

13008

No. _____

Supreme Court of Illinois

Brown

vs.

Graham

71641  7

STATE OF ILLINOIS,
SUPREME COURT.
Third Grand Division.

No. 148.

1860

Peperd

Brown

vs

Graham

12008

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ROMAN L. BROWN }
 vs.
ROBERT H. GRAHAM. }

APPELLEE'S BRIEF.

THERE was no variance between the ~~fact~~^{and} and declaration. The middle initial letter is no part of the name and may be rejected.

It was not proper for the witness, Merrill, to answer questions asked for the purpose of contradicting the return which he had made as sheriff. Sheriff's return could not be contradicted by parol. 2d. The Record does not show that exception was taken upon the trial to the refusal of the Court to permit the questions to be asked. As to the two first questions, the words of the Record are, "Objection sustained; defendant excepted." As to the other question Record says, "Objection sustained—exception by defendant." We think the Record ^{shows} clearly to what the exception was taken and at what time, not by inference, but by exact statement.

The question asked the witness, Wheeler, was improper; it called for declaration of the defendant not accompanying an act, and not brought to the knowledge of plaintiff; but there is no proper exception. Record says, objection sustained, exception by defendant. It don't appear when that exception was taken.

The 8th interrogatory in Gould's deposition is as follows:

"Was it *understood* that there was no warranty of the title?"

It was not competent testimony, and the objection was well taken when the deposition was read.

APPELLANT'S BRIEF.

ROMAN L. BROWN, vs. ROBERT H. GRAHAM.

The Court should have dismissed this Suit because of the variance between the Writ and the Declaration. 20 Ill., 46 : 5 Gil., 77 : 5 Halsted, 230.

The Court should have allowed the witness Merrill, to answer the questions of Defendant below for the purpose of proving the issue of property in Henry S. White, and of proving that the property was not in Plaintiff below.

The Court should have allowed the witness Wheeler to answer the questions asked him by Defendant below and should not have excluded that portion of his testimony which related to his acting as the agent of Gould. An agent is a competent witness to prove his own authority. 1 Greenleaf on Ev., Sec. 416.

The Court should not have suppressed the 8th Interrogatory and Answer in Deposition of Gould, as the objection was first made on trial and both Interrogatory and Answer were proper. Objections to a deposition must be made before the trial.

The Instructions for Plaintiff below were not based upon the evidence, were not properly drawn and were not the law as applicable to the case and were calculated to mislead the Jury and should not have been given.

The Instructions asked by Defendant below were based upon the evidence and stated the law correctly and should have been given.

The Instructions asked by Defendant below, which were refused as not in time, should have been given, as there is no rule on the subject, except if any, a mere traditionary and verbal one which may be enforced or not at the option of the Court. 22 Ill., 173.

The motion for a New Trial should have been allowed, because of the errors in the trial and that the verdict was contrary to the evidence.

The verdict of the jury was insufficient to authorize a judgment, in that it did not find the value of the property and a judgment on such a verdict is bad on error.

The judgment is not the proper one for the action of Detinue. The judgment should be in the alternative for the return of the property or the payment of its value as found by the Jury and none other is authorized by law in this action. It is the right of the Defendant to return the property or pay its value as found by the Jury. On the two last points, see 1 Chitty on Pleading Title Detinue, 124 :— 1 Wheaton's Selwyn Nisi Prius, 494 : 1 Archabald's Nisi Prius, 472 : 5 Miss. R. 489 : 6 Monroe R., 52 : Walker R., 538 : 7 Ala. R., 189 : 3 Stewart, 221.

On the point that such a verdict and judgment are fatal on error, see 4 Yrger, 570 : 5 Ala. 503 : 7 Ala 807 : 2, Starkie on evidence, 494.

A. WEBSTER, Attorney for Appellant.

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Brown vs Graham

Plffs Brief

Filed Apr 20. 1860

L. Deland

clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ROMAN L. BROWN }
 vs.
ROBERT H. GRAHAM. }

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"Was it *understood* that there was no warranty of the title?"

It was not competent testimony, and the objection was well taken when the deposition was read.

The evidence is not all given; the Court will presume that it sustains the verdict.

The plaintiff's instructions are good law.

The Court had a right to require instructions to be presented before the final argument. The Court had passed upon all the instructions on both sides, prior to the time when this last batch was asked. The Circuit Court had a right to place some limit to the asking of instructions.

As to the point, that the verdict was insufficient to authorize a judgment because it did not find the value of the property, we answer the statute cures that. 1 Purple's Stat., p. 493, § 6.

If the judgment is not in proper form, it should be corrected in this Court.

But the judgment is a proper one for the return of the chattel.

2 Saund. 746.
1 Scam. 207.

GLOVER, COOK & CAMPBELL.

148-

Roman L. Brown

vs

Robert H. Graham

Brief

Filed May 28-1860

L. Lillard
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ROMAN L. BROWN }
 vs. }
ROBERT H. GRAHAM. }

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148

Kornan L. Brown

15
Robert H. Graham

Brief

Filed May 28 - 1860

L. Chelmsford

Clerk

Brown

148 vs Mo. to continue & for certiorari
Graham

of record
The Sudyt in this case has been entered
in the Circuit Court, ~~an~~ an erroneous
& informal Sudyt appears on the
record here filed. The affidavits
explain how it has occurred we
ask for time to have the Sudyment
entered & certipine to this court

B. C. Cook for Motion

148 - 135
Brown is Graham

Suggestions in Support
of meteor

Filed May 5, 1860
L. Veland
C. H.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

ROMAN L. BROWN }
vs. }
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GLOVER, COOK & CAMPBELL.

148.

Roman L. Brown

74.

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Filed May 28-1860

L. Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

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GLOVER, COOK & CAMPBELL.

148

148

Roman L. Brown

vs

Robert H. Graham

Brief

²⁴Filed May 28-1860

L. Leland
Clerk

In the Supreme Court of the State of Illinois, for the 3^d
Grand Division. At April Term AD 1860.

Roman L Brown

"

Robert H Graham.

State of Illinois

Rock Island County }^{ss.} In O Wilkinson of said county
being duly sworn on oath states that he was one
of the attorneys of the said named Robert H Graham
in the Circuit Court of Rock Island County and
and was present at the trial thereof and at the
time of the overruling by the Court of the motion
of said Brown, defendant in the Court below, for
a new trial and the announcement by the Court
of the entry of judgment for the plaintiff in said
case in said Court. That in the overruling of said
motion and in the announcement by the Court of the
judgment, nothing was said by ~~the~~ ^{the} Court of
said Court as to the ~~that~~ judgment was entered,
or the form in which it should be entered except
only that the judgment was for the plaintiff in
said action, the said Graham, That affiant has
this day examined the docket kept by the said
Court at the January Term AD 1860, at which
the said judgment was entered, and that the
entries appearing on said docket in said cause
are as follows. "9 - Dec't to hear, sustained - 30
July Term - 31 Verdict for plaintiff ~~for~~ the damages

at \$45 - 2nd for new trial by deft. - 4. 2nd overruled.
Judgment. - appeal prayed allowed by giving bond in
\$150 with John McGonigle as surety within this month
bill of exception to be filed in this month" That said
entries are in the handwriting of Hon J W Drury the
presiding Judge of said Court at said term, and that
no other entries or remarks whatever appear upon
the said docket of said term in said case.

That according to the practice of said Circuit Court
the records of its proceedings are ^{written} ~~made~~ up by the
Clerk of said Court ^{in vacation} after the adjournment of the
term, and that the records are not read in
open Court. And that affiant had no knowledge
of either does he believe that the said Plaintiff Graham
or any of his attorneys had any knowledge of
the form of judgment entered in said case
by the Clerk of said Court until after the said
case was appealed to the Supreme Court.

Signed & subscribed before me

Geo D Wilkinson

this 3rd day of May A.D. 1880.

Witness my hand & seal of the

County Court of 2nd County

Jo. Corbett

Clerk County Court R. I. Co.

State of Illinois

Rock Island County

Quincy McNeil being duly sworn
on oath states that he is Clerk of the Circuit Court
of said County and has been such clerk for two
years and more past past. that according to

the practice of said court the records of its proceedings and judgments are written up by the Clerk of said court after the adjournment of the term of said court, and that the records are not read in open court. That affiant as such clerk is at the present time engaged in writing up the records of said January Term 1860 of said court, and that the judgment of said court in said case above named has not yet been entered up and written in the said records. That the said judgment as it appears in the transcripts sent up to the Supreme Court in the said case was written by this affiant in the form it appears in said transcripts, under the supposition and belief that the form thereof was proper, and that if the same is informal or improper, it was by and through the mistake of this affiant alone. That the said court in pronouncing the judgment, also in entering the same on its docket did not designate the particular kind of judgment that should be entered, but merely that the judgment was for the plaintiff.

Luning M. Wheel

Subscribed to before
me this 3^d day of May
AD 1860. Witness my hand
Seal of the County Court of
County.

Go. Court Clerk County Court N. H.

148-105

Brown vs Graham
2 affdts.



Filed May 5. 1860
L. Keland
Clerk.

APPELLANT'S BRIEF.

ROMAN L. BROWN, vs. ROBERT H. GRAHAM.

The Court should have dismissed this Suit because of the variance between the Writ and the Declaration. 20 Ill., 46 : 5 Gil., 77 : 5 Halsted, 230.

