

No. 12586

Supreme Court of Illinois

McDonald

vs.

Beach

71641  7

207
James M. Donnell
vs
James S. Beebe

207
McDonnell

12086

1858

United States of America

STATE OF ILLINOIS, COUNTY OF COOK, S. S.

Pleas, before the Honorable

George Manum

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding
Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof
begun and held at the Court House in the City of Chicago, in said County, on the

Second Monday, (being the *thirteenth* day) of

April in the year of our Lord one thousand eight hundred and

fifty seven and of the Independence of the said United States the

Eighty First

Present, Honorable

George Manum

Judge of the 7th Judicial
Circuit of the State of Illinois.

Charles Haven

States Attorney.

John S. Wilson

Sheriff of Cook County.

Attest:

Amos Church

Clerk.

Be it remembered, that heretofore, to wit, on the sixth day of December in the year of our Lord one thousand eight hundred and fifty six James Mc Donald by Samuel Ashton his attorney filed in the office of the Clerk of the Circuit Court in and for the County of Cook in the State aforesaid his certain affidavit in writing which is in the words and figures following to wit,

State of Illinois }
Cook County ss }

"James Mc Donald being duly sworn states on oath that he is the owner of one "Six Octave commonly called Rose Wood "Piano" Forte, of the manufacture of the Manufacturing Co. of Philadelphia, now in the building formerly known as the "Young America" Hotel in the County and State aforesaid. The said "Piano" Forte, being of about the value of two hundred and fifty dollars.

And that he is lawfully entitled to the possession thereof, that he is about to institute an action of Replevin for the same, in the Circuit Court of Cook County against James S. Beach, and that the said "Piano" Forte has not been taken for any tax, assessment or fine levied by virtue of any law of this State - nor seized under any execution or attachment against the goods and chattels of the said James Mc Donald liable to execution or attachment.

"Affiant therefore prays that a writ of Replevin may issue from the said Court Returnable &c.

(Jas Mc Donald)

And afterwards to wit, on the day and year last aforesaid (to wit, December 6th A.D. 1856) the said James Mc Donald by his said attorney filed in the office of the Clerk of said Court his certain precept which is in the words and figures following to wit,

Cook Circuit Court	} March Term A.D. 1857
"	
James Mc Donald	
vs.	"Replevin,
James S. Beach	Damages \$250 ⁰⁰

The Clerk of the above entitled Court will please issue writ of Replevin vs. defendant as above for one "six octave; Commonly called Rose Wood, "Piano" Forte?" as described in plffs affidavit Returnable to March Term 1857

S. Ashton
(Plffs' atty.)

And afterwards to wit, on the day and year last aforesaid there was issued out of the Clerk's office of the Court aforesaid and under the seal of said Court, the People's Writ of Replevin clothed in the words and figures following to wit,

State of Illinois }
Cook County }⁰⁰

The People of the State of Illinois
to the Sheriff of said County Greeting:
Whereas James Mc Donald Plaintiff complain

that James S. Beach Defendant unlawfully and wrongfully has taken and does detain the following described goods and chattels, to wit, One "Six Octave, Commonly called Rose Wood Piano Forte" of the Manufacture of the Manufacturing Co. of Philadelphia of the value of two hundred & fifty dollars.

Therefore we command you, That if the said plaintiff shall give you bond 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 replevying 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 Circuit Court of said County, on the first day of the next term thereof to be holden at the City of Chicago, in said County, on the 4th Monday of March next, to answer said plaintiff in the premises. And you have then and there 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 commanded, before executing this writ.



Witness W^m L. Church. Clerk. of our said Court, and the seal thereof at Chicago in said County, the Sixth day of December 1856

(W. L. Church Clerk)

Received of John L. Wilson Sheriff of Cook County
 the within described property of Chicago Dec. 6th 1856
 of Jas McDonald

And afterwards, to wit, on the 13th day of December in the
 year last aforesaid the said writ was returned to the Court
 aforesaid by said sheriff, endorsed as follows to wit,

The Plaintiff having given Bail as the bond demanded
 I have taken the within Describ property and delivered
 to the plaintiff per his receipt an esset and served this
 writ by reading to the within named James S. Beach this
 6th day of December A.D. 1856

Fees Pa. } By Offs }	per 1 Judge	50
	1 Deft	50
	Bone	50
	2 ur	100
		<u>\$ 1,70</u>

John L. Wilson Shff.
 (By John Snow Deft.)

And afterwards, to wit, on the said 13th day of
 December in the year last aforesaid a certain bond was
 filed in the Court aforesaid by said sheriff which said
 bond was attached to the writ aforesaid and is in the
 words and figures following to wit,

Know all men by these Presents, That we James
 McDonald are held and firmly bound unto John
 L. Wilson Sheriff of the County of Cook in the State of
 Illinois and to his successors in office, executors, admin-
 istrators and assigns, in the penal sum of five 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

administrators. The condition of this obligation is such
That whereas, on the sixth day of December in the year
of our Lord one thousand eight hundred and fifty six
the said James Mc Donald sued out of the Circuit
Court of Cook County, a writ of Replevin against James
S. Beach defendant for the recovery of the following de-
scribed goods and chattels, property to wit, One Six
Octave commonly called Rosewood Piano Forte of the
Manufacture of the Manufacturing Co. of Philadelphia
Now, if the said James Mc Donald Plaintiff shall
prosecute his said 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 sixth day of
December A. D. 1856

Witness

James Mc Donald (seal)
D. S. Brainard (seal)
P. B. Morgan (seal)

And afterwards to wit, on the sixth day of
February A. D. 1857 the said plaintiff by his said attorney filed
in said Court his certain declaration which is in the words &
figures following to wit,

Cook Circuit Court }
State of Illinois } March Term A. D. 1857
Cook County }

James S. Beach who was summoned to answer James McDonald wherefore he took the goods and chattels to wit one Six Octave (Commonly ^{called} Rose wood) Piano Forte of the Manufacture of the Manufacturing Company of Philadelphia, of the said James McDonald and unjustly detained the same against Sureties and pledges until &c.

And therefore the said James McDonald by S. Ashton his attorney complains for that the said James S. Beach defend ant in this suit to wit, on the sixth day of December A.D. 1856 in the County of Cook and State of Illinois took the goods and chattels to wit one Six Octave (Commonly called Rose wood) Piano Forte of the Manufacture of the Manufacturing Company of Philadelphia, of his the said James McDonald of great value to wit, of the value of two hundred and fifty dollars and unjustly detains the same against sureties and pledges until &c.

And also for that the said James S. Beach afterwards to wit, on the six day of December in the year aforesaid in the County and State aforesaid unjustly detains the goods and chattels of the said James McDonald to wit, one other Six Octave (Commonly called Rose wood) Piano Forte of the Manufacture of the Manufacturing Company of Philadelphia of great value to wit, of the value of two hundred and fifty dollars and then and there detained the same until &c.

Wherefore the said James McDonald saith he is injured and hath sustained damage to wit over two hundred and fifty dollars and therefore he brings suit &c.

S. Ashton
(Plffts Atty.)

And afterwards, to wit, on the 4th day of March in the year last aforesaid the said defendant by Messrs. Farnsworth & Burgess filed in the office of the Clerk aforesaid his certain Pleas which are in the words and figures following to wit,

In the Cook Circuit Court

James S. Beach	}	Replevin
vs		
James McDonald		

And the said Defendant by Farnsworth & Burgess his attorneys comes & defends the wrong & injury when re. & says that he avows the taking and having the said Rosewood Piano Forte as in said declaration mentioned and justly re. because he says that the said Property in the said Declaration mentioned on the day of A.D. 1856 was the property of George Helmum & Job Stockton White & not that of said Plaintiff and that on that day there came into the hands of said James S. Beach then Coroner & ex officio Sheriff of said County of Cook five executions to be by him executed as such sheriff as aforesaid namely one from the Cook County Court of common Pleas in favor of William Jones & Milton S. Patrick against the goods & chattels & lands & tenements of George Helmum & J. Stockton White for six hundred and sixty three dollars and seventy eight cents and costs of suit under the seal of the Court dated the 21st day of July A.D. 1856

8
One in favor of Isaac Cook against the goods & chattels Lands & tenements of said Hulme & White, from said Cook County Court of Common Pleas under the seal thereof dated the 27th day of September A.D. 1856 - for ten thousand three hundred and thirty five dollars & costs of suit,

One from same Court under the seal thereof in favor of Joseph L. Mc Duffie and against the lands & tenements, goods & chattels of Job S. White implicated with George Hulme dated the 3rd day of October A.D. 1856 for twelve hundred and eight dollars & nineteen cents & costs of suit,

One from same Court under the seal thereof in favor of Daniel Eaton and against the lands & tenements & goods & chattels of Job S. White implicated with George Hulme dated the 3rd day of October A.D. 1856 - for four hundred & five dollars & costs of suit -

One from same Court under seal thereof in favor of Elias J. Watkins, & against said Hulme & White for two thousand one hundred and seventy five dollars & costs of suit dated the 3rd day of October, A.D. 1856 and all of said executions directed to the said James S. Beach as coroner & ex officio Sheriff of said County of Cook to execute in due form of law.

