

No. 12581

Supreme Court of Illinois

Mahler

vs.

Holden

71641  7

48 NY = 1

Henry Mahler
vs

Phineas Holder

26
1858

26

12581

1858

X

Refused

The People of the State of Illinois by the Grace of God free and independent. To all to whom these presents may come Greeting: Know that we having caused to be inspected the Records and proceedings now remaining in the office of our clerk of our Circuit Court in and for our County of Will; do find there certain records in words and figures following; to wit:

Will County Circuit Court.

September Term A D 1855

United States of America

State of Illinois } ss.

County of Will

I appear before the honorable Sylvester W Randall, Judge of the eleventh Judicial Circuit of the State of Illinois at the September term of the Will County Circuit Court began and held at the Court House in the City of Sikest in said County on the first Monday of September (the same being the third day of said month of September) in the year of our Lord one thousand eight hundred and fifty five and of the year of the Independence of said United States the eightieth.

Present Hon. Sylvester W Randall Judge as aforesaid

Sherman W Bowen, State Attorney for Wth and. his

Berry Bearrett Sheriff of said Will County

Royal E Barber clerk Will County Circuit Court

And heretofore to wit on the 2nd day of April A D 1855 certain

papers were filed in the Office of our Clerk of our Circuit Court in words and figures following to wit:

Henry Mahler

Statement Judgment

vs
Phineas Holden

} Assumpsit.

Plaintiffs demand \$95. Summons

issued March 16th returnable March 23rd, Summons returned March 23rd personally served by Stephen Goodnow Constable.

Parties called, plaintiff appeared, declared in assumpsit for advertising and keeping stray colts of the defendant: Claim \$95. witness sworn for plaintiff. Charles Sauter Justice of the Peace of the town of Bloom Rock County produced his stray book showing and testifying to the amount fees paid him: H. Mahler testified to the keeping of the colts by plaintiff. William Myer testified to the value of keeping colts.

Henry Mahler - Judgment for Plaintiff damages \$3.25 cts
costs \$5.28 cts

State of Illinois

Will County } ss. I the subscriber a Justice of the Peace in and for the said County do certify that the above transcript contain a full and perfect statement of all the proceedings and of the judgment before me in the above entitled cause.

dated this 29th of March 1855.

Augustus Herbert

Justice of the Peace

3
Appeal Bond:

Know all men by these presents that we, Phineas Holden
+ William Blandell of the County of Will and State of
Illinois are held and firmly bound unto Henry Mahler
of Cook County in said State in the penal sum of one
hundred dollars lawful money of the United States for the
payment of which well and truly to be made we do bind
ourselves our heirs, executors and administrators, jointly
severally and firmly by these presents,

Witness our hands
and seals ^{2nd} day of April A.D. 1855. The condition of the
above obligation is such that whereas the said Henry
Mahler did on the 23rd day of March A.D. 1855. recover a
judgment against the above bound Phineas Holden
before Augustus Herbert a Justice of the Peace in and for the
said County for the sum of thirty three ²⁰/₁₀₀ dollars debt
and five ⁷⁸/₁₀₀ dollars cost from which said judgment
of the said ~~judgment~~ justice of the Peace the said Phineas
Holden has taken an appeal to the Circuit Court of said
Will County and State of Illinois.

Now if the said Phineas
Holden shall prosecute his appeal with effect and shall
pay and satisfy whatever judgment may be rendered
by the said Circuit Court upon the dismissal or trial
of the said appeal, then the above obligation to be null and
void otherwise to remain in full force and effect.

Given and entered into before me at ^{Will} P H Holden (L S)
my office this ^{2nd} day of Apr A.D. 1855 William Blandell (L S)
R E Barber (L S)

And afterwards to-wit on the 25th day August A D 1855 the following papers were filed in the office of clerk of our Circuit Court in words and figures following to-wit;

Summons.

State of Illinois } ss.