The Court should have allowed the witness Merrill, to answer the questions of Defendant below for the purpose of proving the issue of property in Henry S. White, and of proving that the property was not in Plaintiff below.

The Court should have allowed the witness Wheeler to answer the questions asked him by Defendant below and should not have excluded that portion of his testimony which related to his acting as the agent of Gould. An agent is a competent witness to prove his own authority. 1 Greenleaf on Ev., Sec. 416.

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The Instructions for Plaintiff below were not based upon the evidence, were not properly drawn and were not the law as applicable to the case and were calculated to mislead the Jury and should not have been given.

The Instructions asked by Defendant below were based upon the evidence and stated the law correctly and should have been given.

The Instructions asked by Defendant below, which were refused as not in time, should have been given, as there is no rule on the subject, except if any, a mere traditionary and verbal one which may be enforced or not at the option of the Court. 22 Ill., 173.

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On the point that such a verdict and judgment are fatal on error, see 4 Yrger, 570: 5 Ala. 593: 7 Ala. 807: 2, Starkie on evidence, 494.

A. WEBSTER, *Attorney for Appellant.*

Argument for Appellant

Roman Le Brown }
 as } He has
Robert A H Graham }

To the Supreme Court:

On the fact of the Appellant in the above cause we wish to offer a few suggestions to be considered by the Court in making up its judgment in this cause.

This is an action of Detinue - of which our Illinois Reports afford but one or two reported cases & is a form of action but rarely reported to a case which are reported do not present the questions which arise on this Record, we therefore commend it to the particular attention of this Court.

The suit was brought by the Appellee for the recovery of a horse & the Appellant depends chiefly on the grounds that the Appellant is not a owner of the horse in the sense required by our Statute & that if he has any interest in the horse it is as a tenant in common of the horse with the Appellant & that therefore he is not entitled to maintain this suit - The proof does not show

that the horse was ever in Puffy's possession & if it was paid for & on endorsement on the Execution in favor of White then the intent of Breuer belonged to White & the proof would not show that the Puffy had ever a special property in the horse.

We claim that the court below should have dismissed the suit on motion of Appellant because of the variance between the writ & declaration in that the writ was against Roman Le Brown & the declaration was against Roman Brown. As appears from the record a motion was made to dismiss in the first instance, & was overruled, which decision of the court below is assigned for error, that this was a proper method of taking advantage of the writ see 20 Ill 46 & 5 Gilman 77.

Whatever may be said about the middle letter, & whether it was necessary to sue with it or without we claim that the Appellee having commenced the suit either with or without it, he must make all his subsequent pleadings conform to the writ for the purpose of avoiding an apparent variance upon the record.

In regard to the second point we claim that the witness Merrill should have been allowed to have answered the questions of the defendant.

In the pleadings there was an issue of property in Henry S White, who was the Plaintiff in the Execution on which the horse was sold. The questions whether Graham the Plaintiff herein (but who was attorney for Henry S White) paid the Sheriff for the horse, or whether the Sheriff sold the horse to the Plaintiff as to any more bidder at the sale or to him in his capacity as attorney for White, the Plaintiff in the execution (as the return to the Execution would seem to indicate) & whether by the Sheriff's return was meant that the horse was sold to Graham personally or to Graham as attorney for White & whether Graham paid the cash for the horse or whether the amount of his bid was endorsed on the White Execution as so much received by White - all had a tendency to prove that the property was White's & not Graham's - we therefore claim that the court erred in not allowing the witness to answer these questions for they were clearly proper for the purpose above mentioned.

We apprehend that it can make no difference should it be claimed that Graham had a special property in the horse - for there never was an issue of property in White & the owners to the questions above referred to would have a direct tendency to prove the issue on the part of the defendant.

This may raise the question of a construction of our statute on the subject of detinue, which provides that on the filing of an affidavit that the Plff is the owner of the property a writ may issue. From this language we claim that the Plff must show that he is the owner of the property - & that proof that he is entitled to the immediate possession of the property is not sufficient in the action of detinue under our statute as it would be in an action of Replevin,

We claim also that the above questions are proper as tending to show that the Plff below never had title to the horse.

As to the third point we claim that the witness Wheeler should have been allowed to have answered the questions put to him, & that said Gould

Argument for Appellant

Roman Le Brown }
 as } De tunc
Robert A H Graham }

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direct you while at Moline to bring the horse to him after the sale. Although the answer to the following question should not have been included, instead of taking the horse as the agent for the request of the Plff did you not take him at the time you have testified of as the agent of & at the request of Gould. Witness answered, I did not come down here after the horse I took him at the request of both; It appearing that Gould made their request at the Post Office at Moline while the horse was a Roach Island the court on motion excluded all the testimony of the witness relating to Goulds requesting him to take the horse.

The Plff had attempted to show that Charles Wheeler the witness acted as the agent & at the request of the Plff, & the Deft attempted to contradict this by showing that Wheeler the witness went after the horse at the request of Gould & for that purpose the above questions were asked, the answer were ruled out on the ground that the horse was not present at the time Gould requested Wheeler to go after him - It is certainly novel & strange

doctrine of a man cannot appoint
an agent to perform some act with
reference to absent property, but if
such is the law we suppose the Court
will so decide. It certainly is
is not contended that an agent
is not competent to prove his own
authority when it is by parol.

The only other question in this
connection is was it important
to show that the witness Wheeler
was acting as the agent of Gould &
we claim that it was, for the purpose
of showing & it certainly would have
a tendency to show that the horse
was near in the Appellees' possession
& that the horse when it
came into the possession of the
Appellant in the afternoon came
there as Goulds property. By the
by the proof shows that there was
no one there at the time the horse
first came to Appellant's stable
We claim that the Court erred in
excluding the testimony of this witness.

As to the date & hour of the seizure
of George Gould, we claim that
the motion to exclude coming first

an trial was too late to be considered & that the Int & Ans were both highly proper. And should it be contended that the same evidence was put before the jury in another way we will reply that it is not the province of the court, to decide upon a sufficiency of evidence —

As to Appellee's Instructions

The first Instruction is drawn entirely with reference to the sale from Brewer to Gaudel of the White Horse & as that is not the horse in question here & not the one that was taken on the White Execution we claim that the Instruction was not based upon the evidence, even if it was good law as applicable to a proper case.

But we claim that it is not good law as applicable to this case — even if the white horse were in question — The defense is that the horse belonged to both Peff & Sept as tenants in common & that therefore the Appellee could not maintain an action to recover the possession of the horse from the Appellant.

So long as the law recognizes that inchoate property may be owned by two or more persons as tenants in common

so long but one of the owners can be in the actual possession of the property & the possession of the other owners is & can be only constructive; we claim therefore that a bona fide sale of an undivided part or interest in a piece of indivisible property may be good & valid - without any actual delivery of possession, on the ground that such a delivery of an undivided interest would be impossible & upon the ground of the well known maxim of the law "That the possession of one of two or more tenants in common of indivisible property is the possession of all" & both owners cannot be in the actual possession at the same time,

This is true in whatever way such claims to property may originate. A similar case is upon the dissolution of a co partnership, when the property of the partnership belongs to the original partners as tenants in common. In such a case no one claims that the entire property can be taken for the private debt of the partner who happens to be in possession without regard to the rights of the other partners - We also claim that the Instruction is not drawn upon a supposed

as hypothetical state of fact—as an instruction should be & does not direct the jury what verdict to find in case they find the supposed state of fact to be true, Also the White horse is the one referred to in the first instruction was traded away as the proof shows before the Exemption was issued So that in whatever light the dispute may be viewed we claim that it was at least calculated to mislead the jury & should not have been given

The second & third of Plffs instructions we claim are subject to the same objections as the first but particularly to the objection of not being drawn upon a hypothetical state of fact with a direction of how the jury are to find a verdict in case they believe such fact to be true

The Instructions asked by the Appellant & refused by the court we claim presented the law fairly & hence it should have been given. The Plff here as Appellee is chargeable with whatever mistake there might be & is not to be regarded as an innocent third party, He being attorney for White stands

in the same light & in the same position
as White himself & we claim that if White
the Plff in the operation or the Plff in this
suit had notice of the adverse claim to
the horse of Gould, that he could not ^{impeach}
the rule from Breuer to Gould - especially ^{because the property was not} as the
claim in this case was, & the evidence showed
that Breuer & Gould were tenant in common
of the property & the rule of the law is that the
possession of the one of two or more tenant in
common is the possession of all. ~

As to the Instructions which were refused
as not asked in time, the Bill of Exceptions
shows that they were disregarded ~~as~~ because
of a verbal or traditional rule of the court
that all Instructions shall be asked before the
commencement of the closing argument,
We can see very little sense or propriety
in such a rule at all, but certainly none
when it exists only by tradition & in
the mind of the Court & is so wholly committed
to writing as a part of the records of the court
& may be suppressed or laid aside at the
option of the Judge. On this subject we
wish only to refer the court to the very
reasonable & appropriate language used by this
court in 22 Ill 173. ~

The more important & as we think decisive
point in this whole case is in relation
to the verdict of the jury & the judgment
of the court below, both of which are
insufficient & erroneous —

In the action of Detinue as every elementary
work in which the title of Detinue is
used will show the jury must find
in addition to other matters — the value
of the property. The judgment must then
be for the return of the property or for
the payment of its value as found by
the jury. It is the privilege of the Deft
to keep the property & pay its value as
found by the jury — or to return the property
if he so chooses & the property he in his
power to return. In this case the judgment
is simply for the return of the property which
is clearly a beyond question erroneous
Upon this point we wish only to refer the
Court to the list of authorities printed
in the Appellate Printed Brief.

