

13611

No. _____

Supreme Court of Illinois

Millay et al

vs.

Dunn

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 57.

Dunn
vs
Mullay

1862

13611
Prepared

1
State of Illinois } Pleas before the Honorable
Safall County } Madison E. Hollister the
Judge of the Ninth Judicial
District of the State of Illinois, and the
Presiding Judge of the Safall County Circuit
Court, in Said State at a term of said Court
commenced and held at the Court House
in Ottawa in Said County and State on
the first Monday in the Month of ~~February~~^{November}
the Same being the ~~fourth~~^{ninth} day of Novem-
ber, in the year of our Lord One Thousand
Eight Hundred and Sixty and of the
Independence of the United States of
America the Eighty Ninth,
Present, The Honorable Madison E. Hollister, Presiding Judge
John F. Nash Clerk
Washington Bushnell, States Attorney
Francis Warner Sheriff.

Be it Remembered That on the 3rd day of
October, A.D. 1860, an affidavit was filed
by J. F. Nash, Clerk of Said Court, which
is in the words and figures following,
To Wit:

State of Illinois }
Safall County } Marvin Dunn on oath

2.
Says That he is the legal owner, and is lawfully entitled to the possession of about Five Hundred Bushels of Ear Corn in a Crib, by itself, on the premises of One Nathaniel S. Pierce, in the Town of Adams, in Said County, and also Two Hogs of great value, to wit, of the value of One Hundred Dollars.

That on the 25th day of September A.D. 1860, James J. Millay, and Nathaniel S. Pierce, wrongfully distrained and took Said Corn from affiant, and unjustly detain the Same goods and Chattels from him.

And affiant Says, that Said goods, have not been taken for any tax, assessment or fine, levied by virtue of any laws of this State nor Seized under any execution or attachment, against the goods, and Chattels of affiant liable to execution or attachment.

Merwin Dunn

Subscribed & Sworn
before me this 2^d Oct, 1860,

John F. Nash Clerk
Giles Harrington Jr Deputy,

Be it Remembered, That, on the

3.

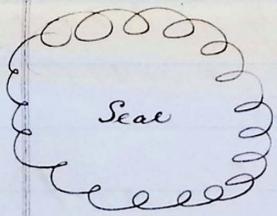
3^d day of October, A. D. 1860. A writ
of Replevin, was issued ^{under the seal} out of Said
Court, which is in the words and
figures following to wit:

State of Illinois } The People of the
Safall County } State of Illinois
Do the Sheriff of
Said County Greeting:

If Marvin Dunn
of Said County, shall give you good and
Sufficient Security, to prosecute his
Suit to effect and without delay
and to make return of the following
described goods and Chattels the prop-
erty of him, ^{the} Said Marvin Dunn to wit:
About Five Hundred Bushels of Ear
Corn in a crib by itself, one the premises
of One Nathaniel S. Pierce in the Town
of Adams, in Said County, and also
Two Hogs of great value To wit:
of the value of One Hundred Dollars,
Which James Millay & Nathaniel S. Pierce
also of Said County, forcibly and unlaw-
fully took and unjustly detains and return
the Said property, if return thereof be a-
warded - and further to Save and keep
you harmless in replevying Said property.

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then you are to Cause the Said property to be replevied and delivered to Said Marvin Dunn without delay, And Summon the Said James J. Millay & Nathaniel Price personally to be and appear before our Circuit Court in and for Said County, on the first day of the next term thereof, to be holden at the Court House in Ottawa in Said County on the first ~~day of~~ ~~the next term thereof~~ Monday of November next, to answer to the Said Plaintiff of the Said Dunn, for their unjustly detaining the goods and Chattels aforesaid, And make due return of the bond to be taken of the Said Plaintiff, as aforesaid together with this writ, to the Clerk of our Said Court, with an endorsement hereon, as to your doing in the premises



Witness John F. Nash Clerk
 and the Seal of our Said
 Circuit Court at Ottawa
 this 3^d day of October A.D.
 1861.

