

No. 12698

Supreme Court of Illinois

Neary

vs.

cahill

138-43

Edward Noy

vs

James Cahill

appon

138

12648

1858

~~XX~~

Imperial

1388

Edward Henry

vs.
James. Oakill

Record

Filed April 17 1858
L. L. Lund
Clerk

Edward Wray	State of Illinois
vs	Supreme Court - 3 ^d Division
James Calhoun guardian	Filed Term Ad 1858
of Phenna Duff, et al,	Appeal from Cassell's Com
Minor	Court

And now comes the appellant in the above entitled case, & says that in the record & proceedings, & in the rendition of the judgment in said case there is error in this to wit -

1st The Court erred in overruling motion of defendant Wray to dismiss suit for want of proper parties

2^d The Court erred in refusing to give instructions asked by defendant Wray without addition thereto made by the Court

3^d The Court erred in giving the instructions asked by defendant Wray with the additions made thereto by the Court

4th The Court erred in giving the instructions asked by Plaintiff Calhoun

5th The Court erred in overruling the motion of defendant Wray for a new trial

6th The Court ruled in overruling the
motion of defendant Wray in arrest of
judgment.

7th The Court ruled in rendering
judgment for claimant Calvert.

For these & other manifest errors
in the said record & proceedings, said
appellant prays that said judgment may
be reversed, & wholly for nothing claimed
D. S. Wright
Attorney for Appellant

Edward Wray
vs
James Cahill
Guardian &c
— 11c —

Assignment of Errors
— 11c —

Filed April 21, 1838

L. Belmont
Clerk

1
Sasalle County Court
Term Second 1857

State of Illinois
Sasalle County

3 p.
Pleas, Proceedings, and

Judgments held and taken in and
before the Sasalle County Court in the State
of Illinois at the Court House in Ottawa
in the County of Sasalle of Illinois from thereof
to wit, of the first day of Term A.D. 1857
and of the Independence of the United
States of America the eight first

Present Hon. John C. Champfleur Judge

Be it remembered that hereof to wit
on the - day of March A.D. 1857 the following
notice was filed in the office of the clerk
of the Sasalle County Court, Illinois "to wit"
"To Wm. Newstadt Amicable

" Sirs. Cherry claim

"property in the following goods and
"chattels, to wit" One Bay mare, leased
"upon by you, by virtue of our attachment
"issued by Nicholas Lawrence Esquire a Justice
"of the peace of Sasalle County and to you de-
"livered, in favor of Edward Tracy against
"the goods and chattels, of John Duffy and
"intended to prevent my claim to the same

"according to the statute in such case
made and provided - Dated this
"Second day of May A.D. 1856

James Labill
Guardian of Johnna Duff,
Catharine Duff, Ellen Duff and
Margaret Duff

And on the same day a bond and transcript
was filed with the clerk of said court
in the words and figures following to wit:
"Know all men by these presents, that we
"James Labill Guardian of Johnna
"Catharine, Margaret and Ellen Duff
"and John S. Dowling are held and jointly
"bound with Edward Barry in the penal
"sum of Forty dollars lawful money of the
"United States, for the payment well and
"truly to be made, on bind ourselves, our
"heirs and administrators, jointly, severally
"and jointly, by these presents - Witnesses our hands
"and seals this 14th day of June A.D. 1856

"The condition of the above obligation is
"such, that, whereas, the said Edward Barry
"died on the 14th day of June 1856 before Nicholas
"Duncan a justice of the peace for the county
"of Laballe recd a judgment against
"the above named James Labill Guardian
"re. for the sum of - dollars, from which

judgment the said James Cahill as
 parish Guardian has taken an appeal to
 the County Court of the County of Dublin and State
 of Illinois. Now, if the said James
 Cahill guardian &c. shall prosecute
 his appeal with effect, and shall pay
 whatever judgment may be rendered
 by the Court, upon dismissal or trial of
 said appeal, then the above obligation
 shall be void, otherwise to remain in full
 force and effect

Witness my hand and official seal
 this 14th day of June A.D.
 1856

James Cahill
 Guardian &c.
 J. S. Dowling

Nicholas Duncan J. P.

James Cahill Guardian
 of Johnna, Catharine
 Ellen Mary and Duff - Claimants

Edward Barry - Plaintiff in
 Attachment n. John Duff

Right of Property

1856 - 10th day of May.

