No. 12737

## Supreme Court of Illinois

Dexter

vs.

Parkins

71641

John Dexke Jahn Parkins 89 4859 Orefores)

State of Illinois; Supreme Court Wind grance divisein Mon Wester Appellant 3 John Parking Appelles Ance now Comes the xie flow Dester by Linusing Lancer Morney, and Jus that in the recerce ance proceeding & Jain County Court there is menifert & manifold Iner and assigns for Enor. Saine Court End in allowing Mrs Smallidge wife of the defendant in Execution to testify in Jain Cause The Court Emo in refusing the first instru Olim as asked for by Quick Souter The Court End in amending the 5th 6th 4th The One The Court your wany motive hors asked The for leg said Parkins The Veresich of the funges against the The Vereiet of the juny is against the Encience gthe These is no law or incloude in this Course to Support the Ucraiet of the Juny £12737-1

The Since Orint Enece in not granting Since Deater a new hill forthe readons thates in said motion. 10th The Dain Court Ened in overreling the motion of occard exter fer a new heep for the newsons Stated in Daire Motion Menfore, for the Emos aforexice, the Said Ilhou Wester prop their the said be neversed Let used and for might had, held and Esterned Timeson & Daneer for Sportens Parkin In the Dupum court ats be april lun 1858 Defter And the said appelle comes Hays that then is on enor in. the recordafraculty now it to en delin of Inexement in this care that he puejs may be enquel of I the Court Thom at for deft in Eno

Hale of Merion 3: Country Court of Venna Country. John Parking & With Eniembered, That on the 31st · day of December 185 Thuo was plea John Gexter 3 in the Oleves office of the County Court of said County, an appeal Bond in africais Anti, in the words and figures following & Blit. " Thou all mon by these hesers the we john Paiken Williams Think and farrettion are held: and finite found into John Dentes in the penal cum of One hundred Dollars lawful mioner of the itnited states for the payment of which well and trilly to be made. we bind ourselves, our heirs and administrators fruitly several and finely by these piesents. Witness our hands and seals this 30 daw of December 4. 2. 1857. The Condition of the above Obligation is such that whereas the daids John Deater did on the 28th day of December AD. 1857; before For M. Milles a Justice of the Bace and a purp of close new of the County of Peria, recover a sudgment against the above bounden : John ! Parkin, for the Jum of Fifteen 49100. Dollars, Cost in a trial of the right of Property levied on by If M. Milles Contains In vituo of an Execution Visened by M. M. Moller a vislei of the reace for the country of could and State of Minois in facor. of John Dester and against of in mallide - from which fud hourt the daid ohn Parkin has takewan appeal to the County Court of Peous Country and Chate of Illinois, Mw of the said from Parkin shall prosecute his appeal with effect and without delangered shall pay whatever costs have acerued orman account on the dismissat or tras of such appeals. on the faid bourt then the above Obligation to be mill and with otherwise oremain in full force and effect ?? Webiroved Dec, 3/ et/857. John Parkin Seul & Carreteoro Teal charles Settelle Clerk . pin. Jom Spurch Cleurs Gerto Kellelle soi

And on the same day, For Wet; on the 31st day of December 1857 there if judd from the office of the Clerk of the County Coult of Four County, a Summons in the words "adjunes following To Wite: Thats fellinois 300. The People of the State of Illinois to the Shuiff.
We Command You that you summon John Deater of he shall be found in your County, flere on ally to be and appear before the County Cour of Said Plouis County, on the first day of the next Term thereof; to be holden at the Court House in Peoria, in vald Peoria County, on the Trist Monday of Pebenary. 1858, to answer unto John Parkin in a suit lately appealed to our Country Court from before W. W. Clother a C. Pin said Country Ond have you thew nd thew this With wendowsement thereon; in what manner you shall have executed the Jame " Mitness, Charles Stettello, Chik oform Said Court and the Seal thurst at Sevia aforesaid, this 31 day of December 00. 1867. Charles Nettello Clerk! Jes Hothelle of And on the fame day . To Wit: outhe 31 day of Occurber 1857, there issued from the Office of the Clarke of the Country Court of Teoria Country, a Super sede as. in the Words and figures following To Wet: "Hate of Illinois \ 55. The People of the State of Illinois:

Peace, and I. W. Miller a Constable in and for Said County.

Thereas in a certain cause ladely funding before you the said

Justice of the Peace, wherein John Parkin Plaintiff, and John Decler defendant, judyment has been given by your agamin the Said John Parkin as it a said from which judgment and appeal has taken by the Said John Parking to the Country Court of said Country, and a bond dilly approved and filed of the office of. the clerk of said Country Court: Therefore we command and enjoin you, the sales justice of the Scace and Constable, to Suspend all further proceedings on said judgment and cease how fultie molisting the Daid John Parkin on occasion. thereof, until the further offer of baids Country Court. Mothes Charles Kettello Clerks of said Court, and the Deal thereof at Oloria in said Country . Mis 31 Dday of December A.D. 1857. per Geo Hordestelle Spty Clk. Clerke. That of Minois } 35 Sevia County, } 35 Shaveduly surved this worth by the wilding arouned WYN Wille, I faid MY Courtable this 4" day of fair Teles, Levice, 1.00 Suitage, 1.80 Mitter, 1.00 And afterwards, To Wit ou the 19 th January, 1858. There was filed in the of the Proceedings in above entertied course, in the following Words me tymes following To Mit. a Dec 18# 1857. a wolvers court below the undersigned defendant. John Packins having obtained a judgement before the underseque on our car load of Coal in the bity of Peoria and two bay marcs a two horse waggou and a let of double harness taken as the property of laid folio Inialliedge, the court, was notified by Plantiff that the fortherty levied on belonged to him a trial for the right of property was \$12727-3 that he could not proceed to trial on account of the absence of a ma-

