtue of a certain writ issued on the 11<sup>th</sup> day of March A.D. 1863 by one Calvin De Wolf acting as a Justice of the Peace in favor of one Peter Corbin and against one Joseph — Your petitioner further states that he is unable to read or write in the English language and has no knowledge of the contents or effect of said writ except as he is informed by others, that he speaks and understands the English language but imperfectly and indifferently, but as he is informed and believes said writ is not issued against your petitioner and does not warrant or authorize the arrest of your petitioner, but was issued upon a judgment against one Joseph in favor of said Corbin and entered before said De Wolf as Justice of the Peace. Your Petitioner further states that

2  
3  
he was not present at the time of the rendition of said judgment - and was not a party thereto and as he is informed and believes is in no manner affected thereby  
Your petitioner further states that he has already always both in Chicago and elsewhere been known by his true name of Joseph Vaccaro - Your petitioner further states that he has for years been well known in Chicago in the vicinity of his place of business on Clark Street by his true name of Joseph Vaccaro and by no other name - Your petitioner further states that he is confined and restrained as aforesaid in the custody of said David S. Hammond Sheriff and that his said confinement and restraint is illegal because the said writ under and by virtue of which he is confined is not issued against your petitioner and contains no warrant or authority for said Sheriff to so confine and restrain your petitioner.

Your Petitioner attaches a copy of said writ to this his petition

Your petitioner therefore prays that a writ of Habeas Corpus may be issued as provided by statute, to the said David S. Hammond and that your petitioner may be discharged from his said imprisonment and restored to his liberty

Joseph <sup>his</sup> Vaccaro  
mark

Joseph Vaccaro the above petitioner being duly sworn on oath says that the foregoing petition has been read to him, that he knows the contents thereof



3

you have him to satisfy unto the said plaintiff  
 the judgment aforesaid, and if the same be not  
 forthwith paid, then you will commit said defen-  
 dant to the custody of the Sheriff or Jailor of  
 said County - there to remain until said judgment  
 and costs are fully paid and satisfied, or he  
 become otherwise legally discharged, - and  
 hereof make due service and return as the law  
 directs within seventy days from the date hereof  
 Given under my hand and seal this 11<sup>th</sup> day of  
 March A.D. 1863.

Calvin De Wolf Secy

Justice of the Peace

Copy of Return

Executed by arresting the within named defendant  
 Joseph - and committing him to the Jail of  
 Cook County - this 12<sup>th</sup> day of March A.D. 1863  
 Wm M Douglas Const<sup>l</sup>

And thereupon to-wit: at the February Term of  
 said Court to-wit: on the said 13<sup>th</sup> day of March  
 in the year aforesaid, the following proceedings,  
 among others, were had and entered of record to-wit:  
 The People of the State of Illinois  
 at the relation of Joseph Vears

David D. Wammund

Petition for Habeas Corpus

On reading and filing the  
 Petition of said Petitor and on motion of Smith West &

Writ of Habeas Corpus; it is ordered that a writ of Habeas Corpus be issued by the Clerk of this Court directed to the said David S. Hammond commanding him to forthwith bring the body of the said Relator — Joseph Vacaro into Court —

And afterwards, to-wit: on the said 13<sup>th</sup> day of March in the year aforesaid, there was issued out of and under the seal of said Court, the People's writ of Habeas Corpus, directed to the said David S. Hammond, in the words and figures following. To-wit:

State of Illinois  
Clerk of Court

The People of the State of Illinois, to David S. Hammond, Greeting

We command you that you do forthwith without excuse or delay bring or cause to be brought before our Circuit Court of Cook County — now sitting at the Court House in Chicago the body of Joseph Vacaro, by whatever name or addition he may be known or called, and who is unlawfully detained in your custody as is said, together with the day and cause of his capture and detention. Then and there to abide such order and direction as our said Circuit Court shall make in that behalf; hereof fail not and make

7<sup>4</sup>  
due return forthwith, under penalty of what the law directs

Seal

Witness, William S. Church Clerk of  
Our said Court, gave the seal thereof  
at Chicago this 13<sup>th</sup> day of March A.D. 1863

Internal  
50¢  
Revenue

Wm. S. Church Clerk

Endorsed

"By the Wabau Corpus Act"