Monis & Constable brought a jury before
 me to try the right of property in a certain
 man - hired on by virtue of an attachment
 and ordered to be sold to satisfy a judgment
 obtained by said Barry n. John Duff -
 The parties appeared (Long Green, & Co. and J. P.)

Doct. Entry	.12 1/2	and having heard the proofs and
Sub. for claim.	.18 3/4	allegations the Jury retired in charge of
do " depts.	.18 3/4	said M. Stewart constable =
Verdict	.25	The jury being unable to agree were
oath to the Jury	.37 1/2	discharged - By consent of the parties
4 oaths to sub.	.25	the cause continued until the 17 th
Continued	.12 1/2	day of May 1856. 2 o'clock P.M.,
Sub. for claim.	.18 3/4	1856 - 17 th day of May the said constable
do " depts.	.18 3/4	having in court a panel of jurors
Verdict	.25	The parties (Stewart & Bull for defendant)
oath to the Jury	.37 1/2	appeared (the Jury sworn) and joined issue
sub for Claim	.18 3/4	and having heard the proofs and allegations
do " depts.	.18 3/4	the jury retired in charge of said cons-
Continued	.12 1/2	table. and being unable to agree the
Verdict	.25	jury was discharged - The cause con-
oath to the Jury	.37 1/2	tinued until the 31 st day of May 1856
1 oath	.6 1/4	one o'clock P.M., at which time the parties
Ed. verdict of Jury	.25	appeared - the said constable having
do Draft	.25	a panel of jurors. on application of claim-
do Appeal	.25	ant the cause continued until the 7 th day
Wit. J. J. Bond	.50	of June next. one o'clock P.M.,
Manuscript	.25	at which time the parties appeared
	\$ 5.18 3/4	& agreed to have the cause continued
Constables fees.		until the 14 th day of June 1856. one o'clock P.M.,
on which	\$ 1.00	1856 - 14 th day of June - The parties appeared
do Claim Subp.	1.50	and joined issue - Jury sworn & empanelled
Sum. ret. of Jury	1.50	and having heard the proofs and allegations
do " "	1.50	the jury retired in charge of said Morris
Serg. Subp. "	1.30	Stewart constable - and brought in a ver-

Sec. 8. Subp. 1.00
 and other day 1.50
 \$ 9.30

Witness for
 John P. Dowling .50

did "that the property in controversy
 was the property of John Duffy and not
 of the said claimant - Judgment is
 therefore rendered against the said
 claimant for cost - claimant and
 same day gave notice of our appeal
 and filed an appeal
 bond executed by himself and John P.
 Dowling which I did approve. this
 cause is therefore appealed to the County
 Court

State of Illinois
 LaSalle County, Ill.

I the subscriber, a justice
 of the peace in and for the county, do hereby
 certify that the above transcript and the papers
 annexed, contain a full and perfect state-
 ment of all the proceedings, and of the judgment
 before me, in the above entitled cause

Nicholas Dimmock J.P.

Afterwards to wit on the 1st day of June 1857
 being one of the days of the term of the
 said Court, the following proceedings were
 had and entered of record to wit:

Thomas Cahill Guardian
 of John. Duffy et al., versus

Edward Trump

Appeal

This day comes

6.

the defendant by David L. Hough his attorney and enters his motion to dismiss the appeal herein, which motion is overruled by the court. whereupon on motion of said defendant by his said attorney this cause is continued to the next term of this Court.

Afterswards to wit at the September term of said court, on the 8th day of September 1857 the following proceedings were had and entered of record to wit.

James Cahill Guardian
of John Duffly et als. minor

v.

Edward Henry

Appeal

This day comes the defendant by David L. Hough his attorney, and the plaintiff being three times solemnly called comes not nor any one for him but makes default. And on motion of said defendant's attorney it is ordered that the appeal herein be dismissed for want of prosecution.

Afterswards to wit on the 10th day of September 1857 being one of the days of the September term of said court the following proceedings were had and entered of record to wit.

James Cahill Guardian
of John. Duffy et. al. versus

Edward Henry

Appeal

This day comes the
plaintiff by Strain & Bull his attorneys
and on his affidavit and motion it is
ordered by the Court that the order, dismissing
the appeal herein be and the same is
being set aside at the cost of James Cahill
and cause continued to the next term of
this court at plaintiffs cost to be taxed

afternoon to sit on the 8th day of December
1857 at the ~~of~~ December term of said Court
the following proceedings were had and
entered & entered to sit.