And the said James S. Beach so having said executions to execute in due form of law at the said time when &c. seized lined up ^{on} took the said Piano as the property of the said Hulme &

White & kept the same until &c. as he lawfully might
for the cause aforesaid and this he is ready to verify &c.
Wherefore he prays judgment and a return of said
property & his damages by occasion of the taking
of the same from him &c. & his costs to be adjudged
to him according to the Statute &c.

And the said Defendants for a further plea
in this behalf says *actio non* - because he says that
the said goods & chattels in the said declaration men-
tioned at the said time when &c. were the property
of George Hulme & Job Stockton White and not of
the said plaintiff as by the said declaration above
is supposed and this he is ready to verify. Whereupon
he prays judgment if &c. & he also prays a return of
the said property together with his costs in this
behalf expended according to the Statute to be
adjudged to him

And afterwards, to wit, on the 9th day of
April in the year last aforesaid the said plaintiff
by his attorney filed in said Court his certain
Replication which is in the words & figures
following, to wit,

Cook Circuit Court

James S. Beach
advs

James Mc Donald

} April Term A. D. 1857

And the said Plff^t as to the

first and second pleas of the said defendant as above pleaded says Recluso "non — Because he says that the said Rosewood "Piano" Forte in said plaint and declaration mentioned was the goods and chattels of the said plaintiff when *re.* and not the property of the said Hulm and White as in said defendants first and second pleas mentioned and of this the said plaintiff prays may be enquired of by the Country *re.*

S. Ashton

(Plffs. Atty.)

And afterwards to wit, on the 6th day of May by the said defendant by his attorneys filed his certain motion which is in the words and figures following to wit,

(Cook Circuit Court)

Mc Donal

vs.

Beach

} Replevin

Def. moves to suppress deposition of J. S. White — for the reason that the cross-interrogatories are not fully answered. —

The answer to 7th is evasive

The 9th is not answered as to where settlement took place

The 10th is not a direct answer

The 2nd paragraph of 11th X Int. is not fully answered

3rd paragraph the same
5th paragraph the same
6 & 7th " " "

Also moves to strike out of the deposition all that part from words "Plaintiff knew" down to "sacrificed" last page of Deposition not responsive & impertinent.

W. T. Burgess
(Plff's atty.)

And afterwards to wit, at the April Term of said Court for the year of our Lord one thousand eight hundred and fifty seven, to wit, on the 12th day of May in said year the following proceedings among others in said Court were had and entered of record therein to wit,

716 James Mc Donald
vs.
James S. Beach } Replevin

This day comes the said Defendant by his attorneys and moves the Court to suppress the depositions taken by plaintiff and on file herein, and the Court not being well advised in the premises takes time to consider of the same

And afterwards, to wit, at the said April Term of said Court aforesaid to wit, on the 23rd day of May in the year last aforesaid the following proceedings among others in said Court, were had

and entered of record therein to wit,

710 James McDonald }
 vs. } Replevin
 James S. Beach }

This day again come the said parties by their attorneys and issue being joined herein. It is ordered that a jury come - whereupon come the jurors of a jury of good and lawful men to wit, C. A. Morse, A. H. Gray, S. Warner, J. Churchill, James Bridgeport, R. S. Chapman, J. G. Sawyer, J. B. Baker, A. Blinston, Mr. Jenks, W^m H. Shaw & S. M. Clothier who being duly elected, tried and sworn well and truly to try the issue joined aforesaid, after hearing part of the evidence adduced and the hour of adjournment having arrived it is ordered that they be allowed to separate to meet the Court at the coming in thereof on Monday morning.

And afterwards to wit, at the Term of said Court last aforesaid, to wit, on the 25th day of May in the year last aforesaid the following proceedings among others in said Court were had and entered of record therein to wit,

710 James McDonald }
 vs. } Replevin
 James S. Beach }

This day again come the said parties by their attorneys and the jury heretofore empannelled to try this cause also come and they having heard all the evidence adduced

arguments of counsel and instructions of the Court retire to consider of their verdict and afterwards come into Court and say - We the Jury find the issues herein for the defendant. Whereupon the said plaintiff moves the Court for a new trial of this cause -

And afterwards to wit, on the 26th day of May in the year last aforesaid the said plaintiff by his said attorney filed in said Court his motion for a new trial which is in the words and figures following to wit,

Cook Circuit Court

April Term A. D. 1857

James McDonald }
vs. } Replevin
James S. Beach }

And now comes the said pl^{ff} by Sam^l Ashton his attorney and moves the Court for a new trial in the above entitled cause upon the following grounds to wit,

First,

Because the verdict is against the evidence as introduced upon the trial of the above entitled cause

"Second

Because the pl^{ffs} atty had no opportunity to have the jury polled after the verdict was rendered in Court a Request having been made to the Court to have the jury called in order that the plaintiff might have them polled, See 2nd Gill 345

Third Because the verdict is not Responsive to the Issues as made in the above entitled cause, and the Court has no right to order a writ of "Returno Habendo" upon the verdict as found by the Jury - See 2^d Gill 346

Fourth Because the instructions given by the Court on the part of the Deft. were calculated to mislead the Jury and were not borne out by the evidence as given upon the trial of the cause. And that said instructions are against the law and were not warranted by the evidence, nor were they appropriate or pertinent to the facts in the case, although strictly a legal proposition was embraced in said Instructions they should have been refused because they were not appropriate and pertinent to the evidence in the cause. See 2^d Gill 285

Hill vs Ward

Fifth Because the verdict is contrary to the law and the evidence and the Court erred in refusing to give the Jury the instructions asked on the part of the plff.

Sixth Because no fraud was shown by the Defts. on the part of the purchaser at the time the sale was made, and the testimony showing the sale to the plff. to be Bona fide on his part and for a valuable consideration the verdict should have been for the plff.

as to the fraud that will vitiate a sale

"Seventh Because the instructions given for the Deft. by the Court was too broad and not pertinent to the evidence and the Piano Forte remaining in the room at the Hotel was not an evidence of fraud. if the possession remained with Fl. & W. was consistent with the transaction, and the transaction was a "Bona fide one

See 3rd Seam 296 - Please look at McCormick vs Wilson 3 Seam 344

"Eight The Instructions given by the Court for the Deft- were calculated to deprive the Jury of judging of the fact as to whether fraud existed in the sale and delivery from Hulm & White to the plff. of the Piano Forte in question,

"Ninth The Instructions of the Deft. given by the Court was against the law because the Plff. had the right to take the Piano Forte into his possession at any time by the terms of the sale since the bill of sale given at the time gave the plff a constructive possession with power to reduce it into an actual possession at any time and at his own pleasure and the sale was therefore good against creditors of Fl & W. without any actual change in the local situation of the Piano Forte

See 23rd Vol (8 Washb) 82

16
Tenth,

Because the Instructions given by the Court for the Deft, deprived the jury of judging of the question of fraud, it being a question of fact for them to determine from the evidence whether there was a delivery of the Piano or not to the plfff. It is a rule of law that where personal property is from its character or situation at the time of the sale, incapable of actual delivery or in other words of a visible change of possession, at the time of the sale, ~~the bill~~ ^{of the bill} of the delivery of sale, or other evidence of title is sufficient to transfer the property and possession to the vendee. And in this case this rule of law is applicable. Because the Piano Forte was a large and bulky chattel and the plfff's home was at the Hotel, he being there all the time is shown by the evidence and that was the only place to which plfff could take the property.

See *Gilson vs Sheres & Howard* 11 Spurge 384

Eleventh, The Court ought to exercise a sound discretion in this case and give the plfff a new trial if by that means it would be promotive of public justice and the Rights of the parties, for the evidence shows that the Deft. has now in his possession more property of H. & W. than would pay all their debts if it had been properly applied, and because it may be in the power of the plfff. to produce other evidence as to the delivery upon a new trial.

As to what is necessary to constitute a valid sale and delivery and a change of possession

see the case of Powers vs Green 14 Ill Page 386
which was an action of Replevin. See 4th Comstock
Page 303 I think is a case in point. Also see 25th Vt
(2 Dean) 686 - 2nd Carter Inda Price vs Gibson 408 -
20 Ala 179 - 15th Miss 416 - 8th Blackford 148 - 4th
English 482 - 5th Gill 161 and 8th & 2nd of Texas
Pages 279 & 33

All of which is Respectfully submitted on
the part of the plffs-

S. Ashton

Pliff ally

The case referred to by the Court in Scammon's Reports of Thornton vs Davenport does not go to the extent of the Instructions given by the Court for the Dept.

