

13357

No. \_\_\_\_\_

# Supreme Court of Illinois

Nelson et al

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vs.

Cook

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IN THE  
**Supreme Court, State of Illinois.**  
THIRD GRAND DIVISION.  
OF THE APRIL TERM, A. D. 1858.

JOHN G. NELSON and  
WILLIAM GRAYDON,  
Plaintiffs in Error,  
vs.  
ISAAC COOK,  
Defendant in Error.

*ERROR TO COOK.*

RECORD.

ABSTRACT OF THE RECORD.

This was an action of *assumpsit* commenced by Isaac Cook, late Sheriff of Cook County, against the plaintiffs in error, in the Lake County Circuit Court, by attachment, and afterwards removed to the County of Cook and tried before the Hon. J. M. Wilson, at the September term, A. D. 1855, taken by writ of error to this Court and reversed at the June term, 1856, and again tried before J. M. Wilson in June, 1857.

*Pleadings.*

6—8 The affidavit for the attachment sets forth, that the plaintiffs in error were indebted to the defendant in error upon an implied contract arising as follows: That while said Isaac Cook was Sheriff of Cook County, in June, 1848, said Nelson and Graydon, as creditors of Augustus E. Miller and David R. Clements, a firm then doing business in Chicago, sued out an attachment from the Cook County Court of Common Pleas, in their own names, against the estate of the said Miller and Clements, directed to the Sheriff of Cook County to execute, which was delivered to said Cook (the then Sheriff) by the attorney and agent of said Nelson and Graydon to be executed, and in pursuance of the instructions of said Graydon and his attorney, said Cook attached a stock of dry goods and groceries, and a store in Chicago, of the value of three thousand dollars or thereabouts, which stock and store were claimed by one Jacob Miller as his property, but which said Cook was directed by said Graydon and his attorney to seize as the estate of Miller and Clements, and in pursuance of the instructions, said Cook did seize the property about the 12th of June, 1848.

That, at the February term of the Cook County Court of Common Pleas, held in the year 1850, the said Jacob Miller, in an action of trespass *de bonis asportatis*, commenced against said defendant in error for attaching said property as the property of Miller and Clements at the suit of Nelson and Graydon, did recover a judgment against said Cook for the sum of three thousand two hundred dollars and upwards, which judgment was affirmed by the Supreme Court of Illinois; and that said Cook was compelled to pay the same, with costs and expenses; and that the amount of damages sustained by him was four thousand two hundred dollars, which sum said Nelson and Graydon owed to said Cook by implied promise; and that Miller and Clements were about to leave the State with the intention of having their effects removed: upon which affidavit an attachment writ was issued, which was duly served upon certain garnishees therein named.

12—18 The defendant in error filed at the January term, 1854, his declaration, setting forth his cause of action substantially as embodied in the attachment affidavit.

To this declaration the plaintiffs in error filed a demurrer which was overruled by the Court, and the plaintiffs in error then filed the general issue and eight special pleas.

20, 21 The second plea sets forth that, although it is true that plaintiff was Sheriff and John Beach his deputy, and the defendants did sue out and deliver to said Beach said writ, and direct him, as deputy, to levy, and said Beach did levy said writ of attachment as in the declaration alleged; and although true it is that said building, stock of goods, and merchandize were claimed by Jacob Miller as his property; and although true it is that Jacob Miller did recover said judgment against said plaintiff for the cause and in the manner in the declaration mentioned alleged; and although true it is that plaintiff was compelled to pay the money in the declaration mentioned; for plea, nevertheless, defendants say they did not undertake or promise in manner and form, &c., and of this they put themselves upon the country.

21, 22 The third plea is as follows: protesting that plaintiff was not Sheriff and John Beach was not his deputy at the times or in the manner alleged in plaintiff's declaration; and further protesting, that defendants did not sue out nor deliver to Beach, as deputy, said writ of attachment, and the defendants did not direct him to levy, nor did Beach levy the said attachment in manner, &c.; and further protesting, that Jacob Miller did not recover the judgment against the plaintiff for the cause in the declaration mentioned; and further protesting, that plaintiff was not compelled to pay, and did not pay, the sums in the declaration mentioned. For plea, defendants say that the property at the time of the levy by Beach was the property of Jacob Miller, and was in his custody and possession; without this, that defendants did assume and promise in manner and form, &c., and this the defendants are ready to verify; wherefore they pray judgment, &c.

