

14534

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

# Supreme Court of Illinois

Bates

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vs.

Courtright et al

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*Case No. 118*  
**STATE OF ILLINOIS,  
SUPREME COURT,  
THIRD GRAND DIVISION.**

**No. 118**

*J. W. Middleton & Co., Stationers, 196 Lake St.*

*Patent*  
*Custom*  
*1503*

1  
State of Illinois, <sup>3</sup>/<sub>3</sub> ss.  
Lee County, <sup>3</sup>/<sub>3</sub>

Pleas in the Lee County Circuit Court, in the twenty second Judicial Circuit of the State of Illinois, in a certain matter lately pending in said Court, wherein John W. Courtwright and Orange D. Potter were plaintiffs and Miriam Bates was defendant, in an action of Trespas

As it is remembered, that on the 28th day of April, A.D. 1863, the said plaintiffs, by De Wolf & Pinkney, their attorneys, filed in the office of the clerk of said Court their process directing that a summons should issue in said cause, and thereupon a summons was issued in the words and figures following, that is to say:

" State of Illinois, <sup>3</sup>/<sub>3</sub> ss.  
" Lee County, <sup>3</sup>/<sub>3</sub>

" The People of the State of Illinois  
" to the Sheriff of said County, Greeting;  
" We command you that you summon  
" Miriam Bates, if he shall be found in  
" your County, personally 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 Court House in Dixon,  
" in said County, on the fourth Monday

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 " of June A.D. 1863, to answer unto John W.  
 " Courtwright and Orange D. Patten in a plea  
 " of Trespass, to the damage of said plaintiffs  
 " as they say in the sum of two thousand  
 " (\$2000<sup>00</sup>) dollars - And have you then  
 " and there this writ, with an endorsement  
 " thereon, in what manner you shall have  
 " executed the same,

" Seal of Court } Witness, Benjamin F. Shaw, Clerk  
 " of our said Court, and the seal  
 " thereof, at Dixon aforesaid, this  
 " 28th day of April A.D. 1863.  
 " Benjamin F. Shaw, Clerk,  
 " per Joseph Ball D.C. "

And the said summons so issued as aforesaid,  
 was by the Sheriff of said Lee County, returned  
 endorsed as follows, to wit

*Sheriff  
 Return*

" State of Illinois, County of Lee, ss.  
 " I have this 21<sup>st</sup> day of May A.D. 1863, duly  
 " served the within summons by making the  
 " same to and in the presence and hearing of  
 " the within named Hiram Bates  
 " C. F. Lynn Sheriff "

Fees - Service 50  
 Mileage 40  
 Return 10  
 1.00

And the said summons was further endorsed  
 as follows, to wit;

" Filed in the Circuit Court this 23<sup>d</sup> day of June  
 " 1863  
 " Benj F. Shaw, Clerk "

And afterwards, on the 12th day of June, A.D. 1863. came the said plaintiffs by their said Attornies, and filed their declaration in said cause, in the words and figures following, that is to say;

" State of Illinois  
 " County of Lee <sup>3</sup> Lee County Circuit Court  
 June Term A. D. 1863  
 " John W. Courtright and Orange D. Potter  
 " plaintiffs in this suit by DeWolfe and Pinkney  
 " their Attornies Complain of Hiram Bates de-  
 " fendant in this suit who was summoned  
 " to answer the plaintiffs in an action of  
 " Trespass. For that the said defendant  
 " on the third day of October A. D. 1862, to  
 " wit at Dixon in said Lee County with force  
 " and arms, seized took and distrained  
 " from said plaintiffs a large amount of  
 " corn, growing and standing, to wit sixty  
 " acres of corn then and then growing and  
 " standing on the South East quarter of the  
 " North West quarter and the South West  
 " quarter of the North East quarter and the  
 " North East quarter of the South West quarter  
 " and the North West quarter of the South East  
 " quarter, all of Section number twenty town  
 " ship number twenty two range number ten  
 " East of the fourth P.M. in Lee County and  
 " State of Illinois aforesaid which said sixty

Declaration

" acres of corn was then and there the property  
 " of these plaintiffs and in their possession  
 " and of great value to wit of the value of  
 " one thousand dollars, and that said defen-  
 " dant has kept and detained from these  
 " plaintiffs the said sixty acres of corn so  
 " seized taken and distrained as aforesaid,  
 " for a long time to wit; the said defendant  
 " has kept and detained said sixty acres  
 " of corn from these plaintiffs from the said  
 " third day of October A. D. 1862, until the  
 " present time, and that thereby the said  
 " sixty acres of corn so seized taken and  
 " distrained as aforesaid have become wholly  
 " and entirely lost to these plaintiffs, against  
 " the the peace and dignity of the peoples of  
 " the state of Illinois

" And also for that the said defendant  
 " on the said third day of October A. D. 1862,  
 " to wit at Dixon in said Lee County with fire  
 " and arms seized, took and distrained from  
 " said plaintiffs a large amount of corn growing  
 " and standing, to wit; the one half part of sixty  
 " acres of corn, then and there growing and standing  
 " in the South East quarter of the North West quar-  
 " ter and the South West quarter of the North East  
 " quarter and the North East quarter of the South  
 " West quarter and the North West quarter of  
 " the South East quarter, all of Section number

" Twenty, Township number Twenty Two, range num-  
 " ber Two East of the fourth P.M., in said Sec  
 " County and State of Illinois, which said one  
 " half part of sixty acres of corn was the proper-  
 " ty of these plaintiffs and then and there in  
 " the possession of these plaintiffs and of great  
 " value to wit, of the value of one thousand  
 " dollars, and that said defendant has kept  
 " and detained from these plaintiffs the said  
 " one half part of sixty acres of corn so seized  
 " and taken and distrained for a long time  
 " to wit, the said defendant has kept and de-  
 " tained said last mentioned one half part  
 " of sixty acres of corn from these plaintiffs  
 " from the said third day of October A.D.  
 " 1862, until the present time, and that  
 " thereby the said one half part of sixty  
 " acres of corn aforesaid has become wholly  
 " and entirely lost to these plaintiffs - against  
 " the peace and dignity of the People of the  
 " State of Illinois -

" And also for that the said defendant on the  
 " said third day of October A.D. 1862, with force  
 " and arms &c to wit at Dixon in said Sec County  
 " seized took and carried away a large amount  
 " of corn standing and growing to wit, thirty  
 " acres of corn then and there standing and grow-  
 " ing on the South East quarter of the North  
 " West quarter and the South West quarter of the

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" North East quarter and the North East quar-  
" ter of the South West quarter and the North  
" West quarter of the South East quarter all of  
" Section number twenty township number twenty  
" T<sup>y</sup> two range two East of the fourth P. M., in  
" said Sec County and State of Illinois, which  
" said last mentioned thirty acres of said land  
" then and there the property of the plaintiffs  
" and in their possession, and of great value to  
" wit, of the value of one thousand dollars  
" then and there found and being and conveyed  
" and disposed of the same to his own use, and  
" other wrongs to the said plaintiffs, the said  
" defendant then and there did against the  
" peace and dignity of the people of the State  
" of Illinois and to the damage of the said  
" plaintiffs of two thousand dollars and therefore  
" they bring their suit &c  
" De Wolf & Pinkney  
" Atty for Plaintiffs "

And said declaration is endorsed, to wit;  
" Filed June 12, 1863.  
" B. F. Shaw, Clerk "

And afterwards, on the 23<sup>d</sup> day of June  
A. D. 1863, gave the said Defendant, by  
Bargy & Fouke his Attorney, and filed his  
pleas in said cause in the words and

figures following, that is to say:-

" State of Illinois  
 " Des County - 3<sup>ss</sup> Justice Des County  
 " Circuit Court, of the June Term A.D. 1863,  
 " Minam Bates  
 " adz Pleas,  
 " John W. Countryright  
 " and Orange D. Potts  
 " And the said de-

" fendant by Bary & Faulk his attorneys comes  
 " and defends the force and injurys whereof,  
 " and says that he is not guilty of the said  
 " supposed trespass above laid to his charge  
 " or any or either of them or any part  
 " thereof, in manner and form as the said  
 " plaintiffs have above thereof in their said  
 " declaration complained against him, and  
 " of this the said defendant puts himself  
 " upon the country &c."

" And the said plaintiffs do the like  
 " DeWolf & Purkey  
 " Attys for Pliffs "

" And for a further plea in this  
 " behalf said defendant says, acts, now,  
 " because he says that hereof, to wit;  
 " on or about the twentieth day of September  
 " A.D. 1861, the said defendant do mesid to  
 " said plaintiffs the lands described in said  
 " plaintiffs declaration for the space of one year,

8 " the consideration of said demise was that  
" the said plaintiffs were to work and farm  
" said premises in a good and husbandlike  
" manner, the said defendant to furnish  
" half the feed and half the seed to be used,  
" and to furnish team and wagon, and furni-  
" ng implements, and the said plaintiffs  
" were to give to this defendant one half of  
" all the crops raised; the small grain to be  
" divided in the half bushel and to be put  
" in the granary, and the corn to be cribbed  
" on the premises, and it was further  
" agreed that if the said defendant fur-  
" nished more grain than his share to be  
" furnished, he should be reimbursed by the  
" said plaintiffs out of their share of the crops  
" to be raised,

" And this defendant further avers that  
" the said plaintiffs planted the said corn  
" mentioned in said plaintiffs declaration,  
" in the spring of the year A.D. 1862; and  
" that afterwards, to wit; on the fifteenth  
" day of September A.D. 1862, the said plain-  
" tiffs abandoned said premises and left the  
" said corn so planted as aforesaid unhar-  
" vested and ungathered, and the said plain-  
" tiffs so continued away from said premises  
" until the said corn was fully ripe and ready  
" to be gathered and that this defendant

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Thereupon harvested said corn, and placed  
the same in separate cribs, dividing the  
same equally, and after the same was thus  
equally divided, this defendant, from the  
share of the said plaintiffs took one fifth  
part thereof in order to reimburse him the  
said defendant for his trouble and labor  
of harvesting and cribbing the said corn  
so abandoned by the said plaintiffs as  
aforesaid and this defendant avers that  
he made a tender of the residue of one  
half of said corn so harvested and cribbed  
as aforesaid, to said plaintiffs, but that  
the said plaintiffs refused then and there  
to accept the same, and this defendant  
further avers that he was ready and  
willing and has ever since and for a  
long period prior to the commencement of  
this suit, to wit; until the nineteenth day  
of January A. D. 1863, when one William  
Stennis an acting Constable of said county  
and on the 13th day of April A. D. 1863, one  
Charles F. Lynde the acting Sheriff of said  
county levied upon said corn as the prop-  
erty of said plaintiffs under and by vir-  
tue of an execution and he being so to  
delivered over to the said plaintiffs the  
residue of said half of said corn so  
abandoned by the said plaintiffs and so

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"harvested and gathered by this depen-  
"dant as aforesaid, and this defendant  
"further avers that the said corn so aban-  
"doned as aforesaid by said plaintiffs  
"would have been wholly lost and de-  
"stroyed if this defendant had not so  
"gathered and harvested the same as  
"aforesaid; and this defendant avers that  
"the said plaintiffs were at the said time  
"and still are and ever since have been  
"wholly innocent and that a suit against  
"them to recover the said amount so due  
"for the rent of the said premises would  
"have been entirely unavailing and that  
"the amount due from said plaintiffs to  
"this defendant for rent due upon said  
"premises would have been entirely and  
"wholly lost, which said harvesting and  
"gathering of the said corn, by this depen-  
"dant as the same supposed trespass  
"complained of by the said plaintiffs  
"in their said declaration in this behalf,  
"and not otherwise or differently, and this  
"the defendant is ready to verify, wherefore  
"he prays judgment &c."

