

No. 14519

Supreme Court of Illinois

O' Connor

vs.

Union Line Transportation
Co.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 143

Francis
Union Line
Frank

519

1868

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

MARTIN O'CONNOR, PLAINTIFF IN ERROR,

vs.

UNION LINE TRANSPORTATION COMP'Y.

} ERROR TO LaSALLE.

ABSTRACT.

This was an action of Replevin, brought by Defendant in Error, to recover possession of the canal boat Powhattan.

5 Declaration in ordinary form.

6 1st Plea—That defendant does not wrongfully detain, &c. *Similiter* by plaintiff.

2d Plea—That the boat was the property of defendant.

7 3d Plea.—And for a further plea in this behalf, defendant says *actio non*, &c., because he says that heretofore, to wit, at the September Term of the LaSalle County Court, A. D. 1858, to wit, on the 9th day of September, A. D. 1858, one Alfred Deane, and one Marvin Blanchard, recovered a judgment against the said plaintiff, for the sum of two hundred and six dollars and thirty-eight cents, besides costs, which judgment remained in full force on the 13th day of October, A. D. 1858, on which day an execution was issued out of the office of the Clerk of said Court, under the seal of said Court, which execution was in due form of law, and issued upon the judgment aforesaid, which execution was then and there delivered to Eri L. Waterman, who was then and there Sheriff of LaSalle County, duly qualified and commissioned; and said Waterman afterward, to wit: on the 18th day of December, A. D. 1858, he being then and there acting sheriff of said County, levied upon said canal boat, which was then and there the property of said plaintiff, by virtue of said execution which was

then and there in his hands wholly unsatisfied; and said Waterman, by virtue of said execution, afterwards, to wit: on the 19th day of January, sold said property at public auction to the defendant, he being the highest and best bidder therefor, and then and there delivered said boat to said defendant, and that said Waterman duly advertised said property for sale according to law, at the time aforesaid; all of which he is ready to verify, wherefore he prays judgment.

Replication to 2d plea, that the goods and chattels, &c., were the property of the plaintiff, and not of defendant.

12 1st Replication—That Waterman was not acting sheriff, &c.

13 2d Replication—That Waterman did not make said sale by virtue of said execution, but of his own wrong, &c.

3d Replication—That Waterman did not, by virtue of said execution, levy upon said boat, but of his own wrong, &c.

4th Replication—That, on the said 18th day of December, Francis Warner was sheriff of LaSalle County, and alone authorized to make a levy, &c.

15 Trial by Jury.

16 Verdict: "We, the jury, find the defendant guilty of withholding from the possession of the plaintiff, the canal boat Powhattan, in manner and form as charged in the declaration, and assess plaintiff's damages at one cent."

Defendant then entered a motion for a new trial.

17 Motion overruled, and defendant excepted.

Judgment: "That the plaintiff have and recover of the defendant one cent for its damages, and its costs and charges by it herein expended, and have execution therefor."

Bill of Exceptions.

Testimony on part of Plaintiff.

Wm. P. Faling testified: I know plaintiff and defendant, and the canal boat Powhattan. The Powhattan used to belong to the old Union Line, upon the organization of The Union Line Transportation Company. She was transferred to that company, and has belonged to it ever since. The plaintiff was organized sometime time in 185 .

Plaintiff then offered in evidence certified copies of its articles of organization under the general laws of the State of Illinois, showing organization of Plaintiff in the month of ———, A. D. 185—.

David L. Hough testified: After the sale of the boat by Chapman to defendant, I called upon the defendant and tendered him the amount

he had paid Chapman at the sale, and five dollars more for a bonus, and demanded the boat, which defendant refused to deliver.

Plaintiff here rested his case.

Defendant's testimony.

Record of a judgment recovered in the County Court of LaSalle County, in favor of Alfred Deane and Marvin Blanchard, against The Union Line Transportation Company, for \$206.88, rendered on the 9th day of September, A. D. 1858.

Also, an execution on same judgment, dated October 13th, 1858, in ordinary form.

Also, the endorsements on said execution, as follows,
 "Rec'd Oct 13th, 1858, 2 o'clock P. M.

E. L. WATERMAN, Sheriff.

A. E. GROW, Deputy.

By virtue of this writ, I have levied upon the canal boats Powhattan, Lancaster and Red Jacket, as the property of said Union Line Transportation Company; all of said boats were lying in the basin at LaSalle.

E. L. WATERMAN, late

December 18, 1858-

Shff"

E. L. Waterman testified: I was elected Sheriff of LaSalle County in November, A. D. 1856, for the term of two years; qualified and took possession of office as sheriff about the 1st of December, 1856. I can't tell how long I acted. I know I run into Mr. Warner's time; he was my successor; he did not get his commission as soon as he expected. It is customary for the sheriff elect to take his office on the 1st of December, after the election. Warner did not get his commission as soon as he expected it; he wrote to Springfield for it, and it did not come; he then telegraphed several times, and finally went down himself before he got it. After he got his commission, I acted as his deputy, by appointment from him. A. E. Grow was my deputy while I was acting sheriff, and authorized to make all levies on execution in my name, and to sign my name, &c.

Witness was here shown the execution and endorsements read in evidence, and stated: I think the most of the handwriting of the levy is Mr. Grow's. I don't think the figure 8, in the date December 18, was made by Grow. I don't think the word "late" before sheriff, was written by me or any of my deputies. Wm. B. Chapman, of LaSalle, was one of my deputies. I don't think I sent him any executions after I ceased to act as sheriff.