John F. Nash Clerk,
 Geo Harrington Jr, Deputy.

5

On the Back, of which "Writ of Replevin" is the words and figures following to wit;

" 201
Martin Gunn

vs
James J. Millay &
Nathaniel S. Pierce

Writ of Replevin.

Executed this writ by taking the within.

Executed this writ by taking the within named Corn and delivered the same to Plaintiff, the Hogs not found, Also by reading the within writ, to the within named James J. Millay and Nathaniel S. Pierce this 11th day of October 1860.

Sa.	1.00	A. Warner Sheriff
Repls. Hogs	1.00	By, S. A. Signor Deputy
Bond	50	
Ret fee 46	¹⁰ 4.60	
Paid by Plaintiff	7.20.	

Filed November 8, 1860,

J. F. Clerk Clerk "

Be it Remembered, that, on the 8th day of November 1860, A. Bond was filed

6
in Said Court, by John A. Nash Clerk,
which, is in the words & figures following
to wit!

State of Illinois } ss.

Lafalle County } 3

Know all men by these
presents that Marvin Dunn and Lewis Sump-
per of the County of Lafalle and State
of Illinois, are firmly held and bound unto
Francis Warner, Sheriff of Said County
in the penal Sum of Two Hundred dollars
good and lawfull money of the United
States, which Sum well and truly to
be made, we bind ourselves our heirs
executors and administrators firmly by
these presents.

Witness our hands and Seals, this
9th day of October A.D. 1860.

The Condition of the above obliga-
-tion is such, that whereas the above named
Marvin Dunn on the 2^d day of October A.D.
1860, sued out of the Circuit Court of La-
-falle County, a writ of Replevin ar-
-gainst one James J. Millay, and
Nathaniel Pierce for the following
goods and Chattels viz! About
Five Hundred Bushels of Ear Corn, Two
Hogs of the value of One Hundred dollars

7. And Said Writ is returnable at Alliance
in Said County on the 5th day of November
next, Now if the Said Marvin Dunn
shall appear at the next term of Said
Court and prosecute Said Suit of Re-
plevin to effect, and without delay
and make return of Said property
if return thereof be awarded, and
Secure and keep harmless the Said
Sheriff in replevying Said Property
then the above obligation to be null
and void, otherwise to be, and remain
in full force and effect.

Marvin Dunn (S))
Soni's Supper (S))

Be it Remembered, That on the 11th
day of January 1861. The following
Narr, was filed in Said Court, which
is in the words and figures following
to wit!

State of Illinois) SS, And Circuit Court
Safall County) thereof to February
Term A.D. 1861.

James J. McIlroy and Nathaniel S.
Pierce, the defendants in this Suit were
Summoned to answer Marvin Dunn

the Plaintiff in this Suit of a plea
wherefore he wrongfully took the goods
and Chattels of the Said Marvin Dunn
and unjustly detained the Same, against
Sureties and pledges, untill &c. and thereupon
the Said Marvin Dunn by Bushnell & Tracy
his Attorneys Complains, For that on the
Twenty fifth day of September A.D. 1861
the Said dependants in the Town of Adams
& County aforesaid, wrongfully took and
detained, about Five Hundred Bushels
of Ear Corn, and also Two Hogs of great
value, to wit: of the value of One Hundred
Dollars, and unlawfully detained the Same
against Sureties and pledges, untill &c. Where
fore, the Said Plaintiff saith, that he is
injured, and hath Sustained Damage
to the Amount of One Hundred dollars
and therefore he brings his Suit &c

Bushnell & Tracy

P. T. & T.

Be it remembered That on the 4th day of February A.D. 1861. an instrument of writing was filed in the office of the Clerk of Said Court which is in the words and figures following To wit:

State of Illinois } Circuit Court of Said County
Seyalle County } ss February Term AD 1861,

Marvin Gunn
vs

James J. McIlroy &
Nathaniel S. Pierce

Plaintiff

1 Now come the Said defendants by Seeland & Seeland their attorneys & defend &c & say actio non &c because they say, that they & each of them, did not at the said time when &c take & detain the said goods & chattels in said declaration mentioned in manner & form as therein alleged & of this they put themselves upon the Country &c

Seeland & Seeland
defts attys

And plffs, both like by Grey, Avery & Bush,

2 And for another & further plea, in this behalf by leave of Court &c Said defendants say actio non &c because they say, that the said goods & chattels in said declaration, mentioned, at the said time when &c were not the property of said Plaintiff & this they are ready to verify whereupon they pray Judgment.

3 And for another & further plea in this behalf by leave of Court &c Said

defendants, say actio non &c because they say, that the said goods & chattels, at the said time when &c, were the property of said defendant Nathaniel S. Pierce & not the property of said Plaintiff - and this they are ready to verify - wherefore they pray judgments &c,

4th

And for another & further plea in this behalf by leave of Court &c said defendants say as to so much of said declaration as charges the taking & detaining the corn therein mentioned actio non &c because they say that on the nineteenth day of October A.D. 1859, the Plaintiff & said Nathaniel S. Pierce, made & entered into an agreement in writing in the words & figures following; Article of agreement made the nineteenth day of October, One Thousand Eight Hundred and fifty nine, between Nathaniel S. Pierce of the Town of Adams, County of Sasall and State of Illinois of the first part and Marvin Dunn of the Town of Adams, County Sasell State of Illinois of the Second part witnesseth, that the said party of the first part has contracted and agreed to sell to the said party of the second part, all that certain piece or parcel of land situated, in the Town of Adams, in Sasell County State of Illinois, and which is bounded or described as follows to wit, The South East quarter of North East quarter of Section Eleven Township Thirty Six, North Range four³ P. M. and the party of the first part agrees to execute and deliver to the said party of the second part, a warranty deed for the said land, provided and upon condition, nevertheless that the said party of the second part, his heirs or assigns pay to the said party of the first party his heirs or assigns for the same land

11, the sum of Eight Hundred dollars at ten per cent interest
lawful money of the United States of America as follows. The
sum of Seventy five dollars with the interest on the whole
sum each year on the first day of September 1860, the first
payment to be paid in September 1860, and the remaining
sums One Hundred dollars a year from the above
said payment with interest each year, and the said
party of the second part. For himself, his heirs executors
and administrators doth covenant and agree to and
with the said party of the first part his heirs and as-
signs, that the said party of the second part will
pay the said several sums, as they severally become due
with interest thereon without deduction of any taxes
or assessments whatever and it is further agreed
between the parties to these presents that if default be
made in fulfilling this agreement or any part thereof
on the part of the said party of the second part, then and in
such case the the said party of the first part his heirs or
assigns shall be at liberty to consider this contract as for-
feited and annulled and to dispose of the said land to
any other person in the same manner as if this contract had
never been made, and furthermore it is agreed, between par-
ties in case of forfeiture, all improvements shall remain
on the land, such as buildings and fences and the party
of the second part ^{shall} agrees with the party of the first part for
the better security of the payments, that the growing crops shall
be and remain the property of the party of the first part un-
till the said payment or payments be made and cancelled

by the party of the second part, and the party of the first part agrees with the party of the second part, that the grain, or so much thereof as to satisfy the said payment or payments, as they may become due, shall be delivered at Somonauk Station, and the party of the second part, shall have the current price of that place indorsed on the within contract on delivery of the grain, signed and sealed in the year and day above mentioned in presence of first party given second party possession by his commencing and continuing ^{three} ~~three~~ ^{years} ~~years~~ ^{to} ~~to~~ ^{peace} ~~peace~~ ⁱⁿ ~~in~~ ^{good} ~~good~~ ^{faith,}