25 The fifth is a follows: protesting that the defendants did not undertake or promise in manner, &c.; for plea, nevertheless, defendants say that the suit of Jacob Miller, against the plaintiff, in which judgment was rendered, was commenced for, and the judgment recovered for other and different causes of action, as well as for the attachment by the said John Beach; and that the costs, charges and expenses which plaintiff was compelled to pay, and did pay, were paid as well for other and different causes of action as for the levying of the attachment; without this, that the judgment of Jacob Miller against the plaintiff in the said declaration mentioned, was obtained for the cause and in the manner in the declaration alleged; and that said costs, charges and expenses, in the declaration mentioned, were paid by the plaintiff by reason of the cause, and in the manner and form as plaintiff hath alleged, and this defendants are ready to verify; wherefore, they pray judgment, &c.

The plaintiff filed a general demurrer to the second and fifth pleas, and a demurrer to the third plea, assigning for special cause, that it amounted to the general issue, which demurrers were severally sustained by the Court.

22, 23 The fourth plea is as follows: protesting that plaintiff was not Sheriff of Cook County, and that Beach was not deputy; and further protesting, that defendants did not sue out nor deliver to said Beach the attachment writ, and the defendants did not direct Beach, as deputy, to levy, nor did Beach levy, in manner and form, &c.; and further protesting, that Jacob Miller did not recover the judgment for the causes mentioned in the declaration; and further protesting, that the said plaintiff was compelled to pay, and did not pay, the several sums of money in said declaration

mentioned as the plaintiff hath alleged ; for plea, nevertheless, defendants say that the property, before and at the time of the levy, was the property of Jacob Miller, and was, before and at the time of the levy, in his possession, of all which, Beach then and there had notice ; without this, that defendants did assume and promise, in manner, &c., and this the defendants are ready to verify ; wherefore they pray judgment, &c.

To this plea the plaintiffs replied, protesting that said goods, &c., were not Jacob Miller's property, and were not in his possession, and the plaintiff says he had no notice that said goods, &c., were the property of said Miller ; and this he prays may be inquired of by the country ; upon which application issue was joined.

27, 28 The eighth plea is as follows : plaintiff ought not to recover for any further sum than the sum of one hundred and five dollars, because, although defendants cannot deny that they did assume and promise to pay the plaintiff all such sums as he had necessarily been compelled to pay in consequence of the levy upon said property and the detention thereof, by virtue of said attachment ; for plea, nevertheless, defendants say, that the value of said property, at the time of the levy, was the sum of \$2,943, and no other or greater sum of money ; and that Jacob Miller recovered, by his judgment, as for the value of the said merchandise, &c., at the time of the levy, the said sum of \$2,943, and no further or greater sum of money, together with interest at the rate of six per cent. per annum on the last mentioned sum of money to the time of the rendition of the judgment, making the sum of \$293.23 besides the value of said property, as and for the use of said value thereof ; and said defendants further say, that said plaintiff, on the 30th December, 1848, converted and disposed of the said property to and for his own use, and the value of said property at the time of conversion was the sum of \$2,943, and that Jacob Miller did not by his judgment recover any further or greater sum than the sum of one hundred dollars as and for the use of the value of said property from the time of the levy to the time of conversion of the same by the plaintiff to his own use ; and as to the rest and residue of said sums of money in said declaration mentioned, except the sum of ten dollars, the said defendants say, that the said plaintiff was compelled to pay, and did pay, them and each of them, by reason of the said plaintiffs attempting to justify the wrongful conversion of said merchandise, &c., to his own use as aforesaid, and not by reason of said levy ; and as to the said sums of one hundred dollars and ten dollars, the said defendants cannot say aught why the plaintiff should not have judgment against them for said sums over and above his costs, and this the defendants are ready to verify. Wherefore the defendants pray judgment if the said plaintiff ought to have or maintain his action for any further or other sums than those confessed herein.