A. E. Grow testified: I was deputy sheriff under Waterman, from the time of his election, in 1856, until his business was closed up, and he ceased to act as sheriff. I have no knowledge of making any levy of any execution after Warner was qualified as sheriff. I know I had no right, and don't think I did. I would not have been likely to, as I well knew it would be void if I did. The main portion of the levy is in my handwriting; the word "late" was evidently put in the levy after it was made. I am certain I did not do it. I don't think the word "late" was there.

at the time the levy was made. My judgment is that I did not put the word there. I would have known that it vitiated the levy. The "December" and "1858" are in my handwriting. I may have made the "18", but I don't make an "8" like that once in a thousand times. It looks like an insertion.

22 The endorsement of sale is in Chapman's handwriting. I did not write the word "late" before sheriff, in that endorsement. The two "lates" were evidently written by the same person. In the endorsement of the sale, Waterman's name is not written in full; the latter part of Waterman's name looks as if it had been altered into "late".

23 *Wm. B. Chapman* testified: I was deputy sheriff under Waterman, in 1857 and 1858, until Waterman's term expired. I reside at LaSalle, and made the sale of the canal boat Powhattan, under the execution in favor of Blanchard and Deane against the plaintiff. The defendant paid me the money at the time of sale, and I delivered the boat to him. I made the sale as Waterman's deputy, in the last days of December, 1858, or the first days of January, 1859. I received the execution from Ottawa, on the morning of the sale. I made the endorsement of the sale on the back of the execution; the word "late" looks like an insertion; don't look like my handwriting. I know how to spell Waterman's name; it is not all written in that endorsement, or else something is written over the latter part of it.

Defendant then read from the records of LaSalle County Circuit Court for November term, A. D. 1858, which showed that *Eri L. Waterman* was present acting as sheriff of LaSalle County, from the commencement to the conclusion of said term, and that the last day of the term was December 4th, 1858. (*Sec. 14*)

John F. Nash testified: That he was Clerk of the Circuit Court of LaSalle County for 1858 and 1859; that he did not think he ever issued a notice to Waterman, under section 8 of the Sheriff Act, nor to any one else.

24 Defendant rested, and plaintiff read in evidence from the records of LaSalle County, of November 29th, 1858, showing Warner's official bond and oath of office as sheriff of said County, recorded of that date; also, his appointment of Waterman's, as his deputy, at same date.

D. L. Hough testified: I have for some time been acting as attorney for plaintiff and was its attorney in the Deane and Blanchard suit; my impression is, that the word "late" was in the levy the first time I saw it; I am not certain; I did not see it till after the sale.

This was all the evidence.

PLAINTIFF'S INSTRUCTIONS.

If the jury believe, from the evidence, that the canal boat in controversy, down to the time of the sale thereof on the execution in evidence, was the property of the Union Line Transportation Company, and defendant, O'Connor, has shown no title to said boat, or right to the possession thereof except by virtue of the sale on the execution in evidence, then

said O'Connor must recover, if at all, upon evidence to the satisfaction of the jury, of the truth of his averment in his 3d plea; and said O'Connor having averred in his said plea that the levy endorsed upon said execution was made on the 18th of December, 1858, he is estopped from now denying that said levy was made on the said 18th day of December, 1858.

To the giving of said instruction the defendant excepted.

Defendant asked the following qualification:

"Under the plea of property, the defendant is at liberty to prove any legal sale to him of the canal boat before the beginning of this suit, without reference to the date mentioned in the 3d plea."

Refused and exception.

Instruction asked by defendant: "Under the plea of property in the defendant, it is not necessary to prove that the boat was levied on or sold on any particular day; it is sufficient to sustain this plea if it appears that, before this suit was commenced, the boat was sold to defendant under a valid judgment against the plaintiff, by virtue of a valid execution, by a proper officer.

Refused and exception.

ERRORS ASSIGNED.

1st. The Court erred in giving to the jury the instruction asked by plaintiff.

2d. The Court erred in refusing to qualify said plaintiff's instruction as requested by defendant, and in refusing to give said instruction asked by defendant.

3d. The Court erred in overruling said motion for a new trial.

4th. The Court erred in rendering judgment aforesaid, in manner and form aforesaid.

POINTS FOR PLAINTIFF IN ERROR.

I.

The instruction given by the Court, at the request of the plaintiff, was not the law, as it entirely prevented the jury from considering the evidence with reference to the defendant's 2d plea.

This was a plea of property in the defendant, and under it he was entitled to show that the boat was his by any chain of title whatever.

We think the proof in the case fully sustained the 2d plea.

By the record, read in evidence, Waterman was shown to have been the acting sheriff on the 14th day of December, 1858; and, in law, he continues to be sheriff until it is proven that his successor is commissioned.

20 Ills. 429

There was no proof that Warner or any other person was commissioned before the 18th, when the levy was made, so that, by the proofs as they stood, the boat had been sold upon a valid judgment against the plaintiff, by virtue of a valid execution, and by the acting sheriff, who was a proper officer to make the sale.

In this view of the case, it was certainly error to give said instruction to the jury.

But even if the proof was not entirely clear upon the question, still the defendant was entitled to have the jury pass upon it, and this they were prevented from doing by the instruction. The issue upon the second plea was virtually found by the Court.

II.

The qualification asked by the defendant should have been given.

We cannot conceive what was the reason of the refusal of the Court to give it. The defendant was certainly entitled to show that the property was his by virtue of any legal sale, made before the commencement of the suit. If the 3d plea had not been filed at all, he certainly would have had this right; and, by filing it, he is only bound by the averments of that plea so far as the issue is made upon that plea.

Amos v. Sinnot, 3 Scam., 449.

III.

The instruction asked by the defendant, should have been given. Its legal effect is the same as the qualification asked to plaintiff's instruction, but is more fully expressed. The reasons for giving the qualification apply equally to the instruction.