Cerial witness cause continued to the 21 et Dec. 1857, 21st parties afeheared and went to trial the following named proof being empannelled 1 m Vinson Daniel Bower A D Hutchihison John Houtchmison. Joseph Bower & John Flemming their being Some informality in the notice to the Constable Said notice by agreement was waved the evidence being heard! the case was laboutted to the jury who could not agric and by consint of parties the ping was discharged and the cause continued to the 28 Dec: 1857. It parties appeared and parties being ready for trial the following furors were emparailled Wm White auchin Naces, Alvy Rath burn Elias Flain, John. Bissil & Daniel onlew the Evidence being heard the cause was Submitted to the fung who brought in as their verdiel that this property did not belong to John Perking plantiff with the exception of the mare which they decided to be the property of said plaintiff Judgment was therefor rendered against fait plaintiff for costs State of Illinois ? Deoria Country Set. I WIN Miller gui of the IP withing and for said Country do healy ceitify that the foregoing Franscript land hudgement of folin Pasterns to John Deater to timber cop uil from the files and Books in my office this Orday of Jan: uary 1858. MMM. Miller 3 July And afterwards. To Wir, on the Not day of February 1858, there was filed in the office of the County, Clerk of said county and fidavit and motion in words and words following To With State of Minois, Feoria County John Parkin 3 Peous Circuit Bourt February Term. John Derter 3. John Desterthe Defendant inthe above days that he is informed and has good reason to believe and aloes believe that the Plaintiff on the above entitled cause and William Spunk and J. Garison who executed the appeal Good in land can be with land Plantiff, as securities and

each & both of thew unable to pay the Judgment and Costs or cists alone in case the Daid cause Should be Determined against Said Planitiff, that they are peculiarly embanased and inesponsible. That said securities de not owners it holders of. Real Estate, as said deponent is informed and believes, and that the Costs of the officers of this Court are in danger of being lost unless additional and better security be given therein lid be there fow prais that said Mantiff be sheled to file additional & better Decenty The Dexter. Julicibed & Sevornito Cefor me February 1 A D. 188 f. Go Modelitte Spty Clk. And now course paid Defendant and makes no motion that the Planited in the above entitled cause to miled to que fulter und better secuito for cock for grounds etates in above affidantiles Asyrkellogs atty for deft and afterwards to Workoutho 3 dail of Feby 1858 There was filed in the office of the Chuty Court of Said Country an additioned Bond in words Indo figures following to Miles. Anowall men by these presents thatseve John Carteins & fairetsons Windharde and & C Ryneaus and held and firmly bound into ohn Dester in the penal land of Ou hundred Dollars lawful money of the Muted States for the payment of which well aid trity to be shade we brind ourselves four heirs executors fadministrators winth severally and finily by these presents witness wir hands and ceals to 3. de day of Tebruary 1858 The condition of the above obligation is that where the above folia Deate dist on the It day of Die 1855 before N. W. Mollula II for the Country of Perus dieroi a Justimal against the above bounded John Parkins for the Chin of \$ 15 42 12737-47

from which judgement the faid John Packins has taken an appeal to the County Court of the County of Crouse and State of Il now if the said John Parkins shall prosecute, his appeal with effect and chall pay what ever Judgement maybe rendered by the couls upon dismissal on trials of our d appeal their the above Obligation to bevoid Otherwise remain in full force and effect. John Palkons 31 If Sanetson 3 6. C. Rynearson and afterwards. FONThe on the 10th day of February AD 1858. There was filed in the Office of the Clerk of the County Court the following Bills of Exceptions in Words and Figures as follows. To With State of Ollinois 3 County Court Teoria County Teoria County 36 February Term D 1858 John Parkins 3 Trial Right Property -John Deveter Bent Remembered that on the trial of Jaid who were a fruit of landiff officed the Wife of the defendant in execution fand who were and the trial of Said cause to Which the defendant objected . The bout overalled the Dojection and allowed the the Said Wilness to give testimony in said cause To which Ruling of the Court the defendant their and there objected; and Smallridge destified that John Jacknis Clamiant was the Son in law of John Smallridge that the kept her husbands accomb and Books that her husband could not write, That she knew and kept an account of all money paid out by her husband to all. hersons. That Parkins claimant - had worked for her husband and had loaned her husband money mounting in all to about the Sum

I Leven Hundred Dollars white was the couridication of Bill of sale here insulted as follows to MM " Thow all men by these presents that I John Imallridge of the country of Peria nel State of Ellinois of the first part. for and in consideration of the fun of seven Hundred lawful money of the United States tome in hand paid abor before the ensealing of these hugents by John Parkin of the Same place of the Second pail. the receipt of which is hereby acknowledged have bayained and sold and by these presents do bargain and sell unto the laid party of the Second part his Execution Administrators and assigns Two Horses and our Mary, Two horse Colks, Our man Coll, Two Two house Wagons. Plows and Cultivalors, On Harrow, and Harness, and Two our house Carto Six head of hogo, ministeen head of cattle: To have and to hold the same limits the Sand party of the Leened Part his Comentors administrators and as-Lights forever And do fultion bind myself my hers Enceution and administration to Warrant and Defend the Sale. of the said goods and Chattles hereby sold anto the said party of the Second hast his Executors Obdaninistrator and assigns against all and every person and persons whomsomer and the said party of the first part does hereby trans for and deliver the possession of the said goods and Chattles lotte said hally of the second part. I An Witness Whereof the Said hasty of the first part has hereinto bet his hand and seal Uniss John fohn for Smallnidge Executed by John Smallridge her husband to Clarman That faid Moll of Sale, was executed at the time of the date thereof, and at the time of its execution largins was living Some 3 or 4 miles from her husband, Smallnidge, and for. Some time after said Sale in said Bill of sale to Clamant. 13wh mally die used said property from tome to line as her husband had from time to time betrogred said horses and Graffor and hamess, and Parkins had no means of keeping said property on his premises, and that Parkins was in the habit of using said houses wayou and harness, and that her husband never used faid horses, except, when he immend Un Janu, and that the mineteen head of calle containing

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in said Bill of Sale should have been nine instead of mino tel . That the Coal levied upon belonged to Parkins

John Blutch fied Sestified that love time about the 1st December 1857 he went to work for Parkins Chat I mallndge had agreed with him at 14-Dollais per month but sent him to Parkins to see if Parkins would give him 14 Dollais per month and that Parkins used the holses and waggon contained in said Bill of Sale in hauling coal. conallridge total Witness he must look to Parkins for his pay. That he boarded with Smallndge and worked at hauling Coal and That Parkins dig the Coal and Milities hauled Coal for Parkins and he looked to Parkins for his pay. Parkins had paid him part of his wages.