The plaintiff's replication to the 8th plea, is as follows :

37 That it is not true that plaintiff has not necessarily been compelled to pay, in consequence of said levy upon said property and the detention thereof, any other or greater sums of money than said sum of one hundred and ten dollars in said plea mentioned ; but avers the contrary to be true, and that plaintiff did necessarily pay, in consequence of said levy, the said sum of thirty-two hundred and sixty-five dollars and thirty-one and three-fourths cents ; and this he prays may be enquired of by the country.

Upon which issue was joined by the plaintiffs in error.

The sixth and seventh pleas having been withdrawn by the defendants, and issue being joined upon the plea of the general issue and plea of set off, the cause was then

submitted to the Court without the intervention of a jury, and, upon the hearing, the plaintiffs introduced in evidence,—

*Evidence.*

- 47—54 An affidavit for an attachment in the suit of *Nelson & Graydon v. Augustus Miller and David R. Clement*, filed in the Cook County Court for the sum of \$1,120.11, upon two certain promissory notes, setting forth the indebtedness, and that Miller and Clements were about to depart from the State of Illinois, with the intention of having their goods, chattels and effects removed therefrom, which was sworn to by William Graydon on the 12th of June, 1848. Also, an attachment writ in said suit of *Nelson & Graydon v. Miller & Clements*, and security for costs therein.

And the endorsements and return upon said writ, showing service upon Miller and Clements and others therein named, and the levying of the same upon a large amount of personal property, and also a store "which has been occupied by Miller & Clements."

The plaintiffs then introduced the

*Deposition of Samuel Rattles.*

- 56, 57 I know the plaintiff Cook, and Graydon; knew them in 1848. I knew there was an attachment issued against goods of Miller and Clements, then claimed to be held by Jacob Miller. The attachment was issued by Nelson and Graydon. I was not here at the time the attachment was issued, but afterwards I was here. I had a conversation after the attachment was issued with Graydon, at the Sherman House, at his room. He said he had attached the property, a lot of groceries, &c., upon the Sauganash block. Graydon said that he believed that Miller and Clements were fraudulently disposing of the property, and he or they—alluding to the firm—had attached it. Did not mention Cook or Beach's name, as I recollect. He said he had caused it to be attached, and the store was then closed up. He asked me to go to Miller with him, and see if I could not get the matter closed up. I was sworn in the trial of *Jacob Miller v. Isaac Cook*. The same goods were in controversy in that suit that were referred to in this conversation with Graydon. I saw Graydon in Ohio, and he said he was coming up here to collect or secure his bill against Miller & Clements. A few days after the attachment was issued, I came back to town and then had the conversation with Graydon of which I have spoken. I think it was in 1848; but the papers will show.

*Deposition of O. J. Rose.*

- 57—64 Have resided in Chicago since 1843. Have known plaintiff since then. Have known the defendant Graydon since 1847. I knew the firm of Miller & Clements in the year 1848. They were merchants, engaged in general merchandizing, a general assortment of dry goods, boots and shoes. They were located on Lake street, south side, between Franklin and Market streets. I had a conversation with them about levying an attachment upon the goods in the store. It was, I think, in the fall of 1848, at Rose & Rattles' store. The subject of the levy was spoken of more than once at our store. Graydon said that he believed the sale of the stock of goods by Miller & Clements to Jacob Miller, was done for the purpose of defrauding their creditors, or preventing their creditors from collecting their debts out of the goods, and that he meant to seize the goods. These conversations were before any levy was made. I understood a levy was made on the goods of Miller & Clements by the Sheriff, by direction of Graydon, after the sale to Jacob Miller. Graydon said that Jacob Miller claimed the goods under an assumed purchase of Miller & Clements.

Cross-examined. I think this conversation was in the fall or winter of 1848. Graydon said he believed that the sale was made to prevent the New York creditors from making their claims; that he believed it to be a fraud, and that he meant to try the legality of it. He also spoke of the want of means of Jacob Miller to make such a purchase. He said Jacob Miller had been engaged in a livery stable here, and failing in it, and he did not believe he had funds for such a purchase. Graydon said he believed the sale to be a fraud, and he intended to levy and try the legality of it. I am not positive as to the month or even the year when the conversation was had. I think it was late in the fall.

