No. 14825

Supreme Court of Illinois

Hanford

vs.

Obrecht

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 127

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

Hayford
vs
Creek

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The People of the State of Illinois

To all to whom these Presents shall come Greeting That we having caused to be inspected the Records and proceedings now remaining in the office of our Clerk of our Circuit Court in and for our County of Kankakee Do find certain Records and proceedings in the words and figures following to wit:

" United States of America
" State of Illinois } ss
" Kankakee County }

" Pleas before the Honorable
" Charles B Starr Judge of the Twentieth Judicial Circuit
" and presiding Judge of the Kankakee County Circuit
" Court begun and held at the Court House in Kanka-
" kee City in said Kankakee County on the first Monday
" (the same being the Fifth day) of December in the year
" of our Lord One Thousand Eight Hundred and Sixty
" Four and of the Independence of the United States
" of America the Eighty Ninth
" Present. Hon Charles B Starr Judge of the twentieth Judicial Circuit
" N. F. Ament States atty of " " "
" Rayland D Sherman Sheriff of Kankakee County
" John B Welch Clerk of the Kankakee County Circuit Court

And heretofore to wit: on the 20th day of June A.D. 1864 Zalmon P Hanford Plaintiff by Thomas P Bonfield his Attorney did file in the Office of the Clerk of our said Court his certain Praecipe in the words and figures following to wit:

State of Illinois } ss
Kankakee County } ss

Zalmon F Hanford Plaintiff being duly sworn deposes and says he is owner of the following described goods and Chattels viz: 5 Feather Beds 5 under beds 1 Mattress 3 Bolsters: 5 pair Pillows; 10 pair Pillow cases: 10 pair sheets: 10 comforters 1 5 quilts: 5 Bedsteads: 1 Dining table: 1 Breakfast table: 1 Bureau washstand: 3 Parlor Stoves and pipes: 1 Card Table: 1 cooking Stove and pipe 12 cane seat chairs: 2 dining chairs 6 common chairs 1 large looking glass 2 dressing glasses 1 dressing table 1 set of crockery 1 two year old heifer 5 carpets and 14 hives of bees of the value of Four Hundred and Eighteen Dollars and that he is entitled to the possession of the same and that Jacob Obrecht defendant wrongfully took the same from his possession to wit on the Tenth day of June AD 1864 at said County and he further says that said goods and chattels have not been taken for any tax assessment or fine levied by virtue of any law of said State nor seized under any execution or attachment against the goods and chattels of said Plaintiff liable to execution or attachment

Zalmon F Hanford

Subscribed and sworn to before me this 25th day of June AD 1864
Elon Curtis Clerk
by J R Welch Depty

State of Illinois } ss
Kankakee County } ss

Circuit Court September Term AD 1864

Zalmon F Hanford
vs
Jacob Obrecht

Replevin Damages $100.00

Issue a writ of Replevin directed to the

Coroner of said County to serve against said defendant in the above entitled cause returnable according to law for the goods and chattels described in the foregoing affidavit of the value of Four Hundred and Eighteen Dollars

Jo Cleaveland's Co
Clerk Circuit Court

Tho P Bonfield
Plffs Atty

"Filed June 25- 1864

E. Curtis Clerk by J B Welch Deputy"

and afterwards to wit on the same day as aforesaid our said Clerk did issue a writ of Replevin as follows to wit:

State of Illinois
Kankakee County } ss The People of the State of Illinois

to the Coroner of said County Greeting!

Whereas Zalmon P Hanford plaintiff complains that Jacob Obrecht defendant unlawfully and wrongfully has taken the following described goods and chattels to wit: 5 feather beds 5 under Beds 1 Matress 3 bolsters 5 pair pillows 10 pair pillow cases 10 pair sheets 10 comforters 5 quilts 5 bedsteads 1 dining table 1 Breakfast table 1 Bureau washstand 3 parlor Stoves and pipes 1 card Table 1 cooking stove and fixtures 12 cane seated chairs 2 dining chairs 6 common chairs 1 large looking glass 2 dressing glasses 1 dressing table 1 set of crockery 1 two year old heifer 5 carpets and 14. Hives Bees of the value of Four Hundred and Eighteen Dollars. Therefore we command you that if the said Plaintiff shall give you bond with good and sufficient security in double the value of the said goods and chattels as required by law to prosecute his suit in this behalf to effect and without delay and to make

return of the said goods and chattels if return thereof shall be awarded and to save and to keep you harmless in replevying said goods and chattels you cause the said goods and chattels to be replevied and delivered to the said plaintiff without delay. and also that you summon the said Defendant to be and appear before the Circuit Court for said County on the first day of the next term thereof to be holden at the Court House in Kansasville city in said County on the first Monday of September next to answer said Plaintiff in the premises to his damages $100.00 and have you then and there this writ with an endorsement thereon in what manner you have executed the same together with the Bond which you shall have taken from said plaintiff as before commanded before executing this writ.