James Cahill Guardian
of John. Duffy et. al. versus

Edward Henry

Appeal

This day comes
the defendant by Daniel L. Leigh his attor-
ney and enters his motion herein to
dismiss the suit for want of proper
parties. Whereupon comes the plain-
tiff by Strain & Bull his attorneys, and
after hearing the arguments of counsel upon
the motion of defendant entered herein

the said motion is overruled by the Court
to which ruling of the Court the defendant
then and there excepted -

Thereupon came the following jurors of
a jury to wit. George B. Macey; Calvin
W. Ellis. Edward Holland, Moody Clark,
A. M. Lyons, William Ford, W. B. McMillan
William Heigant, William H. Brown, Sylvanus
Crock, Josiah C. Shaw and Franklin Brown
who were duly elected tried and sworn to
well and truly try the issues herein accord-
ing to the evidence - and after hearing
part of the evidence the jury was allowed
to separate and come into court tomorrow
morning.

Afterwards to wit. on the 9th day of December 1857
at the said December term of said court,
the following proceedings were had and en-
tered of record to wit.

James Leabill Grant,
of Johanna Duff, Catharine
Duff, Ellen Duff & Margaret Duff, versus
Edward Henry

Defendant

This day again
came the parties by their said attorneys
together with the jury sworn herein,
and after hearing the balance of the

evidenced, and arguments of counsel the jury
 retire to consider of their verdict and after
 due deliberation thereon had retired into
 court the following verdict. We the jury
 having find the issues for the claimant.

Whereupon the defendant by his said
 attorney enters his motion for arrest of
 judgment and for new trial herein. which
 motions are overruled by the court after
 hearing the arguments of counsel and due
 deliberation thereon had.

It is therefore considered by the court
 that said plaintiff have and recover
 of said defendant his costs and charges
 herein incurred as well as in
 the Court below and that he have execution
 therefor.

Afterwards to wit at said December term of
 said court on the 16th day of December ~~1857~~
 1857 the following other proceedings were had
 and entered of record to wit.

James Cahill Esq. vs. Johanna Duff,
 Catharine Duff, Ellen Duff
 & Margaret Duff minors

vs. Appeal
 Edward Henry

On this day again
 comes the defendant John L. Duff

his attorney, and procured and affixed hereto
which is allowed on his filing and affixed
bond in the sum of two hundred dollars
with David S. Blough as surety, said
bond to be filed within thirty days from the
last day of this term of this court

Afterwards on the 17th day of December 1858
the same being one of the days of the December
term of said court, a bill of exceptions
was filed with the clerk of said court
in the words and figures following to wit:

James Cahill Guardian

of Johanna Duff, Catharine

Duff, Mary Ann Duff & Ellen Duff

vs. ³ Appraiser - Trial of the
³ right of property
Saballe County Court

December term A.D. 1857

Be it remembered that on the 8th day of
December A.D. 1857 the same being one of
the days of the December term A.D. 1857 of the
Saballe County Court, the counsel for the
defendant in this suit moved the Court
to dismiss said suit for want of proper
parties thereto, which motion was overruled
by the court, & which decision of the court
in annulling said motion & dismiss
said suit for want of proper parties

think, the counsel for said defendant then and then excepted

And afterwards on the 8th day of December A.D. 1857 the same being one of the days of the December term A.D. 1857, of the Sabell County Court, this cause came on to be heard by the Court & a jury - Whereupon it was concluded, that the man in controversy was the property of Ellen Duffy in her life time

That Ellen Duffy died leaving as her heirs at-law John Duffy, an adult, & John and Mary Duffy, Catharine Duffy, Margaret Duffy and Ellen Duffy who are all minors - That James Cahill the claimant in this suit was the legal guardian of said minors

That Edward Henry obtained a judgment against said John Duffy before a justice of the peace of said county, upon which an execution was issued, & placed in the hands of a constable to execute - That said execution was laid upon the man in controversy, by said constable -

That said Cahill gave notice of a trial of the right of property, that the same was tried before the justice who issued the execution & came by appeal to this court

