

No. 12821

Supreme Court of Illinois

Peck et al.

vs.

Wilson.

71641  7

John L.
use ac. -

12821

859

[Faint, illegible handwriting]

State of Illinois }
Cook County . . . }

Folio 1

Placed before the Honorable John
Wilborn sole Judge of the Cook County
of Common Pleas within and for the County
and State aforesaid at a regular Term of the
Cook County Court of Common Pleas
and holden at the Court House in the City of
Chicago in the County of Cook and State of
Illinois on the Second Monday to-wit
thirteenth day of September in the year of our
Lord one thousand eight hundred and
Eight and of the Independence of the
States of America the Eighty third

2

Present

John M. Wilborn

Charles Haven Prosecuting

John L. Wilborn

Attest

Walter Kimball. Clerk.

Be it remembered that heretofore to-wit
eighth day of July in the year of our Lord one
thousand eight hundred and fifty eight came
Staff of Cook County, Illinois, duly

Beach Coroner and Ex Officio Sheriff was
of William R. Woodless by B. F. James
and filed in the Office of the Clerk of said
Court of Common Pleas a Process for Summons
3 James E. Bishop and James Peck, Which said
is in the words and figures following to wit.

"State of Illinois Cook County Court of Common
Cook County,) S. September Term A.D. 1858

John S. Wilson Sheriff of Cook County
Illinois Successor of James S. Beach
Coroner & Ex Officio Sheriff who does for us of
William R. Woodless

(2)
James E. Bishop and James Peck }

Clerk will issue process in above
suit returnable as above.

B. F. James

Atty for Plffs

4 And thereupon accordingly, on the said fourth
eight day of July A.D. Eighteen hundred and fifty
eight there was issued out of and under the Seal of the
Clerk of said Court Process Writ of Summons against
said James E. Bishop and James Peck; Which
Summons with the Sheriffs return thereupon
is in the words and figures following, to wit.

"State of Illinois

County of Cook } p

The People of the State of Illinois
to the Sheriff of said County, greeting

We command you that you summon James E. Bishop and James Peck if they shall be found in your
5 County personally to be and appear before the Cook
County Court of Common Pleas of said County on the
first day of the next Term thereof to be holden at the
Court House in the City of Chicago in said County on
the second Monday of September next to answer and
John L. Wilson Sheriff, successor of James S. Wilson
Coroner and Ex Officio Sheriff, who sues for the use of
William R. Woodless in a plea that they tender unto the
said John L. Wilson Sheriff 40 his debt in the sum of
Eight thousand dollars, which they owe to said
6 detain from the said John L. Wilson Sheriff
to the damage of the said Plaintiff as he says in the sum
of Five thousand dollars (\$5000). And have you this writ
and there this writ, with an endorsement thereon, in the
manner you shall have executed the same.

Witness Walter Kimball, Clerk of our said
Court and the seat thereof at the City of
Chicago in said County this 28th day
July A.D. 1858.

Seal

Walter Kimball, Clerk.

Endorsed "Served by reading to the within named
Defendants James E. Bishop on the 3rd of August

and James Fick on the 28th of July 1858

John S. Wilson, Sheriff

By George Anderson, Deputy

And thereafter to wit on the second day of September
A. D. Eighteen hundred and fifty eight the said Plaintiffs
by their said Attorney filed in the Office of the Clerk of
said Court, their Declaration in said suit; Which said
Declaration is in the words and figures following, to wit,

"State of Illinois Cook County Court of Common Pleas
Cook County . . . } ss. Pleas. September Term 1858

8 John S. Wilson Sheriff of Cook County
(Successor of James S. Beach Coroner and Ex
Sheriff) who does for the use of William H. Hendon
Complainant of James E. Bishop and James Fick
that they render unto him the sum of Eight Hundred
dollars lawful Money of the United States which
are to and unjustly detain from him. For that where
heretofore to wit on the twenty ninth day of July in
year of our Lord Eighteen hundred and fifty five at
to wit at the County of Cook and State of Illinois the
said Defendants made their certain Bond or writing
9 obligatory signed with their hands and sealed with their
seals in the words and figures following, to wit,

"Know all Men by these Presents that we James
Bishop and James Fick are held and firmly bound

unto James, S. Beach Coroner and Ex Officio Sheriff of
County of Cook and State of Illinois and to his heirs, assigns
in Office, Executors, administrators and assigns in the
sum of Eight thousand dollars lawful Money of
the United States, for the payment of which sum we do
herby jointly and severally bind ourselves our heirs
10 "Executors and administrators. The condition of this
obligation is such that whereas on the 29th day of July
in the year of our Lord one thousand eight hundred and
fifty six, the said James. E. Bishop sued out of the
Cook County Court of Common Pleas a Writ of replevin
against William R. Hodless defendant for the recovery of
the following described goods and chattels, ~~property~~
"8918 feet, 1st Clear Lumber
"20797 " 2^d " "
"2203110 " Common.
"55174 " Culls. Of the value of Four thousand
dollars. Now if the said James. E. Bishop, Plaintiff
11 "shall prosecute his said suit to Effect and without delay
and make return of the said property, if return thereon
shall be awarded, and save and keep harmless the said
Sheriff in replevying the said property, then this obligation
to be void otherwise to remain in full force and
"Witness our hands and seals this 29th day of July
"D. 1856."

(signed) James E. Bishop
James Beck

Which said Bond or writing obligatory is herewith
produced and to the Court here shown And the
Plaintiff in fact avers that on the twentieth third day of
12 September in the year of our Lord Eighteen hundred and
fifty seven at a Term of said Court of Cook County
Court of Common Pleas, such proceedings were had in
replevin suit above referred to wherein the said James
E. Bishop was Plaintiff and said William R. Hoodless
was Defendant, that the Court did then and there, or
direct and adjudge, that by agreement judgment (to be
rendered) for return of property & damages to be appraised
by the Court, and suit to be dismissed at Plaintiff's cost.
Which said Order or judgment upon the records of the Court
13 is herewith shown And the said Plaintiff in fact avers
that the said Defendant Bishop, though often
requested did not return the said goods and chattels
although return thereof was awarded to the said
William R. Hoodless by the judgment and order of said
County Court of Common Pleas on the aforesaid at the
aforesaid in said suit of replevin so commenced and
said by the said James E. Bishop against the said
William R. Hoodless for the recovery of the said goods
and chattels in said Bond above specified. And the said
14 Plaintiff avers it was the same suit referred to in the
Condition of the said writing obligatory, and that the
said James E. Bishop has at no time since return
offered to return said goods and chattels in

the order and judgment of the Court aforesaid but
has utterly failed and refused -