(Sic Testamur)

Witness Elon Curtis Clerk of our said Court and the seal thereof at Kansasville city this 20th day of June A.D. 1864

Elon Curtis Clerk
by J.B. Welch Deputy

" I have served this writ by Replevying the
" within described goods and chattels and delivered them to
" Zalmon D. Hunford Plaintiff and by reading the within
" writ to the within named Jacob Obrecht
" June 25 - 1864
" W.H. Matheuson Coroner

Filed June 27. 1864. Elon Curtis Clerk
by J.B. Welch Deputy

and said Coroner also filed the Bond in said cause which he had taken in the words and figures following to wit:

Know all men by these presents that We Zalmon D. Hunford and Leonard Money are held and firmly bound unto William

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H Mathewson Coroner of the County of Kankakee in the State of Illinois and to his successors in office executors administrators and assigns in the penal sum of of Eight Hundred and Fifty dollars lawful money of the United States for the payment of which sum we do hereby Jointly and severally bind ourselves our heirs executors and administrators - The condition of this obligation is such that Whereas on the twentieth day of June in the year of our Lord one thousand Eight hundred and Sixty Four the said Zalmon F Hanford sued out of the Circuit Court of Kankakee County Illinois a writ of Replevin against Jacob Obrecht defendant for the recovery of the following described goods and Chattels to wit: 5 feather beds 5 under beds 1 mattress 3 Bolsters 5 pair pillows, 10 pair pillow cases 10 pair sheets 10 comforters: 5 quilts 3 bedsteads: 1 dining table 1 Breakfast table 1 Bureau washstand: 3 parlor stoves and pipes: 1 card table 1 cooking stove and pipe: 12 cane seat chairs: 2 Dining chairs: 6 common chairs: 1 large looking Glass - 2 dressing glasses: 1 dressing table: 1 set of crockery: 1 two year old heifer: 5 carpets and 14 hives of Bees of the value of Four Hundred and Eighteen dollars Now if the said Zalmon F Hanford Plaintiff shall prosecute his said suit to effect and without delay and make return of the said property if return thereof shall be awarded and save and keep harmless the said Coroner in replevying the said property then this obligation to be void otherwise to remain in full force and effect

Witness our hands and seals this 20th day of June A D 1864

Zalmon F Hanford (Seal)

Leonard Morey (Seal)

Filed June 21st 1864
E Curtis Clerk
by W Welch Deputy

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and afterward on the 18th day of november aD 1864 the Plaintiff by TP Benfield filed his declaration as follows to wit:

State of Illinois } ss
Kankakee County } Circuit Court December Term aD 1864

Jacob Obrecht the defendant in this suit was summoned to answer Zalmun F Hanford the Plaintiff in this suit of a plea wherefore he took the goods and chattels of the plaintiff and unjustly detains the same until &c and thereupon the said plaintiff by Thomas P Benfield his attorney complains for that the said defendant on tenth day of June in the year of our Lord one thousand eight Hundred and sixty four at the county of Kankakee aforesaid took the goods and chattels to wit: five feather beds: five under beds: one matress: three Bolsters: five hair pillows: ten hair pillow cases: ten pair sheets: ten comforts: five quilts: five Bedsteads: one dining table: one breakfast table: one bureau wash stand: three parlor stoves and pipes: one card table: one cooking stove and pipe: twelve cane seat chairs: two dining chairs: six common chairs: one large looking glass: two dressing glasses: one dressing table: one sett of crockery: one two year old heifer: five carpets and fourteen hives of bees of the said plaintiff of great value to wit: of the value of four Hundred and eighteen dollars and unjustly detains the same until &c and also for that the said defendant on the tenth day of June in the year of our Lord one thousand eight Hundred and sixty four at the said county of Kankakee