We also claim that the Court erred
in refusing to grant a new trial
by reason of the errors previously
committed by the court & because
the verdict of the jury was contrary
to the evidence. A. Webster
Atty for Appellant

R L Brown
vs 148
Realt H Graham

Argument for
Appellant

Filed April 20. 1880
L. Leland
Clerk

Page 1

RECORD.

Pleas before the Honorable J. Wilson Drury Judge of the Sixth
Judicial District of the State of Illinois, at a term of the Circuit Court begun and held at
the Court House within and for the county of Rock Island and State aforesaid, on the
Second Monday, the Smith day of January
in the year of our Lord one thousand eight hundred and Sixty

Present, Honorable,

J. Wilson Drury JUDGE.

Moses G. Merrell SHERIFF.

Luncy McNeil CLERK.

Robert H. Graham

VS.

Assumpsit.

Roman S. Brown

Be it remembered, That heretofore, to-wit, on the Twenty first day of
March A. D., 1887, the above named plaintiff

Robert H. Graham

by Graham & Brunning his Attorney, issued out of the Clerk's Of-
fice of the Circuit Court aforesaid, a certain writ of Capias ~~Summons in assumpsit~~ ^{in detin} which is in the
words and figures following, to-wit:

(2)

2

State of Illinois,
Rock Island County.

The People of the State of Illinois, To
ss. the Sheriff of Rock Island County GREETING:

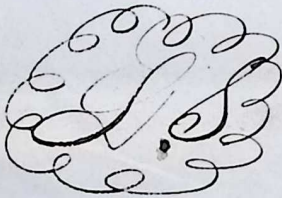
We command you to ~~examine~~ *that you take the body of*

Kennan S. Brown

if to be found in your county, ~~personally to be and appear~~ *and him safely keep so that you have his body* before the Circuit Court of said county of Rock Island on the first day of the next term thereof, to be holden at the Court House in Rock Island on the *Second* Monday, of *May* next, then and there to answer unto

Robert N. Graham

of a plea of ~~trespass on the case upon promises to~~ *Detinue to his* damage in the sum of *Two hundred and fifty* DOLLARS, as he say; and have you then and there this writ, and make due return thereon in what manner you execute the same.



Witness, QUINCY McNEIL, Clerk of our Circuit Court, and the seal thereof affixed at Rock Island, this *twenty first* day of *March* in the year of our Lord one thousand eight hundred and ~~sixty~~ *fifty nine*

Quincy McNeil

CLERK.

On the back of which said summons the said clerk made the following endorsement To wit
"Value of the property shown to, One hundred and twenty five dollars (\$125.) The sheriff is hereby directed to admit the defendant to bail in the sum of Two hundred and fifty dollars,
Quincy McNeil clerk.

(3)

And afterwards writ on the 21st day of March 1859 the Sheriff of the said County returned the said writ of capias into the Clerk's office of the Court aforesaid with his return of service thereon written which is as follows writ

By virtue of this writ I have taken the body of the within named defendant and have admitted him to bail as above directed this 21st day of March A. D. 1859

M. D. Merrill Sheriff of
Rock Island Co. Ill. by
C. B. McLaughlin deputy

And afterwards writ on the 29th day of April 1859 the said Plaintiff filed his declaration in the Clerk's office of the Court aforesaid which is as follows writ

State of Illinois } To the May Term A. D. 1859
Rock Island County } after Circuit Court of said County
Robert N. Graham plaintiff by Graham
and Browning and Wilkinson and Pleasant
his attorneys complains of Roman Brown
defendant, being in custody of a plea
of detinue; For that whereas the said
plaintiff heretofore writ on the 19th day of
March A. D. 1859 at Rock Island County State

of Illinois delivered to said defendant a certain chattel to wit, One dark bay horse said to be five years old being the same formerly owned by John Holt residing near the city of Rock Island in the county of Rock Island and state of Illinois, which said chattel was of great value to wit; of the value of One hundred and twenty five dollars lawful money of the United States of America, to be delivered by the said defendant to the said Plaintiff when by the said defendant should be thence afterwards requested, yet the said defendant although he was afterwards to wit on the day and year last aforesaid at Moline in the county and state aforesaid, requested by the said Plaintiff to do, hath not delivered the said property, a chattel, to the said Plaintiff, but hath wholly neglected and refused and still doth neglect and refuse to do, and still unjustly detains the same from the said Plaintiff, to wit at the county and state aforesaid.

And whereas also the said Plaintiff heretofore to wit on the 19 day of March A.D. 1859 at the county and state aforesaid, was lawfully possessed of a certain other chattel to wit one dark bay horse said to be five years old, being the same formerly owned by one John Holt

5
of great value to wit of the value of one
hundred and twenty five dollars of like lawful
money, as of his own property and being
so possessed thereof he the said Plaintiff
afterwards to wit on the day and year aforesaid
casually lost the said chattel out of his
possession and the same afterwards to wit on the
day and year aforesaid, and at the county
and state aforesaid came to the possession of
~~thence~~ the said defendant by finding, yet
the said defendant well knowing the said
chattel to be the property of the said Plaintiff
and of right to belong to and appertain to him
hath not as yet delivered the last mentioned
chattel to the said Plaintiff although he was
afterwards to wit on the day and year aforesaid
at the place aforesaid requested by the said
Plaintiff so to do and hath detained and
still doth detain the same from the said
Plaintiff at the county and state aforesaid
to the damage of the said Plaintiff of
Two hundred and fifty dollars and
therefore he brings his suit &c by

Graham & Brownig's
Witness & Plaint
his attorney

This paper was left out by mistake
and in compaining the Bond is placed
in by being pasted on to this fourth sheet of
the Bond before the certificate ~~is~~ attached
Denny Merrill clerk

of Illinois delivered to said defendant a certain chattel trust, One dark bay horse said to be five years old being the same formerly owned by John Holt residing near the city of Rock Island in the county of Rock Island and state of Illinois, which said chattel was of great value to wit; of the value of One hundred and twenty five dollars lawful money of the United States of America, to be redelivered by the said defendant to the said Plaintiff when by the said defendant should be thence afterwards requested, yet the said defendant although he was afterwards to wit on the day and year last aforesaid at Moline in the county and state aforesaid, requested by the said Plaintiff so to do, hath not delivered the said property, a chattel, to the said Plaintiff, but hitherto hath wholly neglected and refused and still doth neglect and refuse so to do, and still unjustly detains the same from the said Plaintiff, to wit at the county and state aforesaid.

And whereas also the said Plaintiff heretofore to wit on the 19 day of March A.D. 1857 at the county and state aforesaid, was lawfully possessed of a certain other chattel to wit one dark bay horse said to be five years old, being the same formerly owned by one John Holt

6 And afterwards writ on the tenth day of May and at the May term of the Court aforesaid the following proceeding was had to wit,

Robert H. Graham }
Roman L. Brown } Detainer

This day came the parties by their attorneys and this cause came on to the bench upon plaintiffs motion to dismiss this suit and the court being sufficiently advised in the premises ordered the same

And afterwards writ on the 26th day of May 1859, the said defendant by his attorney filed with the clerk of the court aforesaid his certain plea which are as follows

State of Illinois } Of the Circuit Court of Said County
Rock Island County } May Term 1859

Robert H. Graham }
Roman Brown }

And now comes the defendant in the above entitled suit by his attorneys and defends ~~and~~ says that he does not

7 does not detain the said property of ^{the} plaintiff
or any part thereof in manner and form
as in said plaintiff declaration is alleged
And of this he puts himself upon the
Country &c By A Webster atty

2 And for a further plea in this behalf
the said defendant by leave of the Court
says Actio non because he says that
at the time when ^{where and &c} the said property
in plaintiff declaration mentioned was the
property of the defendant herein and not
the property of the said plaintiff and
thus he is ready to verify &c By A Webster atty

3 And for a further plea in this behalf
by leave of the Court &c the defendant
says Actio non because he says that
at the time when &c where &c the said
property in said plaintiff declaration mentioned
was the property of one Henry J. White and
not the property of the plaintiff herein.
And thus he is ready to verify &c

By A Webster atty

4 And for a further plea in this behalf the
said defendant by leave &c says Actio non
because he says at the time when &c where &c.