IV.

The Court should have granted a new trial, because the verdict was against the evidence. 1st.—It was proven that the property was delivered to the defendant by Chapman, the deputy sheriff, who was then in the actual possession of it, so that the defendant did not unlawfully take the property.

Before he can be found guilty of unlawfully *detaining* it, a demand *by the plaintiff* in person, or by some one professing to act as its agent, must be proven, and a refusal by defendant to deliver the same.

Amos v. Sinnot, 4 *Scam.*, 449.

Woodward v. Woodward, 14 *Ill.*, 467.

Ingalls v. Bulkley, 13 *Ill.*, 817.

20 Ill. 429

No such demand and refusal was proven. The record shows (page 18) that the witness Hough called upon the defendant after the sale, and tendered him the money he had paid, and \$5 more as a bonus, and demanded the boat, and that defendant refused to deliver it to him. But he does not swear that he told defendant he was acting for the plaintiff, nor did he demand the boat in the name of the plaintiff. And, in fact, it does not appear in the proof, and therefore is not true, that he did act as agent of the plaintiff.

This is the only pretence of a demand, and is entirely insufficient.

2d. Waterman having been shown by the proof to have been the sheriff on the 14th day of December, 1858, continued sheriff until his successor was *commissioned and qualified*.

Scates' Stat., 1123, *Sec.* 8.

20 Ill. 429

There was proof offered by plaintiff showing that Warner *qualified* before the 18th of December, but none whatever showing that he was *commissioned*; so that Waterman was acting sheriff on the 18th of December, when the levy was made.

This being the fact, the sale was valid, and vested the property of the boat in O'Connor, and fully sustained the 2d plea, and the verdict should have been for the defendant on that issue.

GLOVER, COOK & CAMPBELL,

For Plaintiff in Error.

185
Martin O'Connor
18
The Mason & Eric
Transportation Co.
a full race of points

Filed Apr 22 1863

L. Leland
M

State of Illinois
LaSalle County ss. Pleas before the Honorable Madison
E. Hollister Judge of the North
Judicial district of the State of Illinois and the
presiding Judge of the LaSalle County Circuit Court at
a term of said Court commenced and held at the
Court House in Ottawa in said County and State on
the second Monday in the month of June the same
being the thirteenth day of June in the year of our Lord
One thousand eight hundred and fifty nine
and of the Independence of the United States of
America the eight third

Present

The Honorable Madison E. Hollister Presiding Judge

John F. Stark Clerk
Washington Bushnell State Attorney
Francis Warner Sheriff

Be it remembered that heretofore to wit: on the
9th day of February A.D. 1859 a certain Precipuit Affidavit
was filed in the office of the Clerk of said Court in
the words and figures following viz:

"The Union Line Transportation LaSalle County Circuit
Court
Lump sum
1859 - Replevin
Damages \$3000.00
Martin O'Connor

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To John F. Marsh Clerk of said Court

You will please issue a writ of Replein for the canal boat Penhatten in the above entitled cause returnable as above

Daniel S. Hough
Atty. for Plff."

"State of Illinois Daniel S. Hough being first duly sworn on oath deposes & says that

he is the agent & attorney of the Union Line Transportation Company the Plaintiff in the above specified matter. And on behalf of said Company says that he is informed and truly believes such information to be true, that said Company is the lawful owner of the Canal Boat Penhatten in the above specified matter & that to his knowledge & is now lawfully entitled to the possession thereof; and that the same has 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 & chattels of said Plaintiff liable to execution or attachment

Daniel S. Hough

Subscribed & sworn to before me

this 8th day of February A.D. 1839

J. F. Marsh Clerk
Per C. H. Hook Depty."

And afterwards to wit: on the same day and after the filing of said affidavit a writ of Replein

was issued out of and under the seal of said
Court in the words and figures following viz:

STATE OF ILLINOIS,

LA SALLE COUNTY,

} ss.

The People of the State of Illinois,

To the Sheriff of said County, GREETING:

If *Vermion Line Transportation Company* 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 property of him, the said *Vermion Line Transportation Company*, to wit:

The Canal Boat Penhatten

which *Martin Clemons*
also of said County, forcibly and unlawfully took and unjustly detains—and return the said property, if return thereof be awarded—and further to save and keep you harmless in replevying said property: then you are to cause the said *property above named* to be replevied and delivered to said *Vermion Line Transportation Company* without delay. And summon the said *Melchior Clemons* 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 *second* Monday of *June* next, to answer to the said PLAINT of the said *Vermion Line Transportation Co.* for *this* 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 doings in the premises.

Witness, JOHN F. NASH, Clerk, and the seal of our said Circuit Court, at Ottawa, this *fourth* day of *February* A.D. 1857

J. F. Nash Clerk
By C. H. Hook Depy



4

Which said writ was returned and filed in said
Clerk's office on the 8th day of March 1839 with
the following endorsement thereon, to-wit:

"Served the within writ by reading to the within
named Martin O'Connor & taking the within
named property and putting John Marshall agent
of Union Line Transportation Co in possession of
same this 9th day of February 1839

F. Warner Sheriff
By C. T. P. De Mott

And afterwards to wit: on the same 9th day of
February AD 1839 the plaintiff filed its declaration
in said Clerk's office in the words and figures
following viz:

"State of Illinois
LaSalle County 3rd And Superior Court thereof
June Term AD 1839

The Menomonic Transportation Company, Plaintiff
in this suit by D. S. Hough its Attorney complains
of Martin Clemons defendant in this suit in a
plea in reply, for that whereas the said defendant
heretofore to wit: on the 9th day of February AD 1839
to wit: at the County aforesaid unlawfully took &
unjustly detains from the said plaintiff the
following goods and chattels to wit: the Canal
Boat Penhattan, which said Canal Boat was then
& there the property of said plaintiff & of great value,
to wit: of the value of one thousand dollars & from
thence hitherto the said defendant hath unlawfully
and unjustly detained the said Canal Boat from
the said plaintiff & still detains the same against
gages & pledges, to the damage of the said plaintiff
in the sum of three thousand dollars, and
therefore brings this suit.