And afterwards, to-wit: on the said 13<sup>th</sup> day of March  
in the year aforesaid, the said writ of Wabau Corpus  
was returned into said Court by said David S. Hammond  
with the following return thereon endorsed. To-wit:

To the Hon. George Maniere  
Judge of the Circuit Court:

The undersigned Sheriff of Cook  
County makes return to the within writ, that he  
holds the defendant Joseph in custody under and  
by virtue of a *habeas corpus* issued by G. D. Wolf a Justice  
of the Peace, dated March 11 A.D. 1863 under and by  
virtue of which said defendant was arrested on the  
12<sup>th</sup> day of March 1863 and committed to jail, and  
is now held by virtue of said *habeas corpus*, a copy of which  
is hereto annexed and made part of this return  
this 13<sup>th</sup> day of March A.D. 1863.

David S. Hammond, Sheriff  
By G. Fisher deputy

8

Copy of leada. attached to writ + made part of  
defendants return.

State of Illinois }  
Cook County }

The People of the State of Illinois to  
any Constable of said County Greeting  
Whereas in a certain suit lately before  
me the undersigned, a Justice of the Peace in and  
for said County depending wherein Peter Kerwin  
is plaintiff and Joseph — is defendant +  
wherein the amount claimed and in controversy  
did not exceed one hundred dollars, judgment was  
rendered by me in said suit in a plea of Dover  
and conversion in favor of said plaintiff and  
against said defendant for the sum of Sixteen  
dollars seventy five Cents beside Costs of suit  
which are herein endorsed and taxed at Three  
dollars; And whereas also the said plaintiff  
has elected execution to be used on said judgment  
against the body of said deft for the Collection  
thereof with Costs as provided by law —

You are therefore hereby Comanded  
that you take the body of the said defendant  
and him safely keep so that you have him to  
satisfy unto the said plaintiff the judgment  
aforesaid and if the same be not forthwith paid  
then you will commit said defendant to the

9<sup>5</sup>

Custody of the Sheriff or jailer of said County, here to remain until the said Judgment and Costs are fully paid and satisfied or he become otherwise legally discharged; And hereof make due service and return as the Law directs, within seven days from the date hereof, Given under my hand and seal this 11<sup>th</sup> day of March A.D. 1863.

Calvin H. Wolf Seal  
Justice of the Peace

Return on the 12<sup>th</sup>

Executed by arresting the within named defendant Joseph, and committing him to the Jail of Cook County this 12<sup>th</sup> day of March A.D. 1863.

Wm. H. Douglass Const

And afterwards, to-wit: at the same term of said Court last aforesaid, to-wit: on the seventeenth day of March in the year aforesaid, the following proceedings, among others, were had and entered of record, To-wit:

The People of the State of Illinois  
at the relation of Joseph Vearo  
v  
David S. Hammond  
Plaintiff  
Defendant

And now on this day in obedience to the said writ of Habeas Corpus issued in this case, comes the said David S. Hammond in his own proper person and by Bailey and says his

10  
attorneys, and makes due return to the said writ  
viz' that he has brought the body of the said Joseph  
Vacaro with him into Court, and sets forth in his  
return the warrant and authority by which he holds  
the said Vacaro in custody; and the parties being  
now both in Court, upon their agreement it is ordered  
that this cause and the matters involved therein be  
heard and considered by the Court without the  
formality of pleadings, each party being permitted  
to introduce any evidence which may be considered  
by the Court, pertinent to the issues in the cause  
and it appearing to the Court from the Petition  
and return of the defendant to said writ of  
Habeas Corpus and the Evidence adduced  
that the said Petitor is held in custody by said  
defendant under and by virtue of an Execution  
issued by Calvin D Wolf a Justice of the Peace  
of said Cook County against the body of Joseph  
upon a judgment recovered against Joseph  
by one Peter Cortni in a suit wherein the summons  
was issued against Joseph and it further  
appearing that the Petitor's name is Joseph  
Vacaro, and that he has never been known or  
called Joseph by the name of Joseph, and that  
no appearance was made by him in the said suit  
after the service of said summons upon him and  
that said judgment was <sup>rendered</sup> by default

It is therefore considered and  
ordered by the Court, that the said writ was

and the same hereby is declared to have been and to be illegal, and that the said defendant be and he is hereby commanded to release the said Relator from Custody, and for so doing this order shall be his sufficient warrant and protection