And afterwards to wit, at the June special term of said Court for the year last aforesaid, to wit, on the 9th day of July of said year, the following proceedings among others in said Court were had and entered of record therein to wit,

710 James Mc Donald }
vs. } Replevin
James S. Beach }
Thompson

This day come the said parties by their respective attorneys and the Court having heard counsel on the said plaintiffs'

motion heretofore made for a new trial of this cause, and not being fully advised takes the same under advisement.

And afterwards to wit, at the same June special term of said Court last aforesaid, to wit, on the 16th day of July in the year last aforesaid the following proceedings among others in said Court were had and entered of record therein, to wit,

710 James Mc Donald }
as. } Replevin
James S. Beach }

This day came the said parties by their attorneys and the Court being well advised in the premises overrules the said plaintiff's motion for a new trial of this cause, to which ruling the said plaintiff by his counsel excepts.

Therefore it is considered that the said defendant do have return of the property replevined in this cause to be held by him irreplevisable and have & recover his costs and charges by him in this behalf expended & have execution therefor.

Whereupon the said plaintiff prays an appeal to the Supreme Court of the State of Illinois which is granted but upon condition that said plaintiff file a bond in the penal sum of five hundred Dollars with Patrick Morgan as surety within twenty days conditioned according to law and also that he file his bill of exceptions by the first day of the next term of this Court

And afterwards to wit, on the 22^d day of July
in the year last aforesaid the said plaintiff filed
in said Court his certain appeal bond, which
is in the words & figures following to wit,

In the Supreme Court of the
State of Illinois

James McDonald
vs.
James S. Beach } An appeal

Know all men by these Presents
that we James McDonald and Patrick R. Morgan
of Chicago and State of Illinois are held and
firmly bound unto James S. Beach of Chicago
and State aforesaid in the sum of five hundred
dollars lawful money of the United States to
be paid to the said James S. Beach, his heirs,
executors, administrators or assignees for which
payment well and truly to be made we bind
ourselves, our heirs, executors, administrators
and assignees firmly by these Presents - sealed
with our seals this 21st day of July A. D. 1857

Whereas the above named James Mc
Donald hath prayed and hath obtained an
appeal to the Supreme Court of the State of Illinois
to reverse the judgment rendered in the above
entitled suit by the Circuit Court of Cook County
and State of Illinois

Now therefore the consideration of

this obligation is such that if the said James Mc Donald shall diligently prosecute his said appeal and shall pay any judgment and all costs, interest and damages which may be adjudged by the Justices of the Supreme Court of the State of Illinois against the said James Mc Donald on such appeal, then this obligation to be void, otherwise to be and remain in full force and virtue

signed & sealed

In presence of

F. H. Manter

James Mc Donald (seal)
P. R. Morgan (seal)

And afterwards, to wit, on the 12th day of October in the year last aforesaid, the said plaintiff by his said attorney filed in the office of the Clerk of the Court aforesaid his certain Bill of exceptions which is in the words & figures following, to wit,

Be it remembered, that on the trial of this cause, the following testimony was offered in evidence on the part of the Plaintiff and the Defendant

Plaintiff's Witnesses - Deposition of Job S. White in the words and figures following to wit,

Cook Circuit Court

James Mc Donald

vs.

James S. Beach

April Term A. D. 1857

Replevin

The deposition of Job S. White of the City and County of Saint Louis State of Missouri a witness of lawful age produced sworn and examined upon his corporal oath on the 18th day of Apl. A. D. 1856 at the office of S. J. Levi Commissioner residing in the City & County of Saint Louis, State of Missouri duly appointed by a Commission issued out of the Clerk's office of the Cook Circuit Court State of Illinois for the examination of the said Job S. White who being by one first duly sworn as a witness in the said cause previous to the commencement of his examination to testify the truth as well as on the part of the plaintiff as the defendant in relation to the matters in controversy between said plaintiff and defendant as far as he should be interrogated testified & deposed as follows

Interrogatory, 1st What is your name, age and business and where do you reside?

Answer Job S. White, 34 years of age, business keeper of a Restaurant on Chesnut Street between 3rd & fourth Street St Louis Mo.

2nd Interrogatory Are you acquainted with the parties to this suit? If yea, state how long you have known them or either of them —

Answer to Second Interrogatory — Deponent says that he is acquainted with both plaintiff and defendant I have known plaintiff about six years — known defendant about three years.

3rd Interrogatory — Were you ever a resident of the City of Chicago County of Cook and State of Illinois? If

year, state when and in what business you was engaged
 State if you were acquainted with the firm of Hulme &
 White? If so, state where said firm resided in the year
 1856 and in what business said firm was engaged and
 who composed said firm?

3rd Answer to 3rd Int- deponent says - He resided in the
 City of Chicago County of Cook and State of Illinois,
 resided there from the Spring 1854 up to March 4th
 1857, was engaged in keeping the Hotel known as the
 Young America, was acquainted with the firm of
 Hulme and White, said firm resided and was doing
 business in Chicago in the year 1856, the said firm
 kept the Young America Hotel, the firm of Hulme
 & White was composed of George Hulme and Job
 S. White.

4th Interrogatory - (Do you know in whose employ the
 plaintiff in this suit was during the year A. D. 1856
 or in the summer of said year? State if the firm of
 Hulme & White were indebted to the said plaintiff in the
 year 1856, if so state what said indebtedness was for and
 what amount said Hulme & White owed said plaintiff.

Answer to the fourth Interrogatory - Deponent says the plaintiff
 was in the employ of Hulme & White in the year of 1856
 in the summer of said year the firm of Hulme & White
 was indebted to plaintiff in the sum of Two thousand
 dollars in the year of 1856, the indebtedness accrued
 for wages due the plaintiff exclusive of borrowed
 money.

5th Interrogatory - State if the plaintiff purchased any

property of the firm of Hulme & White in the summer of 1856? If so, state what the property was, how much said plaintiff paid for the same, and by whom was the same sold to said plaintiff, and at what time the same was so sold to said plaintiff? And if the same was delivered to him at the time of sale and by whom was it delivered to the said plaintiff? And if the plaintiff was always in possession of said property after said sale?

Answer to Interrogatory fifth — Deponent says that plaintiff in the year of Eighteen hundred & fifty six purchased of Hulme & White a Piano and stool — said plaintiff paid for said property two hundred and fifty dollars \$250. The property was sold in the month of May 1856, and was delivered to James Mc Donald the plaintiff by this deponent. It was duly delivered to him and that all he knows that he had full possession of same — and kept the said property after the said sale and delivery and still holds it in his possession.

6th Interrogatory — Did you in the summer of 1856 sell any goods and chattels to the plaintiff in this suit? If yes, state what they were and at what time you sold the same to said plaintiff, And what was the amount paid to you for said goods and chattels by said plaintiff, And where said goods and chattels were situated at the time of said sale, and describe fully said goods and chattels and whether the same was delivered to the said plaintiff at that time of said sale?

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Answer to Interrogatory Sixth - Deponent says he did in the summer of 1856 sell the plaintiff some furniture consisting of sofas, bedsteads, wagons & horses, some tables, stoves, & cast iron roller - This was about June 3rd 1856. The amount he believes to have sold same for was about fifteen hundred dollars. The last named goods or chattels was situated at the Garden City Race Course Chicago Cook County Illinois. Deponent says that he delivered the said property to the plaintiff himself at the Race Course himself at the same day & place above stated -

Interrogatory 7th If you know anything that would be advantage to the plaintiff in this suit further than you have been interrogated state the same fully and at large as if you had been particularly thereunto Interrogated

Answer to the Seventh Interrogatory - Deponent says he does not know anything to state generally that would be of advantage to plaintiff except what he has already been questioned about unless the matter were brought to his mind by questions

Cross Interrogatories

1st Cross Interrogatory - Do you recollect the fact of one hundred dollars being paid by you for Helme & White to Jones & Patrick of Chicago upon an execution they had issued to the Sheriff of Cook County against your firm? If so, state as near as you can the time.

Answer to 1st Cross Interrogatory — I recollect the fact of one hundred dollars being paid by me to Jones & Patrick but do not know the time of that payment.

2nd Cross Interrogatory — If in your answer to the fifth direct Interrogatory you state the firm of Guilme & White sold any property including therein a Piano forte to said Plaintiff was not such sale made after the payment of that money?

Answer to the 2nd Cross Interrogatory — The sale by our firm of the piano forte to plaintiff was before payment of the money to Jones & Patrick on the execution mentioned in the last question.

3rd Cross Interrogatory — Did you make, or give any bill of sale of said Property?

Answer to 3rd Cross Interrogatory — I gave the plaintiff a bill of sale of the piano and delivered the property to him.

4th Cross Interrogatory — Who was present at such sale and such delivery thereof?