Will County }

The People of the State of Illinois to
the Sheriff of said County; Greeting:
We command you that You summon Henry Mahler
if he be found in your County personally to be and appear
before our Circuit Court of our said Will County on the
first day of the next term thereof to be holden at the Court
House in Joliet in said Will County on the first Monday
of September 1855 to answer Phineas Holden concerning his
appeal lately taken to our said Court from the judgment
of Augustus Herbert an acting Justice of the Peace in and
for our said County in a certain cause wherein said Mahler
is plaintiff and said Holden is defendant. to the damage
of the said plaintiff as is said. And have
you then there this writ. Witness Royal
E Barber Clerk of our said Court, and
the seal thereof hereto affixed at office
in Joliet in said Will County this
2nd day of April A D 1855.

Seal

R E Barber. Clerk

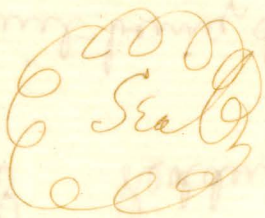
On the back of which was endorsed the following return; to-wit I have served this writ
by reading the same in the hearing of Henry Mahler Aug. 13th 1855.

S P Seamitt Shff.

Supremacy

State of Illinois } ss.
Will County }

The People of the State of Illinois to
Augustus Herbert a Justice of the Peace
and a Constable in and for said County Greeting.
Whereas in a certain suit lately depending before you
the said Justice of the Peace wherein Henry Mahler is
Plaintiff and Phineas Holden is Defendant in which
Judgment was rendered in favor of the Plaintiff before you
on the 23rd day of March A.D. 1855 as by the transcript of
said Judgment appears and whereas the said Defendant
has taken an appeal to the Circuit Court of said Will
County: We Therefore command you the said Justice and
Constable that you do forthwith suspend all ^{proceedings in} relations to said
suit until the said Circuit Court shall make other
order to the contrary:



Witness Royal E. Barber Clerk of our
said court and the Seal thereof at
Loliet this 2nd day of April A.D.
1855.

R. E. Barber Clerk

To the Sheriff of Will County to execute.

In the back of which was
indorsed the following return to writ I have served this writ by reading
the same in the hearing of the within named Augustus Herbert
July 20th 1855.

P. P. Carritt Shff.

6
And afterwards to wit on the 2nd day of September of 1855. the following affidavit of continuance was filed in the office of our clerk of our Circuit Court in words and figures following to-wit:

State of Illinois Will County ss

Henry Mahler

vs
P. Hedden

Will County Circuit
Court September Term 1855

Henry Mahler the plaintiff in this suit being duly sworn says that Henry F. Mahler is a *material* witness for the said plaintiff on the trial of this suit - that he expects to be able to prove by said witness that two certain horses of the said defendant broke into the inclosure of the said plaintiff in the County of Cook in the State aforesaid some time in the month of November 1854, and that said plaintiff duly advertising said horses as strays & took them before the proper Justice of the Peace & had the same duly appraised and that said plaintiff kept & took care of & fed said ^{horses} until about the middle of January then next ensuing, and that said defendant about the middle of January 1855 replevied & took from the said plaintiff said horses, and refused to pay the said plaintiff anything either for his trouble & expense in taking up advertising or keeping & feeding said horses, and further says that said Henry F. Mahler now lives in the County of

7.
look in this state and that he promised the said
plaintiff to attend this court at this term as a witness for
said plaintiff in this cause, and further that said
Witness is now sick with a fever & confined to his bed
and wholly unable to attend this court at this
present term, and further says that this application
is made for delay but that Justice may be done,
Sworn & subscribed to

before me this 5th day of Sept 1855. Henry Mahler
R E Barber clk

And on the same
day to wit on the day and year last aforesaid it also
being one of the regular days of said September Term for
the year 1855 aforesaid, and the said court being then in
session duly organized and open for the transaction of
business, certain proceedings were had and entered of
record by said court in words and figures following
to-wit:

Henry Mahler }
vs } Appeal,
Phineas Hadden }

And now comes the said
plaintiff by Mr Goodspeed his attorney
and files his affidavit and enters his motion that this
cause be continued. Whereupon it is ordered by the court
that this cause be and it is continued. And now comes
the said defendant by Norton & McRoberts his attorney
and enters his motion for judgment against the said
Plaintiff for his costs of this present term. Whereupon it is
ordered by the court that the said defendant do have

8
Judgment against the said plaintiff for his costs and charges of this present term hereof.

It is thereupon considered by the Court that the said defendant do recover of the said Plaintiff his costs and charges of this present term of Court by him about his suit in this behalf expended, and that he have Execution Therefor.