The counsel for the claimant gave in evidence a transcript from the docket of the justice before whom the original trial

was laid. which was in the words and figures following (See transcript heretofore filed) no other or further proof was given or offered in this suit - whereupon the counsel for the claimant, asked the Court to instruct the jury in the words & figures following to wit

1st The Court is requested to instruct the jury, that the law is that "no person shall be deprived of his property except by due process of law"

2nd If the jury believe from the evidence that the minor children represented by James Cahill in this case, owned amongst them, an undivided interest of one fifth in the horse in question, then the constables had no legal right to seize upon and sell their property on an execution against another person, although that other person may have owned an undivided interest in the same property

3rd A legal guardian under the laws of the state is entitled to the custody and control of the personal property of ~~this~~ his wards

4th John Duff, the defendant in execution would not have had a right to the exclusive possession of the horse in question as against his minor brothers and sisters, and the constables could have no greater right

Emery

Emery

Emery

Emery

to the possession thereof he (John) had, except should it under the attachment or execution for the purpose of selling John Duff's interest

The court is requested to instruct that if the proof shows the property levied upon to have been the joint property of the four wards of Cahill and John Duff, and that the constable has levied on the whole as the property of John then he is a trespasser ab initio as to the four wards of claimant and can not protect himself by the levy, as against them - and if they so believe they ought to find for the claimant

To the giving of which instructions, the counsel for said party then & there objected but the court overruled said objection & gave said instructions - to which decision of the court in overruling said objection, & in giving said instructions, the counsel for said party then & there excepted

Whereupon the counsel for said party then asked the court to instruct the jury in the words & figures following to wit:

"The court is asked to instruct the jury for said defendant, that if the jury believe from the evidence, that the property in controversy was the joint property of John Duff & minor wards of said Cahill & the

Duff

The same was levied upon by a constable by virtue of an execution against said Duff, the constable had a right to take possession of said property & hold the same for the purpose of sale of John Duff's interest in said property & they should find for against the claimant, Cahill "

But the Court refused to give said instruction without an addition thereto, in the words & figures following - to wit -

"if they find that the constable levied upon the interest of John Duff only, but if they find from the evidence that he levied upon the entire property in the house they ought to find for the claimant if they find that his words are joint owners of the house with John Duff"

"If the Jury find from the evidence in this case that the constable levied upon the interest of John Duff, such interest was leviable and the constable had a right to take possession of the house levied on and sell the interest of said John Duff and should in that event find for the defendant

But if they believe from the evidence that the constable levied upon the entire property in the house such levy was wrongful as to the other joint owners and

Linn

Examiner

they ought to find for the claimant if they believe his words were the joint owners of the house with John Bluff, the defendant and in the execution

To which decision of the Court, in refusing to give said instruction, without said addition that the counsel for said Mary then & there excepted - and thereupon the court gave to the jury the said instruction, with the said addition that, & the counsel for said Mary then & there excepted to the same. Whereupon the jury retired

to consider of their verdict, & returned into court with a verdict for the claimant - Whereupon the counsel for said Mary moved the court for a new trial because said verdict was against the law of the case & against the evidence which motion was overruled by the Court & the said counsel moved in arrest of judgment which motion in arrest of judgment was overruled by the Court

To which decision of the Court in overruling said motions for a new trial & in arrest of judgment the counsel for said Mary then & there excepted & prays that this bill of exceptions may be signed sealed & made a part of the record - which is done

J. B. Champlin Seal

Afterwards to wit, on the 5th day of January
A.D. 1858 an appeal bond was filed in
the office of the Clerk of said Court. in the
words and figures following to wit:

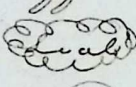
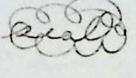
Know all men by these presents
That we, Edward Henry as principal &
Daniel L. Hough as sureties are held
jointly bound unto James Cahill
guardian of Johanna Duff, Catharine
Duff, Margaret Duff, & Ellen Duff in
the penal sum of Two Hundred dollars
good & lawful money of the United States
for the payment of which well & truly to be
made we bind ourselves, our heirs, ex-
ecutors, & administrators, jointly, severally
& jointly by these presents.