Thomas Steers Testified That Packins Claimant worked for him Mitness, from the 9th August 1850 untill 26 Lep Tember 1857. That he saw no perspectly about the previous of Packins during that time — did see at one time a House me Cost there—but blew was no continued prossession of said property. there was some Boys. there the In operty of Paikins. Parkins lived Dones of or 4 miles from Smallidge and was at the linic working at limebels for Mitness and he saw Parkins direct the linic time piles times. And in his prossession. That Parkins left the line piles about the first of September & moved to where he now loves & it was after he moved that witness saw the horses & waggon in Packins possession

River Parkins. Testities that he had seen the Horses and Waggow included in Bill of fale in the possession of John Parkins for the last 3 months. By useing them-but the Horses were Rept at smallfidges most of the time during the summer. One of the Conses his brother, John Sarkins had possession of for 10 months. Witness hauled hay last summer about 2 weeks. with caid teams. Which Hay belonged to Parkins madenidge.

Trank Temdo : Cestified that he worked for mallings during the last Summer - That mallndge was his mele. That he saw thy horses in the possession of. Tothe Parkins and Smallidge. Soto Soto Persons Ris Smaller de but both Parkins and - malling said the trans belowed to Parkins That Parkins had worked for smallnillo on the Rail Road 14/2 months at 17 s per month & in the farm 30. Och to march 1 1855 at 15 ple mouth of Smalleridge borrowed 1004 of Parkins & Smallridgo never claimed property after the Sale. Sam Toucher Testified. Sate Partenis works for Smallndje on the Rail Road but could not pay how long. Longs dale Testified That he sold Parknis our of the males in Said team Some 10 months ago he knew the man well had raised her, and that smallndge drove said mare

in his team on night side. The same team of horses bered in. the one he sold Parkins had a few white hairs in forthead the -other one had a star in the forehead-

Evidence for Defendant Constable Miller Testified that the following Execution "State of Illinois Ses. The people of the State of Ellinois, to any Court Country, Ses. The people of the State of Ellinois, to any Chattels of John "Swallidge in your county, you make the Sum of 110 Dollar "and or Cents debt. and V Dollar and 30 con cort with out exest at the rate of sice per cent per annum from the of day of. "Dec 1857, when judgment was rendered, which John Deater lately udovered before me on a certain hear against the baid John Inallridge and thereof make return to me within seventy days from "this date. Given under my hand and seal this 5th day of Dec Me Willer J.P. Jeur

Mondenter of Honor of 112.30 was held by him and that he made the levy as described on said loge ecution. That the Horses Waggow & c was in possession of John Inval ridge when he made the levy about 2/4 of a nule pools the resedence of Smallridge . That Smallridge told constable that teams belonged to Parkins that the load of com in the Waggow was Parkins that he had no property that it belouged to Packins . Packins was there and claimed the property and said he would control the right of projecty mallridge said team should not go untill fed-William Kutherford Testified that he punhased of of Smallridge on the 1st December last & Barload of Coal. that he was to give him 7/2 cents per Bushel. That he did not know Parkins in the Contract. That Coal was shiped in the name of John Smallnidge and numbed 159, and that the Said Coal was levied on in said Excecution held by constable Samuel Woenen, That the Bill of Shipment - was in the name of John Grallidge and in the hand Writing of & Edwards the agent at Edwards Station on the Rail Road and that mallerdy told agent the Coal, was ready for Shipment . And that Smallnder and hands had hauled the Coal to the Car and That Imallridge gave the notice when Car was ready to Ships. and Witness told Edwards to Ship Car in the name of Imalledge but Inallidge gave no Such derection as urtiress knew of Tylvester Williamson Testified That he worked for Smallridge . that he used his own team. and was employed by Small. ridge and Brotherson and in hauling Goal Smallridge used the letin of Horses and Waggow letied on by constable -Miller. Imalladge drove the true used it himself claimed

the team and called it his ounteaux. Have seen the team in small ridges possession, from time to time ever since - and sow it in his possession at the time the lery was made. Mot ness, was at work hauling/coal for Iniallridge & Brotherson That Smallridge turned Witness off. because he could not gree I teams and stated, that if any train worked he must use his own team, which was the team levied on. Italest at the time he discharged Witness he could not keep Witness and there, I that Witness and there ould not keep Witness and there was before Witness and in fune, (and the coal hauled by Smallridge was before Witness and

Denny Duckworth Testified That Smallidge put the last 3 load of Coal in the Car No 159 levied on, hid that he used the horses in dispute, in hauling faid Coal, faw the horses levied outlowe 14 or 15 head of cattle several head of hoas. Plough & Cultivator and I cold about and on the Onnuring of John Smallridge during the last furnises and that he went hast said place very often during the last furnises and that he had occasion during the last summer and that he had occasion during the last summer and the principes of Carteins from the premises of Carteins from the premises of talkins and that Parkins levied Source 3 miles from amallidge

Harvey Brocket Testified that his farm frined smalleidge have seen several head of cattle I colt. I Wadgons, and horses levied on on the premises and in the prossession of John malleidge during the last lumines from time to time. The Cattle byoke into premises of Witness as he bedained damage from John Smalleidge Who remarked that he had a night to think his stock in said field as he had purchased the completion in said field and in the Conversation he called them his own cattle.