Direct resumed. I had a conversation with Graydon after the levy was made. He told me a levy had been made, or that he had made a levy, or something to that effect. This was about all he said. I cannot say which phrase he used, or give anything more than the substance of what he said.

Witness being afterwards recalled, said that since his examination he has examined the bond for costs, filed in the attachment suit against Miller & Clements, by Nelson and Graydon, signed with his name, as security, and finds himself mistaken as to the date of the conversation above spoken of. He now remembers that the conversation with Graydon was early in June, 1848. I knew John Beach in 1848, and was well acquainted with him. He was deputy sheriff under Isaac Cook. I heard conversations between Beach and Graydon two or three times at our store about the time of the levy. Beach was there to converse with Graydon about the levy. I heard Graydon say Beach had made the levy, and I heard Graydon say he had ordered a levy to be made. This is the substance of the conversation; there was some talk about Graydon's giving an indemnifying bond to the sheriff, and Graydon asked me if I would sign it. I hesitated about signing it, and, so far as I know, there was no bond.

66—79 The plaintiff then introduced the *præcipe*, writ, declaration, plea, and notices in the case of *Jacob Miller v. Isaac Cook*, in an action of trespass *de bonis asportatis*, commenced in the Cook County Court on the 15th day of August, 1848.

66 The first count of the declaration is for a trespass committed by defendant (Cook) on the 12th of June, 1848, in seizing certain goods and chattels, in a wooden building occupied as a store, and converting the same to defendant's use.

The second count is for entering the store of plaintiff and damaging the same.

The third count, seizing the goods in the first count mentioned and converting the same, and for entering plaintiff's store and ejecting him therefrom, to the damage of the plaintiff of \$4,000.

The defendant filed the general issue with notices,—

75—78 First—The defendant at the time when, &c., was acting Sheriff of Cook county, and from that time until the commencement of this suit continued such Sheriff, and at the time and place in the declaration mentioned, he did, by John Beach, his deputy, seize the goods, &c., as the property of Augustus Miller and David R. Clements, found in their store in Chicago, in their possession and control, by virtue of a writ of attachment duly issued by the clerk of this court, and directed to the Sheriff of Cook county, at the suit of William Graydon and John G. Nelson, commanding the Sheriff to levy upon the real and personal estate of Augustus Miller and David R. Clements, and said defendant, as sheriff, by virtue of said writ, by his deputy, levied and took

said goods and chattels, as the property of Miller & Clements, found in their possession, and the same were the property of Miller & Clement, and not the property of the plaintiff.

Second. That the defendant, before and at the time of the alleged taking, was Sheriff of Cook county, and that Henry Yelverton, Robert Yelverton, and George A. Fellows, at the June term, 1846, obtained a judgment against Miller & Clements for the sum of \$1,309.92, damages and cost of suit, upon which judgment an execution was issued and placed in defendant's hands to be executed, by which writ he was directed to levy upon Miller & Clement's property, and by virtue of such execution he did levy on the property as the property of Miller & Clement, and that the property belonged to Miller & Clement, and was not the property of plaintiff.

Third. That as Sheriff of Cook county, by writs of attachment and *fieri facias* above mentioned, he levied at the time when, &c. ; that he was then and there Sheriff of said county, and that the goods and chattels were the property of the defendants of said writ, and not the property of the plaintiff.

The plaintiff then introduced the verdict in the case for the sum of \$3,236.23 ; and the motion for new trial, and judgment upon the verdict.

82—84 Also, the execution in the case of *Jacob Miller v. Isaac Cook*, with the return thereon—the execution being for \$3,236.23 damages, and \$21.23½ costs. The return shows the payment of the amount of the execution, interest, and costs by Cook, the defendant.

The plaintiff then rested his case.

86—89 The defendants, to sustain the issue on their part, introduced the record of the Court, containing the entry of the judgment in the case of *Nelson & Graydon v. Miller & Clement*, on the 7th day of May, 1849, quashing the writ of attachment. Also, the *præcipe*, summons, and declaration in the case of *Yelverton et al. v. Miller & Clements*.