David S. Hough
Plaintiff's Attorney"

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And afterwards to wit: on the 14th day of June 1859
the same being one of the days of the June term of said
Court for said year, the defendant filed his plea
in the words and figures following, viz:

"State of Illinois
Saidle County 3rd District Court for said County
June Term 1859
Western Live Transportation Company
vs
Martin O'Connor
Plaintiff
Defendant

And the said Martin O'Connor
comes and defends &c and says that he does not
wrongfully detain the goods and chattels in the
detention mentioned, or any part thereof in
manner and form as therein alleged; and of
this he swears himself upon the Oath &c
"And Plaintiff doth the like

D. L. Kough Plffs Atty

"And for a further plea in that behalf by leave of
the Court for that purpose given had and obtained
said defendant says ad hoc means that he
says that the said goods and chattels in said
detention mentioned at the said time when &c
were the property of the defendant and not of the
plaintiff, and of this he is ready to verify, when for
the proper judgment of the said Western Live
Transportation Company ought to have its

affirmed action thereof against him &c
Strain & Bull
Deft. Atty."

"And for a further plea in this Wholly deft. says
actis non nocere says that hereafter to wit
at the September term of the Saballe County Court
A.D. 1838 to wit on the 9th day of September A.D. 1838
our Alford Dean and our Marvin Blanchard
have rendered a judgment against the said Plaintiff
for the sum of two hundred and six dollars
and thirty eight cents besides costs which judgment
remained in full force on the 13th day of October
A.D. 1838 on which day an execution was issued out
of the office of the Clerk of said Court under the seal
of said Court which execution was in due form of
Law and issued upon the judgment aforesaid which
Execution was then there delivered to E. L. Waterman
who was then there Sheriff of said County duly
qualified and commissioned, and said
Waterman afterwards to wit on the 18th day of
December A.D. 1838 he being then there acting
Sheriff of said County received upon the said Canal
boat which was then there the property of the said
Plaintiff by virtue of said execution which was then
there in his hands wholly unsatisfied and said
Waterman by virtue of said execution afterwards
to wit on the 19th day of January sold said
property at public auction to the defendant to

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being the highest & best bidder therefor & there
& there delivred said boat to said defendant &
that said Waterman did advertise said property
for sale according to law at the time & place
all which he is ready to verify whereupon he
swears Judge &c. Straun & Bull
for Deft

And afterwards to wit: on the said 14th day of June
1859 the same being one of the days of the said term
term of said Court for said year, the plaintiff by his
attorney filed a Replication & Demurrer to defendant's
said plea in the words and figures following viz:

"Union Line Transportation Company, Latalla County
vs
Martin O'Connor
June term 1859

And now comes the said
plaintiff & for replication to the said defendant second
plea by him then pleaded, says that the said goods
& chattels in said declaration mentioned at the
time when when &c was the property of the plaintiff
& not of the defendant & of this he puts himself
upon the country &c D. L. Blough
Plffs Atty

And said plaintiff demurs to said defendant's
third plea by him then pleaded & says that the same
& the matter therein contained in manner of form

as they are therein pleaded are not sufficient in law & that he is not bound by law to reply to the same

D. L. Hough

"Plff. Atty."

"And for special cause of demurrer said plaintiff shows to the Court that the following: There is an arrangement in said plea that said Waterman at the time of theberg in said plea mentioned was Sheriff of said County of Sabalee and received upon said property & sold the same as Sheriff of said County of Sabalee & by virtue of his office as said Sheriff."

And afterwards to wit: on the 15th day of June 1839 the same being also one of the days of said term of said Court: a certain order was made in said cause and entered of record in the rolls and signed following viz:

"Various Line Transportation

Company

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vs

Martin Connor

Replein

This day the plaintiff came by D. L. Hough its attorney and the defendant by Strain & Bull his attorneys and after hearing the arguments of Counsel, the Court sustains the plaintiff's demurrer to the defendant's third special plea. Thereupon on motion of defendant's attorney it is ordered by the

Cons- that the defendant has been to amend his plea.

And afterwards to wit: on Monday February 6th 1860, the 8th day of the month of the said February term of said Court for the year 1860 another order was entered of record in said cause in the words and figures following viz:

"Domestic Transportation

lumpsum

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rs

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3

Replein

Martin O'Connor

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By agreement of parties it is ordered that this cause

be continued."

Said cause was also duly continued by the parties at the June term of said Court for 1860 at the November term of said Court for the year 1860 at the February term of said Court for the year 1861 at the June term of said Court for the year 1861 at the November term of said Court for the year 1861 at the February term of said Court for the year 1862 at the June term of said Court for the year 1862 & at the November term of said Court for the year 1862

And afterwards to wit: on the 3rd day of February 1863 the 8th day of the month of the said February

Term of said Court for the year 1863 the
defendants attorneys filed in said cause a
demurrer to plaintiffs replication to defendants
3^d plea in the words and figures following viz:

"State of Illinois Sabell County ss Lewis Court
for said County February Term AD 1863

Vermin Live Transportation
Company

vs

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3
3 Replevin

Martin Clemon } And now comes said

defendant by E. F. Bull his attorney
and says that said plaintiffs replication to said defendants
third plea is not sufficient in law and that he is
ready to verify wherefore he prays judgment &c

"And for special cause of demurrer said defendant
shows to the Court the following causes viz:

- 1st Said replication is double.
- 2nd Said replication is uncertain and insufficient.
- 3rd Said replication sets up two separate and distinct
causes to said plea.
- 4th Said replication is in many other respects
informal and insufficient.