8

the said property in said plaintiff declaration mentioned was not the property of said plaintiff as he has alleged, but avers that the said property was the property of both plaintiff and defendant as tenants in common and that said defendant held the property aforesaid as a tenant in common of said property with the plaintiff, and that the defendant avers that at the time & place aforesaid he was entitled to the use & possession of the said property, as such tenant in common. And this he is ready to verify &c

By A. Webster atty

5 And for a further plea in this behalf the said defendant by leave &c says adversely because he says that at the time when & where &c the said property in said plaintiff declaration mentioned was not the property of the said plaintiff as he has alleged but defendant avers that the said property was the property of the said defendant and one Henry S. White as tenants in common of said property, and ^{that} said plaintiff had no title or interest therein and the said defendant is ready to verify &c

By A. Webster atty

9
And for a further plea in this behalf
Said defendant says ~~acts now~~ by law
he says acts now because he says that
at the time when &c, when &c, said property
in said plaintiffs declaration mentioned was
not the property of said plaintiff, but
was that said property was the property
of one Lewis Brewer and that said
plaintiff had no interest in said property
whenever And this said defendant is ready to
verify
By A. Weston atty

And afterwards to wit on the 5th day of
October 1854 the said plaintiff by his
attorneys filed his answer in answer to said
and demurrer which are as follows to wit

Robert N. Graham } Of September term A.D.
" } 1854 of the Rock Island
Roman L. Brown } Circuit Court

And said plaintiff, as to the said
plea of the said defendant by him firstly
above pleaded and whereby he hath put
himself upon the country, doth the like

Attestation & Pleasants
attys for plaintiff

11

And as to the said plea of the said defendant by him firstly above pleaded the said Plaintiff says that the same, and the matter and things therein contained are not sufficient in law to be replied unto and thus the Plaintiff is ready to verify; Wherefore he prays judgment &c

Wilkinson & Pleasant
atty for plaintiff

As to the fifth plea of the said defendant by him fifthly above pleaded, the said plaintiff says precludi non; because he says that at the time and place therein mentioned the said property therein mentioned was the property of the said Plaintiff, and not the property of the said Plaintiff and the said Henry S. White as therein alleged. And this he prays may be inquired of by the country, &c.

Wilkinson & Pleasant
atty for Plff

And as to the said plea of the said defendant by him sixthly above pleaded the Plaintiff says precludi non; because he says that at the time and place therein mentioned the said property therein mentioned was the property of the said Plaintiff

Robert H. Graham } Detainer
 Roman L. Brown }

This day again came the parties by their attorneys and said being joined came a jury trial. William T. Norris, Benjamin Weiss, C. W. Swan, Ernst Zeis, William M. Nutt, John M. Candles, William Williams, Thomas Buntingham, Edwin Rhodes, J. J. Smith, Levi McCain and Jacob Vanduff who were each and severally sworn to well and truly by the issue joined, and having heard the evidence retired to consider of their verdict and the hour of adjournment having arrived it is agreed by the parties and ordered by the court that when the jury agree upon a verdict they may seal the same and disperse to meet the court tomorrow morning.

And afterwards went at the same time of the court aforesaid and on the 31st day of January 1860. the following proceedings were had to wit.

Robert H. Graham } Detainer
 Roman L. Brown }

This day again came the

presented by their attorneys and the jury
 herein before impaneled returned their
 verdict which is as follows to wit "That the
 jury find for the plaintiff and assess his
 damages at the sum of forty five (\$45)
 Dollars". Thereupon defendant entered his
 motion for a new trial.

And afterwards writ on the 3rd day
 of February 1860. the defendant by his
 attorney filed with the clerk of said court
 his reasons for the motion for a new trial
 which are as follows

State of Illinois } Of the January Term A.D. 1860
 Rock Island County } of the Circuit Court of said County
 Robert H. Graham
 Roman S. Brown }

And now comes the said defendant
 in the above entitled cause and enters his
 motion for a new trial of said cause
 By A. Webster his atty.

And for causes of said motion assigns
 That the court refused to admit
 proper testimony on the trial of said cause
 That the court erred in giving

15

plaintiffs instructions to the jury in said cause

That the court erred in refusing proper instructions to the jury asked by defendant in said cause

That the verdict of the jury is contrary to the evidence in said cause

For divers other good and sufficient reasons

And afterwards writ on the fourth day of February 1860 and at the same term of the court last aforesaid, the following proceeding was had to wit

Robert H. Graham	} Detain
Roman S. Brown	

This day came the parties by their attorneys and the cause came on the bench on defendants motion for a new trial, and the court having heard the same and being sufficiently advised in the premises overrules the same. It is therefore ordered by the court that plaintiff do have and receive of the said defendant the said chattel in his declaration mentioned, together with the sum of forty five dollars as his damages assessed by the jury and the costs of this suit by him herein expended

and that he have execution for his damages and costs and a writ of Retorno Habeas for the return of the property aforesaid.

Thompson came defendant and prayed an appeal to the Supreme Court which is granted on condition that the defendant enter into bond in the sum of One hundred and fifty dollars with John M. Gould as Security and file the same in the clerk's office of this Court together with his bill of Exceptions at any time during this month.

And afterwards took on the 27th day of February A.D. 1860. the said defendant filed in the Clerk's office of the Court aforesaid his bond in appeal which is as follows to wit

Know all men by these presents that we Roman S. Brown and John M. Gould of the County of Rock Island and State of Illinois are held and firmly bound unto Robert H. Graham in the penal sum of One hundred and fifty dollars good and lawful money, for the payment of which well and truly to be made we bind ourselves our heirs and administrators jointly, severally and finally, by these presents

Witness our hands and seals the 20th day of February 1860

17
The condition of the above obligation is such
that whereas the said Robert H. Sealband
did at the January Term A.D. 1865. of the
said court ~~of~~ in and for the County of
Rock Island and State of Illinois receive
Judgment against the said Roman L. Brown
in a certain action of Detinue, in said court
then pending, for the sum of forty five dollars
and costs; from which Judgment said
Roman L. Brown has taken an appeal to
the Supreme Court in and for the Third Judicial
District of the State of Illinois.

Now if the said Roman L. Brown
shall prosecute his appeal with effect and
pay or perform whatever Judgment shall
be rendered by the Court upon the dismissal
or trial of said appeal then the above obligation
to be void, otherwise to remain in full force and
effect

R. L. Brown *(Seal)*
J. M. Gould *(Seal)*

State of Illinois Rock Island County ss.

I Quincy Merrill clerk of the circuit court
for said county do certify that the above is a
true and complete Bond in the above cases and
encloses the Summons, Declaration pleadings
return, and bond therein belonging Return my
hand and the seal of said court this 28
day of March A.D. 1865
Quincy Merrill clerk

State of Illinois } Rock Island County Circuit Court
Rock Island County } 24th January Term AD 1860,

Robert H Graham

vs

Roman Le Brown

Debt

Be it remembered that

on the trial of the above entitled cause
at the above term of said court the
said plaintiff to sustain & prove the
issues on his part introduced the
following evidence therein—

1st The records of the circuit Court of
Rock Island County - State of Illinois of
a judgment rendered by said court at
the June Term 1858 in favor of Henry S
White and against - Levi P Persons &
Levius Bremer, which record was duly
proven by Leving McDaniel clerk of said
court & admitted in evidence with-
out objection & which record of judgment
is in the words & figures following
Henry S White—

vs

Levi P Persons &

Levius Bremer

Amount

This day came the Plaintiff
by his attorney & defendant being three
times solemnly called came not but

under default. It is therefore considered by the court that Plaintiff have & recover of & from the Defendant his damages by him herein sustained, and it appearing to the court that this suit is brought upon a note for the payment of money & the damages being unknown to the court it is ordered that the clerk assess the same. The clerk thereupon assessed & reported the damages in the sum of One Hundred & fifty five Dollars & ten cents - which report is accepted by the court. It is therefore ordered by the court that Plaintiff have & recover of the said Defendant the said sum of One Hundred & Fifty five Dollars & ten cents - damages assessed as aforesaid together with his costs & that he have execution therefor.

And A writ of Execution ^{issued} by the Clerk of said court upon the said mentioned ^{at the endorsement & return thereon written} judgment, which were duly proved by Leornig Meddell Clerk of said court & admitted in evidence without objection, which said writ of execution - in endorsement & return thereon are in the words & figures following viz:

State of Illinois }
 Rock Island County } as the People of the State of
 Illinois, to the Sheriff of said County, Greeting:

We command you again that of the goods & chattels, lands & tenements of Lewis Persons & Lewis Brewer in your county you make or cause to be made the sum of One Hundred & fifty five dollars & ten cents ~~cost~~ which on the ninth day of June 1858 they & White recovered in the Circuit court of said county against the said Lewis Persons & Lewis Brewer with legal ~~cost~~ interest - thereon from said date until paid & also the further sum of Seven dollars & forty cents which were adjudged to the said White by said court for his costs & charges in that behalf expended whereof the said Persons & Brewer stand convicted as appears to us of record & that you have the said sum of money & interest & cost at the Clerk's office of our said court at Rock Island within ninety days from the date thereof & have upon them & there this writ.