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detained the goods and chattels to wit: five feather beds 5 underbeds: one mattress: three bolsters: five pair pillows two comforters: five quilts: five bedsteads: one dining table: one breakfast table: one bureau washstand: three parlor stoves: and pipe: one cook table: one cooking stove and pipe: twelve cane seat chairs: two dining chairs: six common chairs: one large looking glass: two dressing glasses: one dressing table: one set of crockery: one two year old heifer: five carpets and 14 hives of bees of the said plaintiff of great value to wit: of the value of four Hundred and eighteen dollars and one unjustly detains the same &c and the said plaintiff is now lawfully entitled to the possession thereof to wit at said county, whereof the said plaintiff says he is injured and has sustained damage to the sum of one Hundred dollars and therefore he brings suit &c

Thomas P Benfield Pffs atty

"Filed Nov 18. 1864 E Curtis clerk"

and on the 5th of December AD 1864. the defendant by Stephen R Moore his attorney filed in the clerks office his pleas in the words and figures following to wit:

State of Illinois }
Kankakee county } ss

In circuit Court December Term AD 1864

Zalmon F Hanford }
vs } Replevin
Jacob Obrecht }

and the said defendant by Stephen R Moore his attorney comes and defends the wrong and injury when &c and says

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1st Plea

that he did not take the said goods and chattels in the said declaration mentioned or any or either of them or any part thereof in manner and form as the said plaintiff in said declaration hath alledged against him and of this he puts himself upon the country &c

Stephen R Moore defts atty

And the Plaintiff doth the like } and for a further plea in this

2d Plea

behalf defendant says actio non because he says that the property of the said goods and chattels in the said declaration mentioned at the said time when &c was in him the said defendant without this that the property of the said goods and chattels or any part thereof at the said time whence was in said plaintiff as by the said declaration is above supposed and by this the said defendant puts himself upon the country &c

By Stephen R Moore defts atty

3d Plea

and for a further plea in this behalf said defendant says actio non because he says that the property of the said goods and chattels in the said declaration mentioned at the time when &c was in one Zalmon Hanford without this that the property of the said goods and chattels or any part thereof at the said time when &c was in said plaintiff as by said declaration is supposed and this the said defendant is ready to verify wherefore he prays judgment and a return of the said goods and chattels . Stephen R Moore defendants atty

4th Plea

and for a further plea in this behalf the said Defendant says actio non because he says that at

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the time whence the said defendant was the sheriff of said County of Kankakee and State of Illinois and that on the 23d day of April A.D 1864 at the County aforesaid one execution came into his hands as such sheriff issued by the Clerk of the Circuit Court of Kankakee county bearing date the 21st day of April A.D 1864 on a judgment in the said court rendered at a term of said Court held in said County, and begun on the first monday of January A.D 1862 wherein one John Dunnell was Plaintiff and one Zalmon Hanford was defendant for the sum of Two Hundred and Fifty four dollars damages and the costs of suit amounting to fifty four Dollars and five cents which were adjudged to the said Plaintiff for his costs and charges in that behalf expended which said judgment was then and there in full force and effect, and the money due thereon unpaid, directed to the defendant, as such Sheriff to execute, and that by virtue of such execution the said defendant as such Sheriff as aforesaid did on the 8th day of June A.D 1864 at the County aforesaid take the said goods and chattels in the said declaration mentioned and levy upon the same by virtue of the execution as aforesaid as the property of the said Zalmon Hanford; and the said Defendant avers that the said goods and chattels in the said declaration mentioned were the property of the said Zalmon Hanford and were subject to execution without that the property of the said goods and chattels or any part thereof at the said time whence was in said plaintiff as by the said

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declaration is above supposed and this the Defendant is ready to verify wherefore he prays judgment &c and a Return of the said goods and chattels &c

— Stephen R Moore
Defendants atty

"Filed Dec 5. 1864
G B Welch Clerk"

and afterwards to wit on the 9th day of December aD 1864 the Plaintiffs attorney filed his Replication in the words and figures following to wit:

State of Illinois
Kankakee County } In Circuit Court of the December Term aD 1864