90 Also, the judgment of *Yelverton, Yelverton & Fellows v. Miller & Clements*, rendered in the Cook Circuit Court for \$1,309.92 and costs.

91 Also, the execution issued on said judgment on the 13th of June, 1848.

The defendants then offered to read in evidence the Sheriff's return, as the same was at first made and as the same stood at the time of the first trial, the reading of which return was objected to by the plaintiff, and the objection being overruled the plaintiff excepted. The original return to the writ having been torn off, the following was admitted to be a true copy, and was then read as follows :—

92—94 “ By virtue of this writ, and by the direction of the plaintiff's attorney, I levied the same upon certain goods and chattels of the defendants which had been previously taken by me on a writ of attachment issued from the Cook County Court on the 12th day of June, A. D. 1848, in favor of John G. Nelson and William Graydon against the estate, real or personal, of the said defendants, Miller & Clements, and executed on the same day, which property attached and levied upon is more fully described by schedule hereto annexed, which levy is subject to said attachment, and I herewith return this writ and schedule. The property not sold for the reason that said attachment writ is not disposed of, but returned into Court, subject to the order of Court in the premises.

By virtue of the within execution I did, on the 13th day of June, 1848, levy upon

93 the property here scheduled, and on the 30th day of December, 1848, at the store of Miller and Clements, in the city of Chicago, between the hours of 10 o'clock in the morning and sundown of the same day, after advertising the same according to law the property scheduled, and that, therefore, T. O. Donahue and others, bid therefor, in separate parcels, the sum of \$949.83, and after deducting the Clerk's costs of \$5.68 $\frac{1}{2}$ , and the Sheriff's fees of \$29.48, and for clerk hire in keeping said goods \$134.63, in all \$169.79, leaving a balance of \$785.72 to be applied to the payment of this execution, and no property found to make the balance, and this execution is not satisfied.

December 30, 1848.

I. COOK, *Sheriff*,  
By JOHN BEACH, *Deputy*."

"By virtue of the within execution I have levied upon the following property, subject to attachment issued from the office of the Clerk of the Cook County Court, dated June 12, 1848, in favor of John Nelson and William Graydon, and against Augustus Miller and David R. Clements, to wit: all the goods and store which has been occupied by Miller & Clements, as will appear from the within schedule.

June 13, 1848.

I. COOK, *Sheriff*,  
By JOHN BEACH, *Deputy*."

The defendants then introduced as a witness,

97, 98 *Louis D. Hoard*, who said that he was clerk of the Circuit Court of Cook county from 1848 to 1856. Was confident that the execution in the case of *Yelverton et al. v. Miller & Clements*, was returned into the Circuit Court, and was among the files there, and that he brought it into the Common Pleas Court some years ago, upon the trial of some cause in that court. It was not the practice at that time to mark final process filed. Not one in a hundred is so marked. I do not know whether the costs were charged to the sheriff or not. It was usual to charge them upon a return of the execution. I have examined one account book, and the other I cannot find. We enter the returns when made in the return books, or within a few weeks after the executions come to our hands. There was no return entered in the return book until about two weeks ago.

Witness left the stand, and after an examination of books and papers, states that he now has no impression as to whether the execution was among the papers in the clerk's office or not; at first he thought it was, but now cannot say that he has any impression on the subject, or that he ever saw it before, except in this court. That it was always the practice, while he was clerk, to enter the returns on executions within a week or two, at farthest, after execution returned on execution docket; that from the fact of no return having been entered on the docket, he is now satisfied the writ never was returned.

It was then admitted by plaintiff's attorney that the amended return to the execution of *Yelverton & Fellows v. Miller & Clements*, was made by the sheriff (Cook) about one month before this trial, without leave of the court.

The defendants then offered in evidence an affidavit of the plaintiff presented to the judge of the Circuit Court in support of a motion to amend the return, which motion was made some weeks previous to this trial; admission objected to by plaintiff, and overruled by court.