Sent

Witness Lemuel McKnight Clerk of the said court & the Seal thereof affixed this 18th day of February in the year of our Lord one thousand eight hundred & fifty nine —

Lemuel McKnight Clerk

On this Exemption are the following enclosures -
This writ came into my hands at 3 o'clock P.M. February 19, 1859 M. S. Merrill - Sheriff

By virtue of of this writ & accompanying
 fee bill I have levied on the following
 described property as the property of the
 defendant to wit, One Bay Horse,
 One single harness, One apr Buggy,
 One detached lever hunting case Watch
 (silver) this 5th day of March AD 1859

M. P. Merrill, Sheriff

By P. W. Leonard deputy

By virtue of this writ & accompanying
 fee bill, & in accordance with the
 law hereon endorsed I have, after
 having advertised the property described
 in said law, by posting notices in
 three of the most public places in
 Rock Island County the time specified
 by law I did between the hours of nine
 o'clock AM & sunset of said day to wit
 on the 18th day of March AD 1859 at the
 door of the Court House in the City &
 County of Rock Island & State of Illinois
 in accordance with said notices offered
 the property described in said law, at
 public auction & the same was then &
 there sold & struck off to R. H. Graham
 Peffer City he being the highest bidder
 therefor at & for the sum of One hundred
 & twenty seven & 25/100 Dollars I therefore
 return this writ & accompanying fee bill

22
Not Satisfied this 18th day of March
AD 1859 M D Merrill Sheriff
Rock Island County Ill

The said Plaintiff next introduced as witnesses
Moses D Merrill who being sworn testified
as follows: - I am Sheriff of Rock Island
County Illinois & have been such Sheriff
since the first day of December 1858. I
made the return on the execution shown me
(which is above set forth) & as to the
sale therein referred to, I had the horse
in possession from the time of the levy up
to the sale being to the Plaintiff, at the
time of the said sale it was in my
possession in the street opposite the
Court house door, after striking it off
to the Plaintiff I delivered it to him.
The horse was a bay young & of good size
I should think it worth then \$150, at
low figures. I afterwards saw the horse
in the possession of the defendant.
On Cross Examination by Deft Counsel
this witness further testified, There were
present at the sale of said horse besides
Wheeler P A Garratt Alexander R H Gra-
ham the Plaintiff, John Wilt & others
Counsel state positively that I saw the
horse in Graham's possession. Considered
that I delivered all the property to him, but

don't know that I took the horse, the
lead & made a formal delivery.

The Sept Counsel here asked said witness
the following questions 1st Did the Jlf
Graham pay you the money for the horse?

Objected to, sustained & Sept accepted.

2nd Did you sell the horse to the Jlf on
his own account or as attorney for White
the Jlf in execution? Objected to, sustained
& Sept accepted.

3rd Please state what you mean by the
language in your return upon the Execution
that you sold to "R H Graham Jlf & Co"
Objected sustained, & Sept accepted.

I think Mr P A Garrigue as agent
for Geo Gould gave notice a few
minutes before the sale that Mr Gould
claimed an undivided half of the horse &
forbade persons buying one half of the
horse. I can't recollect the language used
said witness was here asked by Sept
counsel the following question, Did
the Jlf state at the time of the sale that
he bought the horse for himself or for the
Jlf in the execution? Objected sustained
Sept accepted & the Sept Jlf counsel then
withdrew all objection to the said question
Sept counsel did not pass the question
requiring it should be answered.

24
said witness was then reexamined
by Jeff's counsel & stated - Mr Garrett
after giving the nature of Garbely's claim
hid on the horse twice, I don't recollect
whether I saw Graham hitch up the horse
or not, I saw the horse after it was
hitched up,

He Jeff was introduced as a witness
John Stult who being sworn testified
I have heard the testimony of Mr Merrill, I
~~was~~ was present at the sale at which
Jeff hid off the horse, it was sometime
in March last I think, I once owned the
horse for about a year & a half, I should
not think it worth over \$100, but a
good judge of the value of a horse, I don't
think my opinion worth much -
Charles Wheeler was not called by the Jeff.
& sworn as a witness He testified as follows
I was present at the Jeff sale of the horse
in question, I drove the horse to Muline
after the sale, at Jeff's request, I don't re-
member who hitched up the horse,
I think I took it as it was hitched, the
(the Jeff) told me to take it to the Livery
Stable at Muline, there was but one
livery stable there, the name since & now
as far as I know, I think Bundy owned it then
I drove the horse up there & left him at the

stable, I called for some one but nobody answered & I left him standing on the barn floor too tired I thought to remain. It was a lying stable. On Cross Examination this witness further stated, I think Jeff helped hitch up the horse, Witness was then asked by Sept's counsel the following questions (1) Did not Geo Gould direct you while at Melrose to bring the horse up there to him, after the rule? Objected sustained. Exception by Sept.

(2) Instead of taking the horse as the agent of or at the request of the Jeff did you not take him at the time you have testified of as the agent of & at the request of Geo Gould? Witness answered, Geo Gould sent me down here after the horse I took him at the request of both. Answered without objection by Jeff.

The witness was then re-examined by Jeff's counsel and stated as follows. Geo Gould was at the Post Office in Melrose when he requested me to come to Rock Island & get the horse, The horse was not there but was here in Rock Island at the time. I never told the Jeff Graham that Gould had made any request to me about the horse.

Jeff's counsel here moved the court to rule

and all the testimony of the witnesses respecting the request or statement of Geo Gould made or given to the witnesses when the horse was not present, Sept Objection, Objection overruled by the court & testimony ruled out & Sept excepted,

Hiram W Brown was next called by the
 & sworn as a witness, He testified as
 follows, I am a brother of the Sept my
 brother (the deff) bought of Bandy his living
 stable in Mahine, I don't know precisely
 the time of the purchase, after the purchase Bandy
 remained & worked for my brother at the
 stable until April 1859, when he (Bandy) left,
 Bandy did not work for my brother any
 before the sale

Henry Pershing being sworn testified —
 I was not present at the Sept's sale
 I was at Mahine. I am when it occurred
 & also know the horse, I heard the Sept on
 Monday next after the sale denounce the horse
 of the Sept, & Sept's living stable in Mahine.
 Sept said he had bought the horse & refused
 to deliver him up, The Sept & I were at Sept's
 stable on Saturday evening (the day of the sale)
 to get the horse, the stable was locked &
 Sept refused to open the stable, The horse was
 worth from \$130 to \$140 I saw the horse on
 Saturday while he was being driven up the

he ought not to have bought of Gould
because he knows that he (Plff) had bought
the horses at sheriff's sale. The Plff here
rested his case

28 The Plff having rested his case the Sept then
introduced the following on the part of the
defendant,

1st The Deposition of George D Gould

The deposition of George D Gould a witness
admitted, sworn & examined before me at St. Louis,
St. Louis Police Magistrate - of the City of
Rock Island, Rock Island County & State
of Illinois at my office in the said city
taken on the 31st day of March A.D. 1889
between the hours of 10 o'clock AM & 4 o'clock
PM for the purpose of being read as evidence
on behalf of the defendant on the trial of a
certain cause now pending in the Circuit
Court of Rock Island County & State of Illinois
wherein Robert H Graham is plaintiff &
Roman L Brown is defendant - at the
taking of which Alfred Webster Esqr appeared
for the Sept & R H Graham & Hall Wilkinson
Esqr appeared for the plaintiff, the said Plff by
his counsel object to the receiving of said
evidence, The said George D Gould being by
me first duly sworn that he speaks the
truth in answer to interrogatories as follows.

Q. A / Were you acquainted with the parties to this

mit? if so how long have you known them?

Ans. I have known Mr Graham about two years & Mr Brown about three years.

Int 2 do you know the horse in question in this suit?

Ans I do

Int 3 do you know anything of the ownership of the horse, at the commencement of the suit if so what?

Ans I know that on the 18th day of March/59 I sold one half the horse to Romante Brown the Deft.

Int 4 did he pay you for the horse?

Ans He did

Int 5 Was the possessor of the horse delivered?

Ans It was

Int 6 Who were present at the sales delivery of the horse spoken of?

Ans William Kerns Joseph B Myerhoff Esq
Parson Charles Wheeler & others.

Int 7 Was there any warranty of the title?
None

Int 8 Was it understood that there was no warranty of the title?

Ans (Objection to by the Plffs.)

It was, the sale was understood to be without reserve, as I was going away.

Int 9 Give a description of the horse as well as you can?

31
Ans I should say it is a dark bay horse
tall long bodied - long legged, weight
about eleven hundred pounds, about
five years old, no distinctive marks
about him,

QA 10 When did you get the horse & how long
have you had him?

Ans Me - that is Leucius & Breuer & myself
swapped another horse for him, that is
Leucius & Breuer did it, but he did it
with my advice & consent - with Mr
Holt - about the 22nd day of February 1889

QA 11 What had Breuer to do with the trade?

Ans He had one half interest in the horse
that we traded for the horse in dispute
also he had a half interest in the horse in
dispute.

QA 12 Describe the horse you traded for
the horse in dispute?

Ans It was a white horse, heavy, thick set,
deep - not very tall - weight about eleven
hundred pounds as Breuer's "Billy horse" &
was used as our & Jess' horse for about
a year last June to this.

QA 13 What interest had you in the white
horse if any.

Ans I had one half interest.

QA 14 How long had you had a half interest in
the white horse at the time of making the
trade for the horse in dispute?

31
Ans I should say it is a dark bay horse
tall long bodied - long legged, weight
about eleven hundred pounds, about
five years old, no distinctive marks
about him,

QA 10 When did you get the horse & how long
have you had him?

Ans Me - that is Leucius & Breuer & myself
swapped another horse for him, that is
Leucius & Breuer did it, but he did it
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that we traded for the horse in dispute
also he had a half interest in the horse in
dispute.

QA 12 Describe the horse you traded for
the horse in dispute?

Ans It was a white horse, heavy, thick set,
deep - not very tall - weight about eleven
hundred pounds as Breuer's "Billy horse" &
was used as our & Jess horse for about
a year last June to this.

QA 13 What interest had you in the white
horse if any.

Ans I had one half interest.