In witness whereof we have hereunto
set our hands & seals this 17th day of December
A.D. 1857

The condition of the above obligation is
such that whereas the above named James
Cahill guardian of Johanna Duff, Catharine
Duff, Margaret Duff, & Ellen Duff, did at
the December term of the County Court, held
in & for the county of LaSalle in the State
of Illinois, A.D. Eighteen Hundred & fifty
seven, receive a judgment against the
above bounden Edward Henry, in a trial
of the right of property, that he said

17.

Cahill v. said Mary his costs &
 charges by him herein expended as well in
 said court as in the court below and that
 he now execution therefor to ~~reverse~~ which
 said judgment the said Edward Mary
 has taken an appeal to Supreme Court
 within & for the Third Grand Division of said
 state - Now if the said Edward Mary
 shall duly prosecute said appeal & pay
 or cause to be paid all judgments, costs
 interest & damages which the said
 Supreme Court shall adjudge against
 the said Edward Mary & abide the order
 & judgment of said Supreme Court in the
 behalf then this obligation is to be void
 otherwise to remain in full force & effect

Edward Mary 
 David L. Bangs 

State of Illinois }
 LaSalle County }
 S. Child Liveltay clerk of the County

County of LaSalle County hereby certify, the foregoing
 to be a true and complete copy of all
 the orders of Court and of the pleadings
 and Bill of Exceptions in the foregoing
 Cause as the same appears of record
 and on file in my office

On Testimony whereof
 have hereunto set my hand
 & the Seal of said Court at
 Ottawa this 12th day of
 February A.D. 1858
 Wm. W. Clark

Dec 4 50

STATE OF ILLINOIS, SUPREME COURT,
TO APRIL TERM, A. D., 1858.

APPEAL FROM LA SALLE.

EDWARD NEARY, APPELLANT, *vs.* JAMES CAHILL, GUAR-
DIAN OF ~~Jane~~ DUFFY, *et als*, MINORS, APPELLEE,
Johanna

Abstract of Record.

This was an action originally brought before a Justice of the Peace, in the name of the plaintiff below, against defendant below, to try the right of property in a certain mare, levied upon by a constable, by virtue of an execution issued by said Justice.

Pages 1 and 2.

1st. Notice to the constable, by plaintiff below, filed in the office of the Clerk of La Salle County Court.

Pages 2, 3, 4 and 5.

2d. Bond on appeal from judgment of Justice to La Salle County Court, and transcript of docket of Justice of the Peace of proceedings before him.

Pages 5 and 6.

3d. Defendant moves to dismiss appeal. Motion overruled.

Page 6.

4th. Appeal dismissed for want of prosecution.

Page 7.

5th. Order dismissing appeal set aside by the Court.

Pages 7 and 8.

6th. Defendant moves to dismiss the suit for want of proper parties. Motion overruled by the Court, to which defendant excepts.

Pages 8 and 9.

7th. Trial by jury, and plaintiff and defendant request the Court to instruct the jury. Instructions set forth in bill of exceptions. Jury find for the claimant.

Page 9.

8th. Defendant moves for an arrest of judgment and for a new trial. Motions overruled by the Court.

Page 9.

9th. Court renders judgment for appellee.

10th. Defendant prays for an appeal to Supreme Court, which is allowed.

Pages 10, 11, 12, 13 and 14.

11th. Bill of exceptions as follows :

Be it remembered, that on the 8th day of December, A. D., 1857, the same being one of the days of the December Term, A. D., 1857, of the La Salle County Court, the counsel for the defendant in this suit moved the Court to dismiss said suit for

want of proper parties thereto, which motion was overruled by the Court, to which decision of the Court, in overruling said motion to dismiss said suit for want of proper parties thereto, the counsel for said defendant then and there excepted.

And afterwards on the 8th day of December, A. D., 1857, the same being one of the days of the December Term of A. D., 1857, of the La Salle County Court, this cause came on to be heard by the Court and jury. Whereupon it was conceded, that the mare in controversy, was the property of Ellen Duffy in her life time; that Ellen Duffy died leaving as her heirs at law, John Duffy an adult, and Johanna Duffy, Catharine Duffy, Margaret Duffy and Ellen Duffy, who are all minors; that James Cahill, the claimant in this suit, was the legal guardian of said minors; that Edward Neary obtained a judgment against said John Duffy before a Justice of the Peace of said County, upon which an execution was issued and placed in the hands of a constable to execute; that said execution was levied upon the mare in controversy by said constable; that said Cahill gave notice of a trial of the right of property, that the same was tried, before the Justice, who issued the execution, and came by appeal to this Court.