"And for a further plea in this behalf  
"said <sup>defendant</sup> says actio non habens he says  
"that heretofore to wit; on the fifteenth  
"day of September A.D. 1861, he was seized

" and possessed of the premises in said  
" plaintiffs declaration described and that  
" he was residing on the same; that after-  
" wards, to wit; on the said fifteenth day  
" of September A.D., 1861, this defendant de-  
" mised to said plaintiffs said premises  
" for and during the term of one year  
" for the purpose of cultivating the same,  
" this defendant still continuing to reside  
" thereon; that the terms of said demise  
" so made as aforesaid were that said  
" defendant should furnish the team  
" and farming implements and one half  
" the feed and seed necessary to be used  
" on said demised premises during said  
" term; that the said plaintiffs were on  
" their part to work the said lands in  
" a good and husbandlike manner,  
" and to give to this defendant one half  
" the grain and proceeds of the said land,  
" The small grain so raised to be divided  
" by the half bushels and the part belonging  
" to this defendant to be placed by said plain-  
" tiffs in the granary of this defendant and  
" one half of the corn to be raised to be crib-  
" bed by said plaintiffs for said defendant  
" on said premises, And this defendant  
" further shows; that afterwards, to wit;  
" on said fifteenth day of September A.D.,

" 1861, the said plaintiffs began their  
 " work of cultivating said premises, and  
 " that they continued to reside upon  
 " and cultivate said premises until af-  
 " terwards to wit; the fifteenth day of  
 " September A. D. 1862, when they  
 " quit said premises and abandoned  
 " the same; together with the corn so  
 " growing as aforesaid;

" And this defendant further shews  
 " that afterwards to wit; on the 2<sup>nd</sup> day  
 " of October A. D. 1862, this defendant  
 " as such landlord as aforesaid issued a  
 " distress warrant against the goods &  
 " chattels of the said plaintiffs liable to  
 " be distrained, for the sum of ninety  
 " eight dollars and fifty cents which  
 " this defendant then and then believed  
 " to be due and owing from the said  
 " plaintiffs as such tenants to this defendant  
 " as such landlord for the balance of one  
 " year's rent, due on said demise as aforesaid, which said distress warrant was  
 " directed to the sheriff or any constables of  
 " Lee County to execute, which said dis-  
 " tress warrant afterwards, to wit; on the  
 " said second day of October A. D. 1862, came  
 " to the hands of Miriam S. Mead one of  
 " the constables in and for the County of Lee

" State of Illinois duly elected and qual-  
 " ified, Auditor defendant further avers  
 " that afterwards to wit; the said Hiram  
 " S. Mead as such Constable, distrained  
 " one half of sixty acres of corn then  
 " standing on the ground owned by Hiram  
 " Bates the defendant, which was the  
 " same corn mentioned and described in  
 " said plaintiffs declaration, as the prop-  
 " erty of said plaintiffs by virtue of the  
 " said distress warrant so issued by the  
 " defendant as aforesaid, and the said  
 " Mead then and there made an inventory  
 " of such distress as by law directed, and  
 " the defendant further avers that after-  
 " wards to wit; on said 3<sup>rd</sup> day of October  
 " A.D., 1862, the said Mead as such Con-  
 " stable and by virtue of the said distress  
 " warrant, and the statute in such case  
 " made and provided, served a notice  
 " on the said plaintiffs, which said notice  
 " was in substance as follows, to wit; noti-  
 " fying them that he had distrained the  
 " said goods and chattel specified in  
 " the inventory heretofore referred to and  
 " to which the said notice was attached;  
 " for the sum of ninety eight &  $\frac{50}{100}$  dollars,  
 " being balance of one year not due to  
 " Hiram Bates, their landlord on the first

" day of October for said promise and  
 " that unless they pay the said note with  
 " the costs of distraining the same within  
 " five days from the service of said notice  
 " after the landlord's demand should be  
 " made pursuant to the statute that the  
 " said goods and chattels would be ap-  
 " praised and sold according to law; said  
 " notice was signed by the said Meriam  
 " S. Mead as such constable and was dated  
 " the 3<sup>d</sup> day of October 1862,  
 " And this defendant avers that afterwards  
 " to wit; on the fourth day of October A.D.  
 " 1862, a summons was issued by Platt Town-  
 " send Esq an acting Justice of the Peace  
 " in and for said Lee County directed to  
 " any Constable of said Lee County, to ex-  
 " ecute, which summons after reciting to  
 " the effect following, that whereas Meriam  
 " Bates had lately distrained the goods  
 " and chattels of John W. Courtright and  
 " Orange D. Potter for the sum of \$98<sup>50</sup>/<sub>100</sub>  
 " claimed to be due to him for rent for  
 " certain premises leased to the said John  
 " W. Courtright and Orange D. Potter, com-  
 " manded the said constable to summons  
 " the said John W. Courtright and Orange  
 " D. Potter to appear before the said  
 " Justice at his office in Dixon, on a

15  
" day in said summons named to answer  
" unto the said Hiram Bates, for a failure to  
" pay him a certain demand not exceeding  
" one hundred dollars; and this defendant  
" further avers that afterwards to wit; on  
" the ninth day of October A.D. 1862, such  
" proceedings were had before said Justice of  
" the Peace, that the issues in said suit where  
" in the said Hiram Bates was plaintiff and  
" the said John W. Courtwright and George D.  
" Potter were defendants, were found for the  
" said defendants therein and a judgment  
" rendered against the said plaintiffs therein  
" for the costs of said suit, from which judg-  
" ment this defendant the plaintiffs in the  
" said suit before said Justice took an appeal  
" to the Circuit Court of Lee County in said State  
" of Illinois, and afterwards to wit; on the  
" 25th day of October A.D. 1862, filed his ap-  
" peal bond with said Justice, and which  
" said bond was afterwards on the said 25th  
" day of October A.D. 1862, approved by said Justice  
" This defendant further avers that after-  
" wards to wit; on the 14th day of November  
" A.D. 1862, the said Hiram S. Mead, by whom  
" said distress warrant was levied authorized  
" and procured one Henry Winebrunn as the  
" agent of him the said Mead to gather and  
" harvest the said corn so distrained as aforesaid.

" and procured and authorized the said Henry  
 " Winebrunn to gather said corn and crib  
 " the same on the premises of this defendant,  
 " authorizing and allowing the said Henry Wine-  
 " brunne to retain out of a portion of said  
 " corn, one-third thereof, and out of the residue  
 " of said corn one-fifth part thereof in pay-  
 " ment and remuneration to the said Wine-  
 " brunne for his troubles and labor in har-  
 " vesting and cribbing said corn; and this  
 " defendant avers that said Winebrunn in  
 " accordance with the order of the said mesne,  
 " did harvest and gather said corn, and  
 " crib the same on the premises of this defen-  
 " dant except the amount so reserved, when  
 " the same continued to remain until the time  
 " hereinafter stated -

" And this defendant further avers that  
 " afterwards, to wit; at the February term  
 " A.D. 1863 of the Superior Circuit Court  
 " such proceedings were had in said cause  
 " so appeared from the said Justice that the  
 " issue was found for the defendant  
 " therein and judgment was rendered against  
 " the plaintiffs therein, this defendant for the  
 " costs of said suit, And this defendant  
 " avers that afterwards, to wit; on the tenth  
 " day of March A.D. 1863, after the said  
 " distress suit was so determined in said

17 " Lev county Circuit Court, the said means,  
" as such constable tenders to the said  
" plaintiffs herein the said sum so distrained  
" as aforesaid,  
" And the defendant further avers that  
" afterwards to wit; on the 17th day of March  
" A. D. 1863, one William Stearns an acting  
" constable in and for the county of Lev. by  
" virtue of an execution issued and by Platt  
" Townsend Esq. an acting Justice of the Peace  
" in and for the county of Lev, levied upon  
" the corn in said plaintiffs declaration  
" mentioned, as the property of the said plain-  
" tiffs; which said execution was issued  
" upon a judgment rendered before Platt  
" Townsend Esq. an acting Justice of the Peace  
" in and for said Lev county, and in favor  
" of Miram Bates and against John W.  
" Courtright and Orange D. Potted as defen-  
" dants, for the sum of thirty five dollars  
" and fifty eight cents debt, and seven  
" dollars and twenty seven cents costs, which  
" said judgment was rendered on the 27th  
" day of January A. D. 1863, And the de-  
" fendant avers that afterwards to wit; on  
" the 24th day of April A. D. 1863, the said Wil-  
" liam Stearns by virtue of said execution sold  
" 119½ bushels of said corn to one C. F. Leach  
" and then and there delivered the said corn

" so sold to the said Leach,

" And this defendant avers that hereto  
 " four to wit; on the 13th day of April A.D.  
 " 1863, Charles F. Lyness the acting Sheriff of  
 " Lee County by virtue of a fieri Breve issued  
 " out of the office of the Clerk of the Lee County  
 " Circuit Court, under the seal of said Court,  
 " upon a judgment rendered in said Court  
 " at the February term A.D. 1863 thereof in  
 " favor of Miriam Bates as plaintiff and  
 " against the said John W. Courtright and  
 " Orange D. Potts as defendants. Herein up-  
 " on said Com in said plaintiffs declam-  
 " tion mentioned as the property of the said  
 " plaintiffs, and that afterwards, to wit; on  
 " the 24th day of April A.D. 1863, sold the  
 " remainder of said Com mentioned in said  
 " plaintiffs declaration, not sold by the said  
 " William Stearns, constable as aforesaid, to  
 " one Elias B. Sites, under and by virtue  
 " of said fieri Breve so issued as aforesaid,  
 " and thus and there delivered the same  
 " to the said Elias B. Sites.

" Which said detaining by the said Mead  
 " and the said gathering and cutting by the  
 " said Winbrunnes, of the said Com, here-  
 " inbefore mentioned and stated are the same  
 " supposed trespasses complained of by said  
 " plaintiffs in their said declaration against

" this defendant and not other or different,  
 " and that the defendant is ready to verify, when-  
 " fore he prays judgment &c.

" And for a further plea in this behalf  
 " said defendant says actio non; because  
 " he says that the said lands in plain-  
 " tiff's declaration mentioned and in which  
 " he, now is and at the said several times  
 " when &c. was the close soil and freehold  
 " of him the said defendant to wit; at the  
 " County of Essex aforesaid, whereof the said  
 " defendant, in his own right at the said  
 " several times when &c. committed the said  
 " several supposed trespasses in the said dec-  
 " laration mentioned, upon the said lands,  
 " in which &c, so being the lands and free-  
 " hold of him the said defendant, as he  
 " lawfully might do for the purpose of re-  
 " moving the corn then and then growing  
 " upon said lands; which are the said  
 " several supposed trespasses whereof the  
 " said plaintiff has above thereof com-  
 " plained against this defendant, and  
 " that the defendant is ready to verify,  
 " therefore he prays judgment &c.

" *Bargis & Fouke*  
 " Defendants Attornies -"

And said pleas are endorsed, to wit;

" Filed June 23<sup>d</sup> 1863,  
" B. F. Shaw Clk "

And afterwards, to wit; at a regular term of the Lee County Circuit Court, begun and held at the court house in the city of Dayton, in said Lee County, on the fourth Monday, (the same being the 22<sup>d</sup> day of June A.D., 1863,) then being present,

Honorable William W. Neaton  
Judge of said 22<sup>d</sup> Judicial Circuit,  
David McCartney  
State Attorney for said 22<sup>d</sup> Judicial Circuit,  
Benjamin F. Shaw  
Clerk of said Lee County Circuit Court,  
and Charles F. Lynn  
Sheriff of said Lee County-

Be it also remembered, that on the twenty third day of June A.D., 1863, (the same being one of the regular days of said June term,) the following proceedings were had in said cause, as appears to us of record, that is to say:

" John W. Courtright ~~~~~  
" and George D. Patton ~~~~~  
" vs ~~~~~ Trespas  
" Miriam Bates ~~~~~  
" On this day comes

" the defendant by Barge & Fouke his at  
 " times, and enter their motion for the  
 " plaintiffs to give security for costs, which  
 " said motion is by the court sustained,  
 " and the said plaintiffs are ruled to file  
 " security for costs herein, or to show cause  
 " by to-morrow morning,

" And afterwards on this day the said  
 " defendant enters his motion, verified by af-  
 " fidavit, for a continuance herein, which  
 " said motion is by the court overruled"

And afterwards on the 24th day of June  
 A.D. 1863. come the said plaintiffs, by their  
 said attorneys, and file their demurrer to  
 said defendants second, third and fourth  
 pleas herein, which demurrer is in the words  
 and figures following, that is to say;

" State of Illinois }  
 " County of Lee } Lee County Circuit Court,  
 " } June Term A.D. 1863.  
 " John W. Courtwright }  
 " and Orange D. Potter } Demurrer to 2<sup>d</sup> 3<sup>d</sup> and  
 " } 4th Pleas  
 " Hiram Bates }  
 " }

" And the said plaintiffs  
 " as to the said second third and fourth pleas  
 " of the said defendant and to each and all  
 " of them swear that the same and each of

Demurrer  
 to 2<sup>d</sup> 3<sup>d</sup> and  
 Pleas

" them and the matters therein contained in  
 " manner and form as the same are above  
 " pleaded and set forth are insufficient in  
 " law to bar or preclude them the said  
 " plaintiffs from having or maintaining  
 " their aforesaid action thereof against the  
 " said defendant and that the said plain-  
 " tiffs are not bound by law to answer the  
 " same, and that the said plaintiffs are  
 " ready to verify - Wherefore by reason of the  
 " insufficiency of the said second third and  
 " fourth pleas and each of them in their  
 " behalf the said plaintiffs pray judgment  
 " and their damages by them sustained on  
 " occasion of the committing of the said tres-  
 " passes to be adjudged to them &c

" And the said plaintiffs, according to the  
 " form of the Statute in such cases made  
 " and provided, state and show to the  
 " Court how the following causes of demur-  
 " rer to the said second third and fourth  
 " pleas by said defendant above pleaded  
 " and to each of said pleas, that is to  
 " say - That the said second third and  
 " fourth pleas and each of them amount  
 " in substance to the general issue -  
 " And that said second third and fourth  
 " pleas and each of them are in other

" respects uncertain informal and insufficient  
 " De Wolf & Pinkney  
 " Atty for Pliffs "

And which said demurrer is endorsed, to wit;  
 " Filed June 24th 1863  
 " B. F. Shaw Ch.  
 " per Joseph Ball D.C. "

And afterwards, to wit; on the twenty fifth  
 day of June A.D. 1863, (the same being  
 as yet one of the regular days of the said  
 June term of said court,) the following  
 proceedings were had in said cause, as  
 appears to us of record, that is to say;

" John W. Counright }  
 " and Orange D. Potter }  
 " or } For pass.  
 " Miriam Bates }  
 " }

On this day again came  
 " the respective parties to this suit by their  
 " counsel aforesaid, and the said plaintiffs  
 " demurred to the second, third and fourth  
 " pleas herein filed, now coming on to be heard,  
 " the said demurrer is now by the court sustained "

And afterwards, to wit; on the twenty sixth  
 day of June A.D. 1863, (the same still being  
 one of the regular days of the said June

term of said Court,) the following proceedings were had in said cause, as appears to us of record, that is to say;

" John W. Courtright  
 " and Orange D. Patten  
 " as  
 " Miriam Bates

Trespass.