Answer to 4th Cross Interrogatory — I do not recollect that any one was present at the time.

5th Cross Interrogatory — Where was said property at the time of such sale — describe particularly the location of the Piano forte —

Answer to the 5th Cross Interrogatory — The said property was in the front parlor of the Young America Hotel.

6th Cross Interrogatory — Did not said Piano forte remain in the said position and used in the

same place & by the same persons that it had been before you say this sale took place, until it was replevied by said plaintiff? If not, state how long as to each branch of the inquiry - it so remained.

Answer to the 6th Cross Interrogatory — The Piano forte remained in the same location and was used as before the sale it had been used but this use was by agreement between plaintiff and myself made after the time of the sale and delivery to him.

7th Cross Interrogatory — (Does the indebtedness of which you testify about as being due to said plaintiff appear on the books of Hulme & White? If so, when was it put thereon & by whom?)

Answer to 7th Cross Interrogatory — The indebtedness of Hulme & White to plaintiff partly appears on their books and is partly embraced in notes given by them to plaintiff. The indebtedness of Hulme & White to plaintiff commenced when the Young America first opened. And the charges on his account on the books was kept as every other account.

8th Cross Interrogatory — Where are the books of act. of said Hulme & White at this time? If you do now know, where did you last see them?

Answer to the 8th Cross Interrogatory — I don't know where Hulme & White's books of act. are at this time, when I last saw them they were in Young America Hotel.

9th Cross Interrogatory — (Did you have any settlement

with said James Mc Donald as to what was due him from said Hulme & White? If so, when and where and was present beside yourselves?

Answer to the 9th Cross Interrogatory — There was a settlement made between James Mc Donald and myself for Hulme & White. I think there was no one present at the time.

10th Cross Interrogatory — (Did you or he consult with any other person or persons as to the said sale of said property? If so, with whom and when & how often if more than once? Give the dates of each of such consultations — or as near as you can especially of the first.

Answer to Tenth Cross Interrogatory — I don't recollect that I had any conversations or consultations with any one about the sale of the property to plaintiff.

11th Cross Interrogatory — (Do you swear positively that this sale to Mc Donald of this Piano forte in controversy in this suit took place before the defendant or one of his deputies inform you that he had an execution in favor of Isaac Cook against Hulme & White? What acts did you do in delivering said Piano Forte to the said plaintiff if you did any? Was the firm of Hulme and White indebted to said plaintiff for any thing but his wages as bar tender or in some other employment for them & about the Young America If so, what was it, giving the items of such indebtedness, how & when it occurred, showing a full

& fair & correct statement thereof in detail,

If they were then indebted to the plaintiff for such wages then how much per month have you allowed him in making up the amount of said indebtedness — Is that allowance by the month? If so, how much per month? If not, then for what length of time is it? & what rate per month? How much per month did you agree to give him in the first place when you hired him?

(Did you not tell the said plaintiff before you made or at the time of making such sale, if say, any sale was made to him, that Hulme & White were in pecuniary difficulty, that Hulme had gone or run away & taken a large amount of the funds of the Concern?

If not in this precise language at least to that purpose & effect?

(Did not the said plaintiff then know or have reason to believe that said Hulme & White were on the verge of insolvency or that they were unable to pay their just debts?

Answer to the Eleventh Cross Interrogatory — The sale of the Piano forte by me to plaintiff took place before I was informed that the defendant had an execution in favor of Isaac Cook against Hulme & White. When I delivered the Piano forte to plaintiff, I told him to take it. — The firm of Hulme and White was indebted to plaintiff for borrowed money — wages as Steward in the

Young America Hotel — I cannot give a full statement of the items for wages but the indebtedness for wages from Hulme & White to plaintiff was about two thousand dollars which is exclusive of borrowed money.

The wages were by the year nine hundred dollars for the first year and twelve hundred dollars for the succeeding years.

I do not recollect having ever stated to plaintiff that Hulme and White were under pecuniary embarrassments or that plaintiff knew any thing particularly about it, plaintiff knew that Isaac Cook was going to take the Young America on his hands for my benefit. Such was the agreement between Isaac Cook and myself and friends & I believed him until Cook had bought the property of Hulme and White and then he turned me out.

Isaac Cook has had in his possession property of Hulme & White more than it would take to pay their debt to Cook and I believe he has the same property or the proceeds of the same at this time. Isaac Cook got this property under the understanding that I had to carry on the Young America under which assignment I could have paid.

All my debts to him and other ^{creditors} ~~creditors~~ but when he became possessor of the property he violated his agreement with me. I do not know that plaintiff had any reason to know that Hulme

& White were on the verge of insolvency for I could have paid the debts with the house & property if Cook had let me.

When Isaac Cook bought the property of Hulme & White in the Young America at Sheriff's sale the plaintiff in this suit pointed out to him the Piano forte & other property as property of plaintiff — Isaac Cook told me he would buy the property in for my benefit whereby I could pay all the debts of the concern. He also told some of my friends, Philander Eddy, William G. Coolston James Mc Donald among the number not to bid on the property as he was buying it in for me Under these representations myself and friends permitted the property to be sacrificed as I trusted to Cook for the chance of making the property pay all the debts which if he had fulfilled his contract with me it would have done. There were no persons as bidders present when the property was sold because Cook kept my friends away by his representations. The property was therefore sacrificed

Job Slackton White

Sworn to and subscribed before
me this 11th day of April A. D. 1857
In testimony whereof I have hereunto
set my hand and official seal

S. J. Levi

Commissioner



State of Missouri }
County of Saint Louis } ss.

I Solomon J. Levi of the County of Saint Louis and State of Missouri a Commissioner duly appointed to take the deposition of the Job S. White a witness whose name is subscribed to the foregoing deposition do hereby certify that previous to the commencement of the examination of the said Job S. White as a witness in the said suit between the said James McDonald plaintiff and James S. Beach defendant he was duly sworn by me as such Commissioner to testify the truth in relation to the matters in controversy between the said McDonald Plff. and the said Beach defendant, as far as he should be interrogated concerning the same, that the said deposition was taken at my office in the City and County of St Louis and State of Missouri on the 11th day of April A. D. 1857 and that after said deposition was taken by me as aforesaid the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent Job S. White by me the said Commissioner at the place and on the day and year last aforesaid.

In testimony whereof I have
herunto set my hand and affixed



my official seal this Eleventh
day of April Eighteen hundred
+ fifty seven —

S. J. Levi
Commissioner

Samuel Ashton — I am acquainted with
the hand writing of Job S. White. This bill of
sale is in his hand writing. I first saw it about
four months ago. It was given to me by my
client, the plaintiff. I was not present when
it was made. I know nothing about this bill
of sale except what I heard. Never advised
about the making the bill of sale. Never saw
it before the time mentioned. —

Plaintiff offered in evidence the bill of
sale from the witness White to Plaintiff in
the words and figures following to wit,

Chicago May 27th 1856

James Mc Donald

Bot of Hulme & White

One Piano & Stool in Ladies Parlor \$250.00

Rec^d Payment by note of borrowed
money.

(Signed) Hulme & White

Defendants' Witnesses — Defendant
offered in evidence Execution in favor of
Jones & Patrick and against Hulme & White

with legy endorsed thereon by Sheriff in the words and figures following to wit, Production of the judgment Record having been waived by Plaintiff.

State of Illinois } ss
County of Cook }

The People of the State of Illinois to the Coroner & acting Sheriff of said County - Greeting:
We Command you, That of the Lands and Tenements, Goods and Chattels of George Hulme & J. Mackton White Defendants in your County, you cause to be made the sum of Six hundred & sixty three Dollars and Seventy eight cents, which William Jones & Milton S. Patrick Plaintiffs, lately in the Cook County Court of Common Pleas of said County at Chicago in said County, on the 21st day of July instant in Vacation, recovered against the said Defendants and which by the said Court was adjudged to the said Plaintiffs for their Damages.

And also the further sum Four Dollars and Seventy Cents which were adjudged to the said Plaintiffs for their costs and charges in that behalf expended, whereof the said Defendants were convicted as appears to us of Record. And have you these moneys ready to render to the said Plaintiffs for their damages and costs aforesaid, and make return of said writ with an endorsement thereon in what manner you shall have executed the same, in ninety days from the date hereof.