The counsel for the claimant gave in evidence a transcript from the docket of the Justice, before whom the original trial was had, which was in the words and figures following, viz.:— (See transcript heretofore copied).

No other or further proof was given or offered in this suit.— Whereupon the counsel for the claimant asked the Court to instruct the jury in the words and figures following, to wit:

1st. "The Court is requested to instruct the jury, that the law is that "no person shall be deprived of his property except by due process of law."

2d. If the jury believe, from the evidence, that the minor children, represented by James Cahill in this case, owned, amongst them, an undivided interest of four fifths in the horse in question, then the constable had no legal right to seize upon and sell their property on an execution against another person, although that other person may have owned an undivided interest in the same property.

3d. A legal guardian under the law of the State is entitled to the custody and control of the personal property of his wards.

4th. John Duffy, the defendant in execution, would not have had a right to the exclusive possession of the horse in question

as against his minor brothers and sisters, and the constable could have no greater right to the possession than he (John) had, except to hold it under the attachment or execution for the purpose of selling John Duffy's interest.

The Court is requested to instruct that if the proof shows the property, levied upon, to have been the joint property of the four wards of Cahill and John Duffy, and that the constable has levied on the whole as the property of John, then he is a trespasser *ab initio* as to the four wards of claimant." *

To the giving of which instruction the counsel for said Neary then and there objected, but the Court overruled said objection and gave said instructions. To which decision of the Court in overruling said objection and in giving said instructions, the counsel for said Neary then and there excepted. Thereupon the counsel for said Neary asked the Court to instruct the jury in the words and figures following, to wit:

"The Court is asked to instruct the jury, for said defendant, that if the jury believe, from the evidence, that the property in controversy was the joint property of John Duffy and minor wards of said Cahill, and the same were levied upon by a constable, by virtue of an execution against said Duffy, the constable had a right to take possession of said property and hold the same for the purpose of sale of John Duffy's interest in said property, and they should find against the claimant Cahill."

But the Court refused to give said instruction without an addition thereto, in the words and figures following, to wit:

"If they find that the constable levied upon the interest of John Duffy only; but if they find from the evidence that he levied upon the entire property in the horse they ought to find for the claimant, if they find that his wards were joint owners of the horse with John Duffy."

"If the jury find from the evidence in this case that the constable levied upon the interest of John Duffy, such interest was leviable and the constable had a right to take possession of the horse levied on and sell the interest of said John Duffy, and should in that event find for the defendant."

But if they believe from the evidence that the constable levied upon the entire property in the horse, such levy was wrongful as to the other joint owners, and they ought to find for the claimant, if they believe his wards were the joint owners of the horse with John Duffy, the defendant in the execution:" *

*And D. Campbell produced himself by the lawyer
against the jury - and if they do believe, they
ought to find for the claimant*

To which decision of the Court in refusing to give said instructions without said addition thereto, the counsel for said Neary then and there excepted; and thereupon the Court gave the jury the said instructions with the said addition thereto, and the counsel for said Neary then and there excepted to the same.

Whereupon the jury retired to consider of their verdict and returned into Court with a verdict for the claimant. Whereupon the counsel for said Neary moved the Court for a new trial because said verdict was against the law of the case and against the evidence, which motion was overruled by the Court, and the said counsel moved an arrest of judgment, which motion in arrest of judgment was overruled by the Court.

To which decision of the Court in overruling said motions for a new trial, and in arrest of judgment, the counsel for said Neary then and there excepted and prays that this bill of exceptions may be signed, sealed and made a part of this record, which is done.

(Signed,) J. C. CHAMPLIN. { SEAL. }

Pagos 16 and 17.

12th. Bond on appeal from judgment of La Salle County Court, to the Supreme Court.

*2 Map 5.09 } One tenant in common
15 Dick 75- } Mountain & Hillman v Co tenant.
12 Men? 134 } The rest of price in trial of up
18 Ill 258 } of property.
14 " 408- Constable may take possession
2 Bily 47 } of man on Elm. v 1 joint tenant.*

*

Level old stamp on the back of the paper. It is a circular stamp, and it is the same as the one on the back of the paper. It is the same as the one on the back of the paper. It is the same as the one on the back of the paper.