E. F. Bull

Deft's Atty

12

Afternoon to night on Wednesday February
4th 1863 the same being also one of the days of said
February Term of said Court for said year the following
order was made and entered of record in said cause
viz:

Wenn in diese Transpositionen
beimfang. 3 m.

Rs

3 Replever

Martin O'Connor & His daughter plaintiff comes
by D. L. through its attorney and

The defendant by Bull & Miller his attorneys and
after hearing the arguments of counsel the Court
sustains the defendants demurrer to plaintiffs replication
to defendants third amended plea.

Thereupon on motion of ~~the~~ plaintiffs attorney it is ordered by the Court that he have leave to file several applications to defendants to amend plea,

And afterwards on the same day the plaintiff
filed its Replication to the defendants 3^d amended
plea in the words and figures following viz;

"Keweenaw Line Transportation Company re Martin
O'Brien - Adala Court, Keweenaw Court February
Term 1863

And now comes the said plaintiff for replication
to said defendants 3^d plea as amended. says forcludi
mon because it says that at the time when & in
said plea mentioned the said Eric L. Waterman

was not a ~~city~~ Sheriff of said County of Saballe
and of this said Plaintiff puts itself upon the
County &c

D. L. Keough

"Pliff Att'y"

"And for a further replication to said amended plea
by leave of the Court first instance Plaintiff says
for conclusion because he says that said Waterman
did not at the time when &c make said sale by
virtue of said execution but of his own wrongs & of
this the said Plaintiff puts himself upon the
County &c

D. L. Keough

"Pliff Att'y"

"And for a further replication to said amended
plea by leave of the Court &c Plaintiff says
for conclusion because he says said Waterman at the
time when &c did not by virtue of said Execution
buy upon said Canal Road, but of his own wrong
and of this the Plaintiff puts itself upon the County &c

D. L. Keough

"Plaintiff's Att'y"

"And for a further replication to said amended plea
Plaintiff says for conclusion because he says that
on said 18th day of December in said amended
plea mentioned. Francis Warner was Sheriff of
said Saballe County, and alone authorized to make
a levy of said execution in said plea mentioned
& not the said Eric L. Waterman, and of this the said
Plaintiff puts itself upon the County &c

D. L. Keough

"Pliff Att'y"

And appearances to wit on the same 4th day of February 1863 the defendant by his attorney filed a demurrer to the plaintiffs replications to the defendants 3^d amended plea, in the words and figures following viz:

"State of Illinois Sadale County ss Circuit Court of said County February Term AD 1863

Remondino Transportation

Complainant vs

Martin O'Connor

Defendant

And now comes said defendant by E. H. Bull

his atty and says that said plaintiffs said replications to said defendants said three amended plea and each and every of them are insufficient in law and thus he is ready to verify wherefore he prays judgment &c.

And for special cause of demurrer said defendant shews to the Court the following viz:

- 1st Said replications are each and every of them set up several distinct answers to said plea.
- 2^d Each and every of said replications conclude to the contrary, whereas each and every of them ought to conclude with a verification.
- 3^d Said replications ^{are} each of them are in many other respects informal and insufficient.

E. H. Bull

Deputy Atty

And afterwards to wit at said February term of
said Court From which orders were made and
entered of record in said cause in the name and
behalf following viz:

"Tuesday February 5th"

"Union Live Transportation

Company

vs

3
3

Replein

Martin O'Connor

This day the parties hereto
again came by their said

attorneys, and after hearing the arguments of counsel
the Court ~~ordered~~ the defendants to answer the plaintiff's
affidavits to the defendants which amended
plea."

"Monday February 9th"

"Union Live Transportation

Company

vs

3
3

Replein

Martin O'Connor

This day the plaintiff
came by L. A. Hough its

attorney and the defendant by E. F. Bell & B. C. Cook
his attorneys and whereupon came the following jury
of a jury to wit: L. B. Deane, Ezra Simmons
W. C. Clark, Amasa Banks, Simon Lee, George
Thompson, J. B. Briner, Charles McNeill, J. M.
Kenna, D. G. White, David Case and Silas Hale
who are duly elected, tried and sworn to and

only try the issues herein according to the evidence,
and after hearing a part of the testimony, the further
hearing of this case is postponed until the coming
in of the Court to morrow morning.

"Tuesday February 10th"

"Nemine Line Transportation
Company

3 Replevin

Martin O'Connor } This day again came the
parties hereto by their attorneys
together with the jury sworn herein and after hearing
the rest of the testimony and arguments of counsel
the jury retire to consider of their verdict. And after
due deliberation have returned into Court the
following verdict to wit: "We the jury find the
defendant guilty of withholding from the possession
of the plaintiff the small boat "Ponhaltan" in manner
and form as charged in the declaration & assess
plaintiff's damages at one cent"

Therefore defendants cannot move the
Court for a new trial."

"Friday March 6th"

Nemine Line Transportation

Company

Martin O'Connor

3 Replevin

It is ordered by the Court that the defendants
motion for a new trial be overruled, to which
decision of the Court in overruling said motion
defendants attorneys assent.

It is therefore considered by the Court that the
plaintiff have and recover of the defendants one cent
for its damages and its costs and charges by its heirs
expended and that execution issue therefor.

And now on motion of defendants attorneys it is
ordered by the Court that they have leave to render
and file a bill of exceptions herein in thirty days.