On this day again  
 came the respective parties to this suit by  
 their attorneys aforesaid; also came a jury  
 of good and lawful men, to wit; Mhe-  
 mach Hutton; George Piersen; O. E. Clark;  
 Amasa Harrington; Oliver Wagner; T. O.  
 Woodford; Robert Smiley; John W. Dow;  
 Samuel Church; Reuben Cartwright; T. A.  
 Lyman and William Sutton, who were  
 duly elected, tried and sworn well and  
 truly to try the issues joined, and the  
 said jury after hearing the evidence and  
 the argument of counsel, now return to con-  
 sider of their verdict; and by the agreement  
 of parties on both sides the said jury are  
 directed to sign and seal their verdict,  
 and to meet the Court to-morrow morn-  
 ing at eight o'clock "

And afterwards, to wit; on the twenty sev-  
 enth day of June, <sup>1863</sup> (the receipt being one  
 of the regular days of the said June term

of said Court,) the following proceedings were had in said court, as appears to us of record, that is to say;

" John W. Countryright ~~~~~  
 " and Orange D. Porter ~~~~~  
 " vs ~~~~~ Trespas.  
 " Miriam Bates ~~~~~

" On this day again  
 " came the respective parties to this suit by  
 " their attorneys aforesaid, also came the  
 " jury heretofore empaneled in this behalf,  
 " and the said jury now return a verdict,  
 " that they find the defendant guilty and  
 " assess the plaintiffs damages at two hun-  
 " dred and fifty dollars (\$250\*); and  
 " thereupon the said defendant enters his  
 " motion for a new trial herein"

And the said verdict of said jury in said cause is in the words and figures follow- ing, that is to say;

*Verdict*

" We the jurors find Defendant guilty  
 " and assess damages at two hundred and  
 " fifty dollars (\$250.00)

" Oliver Wagner	O. E. Clark
" Reuben Cartwright	T. O. Woodford
" John W. Dorn	Geny Pissin
" Robert Smiley	Wm. Sutton
" Samuel Church	A. Hamington
" A. Hutton	T. A. Lyman "

And said verdict is endorsed, to wit;  
 " Filed June 2<sup>nd</sup> 1863  
 " B. F. Shaw, Clerk  
 " pr Joseph Ball D. C. "

And afterwards, to wit; on the thirtieth day  
 of June A. D. 1863, (the same being as yet  
 one of the regular days of the said June term  
 of said court,) the following proceedings  
 were had in said cause, as appears to us  
 of record, that is to say;

" John W. Cautright  
 " and Orange D. Bates  
 " vs Trespas  
 " Hiram Bates

Judgment

" On this day again came  
 " the respective parties to this suit by their  
 " attorneys aforesaid; and the said plaintiffs  
 " now remit the sum of fifty dollars, part  
 " and parcel of the verdict in this cause;  
 " and the motion for a new trial coming  
 " on to be heard, the said motion is by  
 " the court overruled, It is considered  
 " and adjudged by the court that the said  
 " plaintiffs have and receive of the said de-  
 " fendant the sum of two hundred dollars  
 " (\$200<sup>00</sup>) their damages by them in this behalf  
 " sustained, together with their costs and  
 " charges by them in and about this suit

" expended, and that they have execution  
 " therefor, and the said defendant now  
 " prays an appeal, which is allowed provided  
 " that the said defendant with William Gar-  
 " man or William Girtin as security enter  
 " into bond in the sum of five hundred dol-  
 " lars properly conditioned; and said bond  
 " to be filed in        days from the date here-  
 " of. And now on defendants further motion  
 " he has leave to have his bill of excep-  
 " tions settled and signed in thirty days  
 " from the date hereof.

" And the court certifies on the docket,  
 " that all the witnesses sworn were neces-  
 " sary on the trial of this cause."

And afterwards, to wit; on the 2<sup>nd</sup> day  
 of August, A.D., 1863, came the said de-  
 fendant, and filed in the office of the  
 Clerk of said Circuit Court his appeal bond  
 in said cause, which appeal bond is in  
 the words and figures following, that is to  
 say;

" Know all men by these presents that  
 " Norman Bates as principal and William  
 " Gamson as security are held and firm-  
 " ly bound unto John W. Coombright and Orange  
 " D. Potter in the penal sum of five hun-  
 " dred dollars, good and lawful money of

Appeal  
 Bond

" the United States, for the payment of which  
 " will and truly to be made the said Meriam  
 " Bates and William Gamson bind themselves  
 " their heirs executors and administrators  
 " jointly severally and firmly by their pres-  
 " ents

" Witness Meriam Bates and William  
 " Gamson and their seals this twenty seventh  
 " day of August A. D. 1863

" The condition of the above obligation is  
 " such that whereas the above named  
 " John W. Courtright and George D. Potts  
 " did at the June term of the Les County  
 " Circuit Court held in and for the County of  
 " Les in the State of Illinois A. D. 1863, re-  
 " cover a judgment against the above  
 " bounden Meriam Bates for the sum of  
 " two hundred dollars, to w<sup>ch</sup> which  
 " said judgment the said Meriam Bates has  
 " taken an appeal to the Supreme Court  
 " within and for the third Grand Division  
 " of said State - Now if the said Meriam  
 " Bates shall prosecute said appeal to ef-  
 " fect, and pay or cause to be paid the  
 " amount of said judgment, and all judg-  
 " ments, costs, interest and damages which  
 " the said Supreme Court shall adjudge  
 " against Meriam Bates, and abide the  
 " order and judgment of the said Supreme

" court in this behalf, then this obligation  
 " to be void, otherwise to remain in full  
 " force and effect. ~~~~~  
 " Signed and appeared ~~~~~ Ninian Bates (Seal)  
 " Aug 27, 1863 ~~~~~ Wm Garrison (Seal)  
 " B. F. Shaw, Clerk ~~~~~

And which said bond is endorsed as follows  
 to wit:

" Filed Aug 27th 1863,  
 " B. F. Shaw Clk."

And afterwards, to wit; on the first day of  
March A. D. 1864, saw the said defendant,  
by his said attorney, and filed his bill of  
exceptions in said cause, in the words and  
figures following, that is to say;

31 State of Illinois

Lee County

In the Lee County Circuit Court  
Of the June Term A.D. 1863

John M. Crowright and Orange D. Potter

vs

Hiram Bates

} Bill of Exceptions

Bill of  
Exceptions

Be it remembered that afterwards to wit  
at the said June Term A.D. 1863, of the said Lee  
County Circuit Court before the Honorable William  
M. Wheaton Judge of said Court and of the Twenty  
second Judicial Circuit of the State of Illinois comes  
as well the said John M. Crowright and Orange D.  
Potter by Mustax, DeWolf and Piskney their Attorneys  
as the said Hiram Bates by George C. Tucker his  
Attorneys: And the Jurors of the Jury being likewise  
called come and after being sworn and sworn to  
try the issues within joined The Plaintiffs by their  
Attorneys in order to maintain the issues on their part  
introduced as a witness Isaac Crowright who being  
sworn testified as follows

I know parties - I know of  
Plaintiff's renting farm by what Bates told me Bates  
told me he had rented farm to boys for one year. This  
was in April 1863. He told me on what terms he rented  
it to the boys - Bates said he was to furnish half the seed  
and half the feed and the Teams and he was to get  
from boys half the crops They were on the place when

I came on 4<sup>th</sup> of April 1862. They raised Grain on  
 Farm. They raised grain and corn. From what I  
 heard Bates say there were 30 acres in each piece 69 acres in  
 all. I think Mr Potter moved away from there towards  
 last of September. John (meaning Plaintiff brought)  
 moved away on the 3<sup>rd</sup> of November his goods were there  
 with the exception of a few articles which he brought to my  
 house (maybe his bed). His wife was at my house during  
 the month of October while he was working out. John  
 was helping Turubough, think during a portion of the  
 time. She still kept a portion of the goods there until  
 3<sup>rd</sup> of December when he moved them away. She was  
 not to farm place any longer than that year. She had  
 nothing to occupy him on farm until husking time Upon  
 Swags-examination said Witness testified as follows

John began to work for Turubough some time  
 in October, worked about 2 weeks. He brought his wife  
 up to my house sometime in the month of October. Think  
 it was about the first of October. She brought a Bed and  
 some other things with him and left some things. He  
 went back to Bates' and moved back the things he took  
 to my house and remained about 2 weeks before he finally  
 moved away from Bates which was about the 3<sup>rd</sup> of  
 November. He did not work on Bates place after first  
 leaving except to dig his Potatoes. She had but a few  
 Potatoes. I don't know of any ploughing he was to do after  
 he left. She had nothing else to do

Joseph Turubough was next produced as a  
 Witness on the part of the Plaintiffs who being duly sworn

Testified as follows

I know these fields of corn are about Sixty acres in all - one two pieces - Saw them all along The corn was raised by Plaintiffs - Saw it about harvest-time - Don't know as I can tell Jury how many bushels per acre of this corn - Judge from my own corn this was not as good as mine - Mine was 70 bushels - Plaintiffs was about 25 bushels per acre in one piece - The other piece was poorer - Don't know much about this piece - Corn last fall was worth about 25 cents per bushel in that neighbourhood - The corn harvest last fall commenced about the last part of November - This land is Sec Twenty (20) Town 22 Range 10 The South West Quarter

Wagon Wagon's examination said Witness testified as follows This land is next to mine and about the same quality (Don't know any reason why this land didn't yield as much as mine) My corn was planted sooner and tended better - The piece that yielded about 25 bushels per acre was the best - Don't know the other piece

Chiram S. Mead was the next Witness called by the Plaintiffs to maintain the issue on this fact also being duly sworn testified as follows

I have been out to 'Bates' Have seen the corn on that place - I had a good many papers to execute - Bates gave this to me (The Witness is here shown the district Warrant which will be found in a subsequent part of these exceptions) - I executed this as it states and made this return I obtained a field of corn one half of Sixty acres

Now belonged to Soudwight and Potter and was raised on  
 Bates place - I can't recollect the date it is on the paper -  
 October 3<sup>rd</sup> 1862 is when I sowed it - Now was standing  
 on the ground - I suppose it was an undivided half - Think  
 Bates had the distaff warrant to use - That is the best of  
 my recollections - I don't recollect whether I went up the same  
 day I got the warrant or not - The papers will show - Now  
 Bates directed me to make the distaff

The Witness upon Dept- examination testified as follows  
 I got a man to harvest the now - Got Mr Strickman  
 gave Strickman a written authority. The Witness is now  
 shown the following paper

1862  
 Dixon Nov 4. 1862

Henry Strickman Esq<sup>r</sup>

D<sup>r</sup> Sir/ I hereby authorize and empower you  
 to gather & crib the interest of John M Soudwight and  
 Orange D Potter in the now raised upon the farm of  
 Hiram Bates for the year 1862 which interest is one half  
 of sixty acres and I hereby authorize you to retain one  
 third of the best piece and one fifth of the best piece of said  
 now as your wages for said labor

Witness

Hiram S Meade

H. B. Esq<sup>r</sup>

That is the paper - The now was harvested and  
 cribbed up on the place there according to the directions  
 of that paper - I tendered Plaintiffs the now that was  
 there on the place - made this tender to them in your  
 (Dixon) and told them I would go with them and  
 give it to them and they refused to go or to take it

This was <sup>before</sup> ~~after~~ the 28<sup>th</sup> of last April - The defendant Bates was present & we went into Esq<sup>s</sup> Courtland's office (I answered to question by Courtland's said) My tender or offer to deliver the corn was upon the condition as I understood it that Plaintiffs should receive the amount in writ as a full discharge of their claim against Bates for the corn - There seemed to be a difference of opinion between Gardier as to the amount of corn tendered them the amount of corn that was there scribbled up being one fifth less than the half of one piece and one third less than one half of the other piece

The Plaintiffs by their counsel further to maintain the issue on their part produced as a witness Marshal Gorton who being duly sworn testified as follows

Know Cornfields in question - Field was formed by Courtland and Bates - Saw one piece frequently which would yield 25 or 30 bushels to the acre - This was the upper piece - Never saw the other close by - Corn was worth last fall 25 cents a bushel - sold mine for 37<sup>1</sup>/<sub>2</sub> cents per bushel and scouted it myself - As a general thing corn is marketed the Spring after the Season it is raised - Corn last Spring was worth from 25 to 40 cents - One of my neighbors got 50 cents

On his Examination said Witness testified as follows Generally commence husking corn about the forepart of October - Corn was then worth about 25 cents - Thinks we commenced to husk corn last year about forepart of October - That is some time before the middle of October

The Plaintiffs further to maintain the issue on their part produced as a witness Asa Liddy who being

duly sworn testified as follows

Am acquainted with this bonfield in question <sup>saw corn</sup> went to see it at the request of Plaintiff Potter - I do consider myself a very good Judge of Corn in the field - but would put one piece at about 25 Bushels - According to my calculations one piece would have about 15 ~~to~~ 16 bushels to the acre - This was lower piece went to examine Corn at request of Potter and saw Bates the defendant - Bates told me they husked 15 rows of this Corn and got 25 bushels shelled Corn and that it would yield about 15 or 16 bushels to the acre on lower piece and 25 on other - that was what I made it and thought he put it high enough and I would go no further - Am a Carpenter and Joiner - Am farming now - Judge of the quantity by my piece - Got 38 cents for bushel for mine - In winter sold to Stiles who paid from 25 to 59 cents for bushel

The Plaintiff next introduced as a witness J. P. S. Hobbins who being duly sworn testified as follows

The upper piece of Corn I thought ought to turn out about from 20 to 25 bushels to the acre - Corn was worth from 25 to 40 cents - One neighbour got 59 cents I do not know of the other piece being destroyed - Saw a horse in there once or twice while they were husking this Corn - It was sometime in November - The horse belonged to Mr Bates - I never went through the Corn I think I saw some horses or colts in there when I was going to a funeral - Saw them only once - About the 8<sup>th</sup> of December - It was in lower piece which was also the poorer piece