John Parkins a low and Pigo. never Law any property and the premises of larkins, del see him drive a tramof horses leveral times have seen Smallndge drive the Same trans in the france the trans in possession of both, but of trues in the presence of Smallndge than in Parkins. Have seen

12737-D

Smallridge drive trave to Packins & House and their back Home Parkins wa hard working man Mathew-McReynolds. Sold John Inallidge Po acres. ofland, paid me Lone. Got Dollaws has a written ague ment for a deed when the land is paid for. Henry Duckworth, Testified that with land purch-ased by Smallridges of Ch Reynolds he Smallridge had a cool Bank out of Which he was digging coal, and That - the Coal Bank Worked by Partens was on the Jame 80 acres of land. That the Coal Bank worked by Parkins was not the one worked by Imallidge. The Claimant asked the Court to give the following 1. The Claimant astes the following Instructions.
1. It the purphelies from the evidence that the property in controversy belongs to the Claimant they should find for Lu Clainiant believe from the lidence that the Claimant bought the property in Controverse hart from Sandsdal & part from Smithston of the part from Sandsdal of part from Small idea in good faith, and that there was no adverse floression of said property by lang other kerson under claims, of title the free. Thould find for the claimant,

3. It the fung believe from the evidence that the Claimant bounds the property in controverse, or any part thereof from malinities and claimed and exercited acts of ownership over buch property at and for lowe time before Secter recovered judgment against mallidge the pull, should find for the claimant

# To Which the Defendant excepted -

The defendants asked the Court to instruct the Juny as follows

1st If the fruit believe from the lindence that they was no deliver
of the Mojesty mentioned in the Bill of Tale offered in Endeing
by the Planite of at the time of the Execution of Jaie Bell of
Tale they will find for the Defendant.

It is boustitute a Delivery the property lold must be ident if tied depended to distinguished from all other goods aproperty. The Chattle Vale that by to terms conveys prospection of the Chattle theire expectation to the ready is exceeded for the land actually follow according to the times thereof. If the true believe from the lendences that possession due not follow, the Bill of Jale according to the times thereof the will find forthe Defendant. They will find forthe Defendant. They will find forthe Defendant to the property of the property free there is a believed from the Vendor to the Vendor of the Vendor o

and in Case of Sale of Goods or chatels possession of Sant God. Remain with the Dolon or vendor the Sale or fraudulents

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Avoid un de of itself as to Creditors and Third persons, and carmot be rebutted by Evidence of fair intention T. That the sale of Goods really consists in the delivery thereof from the Vendor to the Vender That all lales of heisonal property, without adelucing-accompanying the Polle of Sali are transdulent and ebrol as tothe Claims of Judgment Orditors -That unless. Omallings delivered possession of Jaid Property over to Parkins at time of Sill of Sale And property was liable to be taken for the debts of Smallnage by any Judgment Oreditor of mallridge be taken except Such Testimony as is against the intenst of her husband But the Court refused to give the trustructions as asked but modificiel them by adding the following: "When whom the Court refused the 1st metricion asked for m the part of the affendamb. and amended the or enstruction hunselling the Woods "not being a preferred greditor; after Un Words. vender and vender in Said 5th instruction and amended the Orinstruction by adding the words unless such Tale was too perferred oredition and in payment of a perfect And amended the 7" instruction by address themto, whilese bush preferred aeditor befor buch judgments une oftained and wiles in the Case it Should appear from the ludeuce fuch Ial was made to defeat the collection of the debts owns by the vendor no Whenufon the defendant excepted to the de oussion of the Court refusing the frietzenstruction as asked by by defendant and excepted to the anundment to the 5" instruction as asked for by defendant.

And excepted with Amendment to the Oth instruction as asked for by defendant and the The instruction as asked for by defendant and defendant lexcepted to all of said Bustinetions as given by the Court.

Wellington Louise Ennity fridge.

Let a supersecuas go. Bond with sum of \$300.

The Defendant entered, a Motion for a new Trial, which is in the following words and figures. Comti. John Dectes: fire new Friel, forthe followny reason. The Court gave improper instructions tothe Juny. The Court refused to give proper instruction tothe funy. The Court made wing and ellegad modifications to institutions offered by defendants which instruction were conflicting and Calculated to mustices the hun. The Court allowed improper testimong to go to the Juney. The Court admitted and allowed Withinses to testify in Sand Cause which wer by law incompetent to testify in Dand Hu Verdict is against law The Verdut is against Endene Lendon & Lande for defendent. Which was overaled by the Court Tothe Order of the Court. exception Wellington South Condition

Proceedings of the County County County State of Clanois, began and held at the County Mouse in the City of Cleorica in Said County on Monday Petruary 141858 for Indicial and other Cusiness. Indent How Wellington Doubles Judge. Charles Hettelle Clerk, Indigerancis Smith Sheriff.

John Parkin Fraid Right of Property. appeal from S.C. John Devoter On Motion of defendant by his attorney this ordered by the Court, that the laid Plaintiff file an additional Security by Mednesday at 4 Oclock O'Colo, - or Saltiofy the Court that the Escurity gives so sufficient.

Thursday February 4,4858.

John Deater Appeal from J. P. Frial of right of Property John Deater This day came the said Clf by Grove and Molog his attys and the said Dfat by W. Pitts Kellodg and J. J. Loindsay, his attys and the said Dfat by W. Pitts Kellodg and J. J. Loindsay, his attys and this ordered by the order that a pury being amilled to his said cause. Where we came a jury of Tircler good and lawful men to Wit ext. D. Larett John Wetzell, John Miliham Stage Moore, Michael Fresh, Ephraim Mornson, J. M. Johnson, Javos Farrell, Dresh Marwell John H. Thoyd, Davah Fisher and James T. Murden Who were duly chosen, tried and swow reland and to try thosaid cause and a function wind be redeven according to the winded and the Ericher and the Ericher are dich.

John Faction Triday February 5th 1838.

John Parties Appeal from J. C. Trabright of Profesty.

John Deaters.

This dry came again the parties in this furt also the

July empumilled in this cause did returned into Court the following

serdicts. "We the fury find for Plaintiff the Camant" Therefore the faits defendant, by his atty and entered his motion for a new tries of this cause. The bout being fully advised in the furnises doth over whe the fait Motion - Thought the Ordered laythe Court hat the fait four the fait of the fait of the fait of the fait of the Court of the fait of the Destroy his costs and chanes by him in this fait for his beholf aci bended in the Court and the Court below as that he have Concerning therefore the fait of fund below as that he have Concerning therefore the Superior of this cute which was ordered to be allowed to be placed in the Court of this state which was ordered to be allowed to be placed in the Superior of the state which was ordered to be allowed to be placed in the Superior of the state which was ordered to be allowed to be a suffered to day conditional according to Seaw with his hard Surger as Security-

Olad a favored to Wet outhor to day of February 1838. There was feled in the Office of the Oleck of the Country Court of Said Country.

an appeal Bond, in words and figures following To West:

Anowall men by this Tresents That we John Decter ad Richard Ingg both of Provide Boundy Illinois ye held are firmly Cound with John Parking in the Tenal Tum of Three Tounder Delaw. The payment of which we do pind ourselves our heirs descritors and administrators firmly by the operant of the fixed our hands and seals this fifteenth day of Thursey County Of the Three our hands and seals this fifteenth day of Thursey County Of the Whereas. The said Bound John Descritor has prayed an appeal in acculan cause in the law County Of the Suffering County County of the Suffering County County of the Suit Suffering County County of the Suit County Coun

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Charles Report clk

For East Ruises soft.