QA 14 How long had you had a half interest in
the white horse at the time of making the
trade for the horse in dispute?

31
Ans I bought the half interest from Mr Bleuer
in the White Horse on the 12th day of February
1857 and owned him in company with Mr
Bleuer up to the time of the trade of
with Mr Swob.

In A 15 Did you get from Bleuer a receipt
for the purchase money for one half of the
White Horse, if so will you file it in
our case & as a part of the answer to this
question?

Ans I did get a receipt & here permit it, &
considered it a receipt able of rules
"Received Money July 12th 1857 of
Geo D Gould Sixty Five Dollars for one
half of my White Horse (Bely Horse)
L. C. Bleuer"

This receipt is enclosed in the book &
"Receipt referred to in answer to the
15th interrogatory. A. F. Saunders PM"

In A 16 How came you to purchase the
White Horse & what were the circum-
stances connected therewith?

Ans A company consisting of four trust
myself, Lewis's C. Bleuer, John Anderson
& George Anderson were intending to go
to Pike's Peak, and at different times I
gave to Bleuer money amounting to fifty
five dollars for the purpose of purchasing
articles for the outfit & Bleuer used

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in the White Horse on the 12th day of February
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Ans 16 How came you to purchase the
White Horse & what were the circum-
stances connected therewith?

Ans A company consisting of four trust
myself, Lewis's C. Bleuer, John Andrews
& George Andrews were intending to go
to Pike's Peak, and at different times I
gave to Bleuer money amounting to fifty
five dollars for the purpose of purchasing
articles for the outfit & Bleuer used

it for his own private purposes & was unable to pay it back & by reason thereof & in consideration of ten dollars paid to him in addition, he sold to me one half of said White Horse on the 12 day of Feb'y AD 1859.

QA 17 Do you know anything more which would be favorable to the Dept.?

Ans I think of nothing more —
Cross Examination

QA 1 Where was the sale or pretended sale made & where was the horse at the time thereof & how long had he been & under what circumstances was he there as referred to in your 3rd answer?

Ans QA was in Mr Brown's Stable in Maline & the horse was there at the time had been there 30 minutes perhaps, I took him there.

QA 2 How long had you the horse before taking him to said stable. Where & when did you get him & where had he been two weeks previous to coming into your possession?

Ans I had had possession of half of him since the time we purchased him, we had him that is the company. Brewer & I since the time we purchased him from Mr Holt on or about the 22nd of February 1859. I can't say as to where he was two weeks prior to coming into our possession.

it for his own private purposes & was unable to pay it back & of recent months & in consideration of ten dollars paid to him in addition, he sold to me one half of said White Horse on the 12 day of Feb'y AD 1859.

QA 17 Do you know anything more which would be favorable to the Dept.?

Ans I think of nothing more —
Cross Examination

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33
Q^{nt} 3 Had not said horse, on the same day & just before your pretended sale of him been sold at Sheriff's Sale: or had he not been in the Sheriff's possession for about two weeks before that time?

Ans. Mr. Brewer's interest had been sold on that day I suppose Mr. Brewer's interest had been in the possession of the Sheriff for about two weeks before that time?

Q^{nt} 4 In what stable or place had your half of the horse been kept from the time of purchase of salt to the sale to Brown & had Brewer's half been kept at the same place also?

Ans. It had been kept in the stable of A. Guilel in Mobile, until two weeks before the sale to Mr. Brown when the Sheriff of Ala. took him away, on the same day & three or four hours previous to the sale to Mr. Brown. I took him from the livery stable where I found him hitched, ~~Brewer's~~ ^{Brewer's} half had been kept at the same place until the Sheriff's sale of Brewer's interest.

Q^{nt} 5 Previous to the day of the pretended sale of your to Brown, did you ever ride or drive land or actually use the horse in question or either half thereof, & if so state particularly when, where, how, which half & in what manner?

33
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Ans. Mr. Brewer's interest had been sold on that day I suppose Mr. Brewer's interest had been in the possession of the Sheriff for about two weeks before that time?

Q^{nt} 4 In what stable or place had your half of the horse been kept from the time of purchase of Salt to the sale to Brown & had Brewer's half been kept at the same place also?

Ans. It had been kept in the stable of A. Guilel in Mobile, until two weeks before the sale to Mr. Brown when the Sheriff of Ala. took him away, on the same day & three or four hours previous to the sale to Mr. Brown. I took him from the livery stable where I found him hitched, ~~Brewer's~~ ^{Brewer's} half had been kept at the same place until the Sheriff's sale of Brewer's interest.

Q^{nt} 5 Previous to the day of the pretended sale of your to Brown, did you ever ride or drive land or actually use the horse in question or either half thereof, & if so state particularly when, where, how, which half & in what manner?

34
Ans I lead him out ~~into~~ the stable. I never drove him. never rode him. I never used him personally. I lead him out ~~into~~ of the stable once a few days after we got him of Holt.

Q^{nt} 6 Do you know who took the horse to Browns stable & where, for whom & by whose direction ~~was~~ he taken there?

Ans I saw about ten minutes previous to my taking him from Browns stable Charles Wheeler drive him up Wells street looking just the Boring Horse of Gould Pinock & Co & suppose he took him to the livery stable, though I did not see him. I don't know for whom or by whose direction he was taken there.

Q^{nt} 7 Did you have any conversation or understanding with Charles Wheeler that he should try & get possession of the horse or should take him to the said stable, or did you in any way directly or indirectly, in getting possession?

Ans I sent Charles Wheeler to Rock Island after the sale of Brewers interest - taking the horse & put him in the stable where Brewer & I previously kept him.

Q^{nt} 8 In what place did you take the horse from Browns stable & who was present at said Browns stable when you so took the horse?

34
Ans I lead him out ~~into~~ the stable. I never drove him. never rode him. I never used him personally. I lead him out ~~into~~ of the stable once a few days after we got him of Holt.

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Ans I sent Charles Wheeler to Rock Island after the sale of Brewers interest - taking the horse & put him in the stable where Brewer & I previously kept him.

Q^{nt} 8 In what place did you take the horse from Browns stable & who was present at said Browns stable when you so took the horse?

35-
Ans I took him out of the Stable, & directed
Mr Garrett to take him to the Stable of
John H Dean - My Brother in Law - & look
him in & bring me the Key. Mr Brown
was present when I took the horse away.

Q A 9 Was Brown informed of the conflicting
claims to the title of the horse at the time
of your sale to him & what was said on the
subject.

Ans I don't know whether he did or not,
he heard nothing of the kind from me -

Q A 10 What was the price for which you
sold the horse, or half of it, has it been
paid if so where by whom, to whom &
how, whether in money or property?

Ans I sold the half for Fifty Dollars, it
has been paid, paid on the day of sale, the
19th of March 1859 - a paid to me - in current
bank notes,

Q A 11 In your answer to 8th chief question
you state that it was understood
between you & Brown, that there was no
warranty of the title to the horse on your
part, & assigned as a reason therefor
that you were going away - Please state
where you contemplated going & when & with
whom, & whether you had any property here
which could be affected by any warranty
you could make of any what property?

35-
Ans I took him out of the Stable, & directed
Mr Garrett to take him to the Stable of
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you state that it was understood
between you & Brown, that there was no
warranty of the title to the horse on your
part, & assigned as a reason therefor
that you were going away - Please state
where you contemplated going & when & with
whom, & whether you had any property here
which could be affected by any warranty
you could make as to any other property?

36
Ans I contemplated & yet contemplate going to
Pikes Peak with George Andrews & John
Andrews this spring I had one third of an
acres of land which would be about \$225 in
value for my share. —

Qut 12 Did you propose to leave your outfit
here or take it with you & if you had
any property which you proposed to leave
of any kind, name, nature, or value
whatsoever please state what it was, where
situated or ~~what~~ its value?

Ans I propose to take it with me, provided
they did not take it away from me before
I started, I had a good Gold Watch, I pro-
posed to leave with Earl & Dineen & had
on deposit, worth about \$75; for safe keeping
above so other property.

Qut 13 Did you propose to leave your estate
unencumbered by any debt or claim upon it,
so that it could be reached by execution
or attachment - if any were issued against you?

Ans I did

Qut 14 Have you left it there yet?

Ans I have not

Qut 15: Did you know John Hult, or the man
from whom the horse in controversy was
obtained, were you present at the time it
was swapped for or otherwise obtained or
did you send, please state to inform said

Holt as person from whom said horse was had that you had any interest in the purchase of said horse, or any interest in any horse that was traded to him, if so state all that was said?

Ans I am not personally acquainted with him, I was not present at the trade & did not inform Holt of anything in relation thereto.

QA 16 At what place & in whose presence did you make the purchase or pretended purchase from Brewer of the interest in the White horse what did you give for said interest & did you pay for it & if so where to whom with what & in whose presence did you make such payment?

Ans It was in the Post Office in Malone, N.Y. and I was present but Mr Brewer & myself of you sixty-five dollars. Mr Brewer was then owing me fifty-five dollars as stated by me in answer to direct question QA 14 & at said time February 12th I paid him the further sum of ten dollars, no one was present at the payment.

QA 17 Who wrote the body of the receipt attached to your answer to 15th Interrogatory, who signed it, who was present at the execution of it.

Ans I wrote the body of it, G. L. Brewer signed it - there was no person present but G. L. Brewer & I.