Zalmon F Hanford
vs
Jacob Obrecht — } Replevin

and now comes the said Plaintiff and says to the said plea secondly above pleaded by the said Defft precludi non because he says that at the said time when &c the said goods and chattels in said declaration mentioned were the property of the said Plaintiff and were not the property of the said Defft as is by the said Plea supposed and of this he puts himself upon the country &c Defft doth the like

Replication to 2d Plea

and the said Defft says to the said Plea thirdly above pleaded by said Defft precludi non because he says that at the said time when &c the said goods and chattels were the property of the said Defft and were not the property of the said Zalmon Hanford as is by said plea supposed and of this he puts himself upon the

Replication to 3d Plea

Page 11
Replication to 4th Plea

country & deft doth the like.
And the said Plff says to the said plea fourthly above pleaded by said deft precludi non because he says that at the said time when &c the said goods and chattels were the property of the said Plff and were not the property of the said Zalmon Hanford as is by said plea suppose and of this he puts himself upon the country and deft doth the like And the said Plff further says to the said plea fourthly above pleaded precludi non because he says at the said time when &c no execution issued upon any such judgment as is by said plea alledged and this the said Plff puts himself upon the country & deft doth the like

Thos P Bonfield
Plffs atty

11

Filed dec 9. 1864
J B Welch clerk 11

afterward on the 5th day of december A.D. 1864 the same being one of the regular days of the December Term of the said Circuit Court and year A.D. 1864 and the said Court being then duly organized and sitting in open court for the transaction of business certain other proceedings were had and entered of Record in said cause to wit:

Zalmon Hanford
vs
Jacob Obrecht } Replevin

This cause by agreement of the parties is set for trial next friday in the afternoon

and afterwards to wit on the 16th day of december A.D. 1864 the same being one of the regular days of the

December Term of said Court for said year aD1864 and the said Court being duly organized and sitting for the transaction of business certain other proceedings were had and entered of Record to wit;

Zalmon F Hanford
vs
Jacob Obrecht } Replevin

Now come the parties and this cause is ordered to proceed to trial and a jury come for that purpose of good and lawful men to wit: Maxcine Belgarde Henry W Burton Thomas Switzer William Stevens .. George W Huling R D Gleason George H Cook James McKinstry Clark Perry James E Babcock Charles L Wooster and C F Miley who being duly elected tried and sworn to well and truly try the issues joined between the parties to this suit and a true verdict give according to the evidence. after hearing the evidence this day adduced by agreement of counsel seperate to take the case again to morrow morning;

and afterwards to wit: on the 17th day of December aD1864. the same being one of the regular days of the December Term of said circuit Court for said year aD1864 and the said Court being there open and sitting for the transaction of judicial business certain other proceedings were had and entered of Record by said Court to wit;

Zalmon Hanford
vs
Jacob Obrecht } Replevin now again come the

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Verdict

juros in this cause into open court and hear the balance of the evidence arguments of counsel instructions of the court and retire to consider of their verdict and having agreed thereon come again and for verdict say we the jury find the defendant not guilty—

and afterwards on the 19th day of december ad 1864 the same being one of the regular days of the December term of said court ad 1864 and the said court being then duly organized and sitting for the transaction of judicial business certain other proceedings were had and entered of Record by said court in the words and figures following to wit:

Zalmon Hanford
vs
Jacob Obrecht } Replevin

now again come the parties by their attorneys Whereupon it is considered by the court that the Defendant have and recover of the Plaintiff his damages to the sum of one cent together with his costs and charges by him about his defence in this behalf expended and that he do have execution therefor and that a writ De Retorno be awarded to all of which the Plaintiff then and there excepts.

and afterwards to wit on the 24th day of december ad 1864 the same being one of the regular days of the december term of the said court. for said year ad 1864. and the said court being duly organized and sitting for the transaction of business certain other proceedings were had and

Page 14 entered of Record to wit:

" Zalmon Hanford
1863 vs } Replevin
" Jacob Obrecht

" now come the parties to this
" suit and the Plaintiff by I P Benfield his
" attorney prays an appeal from the decision of this
" Court in this cause and the Court being fully advised
" thereon the same is granted upon the Plaintiffs filing
" the necessary Bond herein in the sum of One
" Thousand Dollars with Jackson Wheaton Austin
" Beedy and Stephen F Hanford as security within
" Ten days

and afterwards to wit on the 30 day of January A.D. 1865 the Plaintiff filed his Bond as follows to wit:

Know all men by these presents. That we Zalmon F Hanford Stephen F Hanford Austin D Beedy and Jackson Wheaton of the County of Kankakee and State of Illinois are held and firmly bound unto Jacob Obrecht in the penal sum of One Thousand Dollars for the payment of which well and truly to be made we jointly and severally bind ourselves our heirs executors and administrators firmly by these presents. Sealed with our seals and dated this 27th day of December A.D. 1864

The condition of the above obligation is such that Whereas at the December Term of the Circuit Court

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of the County of Kankakee and State of Illinois 1864 began and held at the Court House in Kankakee city in the County of Kankakee aforesaid on the first Monday of December in the year 1864 in a certain action of Replevin wherein the said Zalmon F Hanford was Plaintiff and the said Jacob Obrecht was Defendant the said Jacob Obrecht recovered a Judgment against the said Zalmon F Hanford for the sum of one cent damages besides the costs of said suit and for the return of the goods and chattels described in said suit to the said Jacob Obrecht to reverse said portion of said Judgment awarding a returno of said goods and chattels to said Jacob Obrecht said Zalmon Hanford has appealed said suit to the Supreme Court of the State of Illinois.

Now if the said Zalmon F Hanford shall duly prosecute his said appeal and shall pay or cause to be paid said judgment in case the same shall not be reversed and all judgments costs interests and damages which may be adjudged against him in this behalf by the said Supreme court and shall abide the order and judgment of the Supreme court aforesaid in this behalf then this obligation to be void otherwise to be and remain in full force and effect

Zalmon Hanford (Seal)
J F Hanford (Seal)
A D Beedy (Seal)
J Wheaton (Seal)

Filed Jany 3d 1865
J B Welch Clerk

State of Illinois
Kankakee County ss. I John B Welch clerk of the Circuit Court in and for said County in the State aforesaid Do hereby certify that the above and foregoing is a true copy of the Record as far as the clerk was required to make it and of the proceedings in a certain cause lately pending in the Kankakee County Circuit in which Zalmon S Hanford was Plaintiff and Jacob Obrecht was Defendant as appears from the Records and files of said Court now in my said office



Witness my hand and seal of our said court hereto affixed at Kankakee City said County this 21st day of March AD 1865

John B Welch
Clerk

And the said Zalmon S. Hanford now comes and says that in the Record and proceedings aforesaid, there is error in this, to wit,

1st That the Court erroneously awarded a return of the goods and chattels in said Record mentioned, to the defendant.

2d That the Court gave judgment in favor of the defendant for a return of the goods and chattels described in said Court, when no such return should have been awarded.

3d That the said judgment should have only been for costs of suit.

Wherefore the said Zalmon Hanford prays that said judgment may be reversed and that he may be restored to all things which he has lost by reason thereof

By S. B. Hanford
His Atty.

And the said Jacob Obrecht, defendant

he may be restored to all things which he has lost by reason thereof

By Thos P Bonsall
His Atty.

And the said Jacob Obrecht, defendant in the appeal, now comes and says that there is no error, either in the record and proceedings aforesaid, or in giving judgment aforesaid, in manner and form as above assigned, and therefore prays that the said judgment may be affirmed, and that his costs may be adjudged to him &c

Stephen R. Moore
Atty for appellee

Zalmon Hanford
vs
Jacob Obrecht
"
Replevin

Record

Filed April 23d 1855
L. Leland
Clerk

#5.00 pd by J P Benfield

["Gazette" Print, Kankakee City, Illinois.]

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

April Term, A. D. 1865.

ZALMON F. HANFORD,
vs.
JACOB OBRECHT.

Appeal from Kankakee County Circuit Court.

ABSTRACT OF RECORD.

Record p. 2, June 20, 1864.

Affidavit filed by the plaintiff, setting forth that he was the owner of certain goods and chattels therein named, of the value of $418, and was entitled to the possession of the same, and that the defendant on the 10th day of the same month, wrongfully took and detained the same from the plaintiff, and that the same was not taken for any tax, &c.

2 & 3 Precipe for writ of replevin.

3 & 4 June 20 1864, writ of replevin issued in the usual form for said property.

4 June 25, 1864, Sheriff returned writ of replevin, served by taking and delivering the property to the plaintiff, and reading writ to the defendant, and also filed replevin bond.