71

198-49

Edward Wray	{	State of Illinois
vs		Supreme Court - 3 ^d Division
James Cahill - Guardian		April Term AD 1858
		Appeal from LaSalle County Court

This action cannot be maintained by one tenant in common of a chattel, against a co-tenant. As well might such tenant in common maintain an action of replevin against a co-tenant; - and yet the law is well settled that replevin in such case cannot be maintained.

Scott vs Fitzgerald 2 Hall 509. Barnes vs Bartlett 15 Pickering 93. Sougham vs W. Carter, 17 Wendell 134. Law of Martin 18 Illinois 288.

The Statute provides a remedy for a tenant in common of a chattel who is aggrieved by the act of a co-tenant
People's Statutes page 64.

The constable was abundantly warranted in taking exclusive possession of the land in controversy, in order to sell the interest of John Duff, the execution debtor. - No sale has been made by the officer.

Wendell vs Buckingham - and cases there cited - 14 Ills Rep 408.
Haddell vs Cook 2 Scile 47 - 3 notes (a)

138-43
Edward W. Wray
vs

James Cahill - guardian

— " —

Plaintiff vs
Defendant

— " —

Filed Apr. 28. 1888
L. C. C.

Many arguments on behalf of
the Constable,
Babine }

The levy and seizure by the
Constable of the entire property in the
house owned by the four members of Babine
and John Duggan jointly, as being the
property of John Duggan, on a
writ of attachment against him alone,
is an abuse of legal authority on the
part of the Constable, which makes
him a wrong doer ab initio. And
leaves him, as to that thing, as if he
had no writ, or was not an officer.

Whitwell v. Cook 2 Will 47. note (a)

Leitch v. Adams 3 Denio 129.

Ulkester v. McFarlane 10 Wend 320

See the last case also on the point
that a levy unauthorized by law, is a
trespass; that replevin will lie where-
ever trespass de bonis asportatis will lie.
And if replevin, why not this proceed-
ing?

So a levy without removal, if un-
authorized, will make the officer a
trespasser, 7 Cowen 735-
15 Mass 81

Whilst it is freely conceded by the
defendant in error, that the interest of
John Duff in the property in question, was
liable to attachment as against him -
and that the officer had a right to
seize the entire property for the purpose
of holding and selling the interest of
John: yet it is believed that no case
can be found, where the officer has
been justified in seizing upon, or
selling any thing more than the interest
of the person against whom the writ
is in the property, seized. Shall not
one of the cases cited by the plaintiff
in error conflict with this view?

The case of Low v Martin 18 Dec. 1866
simply decides that when grain of the
plaintiff, was, with his consent, mixed
with that of the defendant, the former
cannot not maintain replevin; other-
wise if the mixture was without his
consent.

The case of Newhall v Buck-
ingham ^{14 Dec. 408} only decides that the officer
may seize the whole for the purpose
of selling the interest of the judgment
debtor.

On Hart vs Fitzgerald 2 May 1869

Page. & Boadfish were the joint owners
of certain logs. The sheriff levies
on the interest of Boadfish in the
logs. It was held that a replevin cannot
not be maintained by the other joint
owner. The officer kept within
the law in making the levy. Cases
was of course proceded.
The case in 15 Pick. 75 and 12 Mass.
131 are to the same effect, that
replevin does not lie by a co-tenant.

But not one of these cases intimate
that the officer would be justified
in levying upon, or selling the whole
on execution against one joint owner.

The case then stands thus.
upon the record and authority. The
four wards of the defendant in error
are the owners of 40% of the house;
and John Duffy of the other 40%. The
Constable has levied on the whole property
in the house as the property of John.
and has thereby made himself a wrong-
doer ab initio, who then shall hold
the property? Not the Constable for he
had not even a shadow of right.

But the guardian should have it.
for his wards are the only owners, or

persons having right who make
any claim to the present possession.

~~For~~ In answer to the points
made by the plaintiffs in error, that
the Statute (Chapter 641) has provided
a remedy for a covenant, it is suffi-
cient to say, that that statute only
extends the common law remedy, and
does not intend to prevent the party
~~from~~ availing himself of any other rem-
edy to which he may have been
entitled.

Stam & Bull

Attys for Deft. in error.

Edward Healy

James Cahill &c

Argument on part of

Cahill

Filed April 28. 1858.

L. Deland

clerk