And afterwards to wit on the 29th day of December A.D. 1855 ^{it being one of the Regular days of said Term of said Court for said year 1855, Court being duly organized and open for the transaction of business} certain papers were filed in the office of our Clerk of our Circuit Court in words and figures following to wit: ^{Entered of Record by said Court in words & figures following to wit:}
~~State of Illinois Will County, ss.~~

~~Henry Mahler }
vs }
Phineas Holden }
} Appeal.~~

~~Will County Circuit Court
Dec. term 1855.~~

~~It is hereby stipulated & agreed by & between the parties to this suit that the testimony of Charles Sauter a witness on the part & behalf of the said plaintiff be this day taken & reduced to writing by & before O Simonds Esq. a Justice of the Peace of said Will County and that the same together with such exhibits as may accompany the same when so taken, may be read in, as legal evidence on the trial of this cause, by said plaintiff - Witness our hands this 24th day of December 1855.~~

~~J. Goodspeed, atty for plff.
J. M. Roberts, atty for def.~~

State of Illinois Will County ss

Will County Circuit
Court Dec. Term 1855,

Henry Mahler

vs

Phineas Hodder

The testimony of Charles Sauter a witness produced sworn & examined on oath before an acting Justice of the Peace in & for said Will County on the 24th day of December 1855 under and by virtue of the stipulations hereto attached, on the part & behalf of said plaintiff.

Charles Sauter being duly sworn on his oath says:

I reside in the town Bloom Brook County Illinois. I was elected Justice of the Peace in Ill 1848 and have held the office and acted as such ever since. I know Henry Mahler and am acquainted with the name of defendant. — The Plaintiff came to me in the fore part of November 1854, he wanted I should write notice for him to put up in the town where he lived to advertise two stray colts. I wrote three notices describing in the notices that they were one year old last spring and the color of one was brown and the other the same with a star in the forehead and the hind right foot was partly white. the notice stated that said colts were on the farm of Henry Mahler the plaintiff. This sent. Mahler signed his name to the notices himself. On the 18th day of November same year he came

before me with three disinterested free holders they were sworn according to law by me to appraise the said colts after they were sworn the appraised one colt at fifty dollars and the other at forty dollars he said Mahler made affidavit before me that he took the said colts upon his premises and that the marks and brands have not been altered since the taking up. Mr. Mahler paid the appraisers twenty five cents each in my presence. He paid me I think somewhere about three dollars and a half, fifty cents for notices one dollar to send to the county clerk of Cook County the balance for fees that belong to me. I sent one dollar with the transcript to the county clerk of Cook County. (Presents his transcript marked "A" and attached) I saw one of the notices aforesaid posted up at Rich Station at Lewis store on the out side near the door, I saw it everytime I passed there for sometime. It was in the town of Rich and it is at the station as aforesaid where the bank trail road crosses the Illinois R.R. The transcript hereto attached is verbatim as it is on my docket.

Charles Lauter

The counsel for defence objects to all of the foregoing testimony.

State of Illinois }

County of Cook } ss.

Bloom Town }

Be it remembered that on the

13th day of November 1854, Henry Mahler of said County appeared before me Charles Sauter a Justice of the Peace of the said County and took and subscribed the following oath viz: that he is a freeholder that on or about the 1st day of November 1854 in the said County he took up as estrays two holls being one year old last spring one is a dark brown colour and appraised at fifty dollars, the other is red brown with a star in her forehead and the hind right foot is partly white and is appraised at forty dollars that on the 6th day of November 1854 he posted up copies of the said advertisement in three of the most public places in the town of Rich and that the marks or brands of the said holls have not been altered since the taking up. that I did thereupon appoint William Meyer, Frederick Stunkel and Henry Gieske three disinterested housekeepers of the neighborhood to come before me on the 18th day of November 1854 to appraise the said estrays and report to me their appraisement who did thereupon forthwith appear and having been duly sworn by me to appraise the said estrays without partiality, favor or affection did appraise the same and reported to me their appraisement in the words mentioned above that is the two holls together at ninety dollars.