And afterwards to wit: on the 28th day of March 1863
the defendant by his attorneys filed his bill of exceptions
in the words and figures following viz:

"State of Illinois } Circuit Court for said County
Adair County } February term A.D. 1863

The Vermilion Transportation
Company

vs }
} Replein

Martin O'Connor It is remembered that on this
twentieth day of February A.D. 1863 the same being one of the
days of said term of said Court, this cause coming
on to be heard, the plaintiff to maintain the same
on its part called as a witness one William P. Feling
who being first duly sworn according to law

deposed in substance as follows viz: Knew the plaintiff and deft. Murr Knew the canal boat Powhattan for the last six or seven years. She used to belong to the Mc Nemis Line. upon the organization of The Nemis Line Transportation Company she was transferred to that Company and has belonged to it ever since. The plaintiff was organized some time in AD 1835

The Pff further to maintain the issues on its part offered in evidence certified copies of its articles of organization under the general laws of the State of Illinois showing the organization of Pff. in the month of — AD 1835

The plaintiff further to maintain the issues on its part called as a witness one David L. Knapp who being duly sworn testified in substance as follows after the sale of Chapman to the deft. of the canal boat Powhattan he called upon the deft. and rendered him the amount he had paid Chapman at the sale and five dollars more for a bonus and demanded the boat which deft. refused to deliver.

Whereupon the Pff rested his case.

The Deft. to maintain the issues on his part offered in evidence a record of a judgment recovered in the County Court of LaSalle County in favor of Alfred Dean and Merwin Blanchard and against the Nemis Line Transportation Company being for the sum of Two hundred and six ³⁸/₁₀₀ dollars rendered on the ninth day of September AD 1838. also an execution on same judgments

dated October 13th 1838 being for the collection of said judgment, was in the ordinary form and directed to the Sheriff of LaSalle County Illinois also the indentments on the back of said execution which were in the words and figures following to wit:

"Rec^d Oct 13th 1838 2 cc, Jm
E. L. Waterman Sheriff

A. E. Gow dep-

By virtue of this writ I have seized upon the
Canal Boats - Penhatten Lenoir & Red Jacket
as the property of said Menominee Transportation
Company all of said boats now lying in the
basin of LaSalle

E. L. Waterman Rec-

December 18, 1838

Sheriff.

After duly advertising the above described property
I proceeded to sell the same at public vendue
and made the sum of One hundred and one
dollar, of which I have paid the plaintiff eight
thousand five hundred dollars and retained seventeen⁷³ for
fees - E. L. Waterman Rec- Sheriff.

The Dep^t further to maintain the issue on his
part - called as a witness one E. L. Waterman
who being first duly sworn according to law
testified in substance as follows viz: was elected
Sheriff of LaSalle County in November 4th 1836 for
term of two years, qualified and took possession

of office as Shff about 1st Dec 1856 Cant tell how long I acted as Shff. Know I run into Mr. Warren time (who was my successor) Cant tell how long, he did not get his Commission as soon as he expected. It is customary for the Shff. elect to take his office abt 1st of Decr after his election. Warren did not get his Commission as soon as he expected, wrote Springfield for it and it did not come, telegraphed several times and finally went down himself before he got it. After he received his Commission I acted as his deputy by appointment from him. Mr. A. E. Grew was my deputy while I was acting Shff. He was authorized to make all fees on executions in my name, authorized to sign my name to all fees on all executions that came into his hands.

Question - Look at the endorsement of the key on this execution (being the same execution offered in evidence by Duff) and state in whose hand writing the same is? Answer - Am not certain in whose hand writing the key is, think the most of it is McGraws - Question - Look at date of key and see if there is any part of that that is not in McGraws hand writing? I don't think the figure 8 in December 18th was made by McGraws. Question - Are there any other portions of the key not in your hand writing or the hand writing of your deputies? Don't think the word "date" inserted before Shff was written by me or

any of my deputies.

Mr W. B. Chapman of Asalee was also one of my deputies. I do not think I sent him any executions after I ceased to act as Sheriff.

The Duff further to maintain the issues on his part called as a witness one A. E. Ginn who being duly sworn testified in substance as follows. "Was deputy S^hff under Eric S. Waterman from time of his election in A^d 1836 until his business was closed up and he ceased to act as S^hff.

Warner was his successor. I know Warner did not get his O^{er} as soon as he expected. I have no knowledge of making any levy of any execution after Warner was qualified as S^hff. I know I had no right and do not think I did. I certainly would not have been likely to do so as I well knew it would be void if I did. The manuscript of the levy on this execution is in my hand writing. The word "late" was evidently put in the levy after it was made. I am certain I did not do it - I do not think the word late was there at time the levy was made my judgment is I did not put the word there.

I would have known it would have pertained to the levy if I had. The "December" and "1838" in the date of the levy is in my hand writing. I may have made the "18th" but I think it is an insertion I do not make an 8 like that ever in a thousand times. It looks like an insertion. The endorsement of sale is in Chapman's hand writing. I did not

note the word Sale before Sheriff in that
indorsement. The two "Sales" were evidently
written by same person. In the indorsement of
the Sale Waterman's name is not written in
full the latter part of Waterman's name looks
as if it had been altered into Sale

The Deft. further to maintain this case
on his part produced as a witness one William
B. Chapman who being first duly sworn
testified and substantiated as follows was deputy Shff
under Waterman in 1837. 38 until Waterman
left Springfield, resided at Salisbury, made sale of the
canal boat in question to the Deft. under
execution in favor of Dean & Blanchard against
the Deft. in this case. The Deft. paid me the money
at time of sale and I delivered the boat to him
has forgotten how much the Deft. paid but
he was the highest bidder he paid me the
amount of his bid and I told him the boat.
I told the boat as Waterman's Deft. made the sale
the last days of Decr 1838 or the first days of Jan'y
1839 can not tell exactly at what time. Received
the execution from Atticus on the morning of the
day of sale with directions to sell, which I did.
made the indorsement of the Sale on the back
of the execution the word Sale looks like an
insertion, it does not look like my hand writing
I may have made it, but don't think I did.
Know how to spell Waterman's name.

it is not all written in that endorsement or else something is written over the latter part of it.