Let a superseains go. Houd \$ 800. Rechard Grigg

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Surie,

John Gusking appeller - Pecorn-Filed fune 15: 1858 Leboud Elk.

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#### BRIEF OF APPELLANT.

JOHN DEXTER,
vs.
JOHN PARKINS.

STATE OF ILLINOIS, ss.
IN THE SUPREME COURT AT OTTAWA,
OF THE APRIL TERM, A. D. 1859.

The County Court erred in refusing the first instruction, and amending the 5th, 6th and 7th instructions by inserting the words, "not being a preferred creditor," after the words "vendor and vendee," in the said 5th instruction.

And in amending the 6th instruction by adding the words "unless such sale was to a preferred creditor, and in payment of a just debt."

And in amending the 7th instruction by adding thereto, "unless such sale was made in good faith, and without fraud, to a preferred creditor, before such judgments were and unless in the case it should appear from the evidence such sale was made to defeat the collection of the debts owing by the vendor."

A sale of personal property without delivery accompanying the sale, is void as to judgment creditors.

Jennings vs. Gage, 13 Ills., page 611. Low vs. Freeman, 12 Ills., page 469.

The Court erred in allowing the wife of the defendant in execution to testify in said cause.

Purple's Statutes, page 1028, sect. 12. 1st Greenleaf, sects. 341 and 407.

LINDSAY & FOWLER, for Appellant.

John Deeter John Parkins

Error

Filed Opril 22 1889 L. Keland Colord

## SUPREME COURT OF ILLINOIS,

Third Division-April Term, 1859.

DEXTER
vs.
PARKINS.

## DEFENDANT'S BRIEF AND POINTS.

1st. Mrs Smallridge was a competent witness. This court held the husband to be competent. See Breese, page

The statute renders the husband incompetent; but that statute does not render the wife incompetent.

2d. The plaintiff did not prove any judgment against Smallridge, and was therefore not in a position to impeach the sale to Parkins.

Jackson vs. Hobson, 4 Gil, 416. Cook vs. Miller, 11 Ill. 612.

3d. The evidence shows the sale to Parkins to be bona fide.

GROVE, For Defendant in Error. John Destin No John Parkins Defto Brief offices

Filed april 20, Lelenet

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we folm blexter as principal and
The chara by 1972 as sunity are held
and finally formed into folice
Berkins in the penal
Lawful Money of the United States
for the payment of which him well
and truly who fine we hereby bind
ourselves our heirs Executors and
Administrators fointly Lenerally
Girmly by these presents witness
our hours and Seals This 13th days
June 1858.

The Condition of the above of the

gation is such that wheneves the

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prosecuted a civit of Illinois to the Sufram

Court of the state of Illinois to the

Univer grand Division thereof in a

Contain Course, wherein the said folin

Bester was flushing and folin

Outing Planatiff which cease were

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1858. against suice bester to severe

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## BRIEF OF APPELLANT.

JOHN DEXTER,
vs.
JOHN PARKINS.

STATE OF ILLINOIS, 88.
IN THE SUPREME COURT AT OTTAWA,
OF THE APRIL TERM, A. D. 1859.

The County Court erred in refusing the first instruction, and amending the 5th, 6th and 7th instructions by inserting the words, "not being a preferred creditor," after the words "vendor and vendee," in the said 5th instruction.

And in amending the 6th instruction by adding the words "unless such sale was to a preferred creditor, and in payment of a just debt."

And in amending the 7th instruction by adding thereto, "unless such sale was made in good faith, and without fraud, to a preferred creditor, before such judgments were direct, and unless in the case it should appear from the evidence such sale was made to defeat the collection of the debts owing by the vendor."

A sale of personal property without delivery accompanying the sale, is void as to judgment creditors.

Jennings vs. Gage, 13 Ills., page 611. Low vs. Freeman, 12 Ills., page 469.

The Court erred in allowing the wife of the defendant in execution to testify in said cause.

Purple's Statutes, page 1028, sect. 12. 1st Greenleaf, sects. 341 and 407.

LINDSAY & FOWLER, for Appellant.

Ihn Deeler John Parkins 1

## SUPREME COURT OF ILLINOIS,

Third Division-April Term, 1859.

DEXTER
vs.
PARKINS.

## DEFENDANT'S BRIEF AND POINTS.

1st. Mrs Smallridge was a competent witness. This court held the husband to be competent. See Breese, page

The statute renders the husband incompetent; but that statute does not render the wife incompetent.

2d. The plaintiff did not prove any judgment against Smallridge, and was therefore not in a position to impeach the sale to Parkins.

Jackson vs. Hobson, 4 Gil, 416. Cook vs. Miller, 11 Ill. 612.

3d. The evidence shows the sale to Parkins to be bona fide.

GROVE, For Defendant in Error. gohn Darter John Parkins Defto. Brief & Paints

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> JOHN PARKINS, vs. JOHN DEXTER-

IN PEORIA COUNTY COURT, DECEMBER TERM, 1858.

## APPEAL FROM JUSTICE OF THE PEACE.

The property in question was levied upon by virtue of an execution in favor of John Dexter against John Smallridge, dated 5th December, 1857, on judgment recovered by said Dexter against Smallridge on 5th Dec., 1857, for \$110 and costs, and the property levied upon as the property of Smallridge by a constable on the 15th day of December, 1857.

Parkins claimed the property as his, and had a trial of the rights of property before the Justice of the Peace, on which trial the jury rendered a verdict in favor of Dexter against the claimant, from which trial an appeal was taken to said County Court.

At the December term of said County Court, 1857, a jury trial was had, and verdict was rendered for the claimant, from which last trial this appeal is taken.