On cross-examination said witness testified as follows

Do not know which piece was husked first - Think they husked the lower or lower piece first - They husked this barn some time in November or December - Saw one more in there several times - Saw her there some time the first of November or last of October - Have seen her in a lower patch which joins the lower piece of barn and in same field - Do not say about what time

The Plaintiff next introduced as a witness Isaiah Brink who being duly sworn testified as follows

Saw one horse in that barn last fall in the middle of October - It was Mr Bates! It was in the lower piece I was through the upper one thought it would go about 25 or 30 bushels to the acre

The Plaintiff then recalled Marshal Gorton who testified as follows

Saw some cattle and Horses in this barn once - They were Mr Bates - There were 4 or 5 horses & 5 or 6 cattle - The barn was then partly husked - This was on the 8<sup>th</sup> of December as I was going to a funeral

On cross-examination said witness testified as follows  
Some were in the barn not husked and some were in the barn husked - One some were in the lower - Bates was at the funeral too - Do not know how long he was there

The Plaintiff then recalled Isaac Bonbright who testified as follows - I saw a little piece of this barn - Was there a little lower - Think it would yield from 30 to 35 bushels to the acre in one piece and about 15 bushels in the other  
The Plaintiff then offered in evidence and read to the Jury

The following District Warrant  
 State of Illinois  
 Lee County

To the Sheriff or any Constable  
 of said County Greeting

Distrain the goods and chattels  
 of John M. Kountzright and Orange D. Patten which are liable  
 to be distrained wherever they may be found in the County  
 of Lee where the said John M. Kountzright and Orange D.  
 Patten reside for the Sum of Ninety eight dollars and fifty  
 cents being the balance of one year rent due me on the first  
 day of October A. D. 1862 for the Premises now in their possession  
 devised to them by me and situated in said County

Dated the 2<sup>nd</sup> day of October A. D. 1862

Horace Bates

The Plaintiff thereupon rested their case  
 The defendant by his counsel in order to maintain the  
 Issues on his part introduced as a Witness Symon Bates  
 who being duly sworn testified as follows

I know the corn in controversy - I have been through  
 it and helped thresh bush - Would not bush lower price  
 for it - Best or upper price would go about 12 or 15 bushels  
 for acre - Lower price not over 5 bushels for acre - The  
 corn was very poor when I saw it - Weeds were high - Corn  
 was poorly tended - I know that father was threshing there  
~~The defendant~~ Symon Bates on cross-examination  
 said I am son of Defendant - live about 8 miles  
 from him - I do not know how much corn yielded - never  
 was in upper or best price - one helped bush about half

and bound and went to house to dinner

The defendant to further maintain the issues on his part produced Warren Fortynan who being duly sworn testified as follows

I live near Mr Bates - Am a Farmer - I have been a Farmer for 20 years - The one piece of land would yield about 5 bushels and the best piece not more than 15 or 16 bushels per acre - They got a man to see that this corn was spiked and silted - It was sold for 40 cents a Bushel - There were about 250 bushels sold

Henry W. Johnson was the next Witness produced by said Defendant who being duly sworn deposed as follows

Mr Bates got a Warrant out - I spiked some of the corn under the authority that Mr Bates got in Dixon It was a written authority (The Witness here identifies the paper shown Witness Mead as the one under which he acted) - In all there were about 600 bushels of corn - I helped bunk the upper piece I think this would yield 25 Bushels to the acre - Sometime after the last term of court the latter part of February or the first of March Mr Bates and I were coming to Town one day and just about 10 hours we met Hiram S. Mead and the Plaintiff - Mead said "I am just going up to give the boys (meaning Kinsbright and Patten) the corn" Mr Bates said "Well it is out there silted up ready for you - We came on towards Town and when we got on a little piece we turned and found that Mead and the Plaintiff were coming back - The lower and poorer piece of corn would turn out about 5 Bushels per acre There were about 600 Bushels in all



testified as follows

I did tender that loan to Howright and Potter as I stated when I was first examined - don't remember the date - I am not certain that Bates said he would not give up that loan till that Execution was paid - I know that something of that kind was said by Bates but cannot say whether at this or some other time - I had at the time an Execution in favor of Bates and heard so many conversations that I cannot say what was said at any one time - I don't remember my understanding was Bates would not give up loan unless Execution was paid

The defendant next introduced as a Witness Jacob Kope who being duly sworn testified as follows

I helped to pick about  $\frac{2}{3}$  of this loan My unshred picked after I left in all there was between 600 and 700 bushels - Wheat I husked was put half and half in 2 separate bins divided it equally except  $\frac{1}{5}$ <sup>th</sup> of one bin and  $\frac{1}{3}$  of the other five

Witness on Kope's Examination testified as follows

I know there was from 600 to 700 bushels from my Judgment - never seen it measured and I judge of the quantity from the bulks together it was of good quality It sold for 40 cents per bushel - 119 Bushels sold for this price - It was sold sometime in May - All this was out of the same bit - It was sold by Constables Stevens and Meade Constable - Meade sold \$44 worth and Stevens 119 Bushels at 40 cents per bushel and the balance sold for the \$44 by Meade - what was sold for 40 cents per bushel and what was sold in bulks was of about the same quality

The Defendant next introduced N. T. Merrill as a Witness who being duly sworn testified as follows

I should think there was between 600 and 700 bushels of this corn in all - I think the best price would yield about a 1/4 as much as Mr Spoutaugh's which was 75 bushels per acre - The corn was not worth husking - have no actual knowledge of the quantity of this corn - never saw it measured

On cross examination said "Defendant is my father in law" The defendant next offered in evidence the authority from Mead to Winchester and asked to be allowed to read the same to the Jury - which request the Court then and there refused to which ruling and refusal of said Court the defendant by his counsel then and there excepted

The defendant next introduced as a Witness William Stevens and offered to prove by said Stevens that he (Stevens) was an acting Constable in and for Lee County - That as such Constable he received an execution from Platt Townsend Esq<sup>r</sup> an acting Justice of the Peace in and for said County that said execution was in favor of Henry Bates and against John McQuartricht and Orange D. Potter - That the execution now shown exhibits together with the return <sup>on</sup> ~~for~~ the same he made said return - were the ones upon which he acted and upon which he made said return - That by virtue of said execution he levied upon and sold one hundred and 19 1/2 bushels of the corn in question as the property of the Plaintiff's herein and that said execution was satisfied to that amount - Which testimony the Court then and there refused to allow to go to the Jury to which ruling

of the Court in refusing to allow said testimony to be considered by the Jury the defendant by his Counsel then and there excepted

The said defendant next offered to read in evidence the Execution and return referred to by William Stevens a copy of which together with said return is in the words and figures following

State of Illinois

In County } The People of the State of  
Illinois to any Constable of said County Greeting  
We command you that of the Goods and Chattels of John W. Bowtright and Orange D. Potter in your County you make the sum of Fifty five dollars and fifty eight cents debt and Seven dollars and twenty seven cents costs with interest at the rate of Six per cent for amount from the 27<sup>th</sup> day of January A. D. 1843 when Judgment was rendered) which Ariam Bates lately recovered before me in a certain Plea against the said John W. Bowtright and Orange D. Potter and hereof make return to me within seventy days from this date

Given under my hand and Seal this 31<sup>st</sup> day of January A. D. 1843

Watt Townsend J. P.  
Seal

Now to hand this 3<sup>rd</sup> day of Feb 1843 at 9 o'clock A.M.  
H. S. Mead Const  
By virtue of this Execution I have this 17<sup>th</sup> day of March 1843 Seized on One bit of Bone standing on the farm of Ariam Bates supposed to contain about Two

Hundred and Sixty bushels as the Property of John W.  
Bountright and Orange D. Potter

Wm Stevens Court

April 24<sup>th</sup> 1863 Sold one hundred and nineteen and a  
half bushels of corn to W. C. Seach for 40 cents per bushel

Wm Stevens Court

April 24<sup>th</sup> 1863 Paid on this Execution 20 dollars

"Hiram Bates"

Returned this Execution satisfied April 25<sup>th</sup> 1863

Wm Stevens Court

Which Execution and return the Court refused to allow to be  
read to the Jury to which refusal on the part of said Court -  
the defendant by his counsel then and there excepted - It being  
admitted that the Hiram Bates mentioned in both of the above  
mentioned Executions was the defendant in this Suit

The defendant next introduced Charles J. Lynn as a  
witness and offered to prove by said Lynn after he should  
have been first duly sworn, that he was the acting Sheriff  
of Lee County; that as such Sheriff he received a fee  
Bill issued out of the Clerk's Office of the Circuit Court  
of Lee County under the Seal of said Court in favor  
of Hiram Bates as Plaintiff and against John W.  
Bountright and Orange D. Potter as defendants That  
the Fee Bill then in his possession and shown him was  
the Fee Bill in question and that the return on said  
Fee Bill was in his handwriting and genuine - That  
by virtue of the said Fee Bill he levied on the corn in  
question as the Property of the said Plaintiff and that  
he sold the corn remaining unsold after Mr William

Stevens had sold 119½ bushels by virtue of the execution  
in his hands against the ~~said~~ <sup>same</sup> defendants and in favor of  
the same Plaintiff to Elias W. Stiles for the Sum of Forty  
four dollars and that he had paid the same in to the Clerk  
of Lee County Circuit Court and returned the said Fee Bill  
satisfied. And at the same time the said defendant  
afforded the fee Bill and the return thereon referred to by  
said witness a copy of which said Fee Bill and return  
is in the Words and figures following

Whole No. Term No. Execution No. Record Book Page Fee Book Page

STATE OF ILLINOIS, } ss. In Circuit Court, February Term, A. D. 1863.  
*Lee* COUNTY.

IN THE MATTER OF

*Anna Bates*

vs.

*John M. Southright*  
*Orange D. Potter*

*Replevin*

PLAINTIFF'S FEES.

CLERK'S FEES.—Filing Praecipe, .50 c; Docketing Suit, 20c; Entering Appearance Plaintiff and Attorney, 25c; Issuing Summons and Filing, 40c; Filing .50 Papers, 25 c; 1 Continuance, 20 c; <i>Off for Mail 10¢</i> <i>Cost of Replevin 40</i>	25
2 <i>Order to Pleas 20</i> <i>Order sud. (Dues 20)</i> <i>for leave to apply 20</i>	90
Entering Judgment, 25c; Docketing Judgment, 10c; Issuing Execution, 40c; Filing and Docketing, 15c; Entering Sheriff's Return, 10c; Entering Satisfaction, 15c; Making and entering Bill of Costs, 30c; Certificate and Seal, 35c; <i>copy of Costs 20</i>	78
<i>Order for leave to apply 20¢</i> <i>Order for replevin 20</i>	40
<i>Order sale July 20th</i> <i>Order return July 15th</i> <i>Order for filing \$1.20</i>	1 55
<i>Order of July 20th</i> <i>Order for 40¢</i> <i>Order for witness 80</i>	1 40
<i>Order for replevin 10</i> <i>Order for replevin 20</i> <i>Order for replevin 20</i>	50
<i>Order for 20</i> <i>Order for Costs 20</i> <i>Order for 4 20</i>	10
<i>Alamps 50</i> <i>Judge's fee 10</i>	1 50
SHERIFF'S FEES.—Serving and Returning Summons, .50 c; Miles Travel, \$2.00 c;	3 40
	\$ 12 95 \$ 12 95

WITNESSES' FEES.—

<i>Jacob G. Cooper</i> at <i>Feb</i> Term, 1863, 3 Days, .50 c; Miles Travel \$3.00 c;	3 00
<i>J. H. Winchman</i> at <i>Feb</i> Term, 1863, do, .50 c; do \$3.00 c;	3 00
<i>S. M. Water</i> at <i>Feb</i> Term, 1863, do, .50 c; do \$3.00 c;	3 00
<i>C. C. Merritt</i> at Term, 1863, do, .50 c; do \$3.00 c;	3 00
<i>Harriet D. Brown</i> at Term, 1863, do, .50 c; do \$2.80 c;	2 80
<i>M. G. Darrow</i> #3.00	3 00
	17 80
	30 75

I HEREBY CERTIFY the foregoing to be a true copy from my Fee Book of

*Plaintiff's*

costs herein.

*Henry J. Shaw*

CLERK.

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

The People of the State of Illinois, to the Sheriff of said County, GREETING:

We COMMAND YOU, That if the within Fee Bill, amounting to *Thirty* Dollars and *Seventy five* Cents, shall not be paid within thirty days after being by you demanded, you cause the same to be levied on the goods and chattels, lands and tenements of the said *John M. Southright and Orange D. Potter*

in your County, according to the Statute in such case made and provided. And make return of this writ within ninety days, as the law directs, with an indorsement hereon in what manner you shall have executed the same.

WITNESS *Henry J. Shaw* Clerk of the *Circuit*

Court of said County, and the Seal thereof, at *Spring* in said County, this *fourth* day of *March* A. D. 1863

*Henry J. Shaw* CLERK.

*Seal*

*Seal*

Whole No. Term No. Execution No. Record Book Page Fee Book Page

STATE OF ILLINOIS, }  
*See* COUNTY. } ss. In Circuit Court, *February* Term, A. D. 18

IN THE MATTER OF

*Amicus Notes*

*Replevin*

vs.  
*John M. Southright*  
*Orange D. Potter*

PLAINTIFF'S FEES.