And for that whereas the said Defendants
to wit on the Twenty ninth day of July in the year
our Lord Eighteen hundred and fifty six by their certain
other Bond or writing Obligatory signed with their hands
and sealed with their seals at &c aforesaid and to the
15 Court here now shown did acknowledge themselves bound
and to owe to said James S. Beach Coroner and
Officer Sheriff of Cook County, State of Illinois and his
successors in Office the sum of Eight thousand dollars
lawful money of the United States And the said
avers that he the said John L. Wilson Sheriff of Cook
County, Illinois, is the lawful successor of the said
James S. Beach as aforesaid, said Bond or writing
Obligatory containing a condition that he the said
E. Bishop Plaintiff shall prosecute his said suit to
16 Effect and without delay, and make return of the same
property if return thereof should be awarded (in any
manner) and save and keep harmless the said Sheriff
in replacing said property, then this obligation to be void
otherwise to remain in full force and Effect. And the
said Plaintiff in fact avers that the said Defendant
James E. Bishop did not in pursuance to the condition
of said Bond prosecute his said suit to Effect, but that
afterwards to wit, at the September Term A. D. 1857
17 Cook County Court of Common Pleas made and

agreement of record in said Court that a Judgment
should be entered in the replevin suit in said Bond
mentioned for a return of the property therein in said
Bond specified, and damages to be assessed by the Court
and that the said suit of replevin specified in the Bond
aforesaid to be dismissed at the costs of the said James
E. Bishop, Plaintiff in said replevin suit, and defendant
therein. And the said Plaintiff in fact avers that the
said Defendant James E. Bishop although often requested
18 did not nor would return the said Goods and chattels,
although a return thereof was awarded by the
County Court of Common Pleas on 10, the day and
last aforesaid at 10 aforesaid, in the said suit of
replevin by the said Bishop vs the said ~~Wood~~
the recovery of the said Goods and Chattels in said
and in the said Declaration of said Bishop specifying
will more fully appear by the records of this Court in
said suit specified to the Court here now shown by
the said Bond and writing obligatory as aforesaid, by
reason of the matters and things herein alleged to have
19 forfeited, and an action hath accrued to the said Plaintiff
so being Sheriff as aforesaid, for the use aforesaid to be
and demand of the said Defendants the aforesaid of
Eight thousand dollars above demanded Yet the said
Defendants, although often requested so to do, have not
as yet paid the said sum of Eight thousand dollars
above demanded, or any part thereof to the said Plaintiff

20

as aforesaid but have hitherto utterly failed and
and still do neglect and refuse to pay the same or any
part thereof To the damage of Plaintiff of Five thousand
dollars (\$5000), therefore he brings suit &c

B. F. James

Atty for Plff

And thereafter to wit on the tenth day of September
D. Eighteen hundred and fifty eight the said
by Hooper & Gausin their Attorneys filed in the office of the
Clerk of said Court their Plea to said Declaration
the words and figures following, to wit.

" James E. Bishop
& James Peck.

(vs)

John L. Wilson

for use &c

State of Illinois

Cook County ...

In Court of Common Pleas

September Term 1858.

21

And the said Defendants by Hooper
Gausin his Attorneys come & defend the wrong and injury
when &c and say that the said Plaintiff ought not to
have and maintain his action aforesaid against him except
for nominal damages merely because they say that the
property replevied in the said Original action of replevin
the said Declaration mentioned was the property of the
James E. Bishop the Plaintiff therein and that the merits
of the said case was not fully determined in the first of
the said action of replevin in which the said Bond was

22

given, for the reason that the said Replevin writ was discontinued and dismissed for want of prosecution without any investigation of the merits thereof and this the said Defendants are ready to verify Therefore they pray judgment if the said Plaintiff ought to have or maintain this action aforesaid against them, except for nominal damages &

Hooper & Gaudin

Atty for Defs."

And afterwards to wit on the Eighteenth day of September (being one of the days of the regular September Term of said Court) A.D. Eighteen hundred and fifty Eight, the following proceedings were had in said Court and Entered of record in said Court, to wit.

23

" John L. Wilson Sheriff Successor
of James S. Beach Coroner & ex officio
Sheriff use of William R. Howells Debt.

v

James E. Bishop & James Peck

This day comes said
Plaintiff by B. F. James his Attorney and on his Motion
leave is given said Plaintiff to amend his Declaration by
inserting increased amount of damages.

And afterwards to wit on the second day of October
(being yet of the said September Term of said Court)

A. D. Eighteen hundred and fifty eight, the following
further proceedings were had and entered of record in said
Court to wit:

24 "John S. Wilson Sheriff successor of
James S. Beach Coroner & Ex Officio
Sheriff vs of William R. Hordless } Debt
in
James E. Bishop & James Cook }

And now again comes said
Plaintiff by his Attorney aforesaid and on his Motion
Ordered that the Plea of said Defendant herein filed to
the Declaration of said Plaintiff in this cause be removed
from the Docket of this Cause for want of sufficient affidavit
of Merits Whereby said Defendant remains therein and
against the action of said Plaintiff and due personal service
of process of summons issued in this Cause having been made
25 on each of the said defendants, and being three times
solemnly called in open Court come not nor does any one
for them or either of them but herein they severally make
default and fail to plead over or pay anything further
bar or preclusion of the action of said Plaintiffs against
which is on Motion Ordered to be taken and the default of
each of said Defendants is hereby Entered of record for want
of a Plea Wherefore said Plaintiffs ought to have judgment
of the said Defendants use and benefit of William R. Hordless
his Debt in his Declaration mentioned, and also be
26 sustained herein by reason of the detention thereof

720
Because these damages are not certainly known, the
being founded on an instrument in writing for the payment
of money only it is Ordered that a Jury come to assess
the same whereupon comes the Jury of good and lawful
men to wit, B. D. Hopkins, Wm. Fabian, S. H. Bust, Wm.
Pitney, S. Henderson, A. Abbey, J. J. Chambers, W. H.
Jerome Petrie, B. Chase, S. A. Rosser & William Lewis
who being duly elected tried and sworn to diligently enquire
into and true assessment make of the damages sustained
27 herein, after hearing the allegations and proofs submitted by
said Plaintiff retire to consider of their assessment & afterwards
return into Court and pay to the Jury find same due
to one and be indebted to said Plaintiff as in his
Declaration mentioned to the sum of Eight thousand
Dollars, and assess his damages sustained by reason of the
detention of said Debt to the sum of Four thousand
hundred and twenty dollars.

Therefore it is Considered that said Plaintiff
L. Wilson Sheriff, successor of James S. Beach Esq.
Ex Officio Sheriff do have and recover of the said defendant
28 use and benefit of William R. Hoodless his debt of Eight
Dollars & 8000 thousand dollars and also his damages of Four thousand
Dollars & 20 hundred and twenty dollars, amounting to the sum of Four
thousand five hundred and twenty dollars, and together with
his costs and charges in this behalf expended and to be
Execution therefor.