On the trial of said cause in the said County Court, the defendant Dexter filed his bill of exceptions showing in substance as follows:

STATE OF ILLINOIS, Ss. COUNTY COURT, PEORIA COUNTY, FEBRUARY TERM, A. D. 1858.

JOHN PARKINS,

vs.

JOHN DEXTER.

TRIAL RIGHT PROPERTY.

Be it remembered, that on the trial of said cause the plaintiff offered the wife of the defendant in execution, Jane Smallridge, who acted as clerk and agent of her husband in the transaction of his business, as a witness on the trial of said cause, to which the defendant objected. The Court overruled the objection, and allowed the said witness to give testimony in said cause, to which ruling of the Court the defendant then and there objected.

JANE SMALLRIDGE testified that John Parkins, claimant, was the son-in-law of John Smallridge. That she kept her husband's accounts and books. That her husband could not write. That she knew and kept an account of all money paid out by her husband to all persons. That Parkins, claimant, had worked for her husband and had loaned her husband money, amounting in all to about the sum of seven hundred dollars, which was the consideration of the bill of sale here inserted as follows, to-wit:

Know all men by these presents that I, John Smallridge, of the county of Peoria and state of Illinois, of the first part, for and in consideration of the sum of seven hundred dollars, lawful money of the United States, to me in hand paid at or before the ensealing of these presents by John Parkins, of the same place, of the second part, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell unto the said party of the second part, his executors, administrators and assigns, two horses and one mare, two horse colts, one mare colt, two two-horse wagons, plows and cultivators, one har\_ row and harness, and two one-horse carts, six head of hogs, nineteen head of cattle. To have and to hold the same, unto the said party of the second part, his executors, administrators and assigns, forever. And I do further bind myself, my heirs, executors and administrators, to warrant and defend the sale of the said goods and chattels hereby sold unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever. And the said party of the first part does hereby transfer and deliver the possession of said goods and chattels to the said party of the second part. In witness whereof, the said party of the first part has hereunto set his hand and seal this 3d day of March, A. D. 1857.

his
JOHN + SMALLRIDGE.
mark.

Witness: M. R. OWEN.

Executed by John Smallridge, her husband, to claimant. That said bill of sale was executed at the time of the date thereof, and at the time of its execution Parkins was living some 3 or 4 miles from her husband, Smallridge, and for some time after said sale in said bill of sale to claimant. But Smallridge used said property from time to time as her husband had from time to time borrowed said horses and wagon and harness, and Parkins had no means of keeping said property on his premises; and that Parkins was in the habit of using said horses, wagon and harness; and that her husband never used said horses except when he borrowed the same; and that the nineteen head of cattle contained in said bill of sale should have been nine instead of nineteen. That the coal levied upon belonged to Parkins.

JOHN BLUTCHFORD testified that some time about the 1st December, 1857, he went to work for Parkins. That Smallridge had agreed with him at fourteen dollars per month, but sent him to Parkins to see if Parkins would give him fourteen dollars per month, and that Parkins used the horses and wagon contained in said bill of sale in hauling coal. Smallridge told witness he must look to Parkins for his pay. That he boarded with Smallridge and worked at hauling coal, and that Parkins dug the coal and witness hauled coal for Parkins, and he looked to Parkins for his pay. Parkins had paid him part of his wages.

THOMAS STEERS testified that Parkins, claimant, worked for him, witness, from the 9th August, 1856, until 26th September, 1857. That he saw no property about the premises of Parkins during that time. Did see at one time a horse and colt there, but there was no continued possession of said property. There was some hogs there, the property of Parkins. Parkins lived some 3 or 4 miles from Smallridge, and was at the time working at limekiln for witness, and he saw Parkins drive the team levied on several times, and in his possession. That Parkins left the limekiln about the first of September, and moved to where he now lives, and it was after he moved that witness saw the horses and wagon in Parkins' possession.

George Parkins testified that he had seen the hoises and wagon included in bill of sale in the possession of John Parkins for the last three months by using them, but the horses were kept at Smallridge's most of the time during the summer. One of the horses his brother, John Parkins, had possession of for sixteen months. Witness hauled hay last summer about 2 weeks with said team, which hay belonged to Parkins and Smallridge.

FRANK FERND testified that he worked for Smallridge during the last summer. That Smallridge was his uncle. That he saw the horses in the possession of both Parkins and Smallridge, but both Parkins and Smallridge said the team belonged to Parkins. That Parkins had worked for Smallridge on the railroad 14½ months at \$17 per month, and in the farm 36 days at one \$1 per day, and 5 months with team at \$35 per month, and from October to March 1, 1855, at \$15 per month, and Smallridge borrowed \$100 of Parkins, and Smallridge never claimed property after sale.

Samuel Foucher testified, saw Parkins work for Smallridge on the railroad, but could not say how long.

Longsdale testified that he sold Parkins one of the mares in said team some 16 months ago, he knew the mare well had raised her, and that Smallridge drove said mare in his team on nigh side. The same team of horses levied on the one he sold Parkins had a few white hairs in forehead, the other one had a star in the forehead.

## EVIDENCE FOR DEFENDANT.

Constable MILLER testified that the following execution, to wit:

STATE OF ILLINOIS, Ss. PEORIA COUNTY.

The people of the state of Illinois, to constable of said county greeting:

"We command you that the goods and chattels of John Smallridge, in your county, you make the sum of 110 dollars and 00 cents debt, and 2 dollars and 30 cents cost, (with interest at the rate of six per cent. per annum, from the 5th day

of December, 1857, when judgment was rendered,) which John Dexter lately recovered before me in a certain plea against the said John Smallridge, and thereof make return to me within seventy days from this date. Given under my hand and seal this 5th day of December, 1857.