Nathaniel S. Peice

Marvin Dunn

And defendants aver that said sum of seventy five dollars & the interest on said whole sum in said agreement mentioned were at the said time when & due and unpaid that said corn in said declaration mentioned was raised and grown upon said tract of land, in said agreement mentioned & that said Nathaniel S. Peice in his own right & the said McIlroy as the servant & agent of said Peice took said corn by virtue of said agreement for the purpose of delivering the same at Somonauk Station in accordance with said agreement, as they lawfully might & defendants allege that said hogs have not been replevined, and this, ^{said} defendants are ready to verify wherefore they pray judgment &c

Leiland Holland
attys for defts

But it Rememered, That on the 4th
day of February, A. D. 1861. The Same
being one of the days of the February
Term of Said Court, begun and held
in Ottawa, & County of Lafalle, and

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on the first Monday in the mo. of July 1861

State of Illinois, The following order was entered of Record, in the words and figures following. To wit:

Moran Dunn
vs
James J. Millay and
Nathaniel S. Pierce

Replevin

On Motion of the Defendants, by Seland & Seland their Attorneys, the Plaintiff is ruled to file his replication to defendants pleas on or before Wednesday Morning next.

Be it Remember, that on the 6th day of February A.D. 1861, ^{being one of the days of the Spring Term} the following Replications were filed which is in the words & figures following To wit:

State of Illinois } Circuit Court
Safall County } Feb 7, 1861

Moran Dunn }
vs }
Nathaniel S. Pierce }

Replevin

And the Plaintiff as to said second plea, of said defendant

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Says, precludi non, because he says
that said goods & Chattels were the
property of the Plaintiff at the time
when &c & of this he puts himself upon
the Country &c

And the Plaintiff as to
said third plea of said defendant
Says, precludi non, because he says
that said goods & Chattels, were not
the property of said defendant, Na-
thaniel S. Pice, and were the property
of said Plaintiff, and of this he puts
himself upon the Country &c

G. A. B.

And the Plaintiff says, as to said
fourth plea of said defendant by
them fourthly above pleaded, that
the same is not sufficient in Law,
to be replied unto, wherefore he prays
Judgment &c

Gray, Avery & Bushnell
attys for Plff

Be it remembered that on the
6th day of July 1860, the same being one
of the days of the February Term of
said Court, the following order was
entered of record in the words and

figures following To wit,

Marvin Dunn

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vs

James J. Millay &
Nathaniel S. Pierce

Replevin

The Plaintiff
again comes by Bush
-nell & Avey his attorneys, and demurs
to defendants 4th plea.

Be It Remembered, that on the 8th
day of February, 1861, the same being
one of the days of the February Term
the following order was entered of
Record in the words and figures follow-
ing to wit:

Marvin Dunn

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vs

James J. Millay &
Nathaniel S. Pierce

Replevin C.

This day again
come the parties hereto by their attorneys
and after hearing the arguments, of
Counsel, the court sustain the Plaintiffs
Demurrer to defendants fourth plea, there-
upon on motion of Plaintiffs Attorneys

It is ordered that judgment, be entered herein against the defendants on the plaintiffs demurrer to defendants fourth ^{for one cent damages, and costs of suit} plea. The defendant now, by leave of the Court, withdraws their first, second and third pleas. It is therefore considered by the Court that the Plaintiff have and recover of the defendant the Sum of One Cent for his damages, also his costs and charges by him herein expended, and that he have execution therefore.

State of Illinois } 68.
Safall County }

J. Masedam B Moore
Clerk of the Circuit Court in and for said County, do hereby Certify, that the foregoing is a true, & perfect transcript, of the proceedings, in this case, as appears from the records of said Court, & papers on file in my office.