And it is further Ordered that said debt shall

discharged on payment of the aforesaid damages.

29 And afterwards to wit on the sixteenth day of
(being still of the said September Term of said Court
A. D. Eighteen hundred and fifty eight, the following
further proceedings were had in said cause, and entered
of record in said Court, to wit:

"John L. Wilson Sheriff Successor of
James S. Beach Coroner & Ex Officio } Debt
Sheriff use of William R. Hodges } Motion to set aside
vs }
James E. Bishop and James Peck }

This day again comes the said
Defendants by Horner & Hanson their Attorneys and
their Motion to set aside the Judgment heretofore rendered
against them in this cause rendered by the
assessment of the Jury herein.

30 And afterwards to wit on the first day of
November (being one of the days of the regular
Vacation term of said Court) A. D. Eighteen hundred and
fifty eight, the following further proceedings were had
in said cause and entered of record in said Court to wit:

"John L. Wilson Sheriff Successor of
James S. Beale ^{Sherriff} Ex Officio Sheriff
vs of William R. Hoodless Debt

(u)

James E. Bishop and James Cook }

31

On reading and filing of the
Affidavit of the said Defendant James E. Bishop in
support of the Motion heretofore submitted to the Court to
set aside the Judgment entered of record in this case
and rendered upon a finding of the Jury herein, and
counsel being heard upon said Motion and due consideration
being thereupon had and the premises fully understood
it appears to the Court that said Affidavit in support of
said Motion is sufficient, the Motion is therefore granted
and the Court doth Order that the aforesaid Judgment
and the Judgment rendered therein be and the same be
hereby set aside and vacated, and this Cause is remanded
for further proceedings.

32

And afterwards to wit on the tenth day of
January (being one of the days of the January
Term of said Court) A. D. Eighteen hundred and ~~18~~
ninety the following further proceedings were had in said
Cause and Entered of record in said Court to wit

John L. Wilson Sheriff successor of
James S. Beach Coroner and Ex Officio
Sheriff, use of William R. Hoodless Debt.

(vs)

James E. Bishop and James Peck

This day again comes said Plaintiff
by B. F. James their Attorney and the said Defendant
by Shumway Waite & Towne their Attorneys also come
and the judgment heretofore rendered in this cause
Entered of record upon the Assessment of the Jury
in that behalf having been set aside and vacated
Order of the Court. Upon argument of the parties
made in open Court, the assessment of damages herein
referred to a Jury of Eleven persons, Whereupon come the
Jury of Eleven good and lawful Men to wit,

Nathan Peck, J. T. Ballard, F. B. Botsford, J. C. Allen,
Wm. F. Snow, R. L. Chapman, E. Olson, M. S. Nye,
J. W. Husted, W. P. White, and E. Saw, who
duly Elected and sworn to diligently enquire into
and true assessment make of the damages herein, and
hour of adjournment having arrived, by consent of
parties it is Ordered, that the Jury may separate and
meet the Court to morrow morning at nine o'clock.

And accordingly on the Eleventh day of January
(being yet of the said January Special Term of said
Court) A. D. Eighteen hundred and fifty the
following further proceedings were had in said

and interest of record in said Court to wit

" John L. Wilson Sheriff successor
of James S. Beach Coroner & Ex Officio
Sheriff use of William R. Hoodless } Debt,

(12)
James E. Bishop and James Cook }

35 And now again come the parties
to this Cause by their Attorneys aforesaid, and the
Jury of Eleven persons impanelled herein on yesterday
assess the damages herein, also come and after hearing
the allegations and proofs submitted retire to
consider of their Assessment, and afterwards come
into Court and pay up the Jury assess said
Plaintiffs damages to the sum of Two thousand
seven hundred and two dollars and fifty cents, and
thereupon said Defendants submit their Motion
for a reassessment of the Damages herein and
36 Counsel being heard upon said Motion, and the
Court being fully advised overrules and denies
said Motion, Whereupon said Defendants enter
their exceptions to the ruling of the Court.

Therefore it is considered that said
Plaintiff do have and recover of the said
Defendants use and benefit of William R.
Hoodless, their Debt in their Declaration

\$ 8000.00 of Eight thousand dollars and also their damages
\$ 2702.50 of Two thousand seven hundred and two dollars
37 and fifty Cents, in' favor aforesaid by the Jury
here assessed, together with their Costs and charges
in this behalf expended and have execution
therefor.

And it is further Ordered said debt shall
be discharged upon payment of the aforesaid damages
and Costs.

And thereupon comes the said Defendants and their
38 their Exceptions and pray an appeal in this cause to the
Supreme Court of the State of Illinois which is allowed on
the Condition that they file appeal Bond in thirty thousand
dollars to be approved by Judge of this Court, and that they
have ten days time in which to file said Bond and that they
days within which to file their Bill of Exceptions.

And thereafter to wit on the Eighteenth day of
January A.D. Eighteen hundred and fifty nine the
Defendants accordingly filed in the Office of the Clerk of
said Court their Appeal Bond in the words and figures
following, to wit,

"Know all Men by these Presents That we James S. Beach
James Peck and Joseph H. Tiffany are held and firmly bound
unto John S. Wilson Sheriff Cook County Illinois successor of
James S. Beach who sup for the use of William R. Tiffany

in the penal sum of Forty five hundred dollars for which we bind ourselves our heirs executors and administrators firmly by these Presents. Sealed with our seals and dated the seventeenth day of January 1854.

The condition of this obligation is such that whereas in certain suit in the Cook County Court of Common Pleas said John L. Nelson Sheriff of Cook County Illinois processes James S. Reach who sues for the use of William R. Woodless his heirs or assigns we bind ourselves our heirs executors and administrators firmly by these Presents. Sealed with our seals and dated the seventeenth day of January 1854.

James S. Reach who sues for the use of William R. Woodless was Plaintiff and James E. Bishop & James Peck are Defendants the said Plaintiff on the Eleventh day of January 1854 obtained a Judgment against the said Defendants James E. Bishop & James Peck for the sum of Twenty seven hundred and two dollars and Cents damages besides Costs of suit from which said Defendants prayed an Appeal to the Supreme Court of the State of Illinois, which Appeal has been granted to the said James E. Bishop and James Peck, upon said Defendants giving this Bond. Now if the said above bounden Defendants shall well and truly pay the judgment Costs, interest and damages in case the said judgment shall be affirmed by said Supreme Court and shall duly prosecute their said Appeal then the above obligation to be void otherwise of force.

Approved by me

John M. Nelson

Judge.

James E. Bishop

James Peck

J. A. Tiffany

" The State of Illinois }
Cook County . . . } ss.

Arthur L. Nelson who since } Cook County Court
for the use of } } Common Pleas. Of the
(v) } } January Term A.D. 1856.