In witness whereof the said Justice of the Peace has hereto set his hand and seal this 18th day of November, A.D. 1854.

Charles Sauter a Justice of the Peace

Seal

State of Illinois
Cook County
Bloom Town

I Charles Sauter a Justice of the Peace in and for the said County do hereby certify that the above is a true copy of the proceedings in relation to the estrays herein described as entered by me in my stray book.

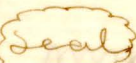
Dated this 24th day of December A.D. 1855

Charles Sauter a Justice of the Peace. 

State of Illinois
Will County

I J. V. Simonds a Justice of the Peace in for said County and State of Illinois do hereby certify that the foregoing testimony of Charles Sauter was taken before me on the 24th day of December A.D. 1855 that the same was sworn and subscribed to by said Charles Sauter at the time when and where the same was taken.

Witness my hand and seal this 24th day of December A.D. 1855

J. V. Simonds J.P. 

~~And afterwards to wit on the 29th day of December A.D. 1855, it also being one of the regular days of the December term 1855, the said Court being then in session duly organized and open for the transaction certain proceedings were had and entered of record by said Court in words and figures following to-wit:-~~

9
Henry Mahler }
vs
Phineas Redden } Appeal.

And now comes the said
Plaintiff by J Goodspeed his attorney and
enters his motion that this cause be now called up for
hearing. And the said Defendant by Norton & McRoberts
his attorneys enters his cross motion that this ^{cause} be now
called up for hearing. Whereupon it is ordered by the
Court that this cause be and it is now called up for hearing.
Thereupon the said Plaintiff enters his motion that this
cause be now called up for Trial. And the said Defendant
enters his cross motion that this cause be now called up
for Trial: And the Court being fully advised in the
premises it is ordered that this cause be and it is
now called up for Trial. And the said Plaintiff enters
his motion that a Jury do now come herein. And the
said Defendant enters his cross motion that a Jury do
now come herein. Whereupon it is ordered by the Court
that a Jury do now come herein. Thereupon come the
Jurors of a Jury of Good and lawful men to-wit;

Olson Havens	James Shaw	Elijah Johnson
Horace Carpenter	Loel George	Samuel Adams
Olson Miles	Solomon Bower	W L Baddock
S S Pratt	W S Jennings	Ed John Hartner

who being duly empanelled and sworn to well and
truly try the issues joined between the said Parties
and a true Verdict give according to evidence. And
the said Defendant enters his motion to suppress

the depositions of one of the said plaintiffs Witnesses herein. And the said Plaintiff enters his cross motion that said motion to suppress said Witness deposition herein be overruled. And the Court being fully advised in the premises it is ordered that said motion to suppress the said deposition of the said plaintiffs Witness herein be and it is overruled. And after hearing the evidence adduced and the arguments of counsel and seeing the instructions of the Court said Jury retire in charge of an officer of this Court to consider of their verdict.

And said Jury returning into Court for Verdict say, We of the Jury find "No cause of action herein" Thereupon the said Plaintiff enters his motion enters his ~~motion~~ for a new trial herein. And the said defendant enters his cross motion that said motion for a new Trial be overruled. Whereupon it is ordered by the Court that said ^{Plaintiff} motion for a new trial be and it is overruled. Thereupon the said Plaintiff enters his exceptions to the opinion of the Court in overruling his said Motion for a new Trial and enters his motion for leave to file his exceptions thereto. Whereupon it is ordered by the Court that same be and it is given to the Plaintiff to make up and file his said Bill of exceptions by the first day of March next.