Witness, Walter Kimball, Clerk of

our said Court, and the seal thereof at Chicago in said
County, this 21st day of July A. D. 1856

(Walter Kimball Clerk)



For value received we do hereby sell, assign
and transfer to Isaac Cook the judgment withⁱⁿ named
and authorise him to receive all moneys collected on
the within

James & Patrick
(By Milton S. Patrick)

On the 21st July 1856, by virtue of this Execⁿ I have
levied on one piano forte in Young America which
has been replevied from me by James Mc Donald
on this 6th day of Decr. 1856

James S. Beach Coroner Sheriff
(By Ira Snow Deputy)

By virtue of the annexed execution No 6241, I
have levied upon one Piano in Young America
and a dwelling house & buildings situate of Lands
of William B. Egan in the S. E. $\frac{1}{4}$ of S. 10 T. 38. R. 4.
14. E. and also upon the following described tract
of Land in Cook County Illinois described as follows
Beginning at the South west corner of the South
west quarter of Section Eleven (11) in Town thirty
eight (38) North of Range fourteen (14) East of the Third
principal Meridian, thence running East on

said Section 15 chains 16 Links, thence North thirty
four chains forty four Links, thence West 15 chains 16
links, thence South 24 c. 44 L. thence West 5 chains,
thence South 10 chains, thence East 5 c. to the place of
beginning, containing fifty seven acres more or less.
And also the buildings & improvements situated
thereon - the 27th Sept. 1856.

The said Piano was on the 6th day of December
replevied from me by John S. Wilson Sheriff of
Cook County under a writ of replevin issued from
the Circuit Court of said County ^{against} ~~of~~ ~~for~~ ~~me~~ me.

on the 22nd day of December 1856 & sold on the
premises between the hours of noon & 4 P. M. the
time & place of sale having been duly advertised
according to law I sold at Public vendue to
Isaac Cook the said dwelling house & barn &
lands under this execution & one in favor of
Isaac Cook against same Defendants from
the Cook County Court of Common Pleas No 6580
and another in favor of Watkins No 6592 and
realized upon said sale the sum of four thousand
dollars for the lands & three hundred & seventy five
dollars for the buildings - of which I have applied
three hundred and twenty five dollars on this
execution by direction of the Off. & return the same
by his order unsatisfied as to the balance thereof.
Dated this 22nd day of December A. D. 1856.

James S. Beach Late Coroner &
ex officio acting Sheriff of Cook County
By Ira Snow Deputy

Rec^d three hundred and twenty five Dollars to
apply on this Est^t as above.

(J^r Cook)

W^m G. Colston — I knew Hulme & White. I knew
there was a Piano ^{in the parlor} at the "Young America" all the time
I was there. I was in the employ of Hulme & White,
was there on the 21st of July 1856, it was there and seemed
to be for the use of the house. Before that date I never
heard of Plaintiff's buying the Piano. The Plaintiff
was in the house all the time it was used by visitors
of the house.

I was acting as Clerk and Book Keeper of the
house. Hulme and White were owing the Plaintiff
all the time I was there before and after July 1856.
The Plaintiff was acting as Steward of the house for
Hulme & White and that was his home. The books
showed the indebtedness to Plaintiff. Knew nothing
of the sale of property on the execution. Can't recollect
when I first heard of the Plaintiff's having a bill of
sale. I know of no entry of sale on the books. I
never heard of it until after execution. Would have
known it if it had been put on the books.

{ The foregoing is the whole evidence
given in the case —

Charges to the Jury

The Counsel for the Plaintiff requested the Court
to charge the jury.

If the Jury shall believe from the evidence that the sale took place at the time mentioned in the bill of sale and the Piano was delivered to the plaintiff by White its remaining in the parlor of the Hotel was not a fraud it being there by agreement of the parties and the law is for the Plaintiff.

Refused by the Court and refusal then and there excepted to by the Plaintiff.

1st The Counsel for the Defendant then and there requested the Court to give to the Jury the following instructions
The Jury are instructed that the execution given in evidence was a lien upon the goods and chattels of Hulme & White from and after the 21st of July 1856 and unless it has been proved to the Jury that the Piano in question was before that date not only sold but delivered to the Plaintiff they should find for the Defendant and the making a bill of sale to Plaintiff and telling him to take the Piano is not a sufficient delivery without an actual change of the possession as against creditors to pass the property to Plaintiff.

2nd That unless the Piano in question was actually delivered to and taken into the possession of Plaintiff by an actual visible change of possession then the sale of it to Plaintiff was fraudulent and void as to the creditors of Hulme & White and if there was no such actual change of possession before the 21st of July 1856 the Jury should find for the Defendant notwithstanding the Plaintiff may have given a

good consideration for it.

3rd That the law requires that there should be a visible change of possession of personal property from the seller to the purchaser before sale of it can effect the creditors of the seller or other purchaser from him, else it is fraudulent in law, even although such sale is made in good faith for a good consideration.

Which said instructions numbered one (1) two (2) and three (3) the Court then & there gave to the jury, and to the giving of which said instructions by the Court the Plaintiff then and there excepted.

The foregoing were all the instructions given by the Court to the jury and the jury having found a verdict ^{for} the Defendant the Plaintiff then and there moved the Court for a new trial because —

1st The verdict is against the evidence as introduced on the trial of said cause.

2nd Because the Plaintiff's attorney had no opportunity to have the jury polled after the verdict was rendered in Court.

3rd Because the verdict is not responsive to the issue as made in said cause and the Court has no right to order a writ of Returs Habeas upon the verdict as found by the jury.

4th Because the instructions given by the Court on the part of the Defendant were calculated to mislead the jury, and were not borne out by the evidence as

given upon the trial of the cause, and that said instructions were against the law and unwarranted by the evidence nor were they appropriate or pertinent to the facts in the case, although strictly a legal proposition was embraced in said instructions they should have been refused, because they were not appropriate and pertinent to the evidence in the cause.

3th Because the verdict is contrary to the law & the evidence and the Court erred in refusing to give the jury the instruction asked for on the part of the Plaintiff.

6th Because no fraud was shown by the Defendant on the part of the purchaser at the time the sale was made and the testimony showing the sale to the Plaintiff to be Bona fide on his part and for a valuable consideration the verdict should have been for the plaintiff.

7th Because the instructions given by the Court for the Defendant were too broad and not pertinent to the evidence, and the Piano Forte remaining in the room at the Hotel was not an evidence of fraud if the possession remaining with Hulme and White was consistent with the transaction and the transaction was a bona fide one.

8th Because the instructions given by the Court for the Defendant were calculated to deprive the jury of judging of the fact as to whether fraud existed in the sale and delivery from Hulme & White to the Plaintiff of the Piano Forte in question.

9th Because the instructions of Defendant given by the Court were against the law, the Plaintiff

having the right to take the Piano Forte into his possession at any time by the terms of the sale, and the bill of sale given at the time, gave the Plaintiff a constructive possession with power to reduce it into actual possession at any time and at his own pleasure and the sale was therefore good against creditors of Hulme & White without any actual change in the local situation of the Piano Forte.

10th Because the instructions given by the Court for the Defendant deprived the Jury of judging of the question of fraud it being a question of fact for them to determine from the evidence whether there was a delivery of the Piano or not to the Plaintiff, it being a rule of Law that where personal property is from its character or situation at the time of the sale incapable of actual delivery, or in other words of a visible change of possession at the time of the sale, the delivery of the bill of sale or other evidence of title is sufficient to transfer the property and possession to the vendee and in this case this rule of law is applicable because the Piano Forte is a large and bulky article and the Plaintiff's home was at the Hotel, he being there all the time as shown by the evidence and that was the only place to which Plaintiff could take the property

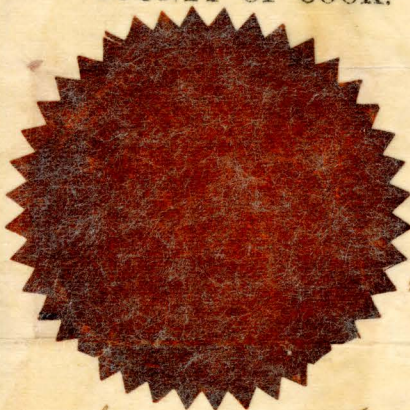
11th Because the Court ought to exercise a sound discretion in this case and give the Plaintiff a new trial, if by that means it would be promotive of public justice and the rights of the parties

for the evidence shows that the Defendant has now
in his possession more property of Hulme & White
than would pay all their debts if it had been properly
applied, And because it may be in the power of
the Plaintiff to produce other evidence as to the delivery
upon a new trial -

The Court then and there overruled said
motion and rendered judgment on the Verdict and
to the decision of the Court overruling said motion
the Plaintiff then and there excepted and tendered
to the Court this his bill of Exceptions and prays the
Court to sign and seal the same which is done
as by the Statute in such case made and provided

George Masiere (seal)
Judge of 7th Judicial
Circuit Ill.)

State of Illinois, }
COUNTY OF COOK. } s. s.



I, WILLIAM L. CHURCH, Clerk of the Circuit
Court of Cook County, in the State aforesaid, do hereby
certify the above and foregoing, to be a true, perfect and complete
copy of the papers filed & proceedings had and entire
record in a certain cause latity pending in said Court on the
Law side thereof, wherein JAMES
McDonald was Plaintiff and
JAMES S. Beach was defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our
said Court at Chicago, this 26th day of March A. D. 1888

Fee for Record \$10.³⁵

Wm L Church

Clerk.