And it is further ordered by the Court that the said defendant pay the costs of this proceeding and that the People on the relation aforesaid have Execution therefor. Whereupon on motion of said defendant five days are given for the purpose of preparing & filing a Bill of Exceptions, and thereupon the plaintiff Excepts to the filing of a Bill of Exceptions in said Cause, upon the ground that no appeal or writ of Error will lie from a judgment in Habeas Corpus, which Exceptions are ordered to be entered of record

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

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

The People of the State of Illinois }  
at the relation of Joseph Vacars }

David S. Hammond Sheriff of Cook County

Best-remembered that on the 13<sup>th</sup> day of March  
 A.D. 1863 being one of the days of the February  
 Term of said Court, the matter came on  
 for hearing before said Court, the Relator being  
 present in person and by Smith Bart-ley, de his  
 attorneys and the defendant by Bailey and  
 Gay, his attorneys and by consent was heard  
 by the Court without any formality of plead-  
 ing upon the Evidence as follows. to-wit.

First, the said Relator with the Consent of said  
 Court introduced and read in Evidence  
 the said affidavits of Louis Bella attached  
 to the petition as follows

State of Illinois }  
 Cook County }  
 Louis Bella of the City of

Chicago being duly sworn on oath says  
 that he is well acquainted with Joseph Vaccaro  
 the Petitioner named in the annexed Petition  
 That said Joseph Vaccaro has resided in the  
 City of Chicago for about five years last past  
 That his true name is Joseph Vaccaro and  
 by this name and by no other name has he ever  
 been known or called either here or elsewhere  
 That said Joseph Vaccaro is an Italian by  
 birth, and speaks and understands the  
 English language very imperfectly, that he  
 cannot write or read in English and knows

137

little or nothing of the legal effect of process issued by Courts or of his rights in a Court of law. That any person seeking to learn the name of said petitioner could have done so by making proper Enquiry among the acquaintances of said Petitioner, such acquaintance being quite numerous in this City and further deponent faith not

Subscribed + sworn to before  
me this 12<sup>th</sup> day of March

Louis Della

MDCCCLXIII. Mdes Almy  
(Seal) J.P.

And the said Relator with the consent of depts. Council further introduced and read in Evidence the affidavit of John Campredonio attached to said Petition as follows

"State of Illinois }  
Cook County }  
John Campredonio of the

City of Chicago being duly sworn on oath says that he knows Joseph Vacaro the petitioner named in the annexed petition well. That said Joseph Vacaro has never been known or called by any other or different name than that of Joseph Vacaro. That he has but little knowledge of the English language, and neither read or write in English, as this affiant believes, and further this affiant further faith not

John. + Campredonio  
make

14

Subscribed and sworn to before me  
the 13<sup>th</sup> day of March A.D. 1863

Wiles Almy M.P.

The said defendant then called as a witness  
Daniel W. Corbin who testified that he was the  
agent of said Peter Corbin in said writ of  
Capias ad satisfaciendum mentioned; that  
said Peter Corbin was a non resident of this  
state; that he (Witness) knew the Relator by  
sight, but did not know his name; that said  
Peter Corbin having as witness believed a cause  
of action in Trover against the Relator, witness  
had a conversation with the Relator before any  
suit was commenced against him as to said  
cause of action, and in said conversation witness  
asked the Relator his name, but the Relator  
would not tell him what it was. That the  
Relator spoke good English. That witness  
afterwards commenced a suit in favor of Peter  
Corbin against the Relator by the name of  
Joseph before Justice DeWalt and at the  
time and place of the trial thereof the  
Relator was present but did not appear in  
said suit, and the witness caused said suit  
to be dismissed at the costs of said Peter Corbin  
as he had not filed security for costs, therein  
that witness then and there asked Relator  
what his name was but Relator would not  
tell him, and the witness then commenced

15

another suit in favor of Peter Corbin before said Justice against the relator by the name of Joseph in which suit the judgment was obtained upon which said Ca Sa was issued, that the Relator was the person he intended to sue

The defendant also further called as a witness William M. Douglas who testified that he was the constable who served the summons on the Relator in the last mentioned suit, as well as in the suit which was dismissed, that the Relator was the person upon whom he intended to + did serve the summons.