And hereupon to
 And afterwards to wit on the 16th day of January A.D. 1858 the said Court on the same day and year last aforesaid the following Plaintiff files his said Bill of exceptions in said case as follows to wit
 transcript was filed in the office of our Clerk of our Circuit

11
State of Illinois, Will County.

Will County Circuit Court
Dec Term 1855

Henry Mahler
vs
Phineas Holden

Be it remembered that on the trial of the above entitled cause it was proven on the part of the plaintiff that some time in the latter part of October 1854, two colts of the defendant got into the inclosure of the plaintiff, (who resides & is a freeholder in the Town of Rich, Cook County Ill) that said plaintiff turned them out & drove them away - that they returned & got in again the next day, & that then said plaintiff, after making enquiries among his neighbors & ascertaining that they did not belong in his neighborhood, took up said colts as strays & fed, & watered, & took proper care of them until about the 12th day of Nov. 1855. That written notices were seen posted up in three of the most public places in said Town of Rich, describing said colts & stating that they were on the premises of said plaintiff & said notices were signed by said plaintiff that said notices were observed by witnesses at a number of different times during the first half of the month of November 1854, That on or about the 18th day of November 1854 said plaintiff obtained three freeholders of said Town of Rich to come & look at said colts, who then went before Charles Lanter who was then the nearest acting Justices of the Peace in said Cook County & were by him duly sworn as appraisers, & they appraised said colts, one at 40 dollars & the other at 50 dollars, That said plaintiff paid said appraisers 50 cents each for their services & deposited with

said Sauter some three & a half or four dollars in money out of which to pay his fee & the balance for him to send to the County Clerk of said Cook County with the transcript of the proceedings before said Sauter. The worth of the keeping of said colts was proven to be three shillings each per day. And that said deft. sued out of the Cook County Court of Common Pleas a writ of Replevin for said colts against said plf. & that the Sheriff of said Cook County, on or about the 12th January, 1855 by virtue of said writ took said colts from the possession of the said plf. and delivered them to the said deft. The plf. ^{then} offered in evidence the deposition of Charles Sauter which is in the words & figures following:

State of Illinois, Will County, ss

Will County Circuit Court
Dec. Term, 1855

Henry Mahler }
as } appeal
Phineas Holden }

It is hereby stipulated & agreed by & between the parties to this suit that the testimony of Charles Sauter a witness on the part & behalf of the said plaintiff be this day taken and reduced to writing by & before S. D. Simonds esq., a Justice of the Peace of said Will County, & that the same together such exhibits as may accompany the same when so taken, may be read in ^{as legal} evidence on the trial of this cause, by said plaintiff.

Witness our hands this 24th day of December, 1855.

J. Goodspeed

Atty for plf.

L. M. Roberts atty for deft.

Which was objected to by dft. for the reason that there was not the proper certificate of the Clerk of the Cook County Court showing that said witness was a justice of the Peace duly qualified &c. at the time said proceedings were had before him, accompanying said deposition & transcript. Which objection was overruled by the Court & the dft. then & there accepted, & said deposition was then read in evidence to the Jury. Here the plf. rested his case.

The dft. then proved that he had at two different times during the fore part of the Month of Aug. 1855 made demand of said plf. for said colts. & that plf. refused to deliver them up unless dft. would pay him 25 cents per day each, for keeping said colts for the time plf. had kept them & dft. refused to pay anything. Dft. then offered in evidence the record of the Replevin case in the Cook County Court of Common Pleas, which is in the words & figures following:

~~Court in words and figures following to-wit.~~

State of Illinois } ss.
County of Cook

Came before the honourable John M Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a regular term of said Cook County Court of Common Pleas began and held at the Court House in the City of Chicago in County and State on the first Monday being the fifth day of February in the year of our Lord one thousand eight hundred and fifty five, and of the Independence of the United States the seventy ninth,

Present The Honourable John M Wilson Judge
Daniel McHarg Prosecuting Attorney.
James Andrews Sheriff.
Walter Kimball Clerk.

Attest

Be it remembered that heretofore to-wit on the eleventh day of January in the year of our Lord one thousand eight hundred and fifty five Phineas H Holden Plaintiff filed in the office of the Clerk of the Cook County Court of Common Pleas within and for the County and State aforesaid his affidavit in an action of Replevin which affidavit is in words and figures following to-wit

State of Illinois } ss.