5 Replevin bond given the Sheriff by the plaintiff in due form of law.

6 November 18, 1864. Plaintiff filed his declaration, containing two counts.

6 1st count was that the said goods and chattels were wrongfully taken and detained by the Defendant from the Sheriff, &c.

7 2nd count, was that the said goods and chattels were wrongfully detained by the defendant from the plaintiff, and that he was entitled to the possession thereof. Damages laid at $100.

7 December 5, 1864, the defendant filed four pleas.

8 1st Plea, Non cepit.

8 2nd Plea, That the property in said goods and chattels was in the defendant.

8 3rd Plea, That the property in said goods and chattels was in one Zalmon Hanford.

9 & 10 4th Plea, That defendant was Sheriff of Kankake County, and that on the 23rd day of April, 1864, an execution for $254, damages, and $54 costs, in favor of Otto Immelt, and against said Zalmon Hanford, came into said Sheriff's hands to be served, and that he levid said execution upon said property, and that the same belonged to said Zalmon Hanford, and was liable to said seizure.

10 December 9, 1864, Plaintiff filed three replications, concluding to the country.

10 Replication to the 2nd Plea, that the property in said goods and chattels was in the plaintiff, and not in the defendant.

10 & Replication to the 3rd Plea, and 1st, Replication to the 4th Plea, that the property in said goods and chattels was in the

11 plaintiff, and not in said Zalmon Hanford.

11 2nd Replication to the 4th Plea, that no execution had issued as alleged.

12 & 13 December 12, 1864, Cause was tried upon the above issues by a jury, who returned a verdict that "the defendant was not guilty."

13 December 19, 1864. Judgment was rendered on the verdict for one cent damages, and the award of a writ de retorno for the property replevied, to which the plaintiff excepted.

14 December 24, 1864, Appeal granted upon plaintiff's prayer by his giving bond in the sum of $1000, with Jackson Wheaton, Austin Beedy and Stephen F. Hanford, as sureties within ten days.

14 January 3rd, 1865. Plaintiff filed Appeal Bond, with the above sureties, in the sum of $1000, conditioned according to law.

ERRORS ASSIGNED.

That the Court awarded a return of the goods and chattels to the defendant.

That the court gave judgment in favor of the defendant for a return of the property, when no such return should have been awarded.

That judgment should only have been for costs.

THOMAS P. BONFIELD,
Appellant's Attorney.

BRIEF AND POINTS.

The Plaintiff in the appeal, presents but one question for revision, and that is whether the Defendant was entitled to a return of the property replevied.

Section 6, of page 434, of Revised Statutes, of 1845, provides that "if the right of property shall be adjudged against "him, the court shall give judgment for a return of the "property taken," which renders it clear that there must be a finding of the right of property in the Defendant, to authorize a court to award a return of the property. And where a cause is tried by a jury, the court is not authorized to award such return unless the jury by their verdict find the right of property against the Plaintiff.

The declaration charged the Defendant, in one count, with a wrongful taking, and in the other count with a wrongful detention of property. The Defendant plead non-cepit, property in himself, property in another, and justification under an execution. These pleadings of the Defendant's, while denying the wrongful taking, admitted the wrongful detention, unless the property was in himself or another. The verdict of the Jury was not a general verdict upon those issues, but was confined to a single issue, that "the Defendant was not guilty," which, under no construction of language, can have any other meaning than that "the Defendant was not guilty" of wrongfully taking the property. In numerous cases this court has held that in a finding in favor of the Defendant, under the issue of whether the Defendant did or did not wrongfully take property, he was not entitled to a return. Vose et al vs. Hart, 12 Illinois, 378. And, although the defendant contends that this court has held that upon a verdict in favor of the defendant, where he has plead non cepit, and property in himself, that he was entitled to a return, yet an examination of those cases show that no return has ever been awarded upon such a verdict, as that in this case, but only where the verdict covered all the issues. and adjudged the right of property against the plaintiff. To show that a rule is wrong which requires a return of property to be made upon any verdict in favor of the defendant, merely because he has plead property in himself or a third person, it is only necessary to call to mind cases within the experience of every practitioner, where, in like pleadings and issues, it has been shown that property came to the defendant's possession lawfully, but he has omitted to make a demand, or has made a

demand, but has failed, through the death, emigration or bad memory of witnesses, to prove it, and while the defendant has not attempted or never contemplated sustaining his pleas of property, yet is entitled to a verdict of not guilty, and under this verdict the plaintiff should pay the costs, but should not be deprived of his property; or the plaintiff might have had no reason to doubt but that the defendant came by the property tortiously, and therefore not made any demand, yet in the conflict of evidence, which the defendant might create, the jury might come to a different conclusion, yet justice would say, that upon such a state of facts and verdict, it is enough for the plaintiff to pay the costs, without losing his property, merely because the defendant has coupled a plea of property with a plea of non detinet.