James Peck and . . . }
James E. Bishop . . . }

Be it remembered that

42 The Trial of this cause the Plaintiff to maintain the
case on their part offered in evidence - the Defendant

" State of Illinois }
Cook County . . . } ss.

James E. Bishop being first duly
sworn deposes and says that he is the owner and
entitled to the possession of the following described goods
and chattels to wit,

Eight thousand, nine hundred and
eighteen feet of first clear lumber.

Twenty thousand seven hundred and
seven feet of second clear lumber.

Two hundred and twenty thousand
hundred and forty feet of Common lumber.

Fifty five thousand, one hundred
four feet of Cuts.

43 That the said goods and chattels are
unlawfully wrongfully withheld from his possession.

William, R. Hoodless and that the said goods & chattels
are of the value of about Four thousand dollars, and
that the said goods & chattels have not been taken for
tax assessment or fine levied by virtue of any law of the
State of Illinois, nor seized under any execution or
attachment against the goods and chattels of him the
affiant liable to execution or attachment."

"Subscribed and sworn to
before me this 29th day of } " Jas. E. Bishop "
July A. D. 1858 " . . . }

Walter Kimball, Clerk
Court to be bot. Com Pleas.

To the reading of which Defendant objected.

44 The defendant inquired of the plaintiff for what
purpose they offered said Affidavit, and they stated for
the purpose of proving the value of the sum offered.

The defendant then and there objected to said
Affidavit being read for any such purpose.

Which objections was then and there overruled
and exceptions was then and there taken and a reading
read in evidence.

45 The Plaintiff then offered in evidence the sum
to the reading of which the defendants then and there
objected, because said sum appeared to have been
altered; Which objection was overruled and the defendant
then and there excepted and said Bond was read in
evidence.

"Know all Men by these Presents That we James E. Bishop and James Peck are held and firmly bound unto James S. Beach Coroner & Ex Officio Sheriff of the County of Cook in the State of Illinois and to his successors in office, Executors administrators and assigns in the sum of Eight thousand dollars lawful Money of the United States for the payment of which sum we do jointly and severally bind ourselves our heirs Executors administrators.

The condition of this obligation is such that whereas on the 29th day of July in the year of our Lord one thousand eight hundred and fifty six the said James E. Bishop sued out of the Cook County Court of Common Pleas a Writ of Replevin against William R. Hodless, defendant, for the recovery of the following described goods & chattels, property, to wit.

8918 feet 1st clear lumber
 20767 " 2nd " "
 220,310 " Common "
 55,174 " Scales " of the value of
 Four thousand dollars.

Now if the said James E. Bishop shall prosecute his said suit to Effect, and without delay and make return of the said property, if return thereon shall be awarded, and pass and keep harmless the Sheriff 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 twenty ninth day
of July A. D. 1856.

Witness.

James. E. Bishop

(Seal)

Chapin Hurlbut

(Seal)

James Peck

(Seal)

The Plaintiff then read the Judgment for
"Sept 23rd 1857".

// James E. Bishop

(Seal)

Replevin.

William R. Woodless

48 This day comes the said Plaintiff
by Hooper his Attorney and the said Defendant by
his Attorney and upon agreement of parties it is ordered
that defendant have return of the property replevied in this
cause, and reference is had to the Court to assess the
damages herein hereafter, and suit to be dismissed at
Plaintiffs cost.

It is therefore considered that said defendant
have a return of the property, goods and chattels replevied
in this cause and damages to be assessed by the Court
and also his costs and charges and a writ of return
habendo for the return of the property replevied.

"June 10th 1858"

"James E. Bishop

(Seal)
William R. Woodless

Replevin.

49 This day again comes the said Plaintiff by ~~his~~
Attorney Storer and the Court under and by an agreement
of the parties herein heretofore entered in this cause, where
judgment was entered for a return of the property replevied
to the possession of the said Defendant, declared to be the
rightful owner thereof, having now heard allegations and
proofs submitted as to the amount of damages sustained
by the said defendant, by the detention of the said property
and being fully advised in the premises assesses the damages
of the said defendant to the sum of Four hundred and
forty dollars.

30. Therefore it is considered that the said Plaintiff
do have and recover of the said Plaintiff his damages of
\$1141.00 Four hundred and forty dollars in form aforesaid
damages as
Piff. Court assessed and also his costs and charges in this cause
expended, and have execution therefor.))

The Plaintiff then admitted that there had been a
trial of the previous suit, and that the title of the property
had not been settled.

The defendant then called

31 Hawley - who testified that he was present
on about the 11th or 16th July 1856 at a conversation
between Hoodless and Bishop and heard the language
for the sale of the lumber in controversy - it was
of part of the cargo of the Brig Banner by the defendant
Bishop to Hoodless for whose use this suit was

That portion of this sheet embraced in Brackets thus [] should be inserted at the Star in next sheet showing Gross Examination.

brought. the sale was for Cash by quantity. 800 lbs
Common \$21 second clear \$25 first clear. The
bargain was made 11 or 16 day July 56, it was
Cash sale on delivery - Lumber was to be inspected by
Mr Davis an Inspector. At the time of the sale the
balsa Boat had commenced to unload from the Bay.
The Bill shown to me in my handwriting might be
mistaken in the items of price - had a Memorandum
made at the time - sale for Cash on delivery. []
while the lumber was being delivered - Knew this was the
Book Keeper - Could not swear as to where Credit was
account of dealings between Hoodless & Bishop except the
lumber sale - It seems very natural that they
should be part in this transaction - Don't recollect
was so recd - \$2000 received before lumber was
delivered. Lumber charged or debited. 2000 debited
Credited before lumber charged, or delivered or inspected.
When Memorandum \$2000 credited, lumber charged.
Merely done as a Memorandum and done sometime
after the transaction. Can't say exact time 2000 paid.
Sure not paid before ~~Export~~^{Vessel} went to Hoodless dock.
Sale made about 2 P.M. at least soon after dinner
was certainly present when sale made. One person was
present ^{and} inspection by Mr Davis. [Lumber to be delivered
to Mr Hoodless on dock. When contact made Brig was
lying at Bishop's dock. I do not recollect making
demand for payment. Lumber all discharged.