The defendant further introduced in evidence the docket of the said Justice and the original summons and receipt for Costs showing a summons and service thereon upon Joseph in a suit of Peter Corbin vs Joseph and a judgment thereon by default conforming with the recitals in said Ca Sa in favor of Peter Corbin against Joseph.

The foregoing was all the evidence in the cause and thereupon on the 14<sup>th</sup> day of March A D 1863 being still one of the days of the said February Term, the said Court decided that the said Relator ought to be discharged from under the said Ca Sa and did accordingly order him to be discharged to which decision and order of the said Court the said defendant then + there Excepted

76

and prays that this his Bill of Exceptions may  
be signed and sealed by the Court & recorded  
and made a part of the Record, which  
is accordingly done this 14<sup>th</sup> day of March  
1863.

George Manierre  
Judge of 7<sup>th</sup> Judicial  
District Ills

Seal

17

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All papers on file + all proceedings entered of record in a certain cause begun pending in said Court, on the Commons side thereof, wherein Joseph Deane was Plaintiff and David S. Hammond Defendant.

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



In the Supreme Court.  
Third Grand Division

David S. Hammond

vs.

The People of the State  
of Illinois in the relation  
of Joseph Vacaro

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

First- In discharging the  
said Joseph Vacaro from the  
custody of the said plaintiff-

Second- In adjudging the costs  
against the said plaintiff-

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

Bailey, Gay & Williams  
Plffs. attys.

~~#~~ 11

Hammond

The <sup>my</sup> People ex  
rel. Vacans

Transcript and  
assign<sup>t</sup> of Errors

Filed April 23<sup>d</sup> 1863  
L. Leonard  
Clerk

# SUPREME COURT OF ILLINOIS,

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

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

vs.

The People of the State of Illinois on the Relation of

JOSEPH VAGARO,

*Defendant in Error.*

} ERROR TO COOK COUN-  
TY CIRCUIT COURT.

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## ABSTRACT OF RECORD.

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

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

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

5           **Return** of constable thereon.

6           **Writ** of habeas corpus.

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

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

9, 10, 11. **Decision** of the court reciting that it appears that the relator is  
held in custody by defendant below by virtue of an execution issued by  
a Justice of the Peace against the body of Joseph upon a judgment re-  
covered against Joseph by Peter Corbin, in a suit wherein the summons  
was issued against Joseph. That the relator's name is Joseph Vacaro ;  
that he has never been known or called by the name of Joseph ; that no  
appearance was made by him in said suit *after the service of summons*  
*upon him*, and that said judgment was rendered by default ; therefore  
discharging relator from custody, and adjudging the costs against de-  
fendant below.

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

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

14           **2d.** Testimony of Daniel W. Corbin, that he was the agent of said  
Peter Corbin in said writ of *capias ad satisfaciendum* mentioned ; that  
said Peter Corbin was a non-resident of this State ; that he (witness),  
knew the relator by sight, but did not know his name ; that said Peter

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

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

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

**This was all the testimony.**

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

**ERRORS ASSIGNED.**

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

## POINTS FOR PLAINTIFF IN ERROR.

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

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

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

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

“ SAME,        }  
    *vs.*                    }  
“ SAME.        }

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

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

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

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

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

Conclusion of opinion 15 Ill. 289.

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

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

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

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

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

Twice he refused to tell his name, (page 14 of the record).

In his petition for the writ of habeas corpus, he does not pretend that the judgment is unjust, or that he did not have due notice of the suit, but only alleges that "he was not present at the time of the rendition of the judgment." (Page 13 of the record).

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

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

BAILEY, GARY & WILLIAMS,

*Attorneys for Plaintiff in Error.*

11

Hammond

<sup>vs</sup>  
The People  
ex rel. Vacarro

Abstract &  
piffs points

Filed April 23, 1863  
L Seland  
em

Baile, Gay & Williams  
off attys

David S. Hammond In the Supreme  
The People of the State <sup>124</sup> of Illinois  
of Illinois on the relation <sup>3</sup> Third Ward  
of Joseph A. Casar <sup>3</sup> Division

April Term A.D. 1863.  
Error to the Circuit Court of  
Cook County

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

Chief of the Supreme Court  
will please issue writ of Error  
and Scire facias as above -

Baile, Gay & Williams  
Attys.

11 10  
D. S. Hammond

7

P. P. M. of St. Valero

Presipe

Filed Apr. 14. 1863.

L. Seland  
Clerk.