- The Appellant in the above entitled Cause says there is manifest error in the Record and assigns the following
- 1st The court erred in refusing to give the instruction as asked by the Pltffs.
 - 2^d The court erred in giving each of the instructions as asked by the Defs.
 - 3^d The court erred in overruling the Pltffs Motion for a new trial.
 - 4th The court erred in rendering the Judgment aforesaid, in manner and form aforesaid.
 - 5th The court erred by assuming a question of fact to be a question of law.

S. Chilton.
for Appellant.

And the appellee comes & says
that there is no error &

W. J. Phipps
for Appellee

James McDonald
208 - 207

James S. Peck

Record
4 copy. of Envs.

Filed April 21, 1888
S. Leland
clerk

psd

Peck

510 50

1888-207

ABSTRACT.

STATE OF ILLINOIS--SUPREME COURT--THIRD DIVISION.

JAMES McDONALD
vs.
JAMES S. BEACH.

Appeal from Cook County Circuit Court.

This was an action of Replevin, brought by Appellant against Appelle. Declaration filed February 5th, 1857.

Record.
Page 6.

1st Count.—Plaintiff alleges that on the 6th day of December, 1856, defendant took the goods and chattels belonging to plaintiff, to wit: one six Octavo Rose Wood Piano-Forte, the property of said plaintiff, of the value of \$250, and unjustly detained the same, &c.

Record.
Page 6.

2nd Count.—Same in substance as first count, alleging the taking and detaining of a Piano-Forte, the property of plaintiff, of the value aforesaid, wherefore plaintiff was damaged, &c.

Record.
Pages 7 & 8

PLEAS—*1st.* Special plea well avowing the taking of the Piano-Forte by defendant, justly, &c., because the Piano-Forte on the day of 1856, was the property of Hulm & White, and not the property of the plaintiff, as charged in the declaration; and that the defendant was Coroner and Acting Sheriff of Cook County, and as such Acting Sheriff there came into his hands from the Cook County Court of Common Pleas, certain writs of execution against Hulm & White, for him as such Acting Sheriff to execute; one of which said executions being dated and issued July 21st, 1856, in favor of William Jones and Milton S. Patrick, for the sum of six hundred and sixty-three dollars and seventy-eight cents; and that by virtue of said execution, as such Acting Sheriff, he the defendant seized, levied upon and took said Piano, as the property of said Hulme & White, and kept the same, &c.

Record.
Page 9.

2nd. Special plea denying that the Piano-Forte was the property of plaintiff; and alleging the same to be the property of said Hulme & White, at the time when, &c., and praying a return of the same with, when, &c.

Record.
Pages 9 & 10.

Issue was joined on the pleas denying that the Piano was the property of said Hulme & White at the time when, &c.; and alleging the same to be the property of the plaintiff, as charged in plaintiff's declaration.

Record.
Page 20 & 21.

On the trial plaintiff read the deposition of Job S. White, in substance as follows:—

22, 23 & 24.
25, 26 & 27.
28, 29 & 30.

"I reside in the city of St. Louis, Missouri. I am acquainted with plaintiff and defendant; have known them several years. I resided in the city of Chicago from the spring of 1854 to March 4th, 1857; was one of the firm of Hulme & White, the proprietors of the hotel known as the "Young America;" the firm was George Hulme and myself; the firm kept said hotel from spring 1854 to 4th March, 1857; plaintiff was in the employ of Hulme & White during the year 1856, and all the time said firm kept said hotel; and the firm was indebted to him in the sum of two thousand dollars for wages, exclusive of borrowed money; plaintiff purchased of Hulme & White in May, 1856, the Piano in question, with a stool; he paid two hundred and fifty dollars for the same; I delivered it to plaintiff myself; the Piano was duly delivered to plaintiff, and he had full possession of the same, and kept the same after the sale and delivery, and still holds it in his possession.

CROSS INTERROGATORIES.

Record.
Page 24.

I recollect one hundred dollars was paid to Jones & Patrick by me; do not know the time it was paid; the sale of the Piano to plaintiff by our firm was before the payment to Jones & Patrick on the execution mentioned. I gave plaintiff a bill of sale of the Piano, and delivered the property to him; don't recollect who was present at the time; the property was in the front parlor of the "Young America Hotel;" the Piano remained in the same location, and was used as before; this was by agreement between plaintiff and myself after the sale and delivery of the Piano to plaintiff; the indebtedness of Hulme & White to plaintiff was part on the books and part in notes; the indebtedness commenced in the spring of 1854, when the hotel first opened, and plaintiff's account was kept as other accounts on the books; I don't know where the books of Hulme & White are at this time; saw them last in Young America Hotel; there was a settlement between plaintiff and myself for Hulme & White; don't recollect of having any conversations or consultation with any person about the sale to plaintiff; the sale of the Piano to plaintiff by Hulme & White took place before I knew the defendant had an execution in favor of Cook, and against Hulme & White. When I delivered the Piano to plaintiff; I told him to take it; Hulme & White were indebted to plaintiff for wages and borrowed money; for wages as Steward of the Young America Hotel; cannot give a full statement of the items, but the amount was about two thousand dollars, exclusive of borrowed money; the wages were by the year, nine hundred dollars for the first year and twelve hundred dollars for the remaining years; don't recollect stating to plaintiff that Hulme & White were under pecuniary embarrassments, or that plaintiff knew anything about it; plaintiff knew that Cook was to take the hotel in his hands for my benefit, such was the agreement between Cook and myself and friends. I believed Cook until he bought

the property belonging to Hulme & White, then he turned me out of the hotel; Cook has in his possession property of Hulme & White, more than it would take to pay his debt; Cook got the property with the understanding that I was to carry on the hotel, by which means I could have paid all of Hulme & White's debts, his and the other creditors; but when Cook became possessed of the property he violated his agreement with me; don't know that plaintiff had any reason to know that Hulme & White were on the verge of insolvency; they could have paid all their debts with the property Cook got at Sheriff's sale; at the sale plaintiff pointed out the Piano as his own property; Cook agreed to buy the property of Hulme & White for my benefit, so I could pay all the debts of the concern; he told my friends so, and that they must not bid on the property, as he Cook was buying it for me; from these representations, myself and friends permitted the property to be sacrificed. I trusted Cook, and if he had kept his agreement, the property would have paid all the debts of Hulme & White; there were no bidders when the property was sold; Cook kept my friends away; the property was therefore sacrificed.

Record.
Page 32.

Samuel Ashton, called by plaintiff, testified he was acquainted with the handwriting of White; the bill of sale is in his handwriting; he first saw it about four months ago; it was given to him by plaintiff; was not present when bill of sale was made; knew nothing about the bill of sale of Piano, but what he heard; did not advise about the making of the bill of sale; never saw it before the time mentioned.

Record.
Page 32.

Plaintiff gave in evidence a bill of sale from Hulme & White to plaintiff, of the Piano in question, as follows:

Record.
Page 32.

CHICAGO, May 27th, 1856.

James McDonald,	Bought of Hulme & White one Piano and Stool	
in Ladies' Parlor,		\$250
	Received payment by note of borrowed money.	
	(Signed,) HULME & WHITE.	

Plaintiff rested his case

DEFENDANT'S TESTIMONY.

Record.
Page 32 & 33.
Page 34.

Defendant gave in evidence execution in favor of Jones & Patrick, and against Hulme & White. (Judgment Record waived by plaintiff.) Issued from Cook County Court of Common Pleas, July 21st, 1856, with levy indorsed thereon, by defendant as Acting Sheriff of Cook County, as follows:—

"On the 21st day of July, 1856, by virtue of this execution, I have levied on one Piano-Forte in Young America Hotel, which has been replevied from me by James McDonald, on this 6th day of Dec., 1856.

JAMES S. BEACH, Sheriff, &c.

Record.

Assignment of Judgment by Jones & Patrick to Isaac Cook, upon which the above execution issued, as follows:—

Page 34.

For value received we do hereby sell, assign and transfer to Isaac Cook the Judgment within named, and authorize him to receive all monies collected on the same.

(Signed,)

JONES & PATRICK.

*By Milton S. Patrick.*Record.
Page 36.

William C. Colston testified in substance, as follows:—Know Hulme & White; there was a Piano in the parlor of Young America Hotel while I was there; I was in the employ of Hulme & White on the 21st day of July, 1856; the Piano was there and seemed to be for the use of the house; never heard plaintiff had bought the Piano; plaintiff was in the hotel all the time. I was clerk and book-keeper for Hulme & White; they were owing plaintiff all the time I was in the hotel, before and after July, 1856; plaintiff was Steward of the hotel; that was his home; the books showed the indebtedness from Hulme & White to plaintiff; knew nothing of the sale of property on the execution; don't recollect when I first heard of bill of sale; knew of no entry on the books; would have known it if it had been on the books.