54 Hoodless dock - She went to Hoodless dock to deliver it.

Cross Examined. Contract of Sale might have been made in August, by reference to my Memorandum can tell. Am not certain as to date. Have the Memorandum in my overcoat pocket (allowed to get it). It was the 16th day of July or about that date. Sale made on board the Vessel. Hoodless, Mr Bishop myself present when sale made, think Mr Cummings and Mr. [unclear] also present or at least near by. Am Mr Bishop's Bookkeeper, certain amount credited ~~to~~ ^{for} there was [unclear]

55 talk at the Office. Considered the Sale closed on the Vessel. Vessel moved to Hoodless dock some afternoon. Can't pay to a day when \$2000 paid or when [unclear] paid within a week, it took very near a week to discharge the cargo. Neighbourhood of [unclear] Vessel. My knowledge of the \$2000 only derived from the Books. I could have ascertained from the [unclear] when credited. I do not recollect of making a [unclear] for the balance of the pay for the cargo. Know Bishop's handwriting. This check dated July 22. 1856 paid in his handwriting. Could not say I ever saw the check before. Don't think I deposited it. I think some of the lumber was removed after the sale before the Vessel went to Hoodless dock. Also by agreement Captain of the Vessel said Vessel would not start off unless part of cargo discharged so as to [unclear]

it was done so as to make it safe to remove the lumber
don't know the exact amount or quality of the lumber
removed - perhaps from 10 to 20 M, put on a canal
boat. Canal boat loading when sale made. I think
57 Captain of Brig, said Vessel not upright - and it
was agreed that some should be removed - which Bishop
was not to get to Hoodless - May not have been the
Captain, it was at least some person in charge of the
Bishop received lumber put on to the Canal Boat.

58 reserved, that when sale was made. It was the
understanding when sale made that it should be taken
off. Don't know where they took it from. Some of it
unloaded into the Canal Boat before sale. I might have
seen the balance put on to the Canal Boat but I don't
recollect. When sale made inspector then inspecting
lumber on to the Canal Boat, he did not stop the
sale, kept on till Vessel righted up. Don't recollect
being directed by Hoodless or Bishop to tell the inspector
to stop. Have the Vessel go to Hoodless dock. I don't
recollect seeing the Vessel after she discharged the

Re-Examined. Canal Boat unloading when sale
made, Lumber afterwards taken off, went on to the
Canal Boat. Lumber charged to Hoodless by Bishop
as a mere memorandum.

59 Stevens. Was a Member of the Committee of Arbitration of the Board of Trade, Chicago. Myself, Mr Mather & Farlton Jones. Committee. Bishop & Hoodless came before them to settle their difference between them in regard to the of lumber. The paper shown to me our award. Hoodless came before us with a long written agreement and put up \$1000 check to abide the award. Bishop demurred to put up to bind him to keep the award, said Hoodless had the lumber and lumber. Agreed that if he did not abide by the award he might deduct \$1000. from the amount coming to him. 60 They both agreed to submit the matter to us. We made this as our award and notified each of the parties of our making the same. After making the award we asked what we should do with the \$1000. Clerk of Hoodless. Bishop said give it back to Hoodless as all he wanted was what was right, his pay for his lumber. The point in dispute or submitted to us, was in regard to the inspection.

Cross Examined. Hoodless deposited \$1000. Certificate check. Not the agreement that both parties should deposit \$1000. Bishop said he had not \$1000 to deposit. 61 Hoodless owed him more than that on the lumber. Young man testified. Hoodless & Bishop both testified before us as Arbitrators. Hoodless had a young man to testify. None of them I think given by us.

Not preserve any Notes of the testimony. Made our award
right away. Can't say whether we were witnessed or not.

62 Re Examined. We decided that the inspection should
be binding on the parties. Hoodless & Bishop each paid
half our fees after we made the award and commenced
the same. This paper is our award which is deposited
by the arbitrators.

The defendants then offered to read the award
in evidence referred to by the last witness, which
award is as follows.

(Paid award being dated after the commencement
of the replevin suit referred to by Bishop & Hoodless.)

"State of Illinois
County of Cook } ss.

63 We the undersigned duly elected and
appointed by the Board of Trade of the City of Chicago,
the Committee of arbitration, for the said Board, do hereby
certify that on Tuesday Evening July 29th A.D. 1886
personally appeared before us as a part of the Committee
aforesaid, by verbal arrangement for that end, made
previous to the said day James E. Bishop Esquire of the
City of Chicago, State aforesaid and William R. Hoodless
Esq. of the same City and State aforesaid; and the said
James E. Bishop and the said William R. Hoodless
having agreed between themselves to submit to arbitration

Committee all and every differences and disputes of any kind
 whatsoever growing out of a certain purchase of lumber made
 by the said William R. Woodless of the said James E. Bishop
 on the twenty eighth day of the Month and year aforesaid
 and the said William R. Woodless having pledged himself to
 abide by, and act upon, and consider final the action of
 the said Committee under a Penalty of One thousand dollars
 and having submitted a statement of his case in writing
 to the said Committee, and the said James E. Bishop having
 by word of mouth submitted his case to the said Committee
 and his statement so made as aforesaid being verified by
 the oath of witnesses sworn and examined at that time
 in his behalf by the said Committee, And the said
 James E. Bishop having produced to us the said Committee the
 original Certificate of the several inspectors, who had
 measured and inspected the lumber aforesaid of which the
 following are true and correct Copies, to wit

" Chicago July 1856

This is to Certify that I inspected the
 Cargo of Barque S.B. Pomeroy purchased by Mr. Bishop
 of J.E. Bishop and find the following quantities and
 qualities.

1 st Clear	8198
2 nd do	19636
Common	62619
Culls	4169
	95822

(signed) J. C. Davis

and

"Blueage, July, 21th 1856

66 " This is to certify that I have measured the
part Schooner S.B. Toner's cargo, of Pine lumber
purchased by Messrs W.R. Hoodless & Son from
E. Bishop, and I find the following qualities & quantities
Viz:

Second Class	1.132	feet
Common	137.871	
Refuse	<u>50.565</u>	
Total	209.568	

(signed) Nathaw Dye, Inspector

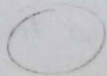
67 And it having been made to appear satisfactorily
to us, the said Committee; that the said measurements in
the said Certificate mentioned were correctly made
were binding on the parties. We the said Committee have
duly considered the said matters and things to us referred
as aforesaid, decided the said measurements to be binding
on the parties and that the said William R. Hoodless
should pay for the said lumber according to the
measurements.

In testimony whereof we have hereunto set
our hands this thirtieth day of July A.D. 1856.

(signed) Farleton Jones

(signed) M. C. Starnes

(signed) W. J. Mather."



To the reading of which award the Plaintiff objected
and the Court then and there sustained said objection to
which decision the Defendant then and there excepted.

68 Cummings - Made a demand of Hoodless for the
balance of pay on the lumber a day after Award by
Board of Trade, think next morning, Hoodless ~~demanded~~
to pay, very decided in refusing, said he would not
abide by the award, and would not pay balance.

Gross Examined. \$2000. had been paid down on
balance due on cargo. I suppose bill was credited with
\$2000, the balance demanded, they had done under award
finished purveying.

69 Re Examined - Saw lumber on dock before it was
refused, think it was after the decision of Board of
Trade. Don't recollect positively, bill shown to me
in my handwriting, presume this was the bill shown
to me. The items below in pencil not my handwriting.
Cannot say whether I made demand before the award.
Have no recollection of making but one demand for pay.