CLERK'S FEES.—Filing Praecipe, 5c; Docketing Suit, 20c; Entering Appearance	25
Plaintiff and Attorney 15c; Issuing Summons and Filing, 40c; Filing 5 Papers, 25c;	90
Continuance, 20c; <i>Off for trial 10; writ of Replevin 40</i>	70
<i>2 Deeds to Pleas 20. Deed sent June 20 1863 for leave to reply 20.</i>	80
Entering Judgment, 25c; Docketing Judgment, 10c; Issuing Execution, 40c;	75
Filing and Docketing, 15c; Entering Sheriff's Return, 10c; Entering Satisfaction, 15c; Mak-	40
ing and entering Bill of Costs, 30c; Certificate and Seal, 35c; <i>copy of Deeds 20</i>	80
<i>Deed. Deo for leave to reply 20; Deed. file reminder 20.</i>	40
<i>Deed. call July 29; Deed. return July 15; 2 Deeds &amp; filing \$1.20</i>	1 55
<i>Deed of May 20. 8 calls 40; 8 off for W. adms. 80</i>	1 40
<i>Exec. g. Reodit 10. Deed. ans. Deo. in Court 20. Deed. in. Deo. for \$1.20</i>	50
<i>Deed. for 20. Deed. for. Deeds 20. Deed. for 4. 20</i>	10
<i>Ally 50. Judge for \$1.00</i>	1 50
SHERIFF'S FEES.—Serving and Returning Summons, 2c; Miles Travel \$2.40c;	2 40
	<b>\$ 12 95</b>

WITNESSES' FEES.—

<i>Jacob G. Cooper</i> at <i>Feb</i> Term, 1863, 3 Days, c; Miles Travel \$3.00c;	3 00
<i>J. A. Minchum</i> at <i>Feb</i> Term, 1863, do, c; do \$3.00c;	3 00
<i>S. M. Water</i> at <i>Feb</i> Term, 1863, do, c; do \$3.00c;	3 00
<i>G. W. Bennett</i> at Term, 1863, do, c; do \$3.00c;	3 00
<i>Warren D. Brown</i> at Term, 1863, do, c; do \$2.80c;	2 80
<i>W. G. Corbow</i> \$3.00	3 00

I HEREBY CERTIFY the foregoing to be a true copy from my Fee Book of

*Plaintiff's* costs herein.

*Ben. H. Shaw*

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

The People of the State of Illinois, to the Sheriff of said County, G

WE COMMAND YOU, That if the within Fee Bill, amounting to *Twelve* Dollars and *Seventy five*

*Received this fee bill this 11th day of March A. D. 1863 at 10 o'clock A.M. H. H. Shaw Sheriff*

IN THE CIRCUIT COURT OF THE STATE OF ILLINOIS  
ON DISMISSAL.

Lee County, Court.

Whole No. Term No. 85

Execution No. 1111

Record Book Page

Fee Book Page 189

Stram Baker

vs.

John W. Southwick

George O. Patton

Plaintiff's Costs, \$ 31.75

Judgment rendered February 25 1863.

This writ issued March 11 1863.

Returnable 186 .

Filed in the Court of Lee County, this

25<sup>th</sup> day of April

A. D. 1863

Magnum & Shaw Clerk.

George T. Foster ATTORNEY

CLAYTON, PAGE & HORTON, Stationers, 125 & 130 Lake St., Chicago.

State of Illinois  
County of Lee

I by virtue of the within execution and fee to me I have this 18<sup>th</sup> day of April A. D. 1863 levied on the following property to wit: One lot of land situated on the farm of Stram Baker in the town of Lee in Lee County of Lee and State of Illinois

H. G. Lynn Sheriff

State of Illinois  
County of Lee

In accordance with the Statutes in such case made and provided after having duly advertised the above described lot of land I did proceed to sell the same on this 24<sup>th</sup> day of April A. D. 1863 at the hour of One o'clock and Elias W. Stiles having bid the sum of Forty four (\$44) dollars it was struck off and sold to the said E. W. Stiles for the said sum of Forty four dollars (\$44.00) he being the highest and best bidder therefor

H. G. Lynn Sheriff

Dated April 24<sup>th</sup> 1863

I return this fee to the Sheriff this 25<sup>th</sup> day of April A. D. 1863 and money said to Clerk of Circuit Court  
Sheriff's fees \$ 2.12

Which said Testimony of said Lynn and the Bee Bird and  
 return the Court refused to allow to go to the Jury to which refusal  
 of the Court the said defendant by his Counsel then and there excepted  
 All of said testimony of said Stevens and Lynn and the  
 Resolutions and fee Bills together with the returns on each the  
 defendant offered in mitigation of damages and not as a full  
 defence to the action All of which the said Court refused  
 to receive and allow the Jury to consider to which ruling of  
 the Court the defendant by his Counsel then and there excepted  
 The defendant thereupon rested his case

And this was all the Testimony offered in  
 the case

The Plaintiffs by their Counsel asked the Court  
 to instruct the Jury as follows

There is no evidence before this Jury of  
 any Resolutions whatever and the Jury have no right  
 to take into consideration any Statements made in their  
 hearing about any Resolutions

This Jury has nothing to do with the question as  
 to whether the Grain was or was not properly worked  
 Whether the Property was or was not sold to pay debts  
 of the Plaintiffs to Defendant is a matter which the  
 Jury have no right to take into consideration

That the law in this case is that if the Jury believe  
 from the evidence that the defendant wrongfully took  
 the Grain in question from the possession of these Plaintiffs  
 and sowed and harvested the same that then and in

Lynn



The Court thereupon gave the same to the Jury and to the giving of which said instructions and each and every of them the defendant by his counsel then and there objected

The defendant by his counsel then asked the Court to instruct the Jury as follows

The Jury are instructed that damages are given as a compensation recompense or satisfaction to the Plaintiff for an injury actually received by him from the defendant & being commensurate with the injury being neither more nor less and if they believe from the evidence that the Plaintiffs have sustained no injury from the defendant then they must find the issue for the defendant

The Jury are instructed that they must be satisfied that the defendant himself or by some agent acting under his direction committed the trespass complained of if they believe a trespass has been committed before they can find for the Plaintiffs and if they do not so believe they must find the defendant not guilty

If the Jury believe from the evidence that defendant's estate made a tender of all the horn in question in as good condition as it was before taken to the Plaintiffs before the commencement of this Suit then the Jury can find but nominal damages for the Plaintiff if they believe the defendant did wrongfully take the property in question

The Jury are instructed that the measure of damages in this case is the actual injury sustained and if the Jury believe from the evidence that the Plaintiffs have sustained no damages by the taking of the horn in question if they

Quinn

Quinn

Quinn

believe that the defendant wrongfully took the same then the measure of damages is but nominal and the Jury should so find

Refused

The Jury are instructed that if they should believe from the evidence that the defendant did take the loan in question wrongfully and if they should believe from the evidence that the Plaintiff's have sustained damages by said wrongful taking then the measure of damages in this case is the price of the loan at the time it was ready to be marketed

The 2<sup>nd</sup> and 4<sup>th</sup> Instructions so asked by said defendant the Court gave; but refused to give the 1<sup>st</sup> and 3<sup>rd</sup> as asked and refused to give the 5<sup>th</sup> at all to which refusal of the Court to give said 1<sup>st</sup> and 3<sup>rd</sup> Instructions as asked and to give the 5<sup>th</sup> Instruction at all the defendant by his Counsel then and there excepted

The Court thereupon gave said 1<sup>st</sup> Instruction modified and changed as follows Adding after the last word of the first Instruction these words "Yet if the property is wrongfully taken the Law implies and the Jury should find for the Plaintiff"

And adding in the 3<sup>rd</sup> Instruction after the words "before the commencement of this Suit" and before the words "then the Jury can find" & these words "and not compelled with any conditions"

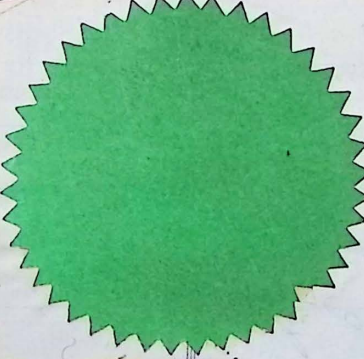
To which said modifications and additions and each of them and the giving of the same so modified the Defendant by his Counsel then and there excepted

And because none of the said exceptions so offered  
and made to the opinions and decisions of the said  
Circuit Judge do appear upon the record of the said  
said Shaw on the Prayer of the said defendant  
by his said counsel the said Circuit Judge has ~~in~~ this  
Bill of Exceptions set his Seal according to the Statute  
in that case made this 30<sup>th</sup> day of June A.D. 1863  
W. W. Heaton J.S.

I hereby certify that the within bill of excep-  
tions was in fact settled and signed  
and sealed by me within the time lim-  
ited for signing the same  
W. W. Heaton "

And the said Bill of Exceptions is endorsed  
as follows, to wit;  
" Filed March 5<sup>th</sup> 1864.  
" B. F. Shaw, Clerk "

State of Illinois, 3  
Lee County, 3  
J. Benjamin F. Shaw, Clerk of  
the Circuit Court in and for said Lee County,  
in the State of Illinois, do hereby certify that  
the foregoing is a full, true and complete  
recapitulation of the record in said cause,  
as appears from the Books and files yet  
remaining in my office—



In testimony of which I hereunto  
set my hand, and affix the seal  
of said Court, at my office, in  
Dijon, in said County, this 11th  
day of March A.D., 1864.

Benjamin F. Shaw, Clerk,  
By L. A. Divine, Deputy.

~~Assignments~~ The errors assigned are as  
follows:

- 1<sup>st</sup> Court erred in sustaining demurrer to defen-  
dant's special plea.
- 2<sup>nd</sup> Court erred in refusing to allow wit-  
nesses Stearns and Lyon to testify.
- 3<sup>rd</sup> Court, <sup>erred in refusing</sup> refused to allow the execution and  
fee bill together with the returns thereon,  
offered to be read in evidence.
- 4<sup>th</sup> Court erred in refusing to allow the ap-  
plication of the sales of the corn under the exe-  
cution and fee bill, to the payment of the plain-  
tiff's (appellus) debts. to go to the jury in mitigation  
of damages.
- 5<sup>th</sup> ~~Howe~~ Court erred in refusing to allow  
evidence in mitigation of damages to go to the  
jury.
- 6<sup>th</sup> Court erred in giving plaintiff's instructions.
- 7<sup>th</sup> Court erred in modifying some and in  
refusing others of defendant's instructions.

61 10 37 70  
8<sup>th</sup> Court erred in overruling motion for  
a new trial,

9<sup>th</sup> Court erred in rendering judgment  
in favor of plaintiffs and against defendant.

Barry & Houke  
Attys for Appellant.

Supreme Court of Illinois  
Third Grand Division  
April Term 1864

John W. Conright &

Charles D. Potter  
vs  
Def Appellees

Hiram Bates  
Appellees

And  
Now comes the said Appellees  
by James H. Essell their attorney  
and says that there is no  
error in the record & proceed-  
ings aforesaid: wherefore the  
said Appellees pray that that  
the said judgment may  
be affirmed: that they the  
said Appellees may be recosted  
with their reasonable costs & 9

James H. Essell  
Attys for Appellees

118 14  
Miraw Bates  
Appellark

<sup>13</sup>  
John W. Courtwright &  
Orange D. Potter  
Appellark.

Record from Sec.  
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Filed April 1st 1864  
L. Seland  
Clerk

# Supreme Court of Illinois,

THIRD GRAND DIVISION.

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APRIL TERM, A. D., 1864.

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HIRAM BATES, APPELLANT,

vs.

JOHN W. COURTRIGHT AND ORANGE D. POTTER,  
APPELLEES.

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## Appellees Brief

### I.

This was an action of trespass brought in the Court below by the appellees against the appellant, for taking and carrying away certain corn of the appellees. It is claimed by the counsel for the appellant that the Court erred in excluding from the consideration of the jury evidence to show that a part of the corn in question was sold under a certain execution and fee bill in *favor of the* appellant and against the appellees, after the alleged trespass; which evidence was offered in mitigation of damages.

We think there was no error in this. It should be observed, that the execution in the hands of the Constable Stevens, as well as the fee bill in the hands of Sheriff Lynn, under which the corn was subsequently sold, were each in favor of the appellant.

The law certainly will not permit a creditor, to first wrongfully seize his debtors property, and then hold it in his custody until he can subsequently acquire legal process against the debtor and have the property sold to satisfy demands in his own favor, and thus derive a benefit from his own wrong.



The subject is fully considered in the case of *Otis vs. Jones supra* in which the following language is held :

“He [the plaintiff in that suit] had been wrongfully deprived of his property in *June*—his right of action was then complete and had the suit been brought within the three months which elapsed before the second sale it is admitted that he would have been entitled to recover the full value of the property. How has he lost that right? The Statute of limitations has not run, nor has the plaintiff done any

act, whatever, to bar or prejudice his claims. How then has he lost everything but the mere form of the remedy? The argument is that by the second sale, on legal process, the property has in effect been applied to the plaintiff's use and therefore he ought to recover nominal damages. *The answer is that a wrong doer cannot discharge himself by any act of his own, without the consent of the injured party.*

"But suppose there was no tort in the case, and the question arose in an action of assumpsit. Although by means of the second sale the sum of \$36, for which the property was struck off, may have been applied to the plaintiff's use by way of satisfying so much of his debt, yet as that benefit was conferred without request, it could create no legal obligation on the part of the plaintiff to refund, or in any other way account for the money.

*Bartholomew vs. Jackson, 20 John R., 38.*

[*Francisco vs. Wright, 2 Gilm., 691, 694.*]

"If the defendant could not in an action recover the value of the benefit thus conferred on the plaintiff, he cannot do the same thing in another form as by setting it off, or using it by way of satisfaction in an action brought against him by the plaintiff. If this could not be done in assumpsit, it surely cannot be done in an action of trover [trespass.]