THOMAS P. BONFIELD,
Appellant's Attorney.

Saluum 127 F Hanford

42

Jacob Vorse
Extract Brief & Civil
Appellant

Yolo Co Aug. 1865
L Secombe

["Gazette" Print, Kankakee City, Illinois.]

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

April Term, A. D. 1865.

ZALMAN F. HANFORD,
vs.
JACOB OBRECHT.
} *Appeal from Kankakee County Circuit Court.*

BRIEF AND POINT FOR APPELLEES.

The question presented is: Was the defendant entitled to a writ de retorno?

The Narr contained two counts. 1st, For the wrongful taking; 2nd, For the wrongful detention.

To the 1st, Count there is the plea of *non cipit.* The party went to trial, without the plea of *non detinet,* and without objection. This objection is cured by verdict.

Ross *vs.* Reddick, 1 Scam, 74.

Brazzle *vs.* Usher, Breese 14.

Graham *vs.* Dixon, *et al.,* 3 Scam, 118.

Statutes of amendment and Jefails, Section 6.

The cause stands, then the same as if the general issue was filed. The jury found the defendant, "Not Guilty." Did

the court err in awarding a writ *de retorno*, Sec. 7, Cooke's statutes, page 226, provides three conditions, that the defendant is entitled to a return of the property. 1st, If any plaintiff in the action of replevin, shall fail to prosecute his suit with effect, and without delay, the court shall give judgment for a return of the property.

2nd. If any plaintiff has an action of replevin, shall suffer a non suit or discontinuance · the court shall give judgment for a return of the property. And

3rd. If the right of property shall be adjudged against him the court shall give judgment for a return of the property.

It will scarcely be contended the plaintiff, prosecuted this suit with effect, with the verdict "not guilty"—staring us in the face.

This court decided "the defendant may plead in bar, pro-
"perty in himself or in a stranger, and if he succeed on the
"trial, he will be entitled to a return of the property, and to
"damages for the detention thereof. It is not necessary that
"he should connect himself with the title of the stranger. It
"is sufficient for him that the right of property is not in the
"plaintiff."

Anderson *et al. vs.* Talcot, 1 Gilm, 371. See authorities there cited.

The case of Vose *et al. vs.* Hart, 12 Ills., 378, is not analogous to this In that case there was but one plea, non cepit.

There are 5 pleas in this case.

1st. Non cepit.

2nd. Non detinect, (by intendment.)

3rd. Property in defendant.

4th. " "Zlaman Hanford.

5th. Justification by defendant as Sheriff, on an execution

against Zalmon Hanford, and an averment, that the property was property of Zalmon Hanford.

On these issues the substantial matter in dispute is the right of the plaintiff to the property—and the verdict of "Not Guilty," is a finding for the defendant in the issues.

Gotloff *vs.* Henry *et al.* 14 Ills., 384.

The evidence in the court below is not presented to this court. The pleadings show, it was a contest of a creditor of Zalmon Hanford, to collect his debt, and the jury found for the defendant, the Sheriff, who held the execution, and the court awatded a return of the property.

Should this court hold the verdict of the jury was not broad enough to sustain the judgment of the court, then the court should follow the rule, laid down in Vose *et al. vs.* Hart, 12 Ills., 379, and remand the cause with an order for a trial *de nova*. But we hold the verdict, is not only substantially correct, but technically correct, and sustains the judgment of the court for a return of the property. Courts are instituted to do justice, and not thwart justice. Great injustice would be done Immell, the execution creditor, if a return of the property should not be awarded to the officer. It would be a barren victory, and the plaintiff might well rejoice to lose the suit, and pay the costs, but hold the property.

STEPHEN R. MOORE,
Attorney for Appellees.

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Rahm & Hanford
vs
Jacob Obrecht
Points for appellee

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L Schandelle