The defendant then read in evidence the following
letter from Hervey and Clarkson, Attorneys for the
but proved it to be in the handwriting of Robert Hervey
and was brought for Plaintiff.

123, Lake Street, Chicago
31: July 1856.

James E. Bishop Esq
Chicago.

Dear Sir,

We are instructed by Messrs
Hoodless & Son to call upon you for repayment of the
advanced by them to you on account of lumber which
have since by law resumed possession of.

70

Unless payment be made of this sum and
damages sustained, we shall be forced to commence
proceedings.

Yours Obt. Servts

Mervey & Clarkson.

Defendants offered to prove by a witness on the
stand that after the bringing the writ of replevin
before the writ was served, the Defendant in this
the Plaintiff in that, demanded of Hoodless the
of the balance for the lumber and Hoodless refused to
the same, and the said Bishop also demanded a
return of the lumber and Hoodless refused to return
the same.

71

To which testimony the Plaintiff objected and
the Court sustained the objection, and the Defendant
then and there excepted.

Harvey recalled

On reflection I demanded pay of Mr. [unclear] before the giving out of the Replevin, and before the [unclear] to the Board of Trade. He said he would not pay Mr. Dye had made full inspection of the lumber. He Dye was then engaged in inspecting the lumber.

~~(It was agreed between Harwood & Dye that Dye suspect the lumber was [unclear])~~

72 Defendants then offered by witness on the stand [unclear] that since the execution of the Replevin Bond by [unclear] James Peck in this case had been altered by crossing the name of Chapin, Hibbard & Co and that it was not the Bond that James E. Peck executed. That the [unclear] executed had the name of Chapin, Hibbard & Co. and with them as Co-Sureties their names being on the [unclear] before that of James Peck.

To which evidence the Plaintiff objected and the Court sustained the objection, and the Defendant then [unclear]

73 Defendants objected to introduction of Bond offered in [unclear] because it appeared that the name Chapin, Hibbard & Co had been signed to the Bond and erased.

The objection was overruled by the Court and the Defendants by their counsel then and there [unclear] the decision of the Court in overruling the objection.

Terrio: Am a lumber dealer. am acquainted with the value of lumber and was so acquainted for the last five years. Am acquainted with Chicago lumber and its character.

The Plaintiff then asked the witness what was the value of First clear lumber July 29th 1856.

74 Defendant objected to the Plaintiff proving the value of the lumber at that time, but that the rule of law was the value of the lumber when the Defendants came to return the same on the writ of return habeas. The Court overruled the objection, and permitted the question to be asked, the Court then and there deciding that the value of the lumber at the time of putting out the writ would control the matter. To which ruling the Defendant then and there excepted.

State what was the value of second clear lumber in Chicago on the 29th day of July 1856. To which question Defendants objected for the reason above

75 Which objection was overruled and exception, the witness answered \$35. Then paid witness was asked the following question - State the value on the 29th day of July A.D. 1856 of Common lumber and bolls.

Objection made to paid question and objection overruled and exception taken.

Answer - Common lumber \$15. to 16 Mc. bolls

The defendant then read the following account
being the one referred to by the witnesses -

Chicago July 29. 1836

Mr. H. R. Woodless -

Bought of James E. Bishop

8918	4 th	1 st clear	@ \$25	\$222 - 95
76 30768	"	2 nd clear	@ \$21.	436 " 13
2205110		Common	@ \$12	26116 " 11
6517411		Culls	@ \$8	4114 " 10
				\$3116 - 10

Hard clear worth \$30 of. to 60 of more than
Common, great variety of grades - Value of Common
lumber made at St Clair when bought by cargo
according to the usual run of cargoes worth \$22.50
more than the inspectors - for the reason that the
inspectors bill only 4 grades, the buyer in selling
makes extra grades, which enhances the value of the
Common \$2.75. In St Clair lumber average
77 better quality at least 1/4 what is inspected. Common
is placed afterwards at a higher grade - is made
about 1/3 flooring and 3rd clear. which is worth
to \$24.

Gross Examined. The prices I have given are
retail prices by the cargo, same as this lumber sold
to Woodless - for.

This sale by Bishop was made by the

price by the Cargo. No rise in lumber between the
Sale and 29th July. Soon after lumber commenced
to fall, been falling ever since.

The Court excluded the testimony that lumber
usually overrun the inspectors Certificate as to quality.

78

Dyer - Testified as lumber inspector was
engaged in 1856. Did not hear Mr Bishop say
this was St. Clair lumber. Inspected all of it
did not in my inspection Certificate certify Clear
as Common, nor 2nd Clear as 3rd Clear.

The paper shown to me is my inspection of the
whole Cargo. Not called upon first by Mr. Bishop
to inspect it. Part had been inspected and then
Stoddess called upon me. Never had any conversation
with Bishop in regard to the lumber - ascertained
the value of lumber July 28th 1856.

79

Value 2nd Clear in the yard 30 to 35

Common \$11 to 16.

Refuse or Culls \$10 to 12.

1st Clear \$11.

Defendant objects to the Value being proved at
that time. Objection overruled and exceptions taken.

When I commenced to inspect, part on the Vessel and
part on the dock - part piled say 11 to 15 ft -
little reported could not say how much.

Crop Examined. Not lumber dealer. Not in the
buying or selling. The prices I have given above
retail price by the same quantity

80

Mr. Davis. Lumber inspector - acquainted with
the lumber inspected by Dye. The lumber Mr Bishop
sold St Clair lumber. Lumber piled in my presence
part of the lumber when off after sold before delivery
at Hoodless Dock

Hoodless - Son of the Plaintiff - Lumber delivered
Dock, commenced to pile it at once - at the time
for the piled - Had all been inspected when
piled on the South side of the yard $\frac{1}{3}$ large
the piled had a portion of the large bay
ready for piling. The balance unpiled on the
The value increased by piling.

81

Acquainted with the value of lumber

1st Clear July 29th 1856 worth - \$110

2nd Clear \$35.

Common \$16.

Could not state quantity of flooring in large
should think $\frac{1}{3}$ - Increased in value by piling
Expense of piling 10¢ or 11¢ per M. Paid
10¢ or 11¢ per day to pile. I consider the
Value over cost to be price at retail I
had never had any experience in lumber, nor
know then anything about it. The price

above are the retail prices, not the price by the cargo

82

Specie. Lumber dealer, knows the particular
the value of lumber in July 1856. From Yards

1st Clear \$110.

2nd Clear \$33 10 34

Common \$15 10 16

Cutts \$11 10 12 1/2.