Record.
Page 36.

This was all the evidence offered and heard on the trial of this cause.

The plaintiff requested the Court to instruct the jury as follows:—

Record.
Page 37.

If the jury shall believe from the evidence that the sale took place at the time mentioned in the bill of sale, and the Piano was delivered to the plaintiff by White, its remaining in the parlor of the hotel was not a fraud, it being there by agreement of the parties, and the law is for the plaintiff.

Record.
Page 37.

Which instruction the Court refused to give, and the plaintiff then and there excepted to such refusal.

Record.
Page 37.

At the request of defendant, the Court instructed the jury as follows:

1st. The jury are instructed that the execution given in evidence was a lien upon the goods and chattels of Hulme & White, from and after the 21st day of July, 1856; and unless it has been proved to the jury that the Piano in question was before that date, not only sold, but delivered to the plaintiff, they should find for the defendant; and the making of a bill of sale to plaintiff, and telling him to take the Piano, is not a sufficient delivery, without an actual change of the possession, as against creditors to pass the property to plaintiff.

Record.
Page 37.

2nd. That unless the Piano in question was actually delivered to and taken into the possession of plaintiff by an actual visible change of possession, then the sale of it to plaintiff was fraudulent and void, as to the creditors of Hulme & White; and if there was no such actual change of possession before the 21st day of July, 1856, the jury should find for the defendant, notwithstanding the plaintiff may have given a good consideration for it.

Record.
Page 38.

3rd. That the law requires that there should be a visible change of possession of personal property from the seller to the purchaser before the sale of it can effect the creditors of the seller or other purchaser from him, "else it is fraudulent in law, even although such sale is made in good faith for a good consideration.

Record.
Page 38.

To the giving of which said instructions, 1, 2 and 3, the plaintiff then and there excepted.

Record.
Page 38.
Page 38.
Page 38.

The foregoing were all the instructions given by the Court to the jury.

The jury found a verdict for the defendant.

The plaintiff then and there moved the Court for a new trial, amongst others, for the following reasons, in substance—

Record.
Page 38.

1st. The verdict is against the evidence.

2nd. The plaintiff's attorney had no opportunity to poll the jury.

Page 38.

3rd. The verdict is not responsive to the issue.

Record.
Page 38.

4th. The instructions given to the jury were calculated to mislead them, and were not warranted by the evidence, and they were against the law—not appropriate or pertinent to the facts.

Record.
Page 39.

5th. The verdict is contrary to the law and the evidence; and the Court erred in refusing to give the instruction asked by plaintiff.

Record.
Page 39.

6th. No fraud was shown in the sale of the Piano by White to plaintiff, and the sale was a *bona fide* one.

Record.
Page 39.

7th. The instructions given by the Court were too broad, and the Piano remaining in the hotel was not an evidence of fraud.

Record.
Page 39.

8th. The instructions given for the defendant were calculated to deprive the jury of judging of the fraud, it being a question of fact.

Record.
Page 41.

The Court then and there overruled said motion for a new trial, to which the plaintiff then and there excepted.

ERRORS ASSIGNED.

1st. The Court erred in refusing to give the instruction as asked by the plaintiff.

2nd. The Court erred in giving each of the instructions, severally, as asked by the defendant.

3rd. The Court erred in overruling the plaintiff's motion for a new trial.

4th. The Court erred in rendering the judgment aforesaid—in manner and form aforesaid.

S. ASHTON, *for Appellant.*

POINTS MADE AND AUTHORITIES CITED BY APPELLANT.

1st. The evidence in the case showed that there had been an actual sale and delivery of the Piano by Hulme & White to plaintiff before the Execution in evidence was issued, or became a lien on the property of Hulme & White; and it was, therefore, necessary for the defendant to show fraud in said sale and delivery before the issuing of said execution, in order to make the execution a lien, or to vitiate the sale—for actual

fraud is not to be presumed, but should be proven by the party alleging it.—See 14th Illinois, Powers *vs.* Green, page 388.

2nd. The rule laid down by the Circuit Court in relation to a delivery, and a change of possession of personal property is this:—When a sale of personal property is made before any liens have attached, although for a valuable consideration, and without any fraud being shown, in order to entitle the purchaser to hold the property, as against subsequent incumbrances, he must have taken the property, and carried or removed it to some other place or location, even though the article purchased was a large and bulky chattel; and that too where the purchaser had no other home or place of business, than the building where the property was located at the time of the sale and afterwards.

3rd. We maintain that the doctrine laid down by the Circuit Court is wrong, because the old doctrine in relation to the transfer of personal property, when it was necessary in order to render a sale valid as against creditors, that there must be an immediate, open and exclusive possession on the part of the purchaser, no longer prevails; and what was formerly a matter of law to be determined by the Court, is now regarded as a question of fact, and in most cases, (such as this) to be submitted to a jury.—See Dunlap *vs.* Bournorville, 26 Penn. S. R., page 72; Powers *vs.* Green, 14th Illinois, page 386.

4th. Where a sale of personal property is made in good faith, and for a *bona fide* consideration, without any fraud on the part of the purchaser, before any liens attached to the property, (as was the case here,) the sale was good, and passed the property to the purchaser, and especially where there is an entire absence of fraud, either on the part of the seller or purchaser.—See Powers *vs.* Green, 14th Illinois, page 386.

5th. The evidence in the case shows a *bona fide* sale and delivery for a good consideration before the execution in evidence was issued; and, therefore, the instructions given by the Court for the defendant were not

borne out and warranted by the facts in the case, and should have been refused; although they may have contained a strictly legal proposition, yet they were not appropriate or pertinent.—See 2nd Gilb. Hill *vs.* Ward, page 285; and 16th Illinois, Sherman *vs.* Dutch, page 283.

6th. The instructions given by the Court for the defendant, deprived the jury of judging of the question of fraud, the same being a question of fact for them to determine from the evidence, whether there was a delivery of the Piano to the plaintiff at the time of the sale, it being a rule of law, that where personal property is from its character or situation at the time of the sale, incapable of actual, or in other words, of a visible change of possession, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee; and in this case this rule of law is applicable, because the Piano-Forte was a large and bulky article, and the plaintiff's home was at the hotel as is shown by the evidence.

7th. As to the rule of law in relation to sales and delivery of personal property, and what is a sufficient change of possession of the same from seller to purchasers as against creditors and subsequent purchasers.—See Powers *vs.* Green, 14th Illinois, page 386; 4th Comstock, 303—25th Vt. (2nd Dean.) 686—20th Alabama, 179—8th Blackford, 148—20th Vt. (5th Washb.) 624; Hugus *vs.* Robinson, 24 Penn. State R. 9; Funee *vs.* Leslie, 6 Penn. State R. 121; 6 Whart. 53.

In the Supreme court-

McDonald

vs

Brach

} Appral from Court
} Circuit court-

To understand the questions raised upon this record, we must first see what facts are clearly in proof before the jury and not disputed-

1st Hulme & White had suffered judgment to pass against them in favour of Jones & Patrick for \$663.25 in the Cook common Pleas July 21, 1856 - on which execution was issued, came to the hands of the Sheriff ~~that~~ of that County, the keeper in this case and was levied on a piano the property in question on the same day -

That Hulme & White had been and then were Hotel keepers and the Plaintiff lived and boarded with them.

That the property was then in the actual possession of Hulme & White -

This latter fact appears from White's testimony - In fact it does not appear from his testimony that the piano ever was in fact delivered - He merely told the Pff. "to take it" - Colstars testimony is that the Piano was in the house in Hulme & White's possession & always had been & he the Hotel keeper & having charge of the house never knew any thing to the contrary until it was removed.

In this state of the case the principles
established by this court as laid down in
1 Scam.

+ 3 Gil
+ 14 Ills govern - and make
this a case of fraud per se.

The counsel for the appellant quotes
the case of 14 Ills as though it infringed
upon the sound salutary rule of the common
law as laid down in Scammon & Gilman.
But an examination of that case will
show that that was not the intention of
the court. The question then was -
was there a delivery & change of possession
in fact - not what was the law was
conceding there was no change of possession.

In the case at bar the witnesses
for the Off & Def. both say that when the execution
came to the Sheriff the property was in the
actual use of Hulme & White, the one for
the plaintiff that it was by an arrangement
made after the sale but how long - why upon
what consideration he does not say - and
the other says that he was there in the house
had charge of it at that time & when the
putting sale took place & never heard of
it or of McDonald's claim to it.