Cook County } Phineas H Holden being duly sworn says that he is the owner of two certain colts one of them two years old in the spring of the year A D 1854 a brown mare

19
colts. — — and the other of them one year old in
the spring of the year 1854 a bay mare colt with a
star in the forehead with one white hind foot. said
two colts of the value of about One Hundred and forty
dollars and that he is lawfully entitled to the possession
of the said colts, that the said colts have not been
taken for any tax assessment or fine levied by virtue
of any law of this state, nor seized under any execution
or attachment against the goods and chattels of this
affiant liable to execution or attachment and this
affiant further says that one Henry Mahler of the
county and state aforesaid withholds and unlawfully
detains the said colts in his possession and custody.

Done to and Subscribed before
me this 11th day January A.D. 1855.

Walter Kimball Clerk of Court
Clk. of Court Pleas

} P He Holden
}

And afterwards to wit on the same day there issued out
of the office of the clerk of said Court a writ of Replevin in said
cause which said writ with the Sheriff's return thereon
and Replevin Bond thereto attached is in words and
figures as follows to wit:

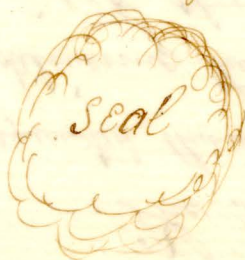
State of Illinois }
Cook County }

The People of the State of Illinois to the
Sheriff of said County Greeting. Whereas
Phineas Holden Plaintiff complains that Henry
Mahler Defendant withholds and unlawfully detains the

following described goods and chattels, (To-wit)

Two Certain Colts,
one of them two years old in the Spring of the year A.D. 1854, a
brown mare colt, and the other of them one year old in the
spring of the year A.D. 1854, a bay mare colt, with a star
in the forehead, with one white hind foot. And two Colts
of the value of about one hundred and forty dollars.

Therefore we Command you. That if the said plaintiff shall
give you bond with good and sufficient security, in double the
value of the said goods and chattels, as required by law, to prosecute
his suit in this behalf to effect and without delay, and to make
return of the said goods and chattels, if return thereof shall be
awarded, and to save and keep you harmless in repleying said
goods and chattels, you cause the said goods and chattels to be
replevied and delivered to the said plaintiff without delay;
and also that you summon the said defendant to be and
appear before the Cook County Court of Common Pleas for said
County, on the first day of the next term thereof, to be holden
at the City of Chicago, in said County, on the 1st Monday of
February next, to answer said plaintiff in the premises, And you have then
and then this writ, with an endorsement thereon in what manner
you have executed the same, together with the bond which
you shall have taken from the said plaintiff as before com-
manded, before executing this writ.



Witness Walter Kimball, Clerk of our said Court,
and the Seal thereof at Chicago, in said County,
the 11th day of January, 1855.

Walter Kimball, Clerk

The Plaintiff giving bond as required by law, I have executed this writ by taking the within described property, and delivering the same to the said plaintiff - and have read this writ to the defendant this 12th day of January 1855.

James Andrew, Sheriff.

By A.C. Fessett, Deft

Received of James Andrew, Sheriff,
by the hand of A.C. Fessett Deft the within
described property

Rich Jan. 12th 1855

P. H. Holden.

Know all Men by these Presents, That
we, Phineas H. Holden, and Charles M. Holden are held
and firmly bound unto James Andrews Sheriff of the
County of Cook in the State of Illinois, and to his successors
in office, executors, administrators and assigns, in the penal
sum of Three hundred dollars, lawful money of the United
States, for the payment of which sum we do hereby jointly
and severally bind ourselves, our heirs, executors and admin-
istrators.

The Condition of this obligation is such,
That whereas, on the Eleventh day of January, in the
year of our Lord one thousand eight hundred and fifty-five
the said Phineas H. Holden sued out of the Cook County
court of Common Pleas a writ of Replevin against Henry
Mahler, defendant for the recovery of the following described
goods and chattels, property, (to-wit)

Two Certain Colts, one of them two years old in the Spring of the year A.D. 1854, a brown mare colt, and the other of them one year old in the Spring of the year A.D. 1854, a bay mare colt with a star in the forehead, with one white hind foot.

Now, if the said Phineas H. Holden, Plaintiff, shall prosecute his suit to effect, and without delay, and make return of the said property, if return thereof shall be awarded, and save and keep harmless the said Sheriff in replevying the said property, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this Eleventh day of January, A.D. 1855.