The affidavit was then read in substance as follows :

*In the Cook Circuit Court.*

*Judgment of June, 1848.*

99, 100 HENRY YELVERTON, ROBERT YELVERTON and GEORGE A. FELLOWS,

*vs.*

AUGUSTUS MILLER and DAVID R. CLEMENTS.

*On motion to correct*

*return to fi. fa.*

STATE OF ILLINOIS, }  
COUNTY OF COOK, } *ss.*

99, 100 *Isaac Cook* being duly sworn, doth depose that he was, during the year 1848, sheriff of said county ; that as such sheriff there came into his hands, to be executed on the 13th day of June, 1848, an execution issued in the above entitled cause, dated that day ; that by direction of the plaintiffs' attorney therein, R. V. M. Croes, he levied said execution upon a quantity of personal property, as specified in the schedule attached to said *fi. fa.*, and now on file ; that said levy was made subject to the lien of an attachment writ, as specified in the levy endorsed on said writ ; that after said levy had been made, the said R. V. M. Croes, the attorney for said plaintiffs, and Buckner S. Morris, one of the attorneys for the attaching creditors, directed this deponent's deputy, John Beach, to sell said property under said execution, and hold the proceeds of the sale subject to the order of the court, as to the disposition and application to be made thereof. That accordingly, on the 30th day of December, 1848, said property was sold by said John Beach, and he realized from said sale the sum of \$949.83, which sum, after deducting the taxed costs of \$5.63½ cents, the sheriff's fees \$29.48 cents, and clerk hire in keeping goods, \$134.63 cents, in all \$169.79 cents, is yet in the hands of the deponent, not applied, in fact, anywhere. That said attachment writ was quashed, and said plaintiffs have disavowed the direction to levy made by their agent, said Croes, and said money is still in affiant's hands, subject, as aforesaid ; this deponent thereupon asks for leave to amend his return according to the facts of the case.

I. COOK.

Sworn to on the 28 day of March, 1858.

101, 102 The plaintiffs then introduced *B. S. Morris* who said that he had seen the attachment writ in the case of *Nelson & Graydon v. Miller & Clements* ; that John G. Brown and himself were the attorneys who brought the suit ; that execution had been issued upon a judgment obtained by *Yelverton & Fellows et al. v. Miller & Clements*. It was in the sheriff's hands ; Croes was the attorney of the execution creditors. He spoke to me about a sale of the property levied on under the attachment and execution, and said they were going to have a sale of the property. I saw Beach, and Beach said the goods ought to be disposed of, as they were perishable and liable to be pilfered and stolen. I told him he must not sell unless the money was returned into court, subject to its order. I told him if he sold, to keep the money and bring it into court ; that if this was agreed to, he might make the sale. Heard afterwards that the sale had been made. I consented to a sale being made upon the terms that the money should not be paid over to either party, but retained by the sheriff and paid into court, to abide the order of the court.

Cross-examined. The only terms upon which I consented to the sale were, that the money should be brought into court to abide its order, and not to be paid over until our suit was disposed of. I knew nothing about the levy of the attachment, or about any special directions given to the sheriff about levy. I do not think that the defendants knew anything about the sale of the goods. They resided in New York ; were not here at the time of the sale. We had no directions from them about sale. Croes was the person insisting upon the sale. Beach died a year or two after the

sale, in 1850. I knew that if Beach sold under the execution, he would return the proceeds, as he said he would, into court, to abide its order.

- 102 The plaintiff then offered to read the return of the sheriff upon the execution in favor of *Yelverton, et al. v. Miller et al.*, as the same is now filed of record, to the admission of which the defendants objected, and the objection being overruled by the court, the defendants then and there excepted.