[Seal]

W. W. MILLER, J. P.

By virtue of this writ I have levied on about 250 bushels of corn on car No. 159, I have also levied on	two bay mares, one set of harness, one two horse wagon, as the property of John Svallinge, this 15th day of Dec., 1857.  G. W. Miller, Constable.	JOHN DEXTER  JOHN SMALLRIDGE.  JOHN SMALLRIDGE.  Demand, \$112 3  Services, 1 0  Lev'd, 1 0	
By writ I about corn o I have	two ba of har horse prop Svall day of	ION.  KTER  LRIDGE.  \$112 30  1 00  1 00	

was held by him, and that he made the levy as described on said execution. That the horses, waggon &c. was in possession of John Smallridge when he made the levy, about \( \frac{1}{2} \) of a mile from the residence of Smallridge. That Smallridge told constable that team belonged to Parkins, that the load of corn in the waggon was Parkins's, that he had no property, that it belonged to Parkins. Parkins was there and claimed the preperty, and said he would control the right of preperty. Smallridge said team should not go until fed.

WILLIAM RUTHERFORD testified that he purchased of Smallridge on the 1st of December last, a car load of coal. That he was to give him 7½ cents per bushel. That he did not know Parkins in the contract. That coal was shipped in the name of John Smallridge, and numbered 159, and that the said coal was levied on in said execution held by constable Miller.

Samuel Wrench, That the bill of shipment was in the name of John Smallridge, and in the handwriting of S. Edwards, the agent at Edwards station on the railroad; and that Smallridge told agent that the coal was ready for shipment; and that Smallridge and hands had hauled the coal to the car; and that Smallridge gave the notice when car was ready to ship; and witness told Edwards to ship car in the name of Smallridge, but Smallridge gave no such directions as witness knew of.

SYLVESTER WILLIAMSON testified that he worked for Smallridge; that he used his own team; and was employed by Smallridge & Brotherson; and in hauling coal Smallridge used the team of horses and wagon levied on by constable.

MILLER testified that Smallridge drove the team; used it himself; claimed the team and called it his own team. Have seen the team in Smallridge's possession from time to time ever since. And saw it in his possession at the time the levy was made. Witness was at work hauling coal for Smallridge & Brotherson. That Smallridge turned witness off because he could not use 2 teams, and stated that if any team

worked he must use his own team, which was the team levied on. Stated at the time he discharged witness he could not keep witness and team. That witness quit in June; and the coal hauled by Smallridge was before witness quit.

Henry Duckworth testified that Smallridge put the last 3 load of coal in the car, No. 159, levied on; and that he used the horses in dispute in hauling said coal. Saw the horses levied on, some 14 or 15 head of cattle, several head of hogs, plough and cultivator and 2 colts, about and on the premises of John Smallridge during the last summer, from time to time, as he was passing by said premises; and that he went pass said place very often during the last summer; and that he had occasion during the last summer to pass by the premises of Parkins from time to time during last summer; and he saw no property around the premises of Parkins; and that Parkins lived some some 3 miles from Smallridge.

Harvey Batter testified that his farm joined Smallridge's; have seen several head of cattle, 2 colts, 2 wagons and horses levied on on the premises and in the possession of John Smallridge during the last summer from time to time. The cattle broke into premises of witness, and he claimed damage from John Smallridge, who remarked that he had a right to turn his stock in said field as he had purchased the corn stocks in said field, and in other conversation he called them his own cattle.

JOHN MITCHELL. Latter end of last March witness sold John Parkins a sow and pigs; never saw any property around the premises of Parkins; did see him drive a team of horses; several times have seen Smallridge drive the same team. Have seen the team in possession of both, but oftener in the possession of Smallridge than in Parkins'. Have seen Smallridge drive team to Parkins's house and then back home; Parkins is a hard working man.

MATTHEW McReynolds. Sold John Smallridge 80 acres of land; paid me some 600 dollars; has a written agreement for a deed when the land is paid for.

Henry Duckworth, testified that on the land purchased by Smallridge of McReynolds, he Smallridge had a coal bank out of which he was digging coal, and that the coal bank worked by Parkins was on the same 80 acres of land. That the coal bank worked by Parkins was not the one worked by Smallridge.

The claimant asked the court the following instructions:

- 1. If the jury believe from the evidence that the property in controversy belongs to claimant they should find for the claimant.
- 2. If the jury believe from the evidence that the claimant bought the property in controversy, part from Landsdale and part from Smallridge, in good faith, and for a bona fide and valuable consideration, and that there was no adverse

possession of said property by any other person under claim in his own right of title, the jury should find for the claimant.

3. If the jury believe from the evidence that the claimant bought the property in controversy, and paid therefor a valuable consideration, or any part thereof, from Smallridge, and claimed and exercised acts of ownership over such property at and for some time before Dexter recovered judgment against Smallridge the jury should find for the claimant.

To which defendant excepted.

The defendants asked the Court to instruct the Jury as follows:

- 1. If the Jury believe from the evidence that there was no delivery of the property mentioned in the bill of sale, offered in evidence by the plaintiff at the time of the execution of said bill of sale, they will find for the defendant.
- 2. To constitute a delivery, the property sold must be identified, separated and distinguished from all other goods and property.
- 3. That a bill of sale that by its terms conveys possession of the chattels therein specified, to the vender in evidence of the sale, provided possession did actually follow according to the terms thereof.
- 4. If the Jury believe from the evidence that possession did not follow the bill of sale according to the tenor thereof, they will find for the defendant.
- 5. That a bill of sale is fraudulent and void, as to creditor and third persons, unless possession of the property specified therein actually followed from the vendor to the vendee, according to the terms of said bill of sale.
- 6. That possession is prima facia evidence of ownership, and in case of sale of goods or chattels, possession of said goods remain with the sellor or vendor; the sale is fraudulent and void per see (of itself,) as to creditors and third persons, and cannot be rebutted by evidence of fair intention.
- 7. That the sale of goods really consists in the delivery thereof from the vendor to the vendee.
- 8. That all sales of personal property without a delivery accompanying the bill of sale, are fraudulent and void as to the claims of judgment creditors.
- 9. That unless Smallridge delivered possession of said property over to Parkins at time of bill of sale, said property was liable to be taken for the debts of Smallridge, by any judgment creditor of Smallridge.

10. That no part of the evidence of Mrs. Smallridge is to be taken, except such testimony as is against the interest of her husband.