"By procuring a sale on legal process the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at common law, either bar an action for a tort, or take away the right to full compensation in damages. The case of *Hayward vs. Seaward, 1 Moore and Scott, 459*, does not proceed upon the ground that a tort can be cured by a tender without acceptance, but on the ground that there had been no

conversion of the property. "In the case of *Hanmer vs. Wilsey*, 17 Wen. 91, we had occasion to consider the effect, both of an offer to restore property which had been wrongfully taken, and of a subsequent sale of the property on legal process against the owner. We came to the conclusion that neither the tender nor the subsequent sale could in any way affect the remedy of the party whose property had been tortiously taken."

## II.

## III.

As applied to the facts of this case, the authorities cited by appellants counsel, do not sustain the proposition necessarily contended for by them, viz:

That a party may wrongfully seize the property of another, and without right retain it in his custody for several months until he can subsequently procure legal process to be issued *in his own favor* against the owner, and have the

property sold upon such process, and then be allowed to show these facts in mitigation of damages, leaving simply to the owner the barren right of maintaining an action to recover nominal damages for such an injury.

In the case of *Irish vs. Cloyes* 8 Vermont, 30, the property was taken from the tortfeasor by a tax collector and sold to pay the tax due from the owner of the property. So in the case of *Squire vs. Hollenbeck*, 9 Pick., 552, it was held that the defendant in the trespass suit might show in mitigation of damages that the property was in one Crippen, and that one Baldwin (a third person) being a creditor of Crippen, caused the same to be attached by a deputy sheriff, and taken out of the defendant's possession, and sold according to law, and the proceeds applied to the payment of Crippen's debt, who was the owner of the property.

In the case of *Kaley vs. Shed*, 10 Met., 317, the goods were taken from the defendant in the trespass suit on an attachment *in favor of a third person*, against the owner of the goods, under circumstances which were held to exclude all suspicion of collusion between the defendant and the attaching creditor or officer, to cause or expose the goods to be attached, and it was held that this might be shown in mitigation of damages in the trespass suit.

In the case of *Pierce vs. Benjamin* 14 Pick., 359, 361, the plaintiff in the trespass suit and the owner of the property by his own act voluntarily claimed and took the benefit of the sale which had been made by the defendant, a tax collector, to satisfy a tax due from the owner of the property sold, and while it was held that this did not waive the original tortious taking, it might be shown in mitigation of damages.

So, in the case *Board vs. Head*, 3 Dana, 494, which was an action of trespass against an officer for making an illegal levy

upon and selling property on an execution against the plaintiff in that suit where the property was bid in at the sale by the execution debtor and plaintiff in the trespass suit, or for his benefit.

The case of Prescott vs. Wright, 6 Mass., 20, 23, was an action of trover against an officer for levying upon and selling the property of the execution debtor, after the return day of the writ, and although it is intimated in that case that the fact that the proceeds of the sale were appropriated to the satisfaction of the execution against the plaintiff in the trover suit, *might mitigate the damage*, the propriety of this *intimation* is strongly questioned in a note to the same case.

*Prescott vs. Wright, 6 Mass., 23, note 5.*

The cases of Wheelock vs. Wheelright, 5 Mass. 104, Caldwell vs. Eaton *ibid.* 399 and Barren vs. Davis, 4 N. H., 338, cited by appellants counsel will be found on examination to be wholly inapplicable to the present case.

#### IV.

Even if it were held that the appellant had the right to show that he had applied the property he had wrongfully taken from the appellees to the payment of the debts they were owing him, or judgments he may have had against them, there was no error in excluding the execution and fee bill produced in evidence, and the testimony of the constable and sheriff as to their proceedings thereunder, inasmuch as the appellant did not prove, nor even propose to prove, the existence of any such debts or judgments against the appellees upon which such execution and fee bill were issued.

The execution and fee bill were not evidence of the existence of such judgments; and the plaintiff in the judgments certainly cannot be allowed to have evidence to go to the jury showing that he applied the appellee's property to the satisfaction of supposed judgments against them when there is no evidence of the existence of such judgments.

It is quite difficult enough to make the jury understand the true issues in a case and the evidence legitimately bearing upon them, without having the cause incumbered with irrelevant matters of this kind, and we submit that the court very properly excluded this evidence from their consideration.

That the plaintiff in an execution is bound to show the judgment upon which it is issued, in such a case, there can be no doubt.

*Clay vs. Carpenter, 1 Mon. (Ky.) 10.*

It may be urged, however, that the bill of exceptions does not show that this particular objection was made upon the trial as the ground for excluding the evidence offered. To this we submit there are two sufficient answers. First: A party "is not precluded from showing in this court and insisting upon the *insufficiency* of the evidence," although the particular grounds of such objections do not appear to have been urged in the court below.

*Gillespie vs. Smith, 29 Ills., 478*

The present case is clearly within this rule. Suppose the proof offered of this execution and fee bill had been admitted, together with the testimony of the officers of their proceedings thereon, it would not have been legal evidence of the existence of the judgments, and could not have benefited the

defendant. In other words the proof would have been legally *insufficient* to show that the proceeds of the sale of the property had been applied in satisfaction of the plaintiff's debt, inasmuch as there would have been no evidence of the existence of any debt against them.

Second: The appellant is the complaining party, and made and tendered the bill of exceptions in this case, which does not pretend to show what objections—whether general or specific—the appellees made to this evidence on the trial below, but simply shows that the court excluded the same.

The presumption is “that the party complaining has incorporated everything into his bill of exceptions which is necessary to *present the full* merits of his case upon the point about which he complains.” The bill of exceptions is not to be considered as a writing of the judge, but it is to be esteemed as a pleading of the party alleging the exception, and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be considered most strongly against the party who prepared it.”

*Rogers vs. Hall*, 3 *Scam.*, 6.

*Cummins vs. McKinney*, 4 *Scam.*, 60.

Now, inasmuch as this bill of exceptions fails to show whether or not, any objections general or specific, were made to this evidence by the appellees, the court should give them the benefit of this omission on the part of the appellant, and should indulge every reasonable presumption, to sustain the action of the court below; and if there did exist any legal ground for its exclusion, whether of a general or special character, it is not unreasonable to presume that it was excluded on such ground.

However, had the evidence been permitted to go to the jury, and the bill of exceptions been made by the appellees, it would of course be incumbent on them to show<sup>no</sup> the specific objection made to the evidence, in the court below, in case it was not obvious to a general objection, as is well settled in this court.

The appellant has assigned for error the sustaining of the demurrer to the second, third and fourth pleas, and the action of the court upon the instructions, but as these matters do not appear to be relied upon in the appellants brief we presume they will not require any special attention from us.

The second and third pleas are clearly insufficient as a complete bar to the action, whether the matters contained in them could properly be shown in mitigation of damages or not. And the fourth plea of *liberum tenementum* is inapplicable to counts declaring for a trespass to personal property.

JAS. K. EDSALL,

*Att'y for Appellees.*

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Supreme Court of Illinois

APRIL TERM, 1863.

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HIRAM BATES, Appellant,  
vs.  
JOHN W. COURTRIGHT, Et Al., Appellees.

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APPELEES BRIEF.

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*Filed May 12 1864*  
*J. K. Edsall*

JAMES K. EDSALL,  
Atty for Appellees.

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# Supreme Court of Illinois,

THIRD GRAND DIVISION.

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APRIL TERM, A. D., 1864.

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HIRAM BATES, APPELLANT,

vs.

JOHN W. COURTRIGHT AND ORANGE D. POTTER,

APPELLEES.

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Brief for Appellant.


This is an action of trespass brought by appellees, who were plaintiffs in the court below, against appellant, defendant below, for damages to the undivided one half of sixty acres of growing corn, which appellant had, on or about the 2nd day of October, A. D., 1862, distrained, as the property of appellees, for rent. The suit in distraint for rent, finally resulted in favor of appellees and against appellant, at the February term of the Lee County Circuit Court, A. D., 1863. The evidence in the bill of exceptions shows, that immediately after the determination of the suit in distraint for rent, in the month of February, 1863, appellees made a demand for the return of the corn in question, and that appellant offered to return the same, except that portion paid for the harvesting of said corn. The record shows that on the trial of this cause in trespass, at the June Term of Lee County Circuit Court, A. D., 1863, the defendant below introduced, as a witness, William Stevens, an acting Constable in and for the County of Lee and State of Illinois, to prove that said Constable, on the 24th day of April, A. D., 1863, levied upon and sold, as the property of appellees (plaintiffs below), 119½ bushels of the corn in controversy, under and by virtue of an execution, in favor of appellant and against appellees, for the sum

of forty-seven dollars and eighty cents, to E. F. Leach; and on the 25th day of the same month he returned said execution satisfied: and also introduced, as a witness, Charles F. Lynn, Sheriff of said Lee County, for the purpose of showing that he, said Sheriff, levied on and sold, as the property of appellees, the balance of said corn remaining unsold after the sale by said Constable William Stevens, under and by virtue of a fee bill, issued out of the Lee County Circuit Court, on the 10th day of March, A. D., 1863, and placed in the hands of said Sheriff on the 11th day of March, A. D., 1863, against appellees, on the 24th day of April, A. D., 1863, to E. B. Stiles, for the sum of forty-four dollars, and on the 25th day of the same month, returned said fee bill satisfied, and paid the money to the Clerk of the Lee County Circuit Court; which testimony of said William Stevens and Charles F. Lynn, and the said execution and fee bill, together with the returns thereon, the defendant below offered in evidence to the jury in mitigation of damages; but the court refused to allow the same to go to the jury, and to the ruling of the court in refusing to allow said evidence to be considered by the jury in mitigation of damages, the defendant below excepted.

The corn in question was the property of the appellees, and as such was liable for the payment of their debts. The constable had an execution and the sheriff a fee bill against appellees, and to satisfy each of which, they had a right to levy upon and sell the corn in controversy, or any portion thereof, it being the property of the appellees, and credit the proceeds of the sales upon the execution and fee bill.

This they did. We insist that the corn in dispute having been levied upon and sold, in a lawful manner, by the officers aforesaid, and the proceeds thereof having been legitimately applied to the payment of the appellees' debts, we have a right to show these facts in reduction and mitigation of damages.

And in support of this view, we submit the following authorities:



Mr. Greenleaf, in his work on evidence, vol. II, §272, §276, says: "If the property, in whole or in part, has been applied to the plaintiff's [appellees] debt or otherwise to his use, this may be considered by the jury as diminishing the injury and consequently the damages."

One page 612, vol. II, §635, he uses this language: "So, if the value of the property has been lawfully applied to the owner's use, this, as has been shown in another place, may be shown to reduce the damages."

In note 5, page 612, §635, he says, after discussing the authorities upon this question: "Perhaps the true principle will be found to be this: that where the appropriation of the goods or their value, to the plaintiff's use, was by his consent, expressed or implied, it goes in reduction of the damages; and that such consent may always be implied, where the goods have been legally seized and sold under process against him."

The case of *Squire vs. Hollenbeck*, 9 Pick., 552 was an action in trespass, and the court says: "The question to be considered is, whether, if the property comes to the use of the owner, evidence of that fact may not be received in mitigation of damages; and we all think it may be."

The case of *Irish vs. Cloyes*, 8 vt., 30, 33, decides that a levy and sale of the plaintiff's property and the application of the proceeds to the payment of his debt, cannot be shown in justification but may be shown in mitigation of damages.—The opinion of the Court in this case, contains this language: "This application of the property, made subsequent to the demand and refusal, even without the consent of the plaintiff [owner] would clearly go in mitigation of damages;" and again in the same opinion: "This application of the property to the plaintiff's use should go in mitigation of damages and can go no further."

In *Pierce vs. Benjamin*, 14 Pick., 361. Morton J. in delivering the opinion of the Court, says: "The general rule of damages is the value of the property taken, but there are exceptions and qualifications to this rule. Wherever the property is returned and received, by the plaintiff, the rule does not apply. And when the property itself has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases and justice forbids its application. In all such cases the facts may be shown in mitigation of damages. These principles are supported by many adjudications and are founded in equity and practical convenience."

In 3 Dana's Abr., 351, c. 85, §10, the law upon this question is stated thus. "And so an executor *de son tort* may give in evidence to lessen or mitigate damages, payment of testator's debts, when sued by a legal executor or administrator."

In the case of Prescott vs. Wright, 6 Mass, 23, Parsons C. J. in delivering the opinion of the Court, says: "But as the defendant paid a debt due from the plaintiff out of the proceeds, this fact may mitigate the damages, to assess which let the cause go to a jury."

The Court held, in the case of Board vs. Head, 3 Dana's R. 489, 494, that when a Constable having an execution against the plaintiff wrongfully seized and sold plaintiff's horse and credited the proceeds on the execution, in trespass by plaintiff for the illegal seizure, that the Constable had a right to show the sale and application of the proceeds to the payment of plaintiff's debt, in mitigation of damages.

BARGE & FOUKE,

*Att'ys for Appellant.*

Supreme CourtThird Grand DivisionApril Term N. D. 1864.

Wiram Bates. Appellant

vs.

John W. Countryman

Orange S. Patten. Appellee.Appeal from Sec.Brief for Appellant

Filed April 19, 1864

J. C. [unclear] ORR

Barge & Houbre  
Attys for Appellant.

Supreme Court,  
Third Grand Division,  
April Term A. D. 1864.

William Bates, Appellant,

vs.

John W. Countright and  
Orange S. Patten, appellees.

Argument for  
Appellant.