On further examination of B. S. Morris, he said,

- 103 Croes claimed he was entitled to the goods, and I claimed I was. I told him I did not want to stand in their way, that they could sell under the execution, but I did not want the sheriff to pay the money over, and I knew Beach would not do so if he said so. The return now on file to the writ, was then read in evidence, as follows:
- 103, 104 By virtue of this writ, No. 4972, and by the direction of the plaintiff's attorney, I levied the same upon certain goods and chattels as the property of the defendants therein, which had been previously taken by me on a writ of attachment issued from the Cook County Court, on the 12th day of June, A. D. 1848, in favor of John G. Nelson and William Graydon, against the real and personal estate of the said defendants, Miller & Clements, and executed on the same day, which property attached and levied upon is more fully described in a schedule hereto annexed, and which levy is subject to said attachment, and I return this writ, that by and with the advice and consent, as well of the plaintiffs in said attachment writ as of the plaintiffs in said execution, I proceeded, on the 30th day of December, 1848, to sell said property, with the understanding between them that the proceeds of such sale should not be paid over to either of them, but brought into court to abide the order of the court in the premises, and that having duly advertised such sale, I proceeded on the said 30th day of December, A. D. 1848, at the store of Miller & Clements, in the city of Chicago, between the hours of 10 A. M. and sun-down, of the same day, to sell said property at public auction to the highest bidder, and that thereupon T. O. Donahue, and others, bid therefor in separate parcels, the sum of \$946.83 cents, and, after deducting sheriff's fees of \$29.48, and expenses in keeping goods, \$134.63, in all, \$164.11, the proceeds of said sale, \$785.72, I now have in court to abide the order of the court.

December 30, 1848.

I. COOK, *Sheriff*.

- 105 The plaintiff then introduced as a witness, *Wm. T. Burgess*, who said that he came into the case as attorney since the former judgment was reversed by the Supreme Court. Upon examining the case, I found the execution above spoken of, and deemed it necessary to amend the return to correspond with what I supposed were the facts. I found the execution among the papers in this cause, and supposed it had been returned into court by the sheriff. Under this impression, I made the motion to amend the return in the Circuit Court, and drew up the affidavit of Cook, heretofore introduced in evidence, and presented the same to the Judge of the Circuit Court. I drew up the affidavit under the impression that the execution had been returned. Cook swore to it. I afterwards saw that the writ did not appear to be filed; there was no endorsement upon it. I then withdrew the motion to amend the affidavit; the old return was torn off from the writ, and the new one annexed about a month ago. I also examined the clerk's office and found no entries there on the execution docket, or elsewhere, showing that it had been returned.

- 106 Plaintiff's and defendants' attorneys then admitted that the money raised on the sale is in the plaintiff's hands, and always has been.

- 107 This was all the evidence introduced in the cause, either on the part of plaintiff or defendants.

The plaintiffs then asked the following instructions :

- 107 1. That if the jury believe from the evidence in this cause, that the defendants sued out a writ of attachment from the Cook County Court directed to the Sheriff of Cook county, and that the plaintiff in this suit was at the time the sheriff of said county, and that the defendants caused the said Cook, by himself or his deputies, to levy upon and take under said writ, goods and chattels described in the return to that writ, the said Nelson & Graydon, or either of them, at the time representing them to be the goods of said Miller and Clements and directing a levy to be made thereon, then the law implies an agreement on the part of said Nelson & Graydon, with the said Cook, to indemnify him against any damages he might suffer by reason of such levy; and if the jury believe from the evidence that Jacob Miller afterwards recovered from the said Isaac Cook, damages for having so made such a levy, then the said Cook is entitled to recover in this case the amount paid by said Cook to satisfy said judgment and interest from the time of payment to the present.
- 108 2. That if the jury believe from the evidence that the sale of the goods in question was made under the execution, with the understanding between the plaintiff and the attorneys of the defendants, that the proceeds should be held to apply on the attachment of the defendants on the execution of Yelverton & Fellows, as the court might direct, and not to be paid over to either party until the attachment suit was disposed of, then unless they also believe from the evidence that said Cook did in fact pay over the money to said Yelverton & Fellows, upon said attachment suit, before the same was disposed of, he was not guilty of any breach of trust towards said Nelson & Graydon, and is entitled to recover against them such damages as he may have sustained and proved to the jury.
- 109, 110 3. That if the said Cook still has the said money in his hands not applied, it is the province of the jury, if requested by the said Nelson and Graydon, to apply that money by way of deduction from the amount paid by said Cook to said Jacob Miller, the said Cook expressing his willingness that such discount should be made.
4. That in order to charge said Cook with a conversion of the property so as to take away his right of recovery, it should appear to the jury that the return of Deputy Beach was in fact made before the disposal of the attachment suit, that if it was made after that time, then that it is of no consequence to the defendants. If the jury believe the sale was made with the understanding between the Sheriff, or his deputy, and the attorney of the defendants that the money from the sale should be paid to the party who in the end should be entitled to it, they will find for the plaintiff.
5. That the return of the Sheriff to the Yelverton & Fellows execution is in the nature of an admission by the Sheriff, and the action not being upon that return, the same is open to an explanation and the real facts of the case may be shown, viz., that the sale was made with the consent of the said Nelson & Graydon, either through their attorney or by themselves, and that the money was not paid to either party, if the jury believe those facts proved by the evidence.