The same state of facts is assumed
by the instructions asked for by the Off. "It
remains in the parlor of the Hotel"

This then being the case the
language of this court in Powers vs Green
on page 389 applies with all the

force of the original case to this - and the paragraph concludes thus -

"It is not contradictory in this case that the sale would have been good without a delivery. notwithstanding a previous indebtedness is deemed a valuable consideration and a purchase may be bona fide made. The objection raised is to the fact of delivery & a continuance of the possession in the purchaser. The jury found there was a delivery and that possession was retained by the vendor -

But the court in the case at bar desires to explain away a possession thus conceded to remain in the vendor -

There is no evidence before the court or jury as to the size weight or cumbersome of this piano whether it would take one or four men to move it or whether it could not be moved at all a piano is a thing movable in its nature designed for personal use & amusement usually considered a fine delicate instrument that needs careful use - The plaintiff bought it for his own personal use or to sell - If for his own use - The hotel public parlor of a hotel was certainly not the place to keep this kind of property in & especially as there is no proof that he could not keep it in his room - and if he bought it to sell again then he should have removed it before the lapse of nearly 2 months from May 27 to July 21.

And any way leaving an instrument
of that character to be used in a public
Hotel by all comers & goes indis-
criminately is so utterly inconsistent
with any idea of permanent own-
ership on the part of the Pff. that
that fact alone excludes the idea of
the transaction being a bona fide one.

See	3 A. H.	415-
	6 conn.	277
	14 "	530
	17 "	319-

The instruction asked for by the
Pff equally excluded the question
of fraud upon the jury - The court
is asked to instruct presumptively
that it is not fraud -

W. J. Briggs
for deft -

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Brach

ad

McDonald

Pris

Filed May 28, 1858

L. Leland

CLP

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James McDonald

vs

James S. Beach

Filed Apr 20, 1858

L. Leland
Clerk

In the Supreme Court }
" } Appeal from
James McDonald }
vs } Cook Circuit
James S. Beach } Court.

April Term CT D 1858
State of Illinois }
County of La. Salle ss }

Saml. Ashton of the County
of Cook and State of Illinois being
duly sworn doth depose and say,
that he is the attorney of said McDonald
in the above entitled cause, and is the
only and sole attorney in said cause
and has had entire control and ma-
= nagement of said cause, from its comm-
= encement, and is still the only, and sole
attorney in said cause for said McDonald.

Affiant further states that at
the time the rule in said cause was
taken on the appeal to join in Error
no error was joined as now appears of
Record, and that said rule was asked
for and taken on the appeal by this
affiant in person, and that at that
time, this affiant states positively

that no error was joined as now ap=
=pears on said Record, and that said
error has been joined on said Record
since the rule was taken in the case
and that at the time the rule expired
to wit on the 30th day of April when the
Judgment was reversed for non join=
=der in error, no error had been joined
as now appears on said Record as this
affiant was informed by Mr Parks,
who asked for the order in compliance
with a request of this affiant as a Ma=
=tter of professional courtesy, and
that Mr Parks had nothing to do with
said case, except to ask for a reversal
of said Judgment, if said rule should
not be complied with by the appellee,
which was done by said Parks at the
request of this affiant because said
rule to join in error had not been comp=
=lied with by the appellee.

Affiant further states that
after said rule to join in error had
expired, and some time after the
Judgment had been reversed, and at
the time the argument was made in
the case of Morgan vs Ryerson, this
affiant again, in person examined

the Record to see if any error had been joined, and even at that late day no error was joined as now appears on said Record, and of this fact this affiant is positive, and affiant therefore states that said joinder in error has been put upon said Record as it now appears since the Judgment was reversed, and as this affiant believes at a very late date, which more fully appears by a reference to the same, the same having the appearance of just being done, or very recently.

Affiant further states that E. Peck, Esq. had nothing to do with said case except to bring the record and abstracts down from Chicago and file the same for this affiant which he did, and so informed Mr. Burgess, as this affiant understood from said Peck.

Affiant further states that he never had but one conversation with said Burgess, about said case since the record was filed, and that was only in reference to his having leave to submit his argument in writing.

which was before the Rule to join was
was taken, in which conversation I
did not intend (and so stated I
think to said Burgess,) to confirm any
of my legal rights. the conversation
only lasted a moment, and that is the
only conversation I have had with
said Burgess about the case since
the Record was filed, until this time.

Affiant states that said Burgess, never
took any steps in said case about his
argument until after the court had closed
the argument of cases. showing clearly
that he had neglected it, or had no
confidence in ^{the} decision of the court below.

Affiant further states that all the
evidence in said case, except a very
small portion is contained in depositions
= ons, and that no questions were raised
but what have already been settled by
this Hon Court, as well as of other states,
and that no damage can result to either
party, by a new trial.

Affiant further states positively that
he never had any conversation with
said Burgess, about said case except
the one above stated. and at that time
said Burgess, stated as the affiant

now recollects that he had not seen the
Record. and at that time this affiant
stated to said Burgess, that he this
affiant was going to Ottawa the next
day to attend to said cause, and
on my arrival in Ottawa I discovered that
error had not been joined and at that
time I took the rule before mentioned.

Affiant further states that he never
made any bargain or arrangement with
said Burgess about said case whereby
any of his legal rights would be waiv-
ed, or otherwise, ^{except} as herein stated, and
that the rule entered in this cause was
done by this affiant in person on the 28th
day of April and expired on the 30th, as
will more fully appear from the clerks do-
cket, and that no written argument was
filed by this affiant as stated in said
Burgess' affidavit, but nothing but
the brief of this affiant as will appear
by a reference to the abstracts on file.

Affiant would therefore ask this
Hon^{ble} Court not to set aside said record
as entered in this cause, but that the
same may stand as made by this Hon^{ble}
Court—

Subscribed and sworn to before
me June 1st 1858.

Saml. Chepton.

J. Ireland C^{lerk}.

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James McDonald

vs

James S. Beach

affidavit

Filed June 1, 1858.

S. Clinton
Clerk

S. Clinton

For Applicant

In the Supreme Court
James S. Beach

vs
James McDonald

} Apprial from Cook
} circuit court

State of Illinois

County of LaSalle vs: William

J. Brypp of Cook county being duly sworn
doth depose & say that he is the attorney
of the said Beach in this cause and
has had the sole management thereof
since its commencement.

That the day or the day but one after
the record assignment of errors were filed in
this cause this deponent entered upon
the said transcript of record the journal
in error as the same now appears - this
is this deponents best recollection of the
matter, his intention being to join in error
in all cases where he was for the appellee
or left in error, & if he had not done
so in this case during the first week of
the term it would have been an oversight
he has now no recollection of doing it
since -

That this deponent was entirely
unaware of the fact that Mr Parks of
Waukegan was retained or employed
in any way in this case - that he has
now no recollection of ever being in-
formed by any one that that was the case
That this deponent was not aware
of the filing of the rule by him in this
case on the 30th day of April last until
today informed of it as hereafter stated
That the transcript in this case

with the abstract of the record in this
case and the argument of the appellant
were filed at the same time by Mr. Beck
that on that occasion this Depo-
nent informed Mr. Beck that he appeared
in the cause for ~~the~~ the appellant
That a few days after this Depo-
nent had a conversation with Mr. Ashton
the Attorney of record in this cause
and it was then agreed between them
that this cause should be submitted to
the court on the part of the appellant
on his printed argument, ^{then on file} for the part
of the appellee on an argument then
after to be prepared by him of which
this Depo-
nent was to furnish said
Ashton a copy - That thereafter
+ after the said rule was entered by
said Courts this Depo-
nent on two
or three different occasions met
Mr. Ashton and was asked by him
if he this Depo-
nent had prepared
his argument in reply - to which
this Depo-
nent replied that he had
not that other business had prevented
his doing so - or would do that effect
but that he would do so in a few
days with which Mr. Ashton seemed
satisfied - at least made no objection
that the last time this occurred was
on ^{Tuesday or} Wednesday of this last week - -
That on Friday or Saturday this Depo-
nent having prepared a copy of his
argument sent one to the clerk of this

Court. done by his clerk to the said Ashton - That the said Ashton as his clerk informed him at first refused to receive it saying that he had got the judgment of the Court below reversed for non joinder in error - which was the first this deponent ever heard of any thing of the kind -

That this deponent immediately wrote to the clerk of this Court to inform him ~~how~~ this deponent knew the matter stood ~~learned~~ by telegraph but did not receive any reply until about nine o'clock last evening too late to find Mr Ashton -

That this deponent left instructions to send Mr Ashton with notice of this motion as early as possible this morning - which he has no doubt will be done -

That this case is a litigated one and to send it back without instructions to the Court below will merely operate to delay & not subserve the ~~right~~ just rights of either party in the opinion of this deponent.

This Deponent therefore moves that the entry of the reversal of judgment in this cause may be vacated & set aside & the cause submitted on written arguments to the Court.

Subscribed & sworn to before

me this 1st day of June 1858

L. Leland Clerk of Sup Court
by J. B. Jones Deputy

W. J. Briggs

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McDonald

Beach

Filed June 1. 1888

J. McDonald
Bk