May it please the Court:-

This is an action of trespass brought by appellees, who were plaintiffs in the Court below, against appellant, defendant below, for damages to the undivided one half of sixty acres of corn, which appellant had, on or about the 2<sup>nd</sup> day of October, A. D. 1862, distrained, as the property of appellees, for rent. The suit in distraint for rent, finally resulted in favor of appellees and against appellant, at the February Term of the Lee County Circuit Court, A. D. 1863. The evidence in the bill of exceptions shows, that immediately after the determination of the suit in distraint for rent, in the month of February A. D. 1863, appellees made a demand for the return of the corn in question, and that appellant offered to return the same, except that portion paid for the harvesting of said corn. The corn was in the custody of the constable

Wiram S. Mead, and remained in the possession of said constable when it was levied upon, taken and sold by constable William Stevens and Charles H. Gunn Sheriff of Lee County, under and by virtue of the execution and fee bill mentioned in the record. The appellant made the distress in good faith, and not for the purpose of wrongfully taking the property of appellus and detaining the same for the purpose of obtaining judgments and executions against said appellus and selling the same under such executions and appropriating the proceeds thereof to the payment of appellus debts due and owing to appellant, as in appellus brief intimated. The corn was in the custody and under the control of Constable Wiram S. Mead and was the property of appellus and as such was liable for the payment of their debts. The record shows that, on the trial of this cause in trespass, at the Court term of the Lee County Circuit Court, A. D. 1863, the defendant below introduced, as a witness, William Stevens, an acting constable in and for the County of Lee and State of Illinois, to prove that said constable, on the 24<sup>th</sup> day of April A. D. 1863, levied upon

and sold, as the property of said appellus, plaintiffs below, 119 $\frac{1}{2}$  bushels of the corn in controversy, under and by virtue of an execution, in favor of appellant and against appellus, for the sum of forty seven dollars and eight cents, to one C. H. Seach, and on the 25<sup>th</sup> day of the same month he returned said execution satisfied. Appellant, defendant below, also introduced, as a witness, Charles F. Lynn, Sheriff of said Lee County, for the purpose of showing that, he, said Sheriff, levied on and sold, as the property of appellus, the balance of said corn remaining unsold after the sale by said William Stevens, under and by virtue of a fee bill, issued out of the Lee County Circuit Court, on the 10<sup>th</sup> day of March, A. D. 1863, and placed in the hands of said Sheriff on the 11<sup>th</sup> day of March A. D. 1863, against appellus, on the 24<sup>th</sup> day of April, A. D. 1863, to C. B. Stiles, for the sum of forty-four dollars, and on the 25<sup>th</sup> day of the same month returned said fee bill satisfied and paid the money to ~~the~~ the clerk of the Lee County Circuit Court; which testimony of said William Stevens and Charles F. Lynn, and the said execution

and fee bill, together with the returns thereon, the defendant below offered in evidence to the jury in mitigation of damages; but the court refused to allow the same to go to the jury, and to the ruling of the court in refusing to allow said evidence to be considered by the jury in mitigation of damages, the defendant below excepted.

We insist that the corn in question being the property of the appellus, and as such, being liable for the ~~actual~~ payment of appellus' debts, and the constable having an execution and the sheriff a fee bill against appellus, to satisfy ~~which~~ which, they had a right to levy upon and sell the corn in controversy, or any portion thereof; and having levied upon and sold it, in a lawful manner, and applied the proceeds thereof to the payment of appellus' legitimate debts, we have a right to show these facts in reduction and in mitigation of damages. We do not claim the right to show them in justification but in mitigation of damages.

The counsel for appellus concedes, in his brief, that where the property of the plaintiff is sold under an execution,

in favor of a third party and against the plaintiff, by an officer, and the proceeds of such sale been applied to the payment of the execution, in an action of trespass by the plaintiff against the officer, the defendant (officer) would, unquestionably, have the right to show this disposition or use of the plaintiff's property in mitigation of damages. This is clearly the law corroborated by all the authorities and disputed by none.

But, the counsel for appellers claims that where the property of the plaintiff is sold under an execution against the plaintiff and in favor of the defendant, by an officer, and the proceeds of such sale been applied to the satisfaction of the execution, in an action of trespass by the plaintiff against the defendant, the defendant would have no right to show this use and appropriation of the plaintiff's property in mit-

igation of damages. He thinks he would, in such a case, certainly and clearly have the right to show the appropriation of the owner's property to the payment of the owner's debts, in mitigation of damages, but not in justification or as a full defence to the action. "Damages

are given" in such cases, "as a compensation or recompense to the plaintiff, for an injury, actually received by him, from the defendant; and they should be precisely commensurate with the injury, neither more, nor less." 2 Treatise on Evidence, § 253.

Where the property has been returned to the plaintiff and received by him, or been applied to his use by his consent, either express or implied, this can undoubtedly be shown in reduction of damages. The plaintiff has the right to accept a return of the property, and his acceptance may be shown to the jury in mitigation of damages; and if this be true, surely the law can do for him what he had a right <sup>to</sup> and could do for himself. And in the case now under consideration the law, through its proper officers, returned the corn <sup>and accepted its return for them,</sup> in controversy to and for the appellants; and we have a right to show this fact to the jury as a circumstance diminishing the injury and consequently reducing the damages. The property is returned <sup>to</sup> and received by the plaintiff and applied to his use by his implied

consent when it has been legally  
seized and sold under process ag-  
ainst him. Mr. Bruntley in his Treatise  
on the Law of Evidence, Vol. 2. § 635: after  
~~that~~ discussing the <sup>all</sup> authorities upon  
this point and carefully examining the  
New York cases cited by the attorney for  
appellus and upon which the coun-  
sel for appelleus entirely relies, lays  
down the law to be as we have stated  
and expresses his opinion upon this  
subject in the following language:  
"The return of the property to the owner's pos-  
session and his acceptance of it, being  
available to the wrong doer in mitiga-  
tion of damages, but not in bar of the  
action. So, if the value of the property has  
been lawfully applied to the plaintiff's  
use, this, as has been seen in another  
place may be shown to reduce the  
damages." And in note § to the  
above section he declares the law to  
be as above indicated, in this lan-  
guage after speaking of the New York  
cases. "Other courts, however, have held,  
that whenever the property has been ap-  
plied to the plaintiff's use, this may  
be shown in mitigation of damages;  
and cites again in the same note

he says: "Perhaps the true principle will be found to be this; that where the appropriation of the goods or their value, to the plaintiff's use, was by his consent, expressed or implied, it goes in reduction of damages; it being in the nature of a return and acceptance of the goods; and that such consent may always be implied, where the goods have been legally seized and sold under legal process against him. If the appropriation was made in any other manner, his consent may be shown by any evidence of a subsequent ratification; such as claiming the benefit of it, if it were delivered in payment to his creditor, or the like". This, then, is the law as stated by Mr. Bramley and it makes no distinction between the cases where the property of the plaintiff is sold under an execution in favor of a third party and against the plaintiff, by an officer, and the proceeds of such sale applied in payment of the ~~execution~~ debt due from the plaintiff to such third party, and those cases where the property of the plaintiff is sold under an execution against the plaintiff and in favor of the defendant, by an officer.



many adjudications, and are founded  
in equity and practical convenience:

Now, apply these principles of law to the case  
now before the court and see what damage  
the appellers have sustained. They  
owed these debts. They were first debts.  
Their property was liable for the payment  
of these debts. The corn was in the pos-  
session of suitable bread. The execu-  
tions and fee bill were in the hands  
of the officers. These officers seized  
upon and sold the corn, it being the  
property of the appellers, for a fair price  
and paid the debts of appellers with  
the money they received for this corn.

Didnt it go to the use of appellers? And  
didnt they receive the benefit of it?  
Most assuredly they did. Then, what  
damage have they sustained from  
the sale and application of this corn to  
the payment of their debts? Certainly  
none: And we have the right, by law,  
to show these facts to the jury in miti-  
gation of damages. This is the law -  
it is the equity - the reason and the  
common sense of the whole question.

In reply to the point made in appellee  
brief that the record should show

that the judgments should have been offered in evidence, before offering the executio and fee bill or introducing the witnesses Stevens and Ginn. we have any to say that such was not necessary, and even <sup>if</sup> it ~~was~~ <sup>were</sup> necessary to do so, the objection now comes too late: appellus not having made it in the court below. In support of our view of this point we ask the court to examine the following authorities: The case of *Rapley vs. <sup>Margaret</sup> ~~Jeff~~*, 2 Seam. 561. decides that it is not necessary to show a judgment to lay the foundation for the introduction in evidence, of an executio issued thereon. In this case the first assignment of error was in these words: "The admission in evidence of the executio without first showing the judgment ~~on which~~ upon which it issued" This court says: ~~The~~ "the court is of opinion that the first error is <sup>not</sup> well assigned."

That the objection comes too late is clear from the following cases: In the case of *Davis vs. Ransom et al.*, 26 Ill. 105. The court says: "The points made by the affidavit, question, first, the propriety of allowing Mix to be sworn as a witness

as he had signed a bond for costs, in the  
cause, and also was the security on the  
replevin bond. In answer to this, it  
is sufficient to say, these reasons for  
objecting to him as a witness were not  
urged in the court below. The bill  
of exceptions simply states Fink was ob-  
jected <sup>to</sup> when called as a witness, but  
the grounds of objection were not stated.  
They cannot be stated in this court  
for the first time. *Brittain vs. Bailey*,  
27 Dec. 409. The only objection in the  
court below, to the introduction of  
the witnesses Stevens and Lynn and  
the replevin and fee bill was that  
such evidence was inadmissible  
in mitigation of damages. There  
was no objection made by appellee,  
plaintiffs below, because the judgments  
were not first offered as a founda-  
tion, and we submit that the ob-  
jection comes too late now. It will  
also be remembered that the parties  
to the trespass suit in the court be-  
low, were also the parties to the re-  
plevin and fee bill. These authori-  
ties and this argument we trust, satis-  
factorily dispose of the appellee's objection  
to the admission of the testimony of Stevens

And your and the execution and be  
will, because of the failure in the record  
to show the offer of the judgments as a  
foundation for the introduction of all  
this testimony. This being the case; there  
is then but one question before this  
court, and that is the admissibility of  
the excluded testimony in mitiga-  
tion of damages. And we hope ~~for~~  
a careful examination of all the au-  
thorities cited in the briefs of the respec-  
tive parties to this ~~and~~ cause, will  
convince this honorable court of the  
truth and correctness of our position  
and view upon this question. With  
these remarks, your haste made ~~it~~  
~~the~~ for want of sufficient time to  
more fully present and elaborate  
these ~~points~~ <sup>these questions</sup>, we herewith submit the  
case to the consideration and de-  
termination of his honorable court.

Barry & Kunkin

Attys for Appellant

Supreme Court

Third Grand Division

April Term A. D. 1864

Horiam Bates, Appellant  
vs.

John W. Countryright and

Orange D. Patten, Appellus.

Argument for Appellant,

Filed April 22, 1864

J. S. Lee, Clerk

Barg & Hanks

Attys for Appellant

# SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1864.

HIRAM BATES, *Appellant*,  
*vs.*  
JOHN W. COURTRIGHT AND  
ORANGE D. POTTER, *Appellees*. } *Appeal from Lee.*

## ABSTRACT OF THE RECORD.

- 1     SUI commenced by appellees, who were plaintiffs below, against appellant, defendant below, at the June Term of the Lee County Circuit Court.
- 3, 6,     Declaration in trespass—containing three counts—by appellees against appellant, for damages for distraining and carrying away certain growing corn.
- 7     First Plea, general issue.
- 8, 10     Second Plea alleges that, on or about the 12th day of September, A. D. 1861, appellant demised and leased to said appellees the land described in said appellees' declaration for one year, and was to have one-half of all the crops to be raised; that said appellees planted said corn, mentioned in declaration, in spring of 1862, and that afterwards, on 15th of September, 1862, the appellees abandoned said premises and left said corn ungathered and unharvested, and that said appellant harvested the said corn and equally divided the same, and from the share of said appellees, said appellant took one-fifth of said share of said appellees, so abandoned, to re-imburse himself for the care and labor of husking and gathering; that appellant afterwards made a tender of said corn, so divided, to said appellees, but that they refused to accept it; that afterwards one William Stevens, constable, levied upon said corn as the property of appellees, and

took it from the custody and control of appellant; that said appellees, when they abandoned the farm of appellant, and ever since said time and at the present time, are insolvent, and that a suit against them to recover rent due to appellant would be unavailing, which were same trespasses complained of in plaintiff's declaration.

- 10, 15 Third Plea alleges, in substance, that the farm was rented by appellees from appellant; that appellant issued a distress warrant and had the same levied on the corn; that he failed in his distress suit, and that afterwards he tendered said corn back to said appellees, and that the same was afterwards taken by virtue of executions and fee bills against said appellees, and sold to satisfy and did satisfy debts due by appellees, &c.
- 19 Fourth Plea of *liberum tenementum*.
- 21 Appellees add *similiter* to first plea.  
Motion for security for costs.  
Motion for continuance.
- 22 Demurrer to second, third and fourth pleas.  
Demurrer sustained.
- 25 Jury trial; verdict guilty. Damages \$250.  
Motion made for a new trial.
- 26 Plaintiff's remit \$50, part of verdict.  
Motion for new trial overruled, and judgment for \$200 and costs.
- 27 Defendant prays an appeal. Allowance of appeal.
- 30 Bill of Exceptions to be settled and filed in thirty days.  
Appeal bond.
- 27, 29  
31 *Bill of Exceptions.*

The plaintiffs below then called Isaac Courtright, who testified that plaintiffs had rented farm of defendant for one year; defendant to furnish half the seed and half the feed and the teams, and was to get half the crops; they were on Bates' farm in

April, 1862; they raised grain—raised 60 acres of corn off the place; Potter moved away in last of September, 1862; Court-right moved away on 3d of November; his wife was at my house during the month of October, while John was working out; he was helping Turnbaugh to thresh; he was not to farm the place any longer than that year.