Witness:

P. H. Holden



C. N. Holden



And afterwards (to-wit) on the fifteenth day of January in the year Eighteen hundred and fifty-five Phineas H. Holden filed in the Clerk's office aforesaid his declaration in said cause which declaration is in words and figures as follows: to-wit:

Cook County Court of Common Pleas
of the Feb Term A.D. 1855

State of Illinois }
Cook County } S.S.

Henry Mahler the defendant in this suit, was summoned to answer Phineas H. Holden, the

23
Plaintiff in this suit of a plea wherefore he took the Colts of
the said Phineas H. Holden and unjustly detained the same
against sureties and pledges until &c. and thereupon the said
Phineas H. Holden by Allen & Ingalls his attorneys complains =
For that the said defendant on the first day of December in
the year one thousand eight hundred and fifty-four at the
Town of Rich, to-wit, at the County of Cook aforesaid took the
Colts, to-wit, one mare colt two years old in the Spring of the
year A.D. 1854 of a brown color, and one bay mare colt
one year old in the Spring of the year A.D. 1854, with
one white hind foot, the property of the said Plaintiff
of great value, to-wit, of the value of two hundred dollars and
unjustly detained the same against sureties and pledges until
&c. Wherefore the said Plaintiff saith he is injured
and hath sustained damages to the amount of Three hundred
dollars and therefore he brings suit &c.

Allen & Ingalls
Plffs attys.

And afterwards to-wit on the Seventh
day of February in the year last aforesaid, said day
being one of the days of the February Term of said
Cook County Court of Common Pleas, the following
among other proceedings was had in said Court and
entered of Record, to-wit =

Thomas H. Holden
 vs.
 Henry Mahler } Replevin

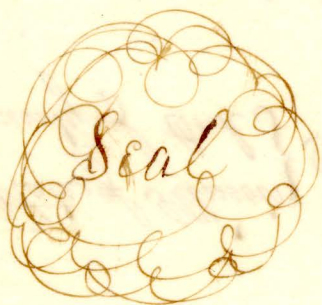
This day comes the said plaintiff by
 Free & Ingalls his Attorneys and the said defendant having
 been duly served on the writ issued in this cause, and he
 being three times solemnly called in open Court comes not
 nor does any person for him, but herein makes default which
 is on motion of said plaintiff's Attorneys ordered to be taken
 and entered of record, Wherefore the said plaintiff ought to
 have and retain possession of the property replevied on the
 writ issued in this cause and also recover of said defendant
 his damage occasioned by reason of the premises. And by
 consent of said plaintiff the Court assesses his damages to
 the sum of one cent

Therefore it is considered that the said
 plaintiff do have and retain the possession of the property
 replevied on the writ issued in this cause, and also recover of
 said defendant his damages of One Cent in manner afore-
 said, by the Court here assessed and also his costs and charges
 by him in this behalf expended and have execution therefor

State of Illinois }
 County of Cook } S.S.

I Walter Kimball Clerk of Cook
 County Court of Common Pleas within and for the County
 and State aforesaid, do hereby certify that the foregoing is a
 true transcript of the whole proceedings in said cause

in which Phineas H. Holden is Plaintiff and Henry Mahler
defendant in an action of Replevin



Certified under my hand and the seal
of said Court at the City of Chicago
in said County, this 18th day of August
A. D. 1855. Walter Kimball Clerk,

To which plf. objected - & the Court overruled
the objection, & the plf then & there excepted to the decision of the
Court in overruling same, & the record was then read to the jury.
Jury then retired.

The evidence being closed the plf then requested
the Court to instruct the Jury as follows, viz:

That if the Jury believe
from the evidence, that notwithstanding the Record of the
Replevin suit read in evidence in this cause, that the
plaintiff, justly ought to recover - that then they should bring
in such damages for plaintiff as he reasonably ought to
receive, under the evidence. Which said instruction the
Court refused to give - and to the decision of the Court in
refusing said instruction, said plf then and there excepted.

The dft, then asked the Court to instruct the
Jury as follows:

1. That unless the Jury believe from the evi-
dence that the defendant promised the plaintiff, to pay
him for the keeping the colts in question, then the
law is for the defendant.