Witness my hand, and the
Seal of said Court at Ottawa
this 11th day of March A.D. 1861
J. B. Moore
Clerk

State of Illinois vs. Supreme Court -
Third Grand Division - April Term A.D. 1861.

James J. Millay & }
Nathaniel S. Pierce }
vs } Error to La Salle County
Marvin Dunn } Circuit Court

Now come the said plaintiffs
in Error by Leland & Leland their attorneys
& say that in the record & proceedings aforesaid
in said cause there is manifest error, in this,
viz: -

The Court below erred in sustaining the
demurrer to the fourth plea & rendering
judgment thereon.

Leland & Leland
Attys. for plffs in Error

And now comes the said Marvin
Dunn, defendant in error, and says
that in the record and proceedings
aforesaid, there is no error:

Wm. Avery & W. H. H. H. H.
attys. for deft in
Error

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Marvin Dunn

152 W

James J. Mullan &

Nathaniel S. Pierce

Copy of Proceedings
for Supreme Court

Filed April 5th 1861
L. Leland
Clerk

Joinder in error
filed Apr. 25 - 1862
L. Leland
Clerk

Fees of Clerks of Circuit
Court, \$5.00 paid by
Soelund & Leland
Sept 6 attys

\$5.00

Completed

⁵⁷⁻¹⁵²
Nathl. S. Pierce
Et al. vs.

Marvin Dunn

Receipt -

Filed March 28. 1861
L. Leland
clerk

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the circuit Court for the County of La Salle Greeting:

Because, In the record and proceedings, as also in the rendition of the judgments of a plea which was in the circuit Court of La Salle County, before the Judge thereof, between Marvin Dune

plaintiff, and James J. Millay & Nathaniel S. Pierce

defendants, it is said manifest error hath intervened, to the injury of the aforesaid Defendants

as we are informed by them complainants and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgments thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 28th day of March - in the Year of Our Lord - One Thousand Eight Hundred and Sixty one

L. Deland

Clerk of the Supreme Court.
by J. B. Rind Deputy

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James J. Millay et al

No.

vs.

Marvin Dunn

WRIT OF ERROR.

FILED..... A. D. 186

Clerk.

STATE OF ILLINOIS—SUPREME COURT,
THIRD GRAND DIVISION—APRIL TERM, 1861.

JAMES J. HILLAY et al,
vs.
MARVIN DUNN.

We are not disposed to question the principle that at common law, a sale, pledge or mortgage of personal property which has neither an actual nor potential existence, does not pass property afterwards coming into existence as the property of the vendor, pledgor, or mortgagor, as to persons who obtain title and possession thro' the vendor, pledgor or mortgagor prior to obtaining possession of such property by the pledgee, mortgagee or vendee; perhaps not among parties without some new act of the grantor, or at least without a taking of possession by the grantee. In modern times, perhaps, the latter may perfect the grant.

We claim, however, that if Pierce by the terms of the agreement had the right to take possession of the after acquired crops and apply them to pay his debt, neither an action of trespass or replevin could be maintained against him by Dunn for taking said crops under the agreement, though when they first came into existence they might have been the property of Dunn.

Gregg vs Sanford, 24 Ill. 17. Tapfield vs. Hillman, 6 Man. & Grang. 245. Jones vs. Richardson, 10 Metcalf, on page 491, 2. Sunn vs. Thornton, 1 Man., Grang. & Scott's opinion by Trisdall, on page 386.

We claim, however, that by the terms of the agreement the crops raised under it on Pierce's land came into existence as the property of Pierce for the purpose of being applied under it to pay the indebtedness. The language of the agreement is, that, for the better security of the payments, the growing crops shall be and remain the property of Pierce, until the payments are made by Dunn; and we insist that the expression, "the party of the first part (Pierce) agrees with the party of the second part, that the grain, or so much thereof as to satisfy the said payment or payments as they become due, shall be delivered at Somonauk Station," clearly means that Pierce is to deliver at Somonauk Station.