But the Court refused to give the instructions asked, but modified them by addressing the following, to wit:

"Whereupon the Court refused the 1st instruction asked for on the part of the defendant, and amended the 5th instruction by writing the word "not being a preferred creditor," after the words vendor and vendee in said 5th instruction, and amended the 6th instruction, by adding the words "unless such sale was to a preferred creditor, and in payment of a just debt; and amended the 7th instruction by adding thereto, "unless such sale was made in good faith and without fraud to a preferred creditor, before such judgments were obtained, and unless in the case it should appear from the evidence such sale was made to defeat the collection of the debts owing by the vendor.

Whereupon the defendant excepted to the decision of the Court refusing the first instruction asked for by defendant, and excepted to the amendment to the 5th instruction as asked for by defendant, and excepted to the amendment to the 6th instruction as asked for by defendant, and excepted to the amendment to the 7th instruction as asked for by defendant, and defendant excepted to all of said instructions as given by the Court.

WELLINGTON LOUCKS, County Judge.

Proceedings of the County Court, Peoria County, State of Illinois, began and held at the Court House, in the City of Peoria, in said County, on Monday February 1st, 1858, for Judicial and other business. Present Hon. Wellington Loucks, Judge, Charles Kettelle, Clerk, and Francis Smith, Sheriff.

## JOHN PARKINS vs. JOHN DEXTER.

## TRIAL RIGHT OF PROPERTY.-APPEAL FROM J. P.

On motion of defendant, by his attorney, it is ordered by the Court, that the said plaintiff file an additional security by Wednesday at 4 o'clock P. M., or satisfy the Court that the security given is sufficient.

#### THURSDAY, FEBRUARY 4th, 1858.

APPEAL FROM J. P. TRÍAL OF RIGHT OF PROPERTY

JOHN PARKINS vs. JOHN DEXTER.

This day came the said plaintiff by Grove and McCoy, his Att'ys, and the said

defendant by W. Pitt Kellogg and J. T. Lindsay, his Att'ys; and it is ordered by the Court that a Jury be empanelled to try said cause. Whereupon came a Jury of twelve and lawful men, to wit: A. O. Garrett, John Wetzel, John Milehan, Isaac Moore, Michael Fash, Ephraim Morison, J. M. Johnson, Jacob Farrell, David Maxwell, John H. Floyd, Isaiah Fisher, and James F. Murden, who were duly chosen, tried and sworn, well and truly to try the said cause, and a true verdict render according to the evidence given. The Jury having had the evidence in the case, and the argument of counsel retired to consider their verdict.

#### FRIDAY, FEBRUARY 5th, 1858.

APPEAL FROM J. P. TRIAL RIGHT OF PROPERTY.

#### JOHN PARKINS vs. JCHN DEXTER.

This day came again the parties in this suit; also the Jury empannelled in this cause, and returned into Court the following verdict: "We, the Jury find for plaintiff, the claimant." Therefore the said defendant, by his Att'y and entered his motion for a new trial of this cause. The Court being fully advised in the premises, doth overrule the said motion. Therefore, it is ordered by the court that the said John Dexter, or his agent, or the officer making the levy, make due return to the said John Parkins, of the goods so detained by him, and further considered by the court, do have and recover of and from the said John Dexter, his costs and charges by him in this suit, in his behalf expended in this court and the court below, and that he have execution therefor: Therefore the said defendant prays an appeal of this cause, to the Supreme Court of this State, which was ordered to be allowed, on his entering into bonds in the penal sum of three hundred dollars, within two days conditional according to Law, with Richard Gregg as security.

And afterwards, to wit: on the 15th day of February, 1858, there was filed in the office of the Clerk of the County Court of said county, an appeal bond, in words and figures following, to wit:

"Know all men by these presents,—That we, John Dexter and Richard Gregg both of Peoria county, Illinois, are held and firmly bound unto John Parkins in penal sum of three hundred dollars, the payment of which we do bind ourselves, our heirs, executors and administrators firmly by these presents. Witness our hands and seals, this fifteenth day of February, A. D 1858.

The condition of the above obligation is such, that whereas, the said bound John Dexter has prayed for an appeal in a certain cause in the county court of Peoria county, Illinois, wherein John Parkins is plaintiff, and John Dexter, defendant, to the Supreme Court of the said State,—which trial is the right of property. Now in case the said John Dexter shall pay all judgments for costs which may be awarded against him by reason of said appeal, and shall pay all costs

which may be awarded against him in said county court, in said cause, and shall keep the said John Parkins harmless from any costs or damages, which by law the said Dexter should pay, then this obligation shall be void, else to remain in full force and virtue.

JOHN DEXTER,
By JOHN T. LINDSAY, his Att'y in fact.
R. GREGG,
[L. s.]

STATE OF ILLINOIS,

I Charles Kettelle, Clerk of the County Court of said County, do hereby certify that the foregoing is a true copy of the papers filed in said entitled cause, and bill of Exceptions, Appeal Bond, and a true transcript of the records in said cause being a full and perfect record of said cause.

Witness my hand and seal, the 19th day of April 1858.

CHARLES KETTELLE, Clerk.
Per. Geo. H. KETTELLE, Deputy.

JOHN PARKINS, vs.-JOHN BEXTER. STATE OF ILLINOIS,
SUPREME COURT, THIRD GRAND DIVISION.
APRIL TERM, A. D. 1858.

And now comes the said John Dexter, by Lindsay & Lander, Attorneys, and say that in the records and proceedings of said County Court there is manifest and manifold error, and assign for error,—

1. Said Court erred in allowing Mrs. Smallridge, wife of the defendant in execution, to testify in said cause.

2. The Court erred in refusing the first instruction, as asked for by defendant.

3. The Court erred in amending the 5th, 6th and 7th instructions, as asked for by defendant Durit Leaster

4. The Court gave wrong instructions, as asked for by complainant.

5. The verdict of the jury is against the instructions of the Court.

6. The verdict of the jury is against the evidence.

7. The verdict is against law.

8. There is no law or evidence in this cause to support the verdict of the jury.

9. The said Court erred in not granting defendant a new trial.

10. The said Court erred in overruling the motion of defendant for a new trial, for the reasons stated in said motion.

Wherefore, for the errors aforesaid, the said John Dexter prays that the said judgment and decree of said Circuit Court may be reversed, set aside, and for nought had, held and esteemed.

LINDSAY & LANDER, for Appellant.

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