St. Clair lumber after inspection is when sold
into four grades - profits made in the quality
flooring & 3rd Clear picked out of that designated

St. Clair lumber averages 25% to 40% flooring
3rd Clear - cost of piling or docking lumber 15%
for M. all round. Don't know the character of
Mr. Hoodless yard.

Crops Examined. The prices I have given are the
83 / retail prices by the cargo worth in the Market

The Court then decided that they should take
the rule of damages to be as it was conceded that the
lumber in question had been sold by Bishop to Hoodless
at the Market Value by the cargo, and that lumber
by the cargo when this was received was worth
the same as when sold, that the rule of damages
governing this case, should be the amount paid for
the lumber with interest, and the expenses of

and handling the lumber and reasonable compensation
84 for the use of dock.

— To allowing which rulings and decisions the
defendants excepted -

This was all the testimony introduced in the case.

The Plaintiff then asked the Court to instruct the
Jury as follows.

"Case No 932. Cook County Court of Common Pleas.
Wilson vs of Hoodless Pleas.

Instructions asked by Plaintiff
James C. Bishop
and James Peck

85 If the Jury believe from the testimony
that the lumber in controversy was sold and delivered by
Defendant Bishop to Hoodless, the Plaintiff, and that said
Defendant subsequently to the day of sale, charged upon
his, defendants books of account, the lumber so
paid Hoodless, and credited Hoodless with the amount
paid on account - that then Bishop did not in fact
fact have the right to sue out a Writ of replevin
the lumber in controversy, but should resort to the
legal remedy to recover the balance due, on account
paid to Purchase by Hoodless aforesaid. And that in
the event of so finding as aforesaid, the measure of
damages will be the value of the lumber
replevied by said Bishop, with six per cent interest

56

per annum from the service of the person it was
such other damages as appears from the evidence
arise from the expense and labor of assorting and
said lumber in the yard of said Hoddless."

"If the Jury believe from the evidence that the
suit was commenced without cause and the lumber
removed from the possession of Hoddless, after the same
been duly sold and delivered - the Jury may give the
actual value of the property removed, at the time of
removal"

57

"If the Jury believe from the evidence that the
was sold and delivered to Hoddless although the full
price of the same had not been paid, then the
delivery of the lumber vested the property in Hoddless."

All of which the Court refused to give.

The Defendant then asked the Court to give the
following instructions.

"We pray the Court to instruct the Jury that,
they view from the evidence that the lumber was to be
paid for at the time of delivery, then the Sale was only a
conditional one and did not until the payment of the
divest the property out of Bishop and vest it in Hoddless
although they may find that part of the purchase price

was paid and the whole property delivered."

2

"That if the Jury find from the evidence that Hordless abandoned the Contract of Sale after the institution of this suit, then he is not entitled to recover."

3

"If the Jury should find from the Evidence in the case, that the lumber was worth no more in the market than the price agreed to be paid for the same, the Jury will not allow the Plaintiff the whole value of the lumber, but only his interest therein. Which was the amount paid on the same - together with the cost of placing the same in the yard."

4

"If the Jury find from the evidence that the lumber in question was a broken one and that only a part of the price was paid, the damages (under the whole Evidence in this case) on the amount paid with interest in the discretion of the Jury."

5

"If the Jury find from the Evidence that Bishop sold the lumber in controversy to Hordless to be paid on delivery - if on the delivery of the lumber, Hordless refused to pay for the same - Bishop had a right to replevy the same and they will consider that as mitigation of Plaintiff's damages, and will not in their action allow him the value of the lumber."

7 " If the Jury find from the evidence in this case that Bishop sold the lumber in question contrary to Hoodless to be paid for upon the delivery of the same, Hoodless refused to pay for the same, Bishop had the right to replevy the same, and they will award damages in mitigation of Plaintiffs damages and if they find it to be the case, they will not in this action award the Plaintiff the value of the property, even if they find Hoodless had made an advance of \$2000 on the lumber and had not tendered back the \$2000."

To the refusal to give each and all of such instructions the Defendant then and there excepted.

The Court gave the following instruction for the Defendants.

" The Jury in making up a Verdict will consider any testimony excluded by the Court."

The Court on his own Motion gave the following

92 " The Jury are instructed that the rule of damages in this case is the amount of money advanced on the lumber with interest thereon, and reasonable compensation for the use of the dock and the expenses of piling it and handling it."

To the giving of which the defendant then and there excepted.

And thereupon the Jury found a Verdict for Plaintiff, and the Defendant then and there moved for a New Trial.

Which Motion the Court overruled, To which the Defendant then and there excepted.

93 And the Defendants asked to have their Bill of Exceptions signed sealed and made part of the record in this case, which is done.

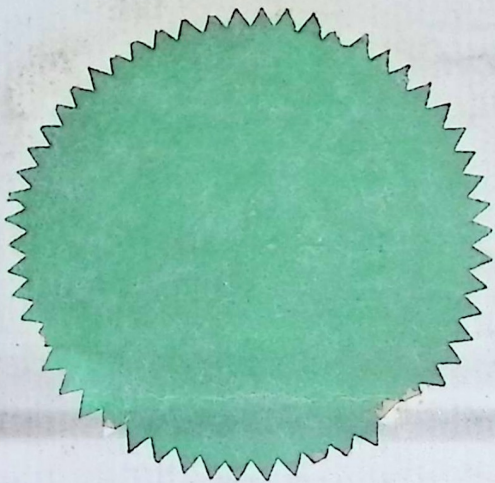
John M. Wilson (Seal)

State of Illinois
County of Cook } B

I Walter Kimball Clerk of the Court of Common Pleas, within and for the County and State aforesaid Do hereby Certify the foregoing to be a true and correct Transcript of the papers now on file in my office together with all orders entered of Record in said Court in a certain suit therein, wherein S. Wilson, Sheriff of Cook County Illinois successor of James S. Beach Coroner and Ex Officio Sheriff is Plaintiff for the use of William R. Woodcock is Plaintiff and

94

E. Bishop and James Peck are defendants.



In testimony whereof I the said
Kimball have hereunto set my hand and
affixed the Seal of said Court at
in said County this Eleventh day of
A. D. 1859. Walter Kimball

The State of Illinois
In Supreme Court
~~John G. Wilson~~
James Bush v. et al
John G. Wilson vs. et al

And now comes the plaintiff
in error and say that there is
error in said record and
proceedings in this Court.
1. The Court erred in striking
the plea from the files.

2 The verdict is excessive; it is un-
warranted by the evidence

3 The verdict is against evidence

4. The Court erred in refusing
to grant a new trial.

5. The Court erred in their discussion
of law during the progress
of the trial

6. The Court admitted improper
evidence

7 The Court excluded proper
evidence

8. The Court sees in a future road
and all the instructions asked
for by the defence.

9 The Court should have been given
the plaintiff in error in the
of the defendant

10 The Court sees in giving the
instructions to the jury

ABSTRACT.