All which instructions were given by the Court, and severally excepted to by the defendants.

The defendants then asked the following instructions :

- 110, 111 3. If the jury shall believe from the evidence that the plaintiff made a sale in the manner set forth in the return upon the execution as it was before it was amended, such sale is such an act as will deprive the plaintiff of his right to recover against the defendants unless the jury shall further believe that such sale was made by the assent of the defendants.

7. That the statement in the amended return, that by and with the advice and consent of the plaintiffs in said attachment suit, the officer proceeded to sell under an understanding on the part of the plaintiffs in the attachment suit, that the proceeds of the sale should be brought into Court, is not evidence of any such advice, consent, or understanding on the part of the plaintiffs—which were refused by the Court, and defendants excepted.

112 The defendants then asked the Court to give the following instructions :

2. That if the jury should believe from the evidence, that Morris, as the attorney of the defendants, consented to the sale of the property attached, upon condition that the money arising therefrom should be brought into Court, and remain subject to its order, and if the jury shall believe that a sale was made and the proceeds applied on the execution, then the plaintiff cannot insist upon such consent as an excuse for a sale thus made.

4. If the jury shall believe from the evidence that the execution of Yelverton & Fellows was returned to the Clerk's office, from which it issued, so that it came into the custody and control of the Clerk before the amended return was made, then the jury will disregard the amended return, and the plaintiff is bound by the return as it stood before the amended return was made.

5. The jury must be satisfied, from the evidence, that the recovery in the suit of Jacob Miller, as defendant, was no other cause of action than for the levy, seizure, and attachment in the declaration mentioned.

6. If the jury shall believe from the evidence that any portion of the sum recovered against plaintiff, in the suit of Jacob Miller against him, was by reason of the defendants attempting to justify the levy under the execution of Yelverton *v.* Fellows, then such sum as was recovered by reason of the plaintiff attempting to justify under such execution cannot be recovered of the plaintiffs in this case.

Which were each given, and severally excepted to by plaintiff.

114 The third instruction asked for by the defendants, and above set forth, was amended by the Court, by the addition, at the end of the instruction, of the words "or their attorneys," to the giving of which instruction, *as amended*, the defendants excepted.

The jury thereupon retired, and came into Court with a verdict of \$3,611.32.

The defendants then filed their motion for a new trial, assigning the following reasons:—

First. The error in admitting plaintiff's testimony.

Second. In excluding defendants' testimony.

Third. In giving plaintiff's instructions.

Fourth. In refusing defendants' instructions, and in modifying them, and in giving them as modified.

Fifth. That the verdict is against law.

Sixth. That the verdict is against evidence.

Which motion was overruled and defendants excepted, and bring their writ of error in this Court, assigning the following errors :

- 118 1st. Court erred in admitting evidence for plaintiff.  
2nd. In excluding evidence for defendants.  
3rd. In giving plaintiff's instructions.  
4th. In refusing defendants' instructions.  
5th. In modifying and altering defendants' instructions, and in giving them as modified.  
6th. In refusing motion for a new trial.  
7th. In giving judgment for the plaintiff instead of defendants.

C. BECKWITH, AND  
WILLIAMS & WOODBRIDGE,  
*For Plaintiffs in Error.*

79-136

S. B. Nelson

vs

Genac Book

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Filed April 28, 1838

S. Belmont  
Clerk

13857