QA 18 Was said receipt signed by Brewer &

delivered to you on the day it bears date?

Ans It was

Q⁸⁸ A 19 Where was you at the time said receipt was written & did you write or was the receipt written & signed & delivered to you at the same time as on the 12th day of February 1859

Ans In the room, a office as a Post Office & Banking House, ^{It was} all ~~was~~ all done in the Post Office. I wrote the receipt & one table & Beer signed it & another & delivered it to me there at the same time on the 12th day of February 1859

Q²⁰ Are you & Beer interested or have you been interested together as partners or joint-owners of any other property except the houses above referred to by you?

Ans We are not & have not been,

Q²¹ Was the capital of your company owned jointly by the company or made up of the separate property of its individual members?

Ans It was not owned jointly - the company was not made up - it was that each one was to put in certain property & then when made up property put in it was to be joint property.

Q²² Was the fifty five dollars owing by Beer to you, loaned to him to buy articles for himself or was it for him to purchase articles for the Ream company referred to before?

Ans It was given to Beer & me to purchase articles

for me to put into the Pike's Peak Company, when that company should be made up.

Q A 22 What property or money was Brewer to put in the company when made up for his share?

Ans He was to put in a wagon & the money that he was to sell a certain buggy for, that he crined & his interest in the horse.

Q A 23 Were not the articles agreed upon to be put in, before the purchase of half of the horse by you from Brewer?

Ans The horse was to have been put in by Brewer at 130 Dollars, before I purchased the half interest in the horse & other articles were agreed upon as talked of to be put in.

Q A 24 In what place had the White Horse been kept previous to & after the time it was traded to Holt?

Ans I don't know where he was kept - until I became half owner, after which he was kept in the barn of A. Guild in Merline.

Q A 25 Did you ever ride drive or otherwise actually use the said White Horse & if so state when & in what manner you so used it & who was present?

Ans I never did. I never had any occasion to.

Q A 26 When did you first see the Brown horse now in controversy?

Ans I saw first the next day but one after we traded for him.

40
Q^y 27 Did you know of the buy by the Sheriff of
the horse in controversy at or about the time it
was made, & did you notify him as the
officer making such buy, that you claimed
to be first owner of said horse?

A^{ns} I did know of the buy (was told so) at London
of the day on which it was made, on the day
of the sale I sent my agent Mr Garratt to
notify the Sheriff of my interest in the horse
that he had better not sell it.

Q^y 28 Were you present at the Sheriff sale & did you
notify him of your claim otherwise than as last
stated?

A^{ns} I was not present at the sale, neither did
I notify him otherwise than as stated above.

Q^y 29 Had John W. George Andrews at anytime any
interest in the White horse or in the horse
in controversy?

A^{ns} They had not, that I know of & I should very
likely have known if they had.

Q^y 30 Have you ever stated or heard it stated by
any of your company in your presence that the
horses referred to or either one of them were owned
by the company & that each member distinct
therein was one fourth?

A^{ns} I never have stated so, nor ever heard any of
them state so in my presence.

Q^y 31 Were you not aware or informed before your
purchase or putrid purchase of the horse in con-

controversy - that a judgment had been rendered against Brewer upon which property of his or which he might own in the company might be taken unless he disjested of it & removed all those rules or pretended rules, bills & receipts - or some of them made for the purpose or with the desire of retaining the horses in the company or in some member of it - until it should be out of the reach of such judgment -?

Ans I was not aware or informed of any such judgment against Brewer & the rule & as for if it was made for any such purpose as stated in the above question -

QA 32 Do you know of any purpose on the part of the Defendant to go to Pike's Peak this spring?

Ans I do not

QA 33 Had you or your company at the time of the rule or pretended rule, of the horse in controversy, all the horses necessary or intended to be used for your outfit - for Pike's Peak?

Ans We did have all the horses we intended to go to Pike's Peak with -

QA 34 How many waggoners or other conveyances of your much weight when loaded did your company propose to take & how many horses or other animals did your company then agree to draw them?

Ans We had one span of horses, one wagon & about one ton when loaded (I rec'd 5/18/84)

Q^A 35 At what time did you then expect to start on your journey?

Ans About the 28th of this present month,

Q^A 36 Was the horse ruled to Brown the depth less suited than either of the others for the journey or so in what respect?

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Ans He was, he was less suited for the reason that he was more suited for travel than Brown & although his age was an objection, he was not filled out & we did not consider he could stand the journey as well & is not equal to the horse we had for endurance & power.

Q^A 37 Have you any interest in the horse in controversy or in any way liable by reason of the rule thereof or otherwise interested in the result of this suit or has there been any agreement or understanding of any kind between you & Brown or between you & any members of your company or of Bleuer & which any loss in this suit or any expenses thereof or any trouble therein should be borne by you or by which you might in any event become liable for any part thereof?

Ans I have no interest in the horse in question I am not liable by reason of the rule thereof nor interested in the result of this suit, there is not nor has not been any agreement or understanding of any kind between me or any one else by which I might become liable as stated in the above question.

Q^A 38 Did you ever procure or request any person like the defendant or any other person in relation to

the purchase of your interest - in the horse in controversy, if so state fully?

Ans I have not.

Q^{ut} 39 Did you not before the sale by your defendant anticipate or expect litigation or controversy on account of the horse or of the ownership thereof, or was you not informed by any person, or otherwise had a knowledge or belief that by a sale of your interest without more notice of title, that you could or might be a witness in the case? & was it not the object as a part of your object in making such sale - that you might render yourself a competent witness?

Ans I did not expect that there would be litigation. I did not know but there might be. I think not. I think that no person informed me that by the sale I would be a competent witness. I knew that I could be a witness - that is I believed so. I have known other cases similar, & it was not part of my object to make a sale, so as to render myself competent to be a witness -

Q^{ut} 40 Did the Jst in this suit sit at or near the Post Office in Mobile ever tell you on the same day or before your sale to Brown ^{the Jst} that he would institute suit for the horse, unless possession thereof should be delivered to him immediately, or anything to that effect?

Ans He did not, but told me he would prosecute me for stealing if I did not give him possession of the horse.

44 Q A 41 Did you not at the time & place last above de-
ferred to agree with the Jff to put the horse in
possession of some disinterested person until the next
Monday in order that the Jff might bring an action
against you to test the ownership of said horse?

Ans I did not agree with him but told him I would
put the horse in Brown's living stable & next day
sell it for the purpose of the sale to Brown.

Q A 42 Did you ever tell Mr. Cross or any person in
his presence that nobody was present at the sale
from Brown to you of the White horse & that you
had sold your interest in the horse in controversy
so that the fact of the sale could be proved as matter
to that effect?

Ans I don't know whether I ever did or not.

Q A 43 I understand you to have sworn that it was
no part of the object of your sale to the defendant
that you might be compelled to testify concerning
your interest in the horse: if then you did tell
Cross or any body else that that was your object &
thus contradict what you have thus here sworn
to would not you be likely to recollect it?

Ans I would not.

Re Examined by Jff to Counsel

Q A 1 Previous to the day of sale to Brown of the
horse in controversy did you ever have pos-
session of said horse by your agent or otherwise
except as you have stated in your answer to
Cross Interrogatory (3) & for what purpose did

you lead him out of the stable as they started

Ans Beaur had complete possession of him after we got him of Holt, for purpose of seeing how I liked him & to see if we had made a good trade,

Qut 2 Did Brown know that you only pretended to sell half of the horse?

Ans He did —

Qut 3 Did Beaur ever tell you that there was no judgment or execution against him or his property?

Ans He never told me there was or was not & I never inquired of him —

Qut 4 Did you at or about the time of being referred to on your cross examination notify the Jff in Execution at his atty that you owned half the horse in controversy & did you at or about the time aforesaid notify Mr Browning Justice of the city for the Jff in Execution that you owned one half said horse?

Ans I went to the officers of the Jff to notify him that I owned one half of the horse that had been seized on but he was absent & I told Mr Browning that I owned one half of the horse. This was on the evening after the hearing was made — I don't know who was Jff in Execution or who was attorney —

Qut 5 Have you at any other time notified

the Jeff that you owned one half the horse?

Ans I have not.

46
Int 6 Did you authorize Mr Garrett to pay the Jeff
sixty dollars for the Brenner's interest in the
horse in controversy or to bid that amount
for his interest at the sheriff's sale?

Ans I did not.

Int 7 Did you not authorize Mr Garrett to
request the Jeff to settle the matter in controversy
and has not Mr Garrett endeavored to do so
by offering the Plaintiff sixty dollars for his
or Brenner's share of said horse?

Ans I told Mr Garrett to try a settle with
the Jeff or buy Brenner's interest in the
horse for sixty dollars.

Geo D Gould

State of Illinois
Rock Island County } ss

I Alex F Swander one of
the Police Magistrates of the City of Rock Island
in said County do hereby certify that the
above deposition of George D Gould was
sworn to & signed by the said deponent
before me & in my presence, & that the said
deposition was taken by me on the 31st
day of March AD 1859 between the hours of
9 AM & 6 PM of said day & the place
for the purpose named in the caption thereof.