32 On cross-examination, witness stated that plaintiff, John Court-right, begun to work for Turnbaugh some time in October; worked about two weeks; brought his wife to witness's house about the 1st of October; brought a bed and other things with him; he went back to Bates' about two weeks before the 3d of November; did not work on Bates' place after first leaving, except to dig his potatoes.

The plaintiffs next in introduced

33 *Joseph Turnbaugh.*—Were about 60 acres of corn raised by plaintiffs; were two pieces—best piece would yield about 25 bushels per acre; corn last fall was worth about 25 cents per bushel in that neighborhood; corn harvest commenced about last of November.

*Cross-Examination.*—This land is next to mine—of same quality; don't know why it didn't yield as much as mine; my corn was planted sooner and tended better; piece that yielded 25 bushels per acre was the best; don't know the other piece.

34 *Hiram S. Mead* was next witness.—Have seen the corn on Bates' place; distrained one-half of 60 acres of corn on Bates' place, which belonged to Courtright and Potter; October 3d, 1862, is the date; corn was standing on the ground; Bates directed me to make the distress.

35 *Cross-Examination.*—Got Mr. Winebrenner to harvest this corn; gave him a written authority; authority spoken of by witness; the corn was cribbed on place; I tendered plaintiffs' (below) the corn that was then on the place; made this tender to them in town, and told them I would go with them and give it to them, and they refused to go or to take it; this was before the 28th of April, 1863; defendant, Bates, was present; there appeared to be a difference of opinion between the parties as to the amount of corn; I tendered them the amount of corn that

was there cribbed up, being one-fifth less than half of one piece and one-third less than half of other piece; tender was upon condition that amount in crib should be received as a full discharge of plaintiffs' claim.

35 *Marshall Gurton* was plaintiff's next witness. Knew cornfields in question; one piece would yield about 25 bushels per acre; this was the upper piece; never saw the other close by; corn was worth last fall 25 cents per bushel; corn last spring was worth from 25 to 40 cents.

*Cross-Examination.*—Generally commence husking corn about the fore part of October; corn was then worth about 25 cents.

36 Plaintiffs next called *Asa Leidy*.—Ain't very good judge of corn in the field; put one piece at about 25 bushels per acre, and the other 15 to 16 bushels per acre—this was lower piece; am a carpenter; am farming now; corn last winter sold for 25 to 50 cents; went to see corn at request of plaintiff, Potter.

36 *J. R. S. Robbins* was called by plaintiffs.—Upper piece would turn out 20 or 25 bushels per acre; corn was worth from 25 to 40 cents; don't know of other piece being destroyed; saw horse in the poorer piece once or twice, when I was going to a funeral; never went through the corn; horse belonged to Bates.

*Cross-Examination.*—Don't know which piece they husked first; saw horse in there several times, and in adjoining clover-field.

Plaintiffs' next witness was *Isaiah Brink*.—Saw Bates' horse in lower piece of that corn last fall; upper piece would yield about 25 or 30 bushels per acre.

Plaintiffs then re-called *Marshall Gurton*.—Saw cattle and horses in this corn; it was then partly husked; this was on 8th of December, as I was going to a funeral.

37 *Cross-Examination.*—Some were in the corn not husked, some in the husked corn and some in the clover; Bates was at the funeral too; don't know how long he was there.

*Isaac Courtright* re-called by plaintiffs.—Saw a little piece of this corn; was through a little corner; think it would yield from

30 to 35 bushels to the acre in one piece, and about 15 bushels in the other.

38 The plaintiff then read to the jury in evidence, the following distress warrant :

Distress Warrant.

The plaintiffs thereupon rested their case.

The defendant (below) introduced as a witness, Lyman Bates. Have been through the corn in controversy ; helped them husk ; would not pick lower piece for it ; best, or upper piece, would go about 12 or 15 bushels per acre ; lower piece, not over 5 bushels per acre ; the corn was very poor ; weeds were high ; corn was poorly tended ; never in best piece.

*Cross-Examination.*—Am one of defendan's ; don't know how much corn yielded.

39 *Warren Pretyman.*—Am a farmer for 20 years ; poorest piece of this corn would yield about 5 bushels per acre ; the best piece not more that 15 or 16 ; they got a man to see that this corn was picked and cribbed ; there were about 25 bushels sold at 40 cents per bushel ; live near defendant. <sup>2 J<sup>v</sup></sup>

*Henry Winebrenner.*—Bates got warrant out ; I picked some of the corn under this written authority shown witness Mead ; in all there were about 600 bushels ; upper or best piece about 25 bushels per acre ; lower or poorer piece about 5 bushels per acre ; last February or March, as Bates and I were going to town, we met Hiram S. Mead and plaintiff ; Mead said, " We are just going up to give the boys (Courtright and Potter) that corn." Mr. Bates said, " Well, it is out there cribbed up ready for you."

40 *Hiram S. Mead* was defendant's next witness.—Remember conversation last witness mentioned ; plaintiffs wanted me to go with them and deliver them this corn ; we went and met Bates and Winebrenner ; Bates said the corn was cribbed up there ; there was something said about an execution ; Courtright said he had the money to pay the execution, if Bates would give up the corn ; can't state whether Bates refused to give up the corn ; Bates wanted to keep what was kept for harvesting the corn ;

Bates said if I delivered this corn, he would hold me responsible; can't remember if it was in this conversation, that Bates said he would hold me responsible if I delivered it.

*Cross-Examination.*—Courtright commenced this conversation about getting the corn. The reply was then made that the corn was there in the crib. Can't say that Courtright said he had money in his pocket to pay that execution or not, at that time. There was conversation at different times. This was not the day I was in Townsend's office; I think Courtright told Bates he was ready to pay that execution as soon as he gave up the corn; Bates didn't want to give up the one-fifth and the one-third that was kept for gathering.

41 *Direct Examination Resumed.*—I did tender that corn to Courtright and Potter as before mentioned; don't remember the date; am not certain that Bates said he would not give up that corn until that execution was paid. I then had an execution in favor of Bates. Heard so many conversations that I can't remember what was said at any one time.

*Jacob Cope.*—Helped to pick about two thirds of this corn. Winebrenner picked after I left; in all there were between 600 and 700 bushels. It was put in two separate cribs, and divided equally, except one-fifth of one piece and one-third of the other piece.

*Cross Examination.*—Know there was about 600 or 700 bushels in all. Never saw it measured. It was of good quality. 119 bushels of this corn was sold for 40 cents a bushel. Sold in May. All out of same crib and by constables Mead and Stevens. Mead sold \$40 worth. Stevens sold 119 bushels at 40 cents a bushel. It was the balance that Mead sold for \$40.

42 *C. F. Merrill.*—Think that there was between 600 and 700 bushels in all of this corn; the poorest piece was not worth husking.

*Cross-Examination.*—Defendant is my father-in-law.

Defendant (below) next offered in evidence the authority from Mead to Winebrenner, and asked to be allowed to read the

same to the jury, which request the court refused; to which ruling of the court the defendant excepted.

Defendant next introduced William Stevens as a witness, and offered to prove by said Stevens that he (Stevens) was an acting constable in and for Lee County, Illinois; that he received an execution from Platt Townsend, Esq., an acting justice of the peace in and for said county, in favor of Hiram Bates (defendant) and against John W. Courtright and Orange D. Potter, (plaintiffs in court below).

Execution here shown witness was the one under which he acted.

43 Execution and return thereon.

By <sup>virtue</sup> ~~return~~ of said execution he levied upon and sold 119½ bushels of the corn in question, as the property of the plaintiffs, and that said execution was satisfied to that amount; which testimony the Court refused to allow to go to the jury; to which ruling of the Court the defendant excepted.

44 Defendant next offered to read in evidence the execution and return referred to by said witness, William Stevens, which the Court refused to allow to be read to the jury; to which refusal the defendant excepted.

The defendant next introduced Charles F. Lynn as a witness, and offered to prove by said Lynn that he was the acting sheriff of Lee County; that as said sheriff he received a fee bill from the clerk of the Lee County Circuit Court, in favor of Hiram Bates, plaintiff, and against John W. Courtright and Orange D. Potter as defendants; that the fee bill shown him was the fee bill in question; that by virtue of said fee bill he levied on the corn in question as the property of said Courtright and Potter, and sold the corn constable Stevens had left unsold, to Elias B. Stiles for the sum of \$44, and paid the same to the clerk of the Lee County Circuit Court, and returned said fee bill satisfied.

45 Defendant then offered the fee bill and the return thereon, referred to by said witness Lynn, in evidence, to the jury.

46, 47 Copy of fee bill and return thereon.

48 Which said testimony of said witness, Lynn, and the fee bill and return thereon, the Court refused to allow to go to the jury, to which refusal the defendant excepts.

All of said testimony of said Stevens and Lynn, and the execution and the fee bill, together with the returns on each, the defendant (below) offered in mitigation of damages, and not as a full defense to the action; all of which the court refused to receive and allow the jury to consider, to which ruling of the Court the defendant excepted.

The defendant then rested his case.

And this was all the testimony offered in the case.

On the part of the plaintiffs, (below,) the Court gave the jury the following instructions:

1. There is no evidence before this jury of any executions whatever, and the jury have no right to take into consideration any statements made in their hearing about any executions.
2. This jury has nothing to do with the question as to whether the farm was or was not properly worked.
3. Whether the property was or was not sold to pay debts of the plaintiffs to defendant is a matter which the jury have no right to take into consideration.
4. That the law in this case is, that if the jury believes from the evidence that the defendant wrongfully took the corn in question from the premises of these plaintiffs, and husked and harvested the same, that then and in that case, the defendant cannot acquire, by any such wrongful act, any claim to compensation from these plaintiffs for any labor, trouble, time or expense in the cutting, harvesting, or taking care of said corn.
- 49 5. If the jury believe from the evidence, that the defendant took or distrained the corn in question from these plaintiffs for rent, and that in fact there was no rent due from these plaintiffs to this defendant; that such taking or distraining was a trespass

49 in itself, and was wrongful, and the defendant is liable for any damages which could arise to these plaintiffs from such taking or distraining to the full value of said corn.

6. If a person wrongfully takes the goods of another, he cannot subsequently discharge himself from liability for the trespass by any offer to return them.

7. The jury in this case are not at liberty to take into consideration any claim, account or debt, due from these plaintiffs to this defendant at any time, in making up their verdict in this case.

8. If the jury find for the plaintiffs in this case, they are at liberty to assess the value of the corn in question at its highest market value.

9. An offer to return property does not amount to a tender unless it is direct and positive, and not coupled with any conditions.

10. An offer to return a part of property taken by trespass, cannot be treated as a tender of the property, as to which such trespass may have been committed, and the owner is not obliged by the law to accept a tender of a part, especially when offered as the whole.

50 To the giving of said instructions the defendant excepted.

The defendant asked the following instructions:

1. The jury are instructed that damages are given as a compensation, recompense or satisfaction to the plaintiffs for an injury *actually* received by him from the defendant, precisely commensurate with the injury, being neither more nor less; and if the jury believe from the evidence that the plaintiffs have sustained no injury from the defendant, then they must find the issues for the defendant.

2. The jury are instructed that they must be satisfied that the defendant himself, or by some agent by his direction, com-

50 mitted the trespass complained of, if they believe a trespass has been committed, before they can find for the plaintiffs; and if they do not so believe they must find the defendant not guilty.

3. If the jury believe from the evidence that defendant Bates made a tender of all the corn in question, in as good condition as it was before taken to the plaintiffs before the commencement of this suit, then the jury can find but nominal damages for the plaintiffs, if they believe the defendant did wrongfully take the property in question.

4. The jury are instructed that the measure of damages in this case is the actual injury sustained, and if the jury believe from the evidence that the plaintiffs have sustained no damages by the taking of the corn in question, if they believe that the defendant wrongfully took the same, then the measure of damages is but nominal, and the jury should so find.

51 5. The jury are instructed that if they should believe that the defendant did take the corn in question wrongfully, and if they believe the plaintiffs have sustained no damages, the measure of damages will then be the price of the corn at the time it was ready for market.

The Court gave the second and fourth instructions as asked by defendant, but refused to give the first and third, as asked, and refused to give the fifth at all, to which refusal of the Court to give the first and third, as asked, and to give the fifth at all, the defendant excepted.

The Court modified and changed the first instruction by adding after the last word, "yet if the property is wrongfully taken, the law implies, and the jury should find for the plaintiffs."

And adding in the third instruction after the words, "before the commencement of this suit," these words, "and not coupled with any conditions."

To which modifications and additions, and to each of them, and to the giving of the same so modified, the defendant excepted.

The errors assigned are as follows:

1. Court erred in sustaining demurrer and defendant's special pleas.
2. Court erred in refusing to allow witnesses Stevens and Lynn to testify.
3. Court erred in refusing to allow the execution and fee bill, together with the returns thereon, offered to be read in evidence.
4. Court erred in refusing to allow the application of the sales of the corn under the execution and fee bill, to the payment of the plaintiff's (appellee's) debts, to go to the jury in mitigation of damages.
5. The court erred in refusing to allow evidence in mitigation of damages to go to the jury.
6. Court erred in giving plaintiff's instructions.
7. Court erred in modifying some, and in refusing others of defendant's instructions.
8. Court erred in overruling motion for a new trial.
9. Court erred in rendering judgment in favor of plaintiffs and against defendant.

BARGE & FOUKE,  
*Att'ys for Appellant.*

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SUPREME COURT,

Third Grand Division,

APRIL TERM THREBOT, A. D. 1864.

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HIRAM BATES, *Appellant*,  
vs.  
JOHN W. COURTRIGHT AND  
ORANGE D. POTTER, *Appellees*. } *Appl. firm Lec.*

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ABSTRACT.

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BARGE & FOUKE,

Attorneys for Appellant.

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*Filed April 19, 1864*

*J. Selmon M.*