2. That the plaintiff could not by his own

voluntary act, without the consent of the defendant make him his debtor.

To the giving of which instructions the plaintiff by his counsel then & there objected ^{in writing}. The Court overruled & gave both of said instructions asked by deft, to the Jury. To the giving of which the plaintiff by his counsel then and there excepted.

The Jury found a verdict of no cause of action. The Plaintiff then moved the Court for a new trial, which was overruled by the Court. To which decision of the Court in overruling said motion the plaintiff then & there excepted and because none of the aforesaid matters appear of record herein the plaintiff ^{there} prays his bill of exceptions be signed, sealed & made part of the record of this Cause which is done

J. W. Randall. 

It is agreed the above is correct

Norton & M^c Roberts
Defts attys,
J. Goodspeed
Pro. Plf.

State of Illinois

Will County

I Royal A. Barber Clerk of the Circuit Court of said County in this State aforesaid do certify the foregoing Transcript to be a true and correct Record of the said entitled Cause & of the proceedings therein.



Given under my hand & the seal
of said Court hereto affixed at
office in Police this 30th day of
May A.D. 1856

R. E. Barber cll

48

Henry Mahler

Phineas Holden.

Filed June 12. 1856
L. Deland
Clerk

26

Henry Mahler

Phineas H. Holden

Record

total \$7.00
to seal .35 \$7.35

Supreme Court
 Henry Mahler
 vs
 Phineas Holden } Assignment of Errors

1st The court erred in admitting the Record of the Replevin suit to be read in evidence on the trial, for the reason that the plaintiff's claim for taking up, keeping &c ~~was~~ ^{was} not and could not have been adjudicated upon in the Replevin suit.

2^d The court erred in giving the Defendants 1st & 2^d instructions for the reason that even at common law finders of lost property, or takers up of strayed property are entitled to recover from the owner full compensation for all reasonable & necessary trouble & expenses incurred about the same. Story on Bailments § 621-121; 2 Kent's Com. page 636 (side paging); 10 John. R. 103; 1 Parsons on Contracts p. 599-80.

But even if such were not the case at common law, the plaintiff has shown a full compliance with the provisions of the estray act, which expressly provides that the taker up of every stray horse, mare or colt "shall be paid by the owner" one

Dollar "together with all reasonable charges"
Rev. Stat. Chap XXXIX - sec 6

The taking up was done under authority of a law, which provides that the taker up shall not only take proper care of the estrays, but shall advertise them, have them appraised & pay the fees of officers. This is all done for the benefit of the owner, and the statute expressly provides he shall repay him. There is something peculiarly sharp about the idea that the statute should require one to pay out money for another's benefit, and also provide that it should be refunded, volens volens, and yet require a promise to give it force.

3d
The court erred in refusing Plffs instruction for the reason that admitting that the record of the replevin suit was properly admitted, yet, as it was not specially pleaded it could not be a bar, but could only go to the jury with the other evidence & they were bound to decide upon the merits of the whole case. 2 Blackf. R. 565; 1 Chittys Pl. 509-548; 2 Gil. 358.

Goodspeed & Bartleson
Attys of Plffs in Err.

117
Mahler
vs
Holden

Henry Mahler
vs
Phineas Holden

Assignment of Errors.

Filed June 28, 1856
L. Leland
Clerk

Supreme Court of the State of Illinois
Grand Division April Term 1887.

Henry Mahler Plff in Error ~
vs ~ Error to Writ.
Phineas Holden Defd in Error ~
And thereupon

afterwards to wit at the April Term 1887 of
the Said Supreme Court, Phineas Holden
Defendant in Error, by J. W. Roberts, his
Attorney, comes into Court, and says that
there is no Error, either in the Record of
the proceedings aforesaid, or in the rendition
of the judgment aforesaid, and prays
that the Justices of the Said Supreme
Court may proceed to examine as well
the Record & proceedings aforesaid as the
matter aforesaid assigned for Error
that the Said judgment may be
affirmed.

J. W. Roberts
Att Defd in Error

Henry Meakin
vs
Phineas Holden

Joined in Error.

1887
Filed April 22
S. Leland
Clerk