The Deft further to maintain the issues on his part offered in evidence the records of Sadale County Councils Comd for Nov. Term 1838 which show that Edw. L. Waterman was present acting as Sheriff of Sadale County from the commencement until the conclusion of that term of said Comd and that the last day of that term of Comd was December 14th 1838.

The Deft further to maintain the issues on his part called as a witness one John F. Hark who being sworn testified in substance as follows was Clerk of Councils Comd of Sadale County in 1838 & 9. Deft thinks I never issued any notice to Waterman under Section 8 of the Saff. act. Deft thinks I never did to anyone.

Whereupon the Deft. closed his case - and the plaintiff further further to maintain the issues on its part or called as a witness one John F. Hark who testified that he did not know at what time in 1838 Warner took possession of the office of Sheriff in place of Waterman.

The plaintiff further to maintain the issues on his part introduced in evidence the records of Sadale County of November 29th 1838 showing Warner's official oath and bond as Sheriff of said County recorded of that date. At his appointment

of Waterman as his Deputy on same date.

The Plaintiff further to maintain this issue on its part recalled the witness D. S. Kough who further testified in substance as follows had been a strong for Pff. in this case as atty for some time, was its atty in the said case in County Court of Decatur when made against it. Mauchaud was an atty of this Court and obtained that judgment. My impression is the word sale was in the brief the first time I saw it, am not certain, did not see it until after the sale. Thought there was error in judgment, apt, Pff in favor of Dean & Mauchaud. After I saw the recitation I felt relieved about the sale of the canal boat because I thought it void.

Wherefrom both the Pff and Dff show their case and further or other testimony was offered or produced by either party.

The Court therefrom instructed the jury on the part of the Plaintiff as follows viz:
If the jury believe from the evidence that the canal boat in controversy down to the time of the sale thereof on the recitation in evidence was the property of the Merrimack Transportation Company & defendant Clemons has shown no title to said boat or right to the possession thereof except by purchase of the boat on the recitation in evidence then said Clemons must recover if at all upon evidence to the satisfaction of the

jury of the truth of his argument in his 3^d plea
and said Occurrence having arrived in his 3^d plea
plea that the very evidence upon which the action
was made on the 18th day of December 1858 he is
relieved from now denying that said plea was
made on said 18th day of December 1858, to the
giving of which instruction the defendant
by his counsel then & there accepted.

The defendant asked the Court to qualify
the above instruction as follows "B under plea
of property the defendant is at liberty to prove
any plea ~~in~~ to him of the Canal Boat before the
beginning of this suit without reference
to the date mentioned in the third plea.

The defendant asked the Court to instruct
the jury that "under the plea of property in
defendant it is not necessary to prove that
the boat was seized on or sold on any particular
day, it is sufficient to sustain this plea if it
appears that before this suit was commenced
the boat was sold to defendant under a valid
judgment against the plaintiff by virtue of a
valid execution by a proper officer.

The Court refused to give the instruction
to which refusal of the Court the defendant then
& there accepted and says that this is a
receipt to signed sealed & made part of
the record which is done.

Mr. E. Hollister
Judge of 9th Judicial Circuit *Beiz*

State of Illinois
Sadale County 3rd J. Abraham B. Moorn Clerk of
the Circuit Court in and for said
County - Do hereby certify that the above and foregoing
comprises a true full perfect and complete copy
of the affidavits and declaration, pleadings
orders of Court and the bill of exceptions in the
said cause of *Remondino Transportation Company*
vs *Marston Oleson* as the same now appear
of record and on file in said cause in my office
and that the same is a full record & complete.

In Testimony Whereof I have hereunto
set my hand & seal of said Court at
Ottawa this 2^d day of April 1863

A. B. Moorn Clerk
By J. H. Vash Deputy



State of Illinois } 3rd Third Grand division
Supreme Court } April Term A.D. 1863.
Martin O'Brien, Plff. in error vs Union Line Transportation Co. Dft. in error
And now comes the said Plff. in error by
E. F. Bull his attorney and assigns the following
causes for error in the above and foregoing
record. viz:

- 1st The verdict was against the law and the
evidence
- 2nd The Court erred in giving improper instructions
to the jury on behalf of the Plff. below.
- 3rd The Court erred in refusing to give proper
instructions to the jury on behalf of Dft. below
and in refusing to grant Plff. instructions as asked by Dft.
- 4th The Court erred in overruling said motion for
new trial.
- 5th The Court erred in rendering judgment
as aforesaid in manner and for as aforesaid
E. F. Bull

for Plff. in error
And now comes the said Defendant
in error by H. S. Edwards its Atty
says that there is no error in the Record
& proceedings aforesaid or in rendering
the judgment aforesaid in manner
aforesaid & wherefore it says the
said judgment should be in all respects
affirmed - H. S. Edwards Atty
for Dft. in error

143
Martin Connor
to

Union Line Transportation
Company

Recd from
Sally Cicely Conn

Filed Apl. 15. 1863.
L. Island
Ch.