Witness my hand & seal this 31st day of March
AD 1859 Alex F Swander PM Seal

Attached to the said deposition is an order
must of course as follows —

Robert A Graham } Acting Deputee in the case
vs } Law & Court Clerk State
Roman Le Brown } of Illinois;

We Sept wishing to take the deposition of Geo. D. Gould in above case & not being now here to make the preliminary affidavit required in such case & the Jff being willing to waive formal notice of ten days for the taking of said deposition, It is hereby agreed by the parties that the said deposition may be taken this day before Jff & I under City Police Magistrate at his office in the city of Rock Island Illinois & that the preliminary affidavit in such case may be filed at any time before the first day of the next term of the Circuit Court of said Rock Island County with like effect as if made & filed before the taking of said deposition, the Jff reserving all right of objection to the competency of said witness, to his being sworn as a witness & to the questions propounded to him & his answer & to the taking of all other objections except the want of notice & the filing of affidavit before the taking of the deposition, & the right of objection to allegations by Jff & answers thereto also reserved by said Sept. &

Sealed this 31st day of March 1859 —

Irue Wilkinson for Jff
A Webster for Sept

48
The Deft counsel asked the court to suppress
the 8th Interrogatory ^{propounded to the witnesses} & answer thereto. Deft
objected. Objection overruled & Interrogatory &
answer suppressed & Deft excepted.

The Deft then introduced the following
witnesses who testified as follows
William Kerns, I know the parties to
this suit, the horse in question & George
de Gauld. I was in Deft's stable last
spring in March & witnessed a sale of the
horse in question. The Deft Brown paid
Gauld fifty dollars for Gauld's interest
in the horse. Charles Wheeler & Parsons &
others were there. Gauld said to witness
it was understood that there was no
warrantee of the title of his interest - in
the horse. Deft - was present & acceded
to this statement. Gauld went into
the stall with the horse & told Deft -
to take charge of the horse. An Examination
by Deft witness - said the sale was in the
~~morning~~ evening after dark. Gauld said he did
not want any trouble about the horse as he
was going to Pike's Peak as the reason why
the title was not warranted. Gauld assigned
as a reason for the sale that there was a dis-
pute about the title & he was going away
I knew the horse & thought he was a good one
young, about five years old, tall, of good size

for the purpose of the Sheriff's rule I explained what I was bidding for which was for Beeman's interest in the horse.

Ed Parsons testified, I first saw the horse in question in Dept Leiney Stable about 8 o'clock in the evening of the day of the ^{Sheriff's} rule. Wm Turner, Charles Wheeler & George & Paul were there. There was a sale of the horse in question there. Dept John Gulch bid \$500 for the horse. Gulch said he would keep one half of the horse without return to him. The horse was then delivered up to Dept. The horse at that time was worth \$400.

In answer to a cross question of Dept's counsel witness said, the horse was 20 or 30 feet from the office in the stable.

William Brown being called for Dept, testified as follows. The horse is not worth more than \$75 at the present time, & was not worth much more than that at the time of the Sheriff's sale. The horse was in a little better condition then. He cannot stand hard work, & is hard to keep in good flesh. He has not been worked more than one fourth of the time since Dept has had him. In answer to cross interrogatory by Dept's counsel witness said, the horse was never hired out as a liney horse, was worked on a farm & in a team when worked at all.

Charles Wheller testified the horse was
 not worth more than Twenty Dollars
~~very~~ quite testified. The horse was
 worth from Twenty to One Hundred Dollars
 He was brought to my stable by Breuer
 who had previously rented it of me
 He kept here rented & the plff asked the
 following instructions to the jury. Deft
 objected. Objection overruled & instructions
 given & Deft excepted.

- 1 A rule by Breuer to haul of the horse or
 of any interest therein would not, unless
 accompanied by possession, pass any
 right or title thereto as against an
 execution creditor of Breuer, - & if the
 horse remained in possession of Breuer,
 & was not in haul, it would be
 liable to buy & sale or execution
 against Breuer.
- 2 If at the time of the sale or pretended
 sale by haul to the Deft of the interest
 claimed by him in the horse, he was
 not in the lawful possession thereof, but
 such possession was in the plff or his
 agent under claim of ownership on the
 part of the plff such sale would convey to the
 Deft no title or interest in the horse,
- 3 If the plff Graham bought the horse &
 received possession thereof, if the Sheriff

5-2
& caused it to be placed in Deft's livery stable. The possession of the Deft would in such case be the possession of the Plff & the Deft could not deliver to & could such a possession as would enable him to convey to the Deft - a good title to the horse or any interest therein.

The Deft then asked the following instructions which were given -

- 1 If the jury believe from the evidence that the property in question at the time of the commencement of this suit was not the property of the Plff, then they will find for the Deft,
- 2 When two or more persons are each the owners of an undivided interest in personal property & not for partnership purposes, they are in law the owners of the property as tenants in common. & if the jury believe from the evidence that the Plff & Deft were at the time of the commencement of this suit the owners of the horse in question as tenants in common or that Deft was the owner of an undivided half in the horse then they will find for the Deft,
- 3 If the jury believe from the evidence that the only interest the Plff has in the horse in question is as a purchaser at a Sheriff's sale under an execution against Brewer then the Plff only became the owner of Brewer's interest

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and if the jury further believe from the evidence that the Deft is the owner of an undivided half in the horse they will find for the Deft.

And also the following instructions which were refused by the court & Deft accepted,

If the jury believe from the evidence that the Plff had notice of the adverse claim to this horse by Hauld previous to his Plffs purchase of the property then Plff cannot impeach the prior transaction by Hauld a Breuer respecting the property - because it was not delivered and if the jury believe that Hauld had an interest in the horse and that such interest was sold to the Deft then the jury will find for the Deft, though they may believe the same was never in Hauld's possession prior to the buying of the execution under which the Plffs sale was made.

Deft also asked the following instructions Twenty five minutes before the argument of the cause was closed & during the closing argument in the cause & the same were refused by the court ^{Deft accepted} all the other instructions above mentioned having been previously introduced & passed upon by the court as out of time there being a verbal rule of the court that all

that all instructions desired in any cause
~~is commenced~~ shall be handed to the court
 before the final argument in such cause is
 commenced,

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- 1 In case the possession of one of two or more
tenants in common is the possession
 of all & if the jury believe from the evidence
 that the horse in question was in the possession
 for tenant in common of the horse at
 the time of the sale of Gould to Brewer & that
 Gould was at that time a tenant in common
 of the horse then the horse was in his
 possession for the purpose of a sale & if
 they believe further that Gould's intent
 was legally transferred to the debt then
 they will find for the debt.
- 2 If the jury believe that the debt is the
 owner of an undivided half of the horse in
 question they will find for the debt.
- 3 The sale of the White horse to Gould by
 Brewer is not in question & the sale
 was good until impeached & if the jury
 believe that the horse in question
 was in his possession with a claim
 of ownership previous to the levy of
 the execution on which this horse
 was sold - such possession was
 sufficient to pass title of the half of the
 horse to Gould from Brewer.

The cause being then given to the jury
 they returned a verdict for the Plaintiff
 assessed his damages at \$445;
 & Sept moved for a new trial -
 And for as much as the matters appear
 since - the same being all of the evidence
 adduced at the trial of the above cause
 do not appear of record herein the said
 Sept prays that this his Bill of Exceptions
 be allowed, affirmed & sealed & made a
 part of the record of said cause all of
 which is done within the time allowed
 by the court for this purpose

J M Quincy Seal
 Judge

State of Illinois }
 Rock Island County } J. Quincy McNeil clerk of
 the circuit Court in and for said County
 do hereby certify that the foregoing is a
 true copy of the Bill of exceptions in the
 above entitled cause filed Feb'y 27, 1860.
 Witness my hand and the
 seal of said court this
 28 day of March 1860
 Quincy McNeil clk

State of Illinois } Of the April Term A.D.
Third Supreme Court } 1860 of the Supreme Court
Judicial District } in a for said Third Judicial
District, held at Ottawa

Roman Le Brown Appellant

vs
Robert H. Graham Appellee } Appeal from
Rock Island
County

And now comes Roman Le Brown
Appellant in above case by his Attorney
A Webster & assigns upon the foregoing
record the following errors:

- 1 The Court below erred in overruling
Appellant's motion to dismiss the suit.
- 2 The Court below erred in refusing to
allow the witness Merrill to answer
~~defendant's~~ Appellant's questions.
- 3 The Court below erred in refusing to allow
the witness Wheeler to answer Appellant's
questions & in ruling out witness
Wheeler's testimony.
- 4 The Court erred in giving the instructions
asked of the Appellee.
- 5 The Court below erred in refusing to give
the instructions asked of Appellant.

- 6 The court below erred in refusing to give the instructions asked by Appellant which were refused as not asked in time,
 - 7 The Court below erred in overruling Appellant's motion for a new trial,
 - 8 The Verdict of the jury was insufficient to authorize the rendering of any judgment in the court below
 - 9 The Court below erred in rendering a judgment on the verdict of the jury,
 - 10 The Court below erred in rendering the judgment it did, in this case,
 - 11 The judgment below is not the proper judgment to be rendered in on a motion of Verdict.
- A. Webster
Attorney for Appellant

And the said appellee by his attorneys comes and says that in the said record and judgment of the said Circuit Court there is no error.

Wickinson & Pleasants.
attys for appellee

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45. p. 10.

Roman L. Brown

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Robert H. Graham

Transcript of
Adm't. of mrs

Filed April 10. 1860
L. Leland
Clerk