Fees Paid, No. Connor
by B. C. Cook, Apl
1863. A. B. Moore
Clerk

Fees \$7.50

State of Illinois } Third Grand Division, April
Supreme Court } Term A.D. 1863-

Martin O'Connor

vs:

The Union Line Transpor-
tation Company

} Error to Sadell Circuit
}

Argument for Plaintiff in Error:

I propose briefly to answer the points made by defendant in error in the order in which they occur.

1st Then as to the sufficiency of the demand made by the witness Hough, there is not the slightest testimony in the case showing that Hough was authorized to make the demand, and upon the principle that "what is not proven is supposed not to exist" he had no such authority - that he had been acting as the attorney of deft. in error is no circumstance from which such authority can be inferred, and even if it was, O'Connor had no knowledge of that fact. ~~But the~~

^{part to that effect and was not a}
The case of Wilson v. Wood, 20 Ill. 37 cited by deft. in error has not the remotest bearing upon this case, in any way whatever nor does it tend to support the position taken by the deft. in error - Neither is the

case of Dwyalls vs. Bulkeley 15 Ill. 224 at all applicable for the reason that the facts of the case are materially different -

Then the demand was made through an agent whose authority was not questioned at the time - but the demand was made in the name of the plaintiff - Then the demand was made by Hough. But he did not pretend at the time that he was making such demand for the Dft. in error. He did not make the demand in the name of the Dft. in error, did not ~~pretend~~ pretend to act as agent. And so there was no necessity of disputing his authority - For all that O'Connor knew he demanded the property in his own right, and even if the property did belong to the Dft. in error and O'Connor knew it, he was perfectly right in refusing to comply with that demand -

2^d It is a sufficient answer to the first and second propositions made by Dft. in error under his second point and to the authority by him cited there, to say that under our statute a defendant in a

(1 1 1)

suit may plead as many matters of fact
in several pleas (See 12th Sect. Practice act)
as he shall deem necessary to his defence,
so that it was ~~perfectly competent~~
proper for him "to go to the jury upon
two inconsistent and contradictory propositions"
if he chose so to do. But I contend that
the propositions were not necessarily "inconsis-
tent and contradictory"

We are only again under our 3rd plea
to prove who was acting Sheriff. And
proving (as we did by the record), that
~~Warner~~ Waterman was acting Sheriff down
to the 14th of December 1858. and that
it is the practice for the new Sheriff to file
his bond, and oath of office and have the
same recorded before he made application
for his commission that Warner the new
Sheriff did not get his commission for
a long time after his oath of office
and bond are filed, the legal presumption,
which is not rebutted by proof, is that
Waterman was the acting Sheriff on
the 14th of December. Again as the
record shows that Waterman was
acting Sheriff on the 14th I suggest

that that word cannot be contradicted,
by any suppositions or presumptions,
that even positive testimony would
be insufficient to do it. on this question
the authorities are so familiar it is
unnecessary to quote them -
Douglas vs. Harfield 22nd Ill. page 108 -

A bare glance at the instructions
given and refused will convince the
Court I think, without argument
that the Court below erred in giving
and refusing the instructions complained
of -

The evidence ~~clearly~~ clearly showed
that some one had been tampering
with the return of the officer and the
endorsements on the execution, no one
would have been likely to do so without
motivation. It was clearly against the
intent of O'Connor so to do as his
little dependence upon the regularity of
proceedings under the execution and
the alterations we complain of would
render the law void, can it be said
that O'Connor is cut off from a just

defence he can show some one adverse to his
interest has altered the record? Upon the
principle that a record cannot be im-
peached? Again the alterations, if any
were made, constituted no part of the
record, they were void, had no business
there, were placed there by some un-
authorized person, for Wakeman and
all his deputies swear they had no
hand in it - we are not then contradic-
ting the record only showing that a
part of what purports to be the
record ~~is~~ upon its face, is not in
fact any portion of it - we cer-
tainly could not be estopped from
denying that the word late in
the endorsement of levy, which might
make that levy void was not in any
sense of the word a portion of the
record of levy but only an interpolation.

3rd The 3rd point made by O'ft. in
error is that "A party justifying under
an execution sale in an action of
replevin must plead it specially"
but he cites no authorities in
support of the position and I apprehend

Now can be found in the books.

The furthest that any of the cases go, is that an officer justifying the seizure of goods by virtue of an execution, in an action of replevin must do it specially, by setting out the execution &c - That doctrine has been held by this Court, but the books are not without authorities against that position - The reason for it I judge to be that the officer claims no interest in the property himself, ~~does~~ in fact has no interest, and in order to justify what is prima facie a wrongful taking, (and as far as any intent he has individually, is a wrongful taking), ~~sets up specially~~ is bound to recite specially the authority by which he takes the property. But when he claims title in himself, in his own right, he is ~~entitled~~ ^(under plea of property in himself) to prove that title by any legal ~~mode~~ sale to him, either by a voluntary sale, a conditional sale or pledge (Amos vs. Simmott 4 Scam. 446) or a forced sale under an execution - Of course the modes of proof in each case would be different, but the end to be reached the same viz: proof that the title to the property in question was in him -

This view of the case is fully
supported by Ames vs. Simeott
4 Scam 445-

The arguments in the plea are
that the property is the property of
the deft. & not of the plff. the proof
of title will of course vary according
to mode in which the property was
obtained, but the end to be reached
is the same i.e. title in deft.

In this view of the case the giving
of Plffs inst. and the refusal of
the defts qualification in the
court below are erroneous -

P. F. Bull
Of Counsel for Plff in Error

No 143 — 5-5

Martin O'Connor

vs:

The Union Line Trans.

Co.

Emm & Lobb Co.

Argument for Pff.

Filed May 8th 1863
L. Leland
Clerk

E. F. Ball
of counsel for Pff.