JAMES PECK, ET AL. }
vs. } *Appeal from Cook County Court*
JOHN L. WILSON, USE, &c. } *of Common Pleas.*

Action below on a replevin bond where the action of replevin was not tried on the merits, but was dismissed for want of prosecution.

8—20 Declaration on replevin bond for the replevy, by Bishop, of 8,918 feet 1st clear lumber, 207,197 2d clear lumber, 220,540 common, 55,174 culls. Declaration contains two counts, neither of them alleges the issuing of a *Returno Habendo*.

14 The first count avers, for breach "that the said James E. Bishop has at no time since, returned or offered to return said goods, in pursuance to the order and judgment of said Court, but so to do has utterly failed and refused."

The record alleges for breach, "that the defendant, Bishop, although often requested, did not or would not, return the said goods, &c, although a return thereof was awarded, &c."

21 Defendants, Sept. 10, file a plea, that the property replevied, at the time of suing out the writ, was the property of the said Bishop, and the merits of the replevin suit had not been tried, &c. "No affidavit of merits was filed."

23 Sept. 18, the Plaintiff amended, by leave, his declaration, by increasing the damages.

24 Plea struck from the files for want of affidavit of merits, and judgment, by default; for want of plea, entered against defendants, and jury called, and damages assessed at \$4,520.

28 Defendants file a motion to *set aside the judgment*, which is sustained so far as the assessment is concerned.

33 The assessment had before a jury,—and they assess the damages at \$2,702.50. Defendant moves for a new assessment, which the Court overrules.

42 On the trial, the plaintiff offered the following evidence :
The affidavit in the replevin suit.—In this affidavit the lumber was stated to be of the value of about \$4,000, and is sworn to July 29, 1856. The plaintiff stated they read the same for the purpose of proving the value of the lumber replevied. The defendant objected, and objections overruled.

The plaintiff then offered in evidence the following bond :

State of Illinois
Cook County Court
of Common Pleas,
247-126

John, L. Wilson use
of W. R. Hord les.

— (vs) —

James, E. Peck et al
appels

Record.

Filed April 20, 1857
L. Leland
clerk

H. S. P. Clerk

45—47 “ Know all men by these presents, that we, James E. Bishop
“ and James Peck, are held and firmly bound, unto James S.
“ Beach, Coroner, and *ex-Officio* Sheriff for the County of Cook,
“ in the State of Illinois, and to his successor in office, execu-
“ tors, administrators and assigns, in the penal sum of eight
“ thousand 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 con-
“ dition of this obligation is such, that whereas, on the 29th day
“ of July, in the year of our Lord, one thousand eight hundred
“ and fifty-six, the said James E. Bishop sued out of the Cook
“ County Court of Common Pleas, a writ of Replevin against
“ William R. Hoodless, defendant, for the recovery of the follow-
“ ing described goods and chattels, property, to wit: 8,918 feet
“ 1st clear lumber, 20,767 feet 2nd clear lumber, 220,540 feet
“ common lumber, 55,174 feet culls, of the value of four thousand
“ dollars.

“ Now if the said James E. Bishop, 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 Sheriff in replevying the said prop-
“ erty, then this obligation to be void, otherwise to remain in full
“ force and effect. Witness our hands and seals this twenty-
“ ninth day of July, A. D. 1856.

JAMES E. BISHOP, 

CHAPIN HURLBUT, 

JAMES PECK. 

In the bond, the words, “Chapin Hurlbut,” and “seal,” are
erased by a line drawn through them. To the reading of which
the defendant objected, because the bond on its face appeared to
have been altered, which objection was overruled. Plaintiff then
read the following judgment in the replevin suit:

48 “ Sept. 23d, 1857. James E. Bishop vs. William R. Hoodless.
“ Replevin. This day comes the said plaintiff by Hooper, his
“ attorney, and the said defendant, by Hervey, his attorney, and
“ upon agreement of parties, it is ordered, that defendant have
“ return of the property replevied in this cause, and reference is
“ had to the Court to assess the damages herein hereafter, and
“ suit to be dismissed at plaintiff's cost. It is therefore consid-
“ ered, that said defendant have a return of the property, goods

"and chattels replevied in this cause, and damages to be assessed
"by the Court, and also his costs and charges, and a writ of
"returno habendo for the return of the property replevied.

"June 10th, 1858. James E. Bishop vs. William R. Hoodless,
"Replevin. This day again comes the said plaintiff, by his at-
"torney, Hooper, and the Court under and by an agreement of
"the parties herein heretofore entered in this cause, whereby judg-
"ment was entered for a return of the property replevied, to the
"possession of the said defendant, declared to be the rightful
"owner thereof, having now heard allegations and proof submitted
"as to the amount of damages sustained by the said defendant,
"by the detention of the said property, and being fully advised
"in the premises, assessed the damages of the said defendant, to
"the sum of four hundred and forty dollars. Therefore it is con-
"sidered, that the said defendant do have and recover of the said
"plaintiff his damages of four hundred and forty dollars, in form
"aforesaid, by the Court assessed, and also his costs and charges
"in this behalf, expended, and have execution therefor."

50 The plaintiff then admitted that there had been no trial of the
51 previous suit, and the title of the property had not been settled
and rested their case. *Deft. then called* Hawley, who testified,
he was present about the 14th or 15th of July, 1856, when Hoodless
bought a cargo of lumber, off the Brig *Banner*, of Bishop; the
sale was for *cash* on delivery, by qualities: \$8 for culls, \$21 2nd
53 clear, \$25 1st clear. The lumber was to be inspected by Mr. Da-
vis. When the sale was made, a canal boat was unloading from the
brig. The bill shown to me is in my handwriting. Lumber to
be delivered on Hoodless' dock. Lumber all discharged at
Hoodless' dock. Brig went there to deliver it. Don't recollect
demanding pay for the balance of lumber after delivery.

55 *Cross Examined.*—Sale made on board the vessel. Hoodless,
Bishop, and myself present. By my memorandum, I find sale
made 16th July. Think Mr. Cummings and Mr. Dugal present
at sale. \$2,000 credited to Hoodless, while lumber being deliv-
ered. Only know it as book keeper. Lumber charged and
money credited. Only done as memorandum. My knowledge
of the \$2,000, only derived from the check drawn by Hoodless, of
\$2000, dated July 22d, is endorsed in Bishop's handwriting.
Could not say I ever saw check before. Took very near a week
56 to unload vessel. Some of the lumber removed after sale, before
vessel went to Hoodless' dock; done by agreement.

59 *Stearnes testifies.*—He was a member of the Committee of Ar-

60 bitration of the Board of Trade of Chicago, with Tarleton Jones and William T. Mather. Bishop and Hoodless both came before the committee, Mr. Mather, Mr. Jones and myself, and referred the question of inspection of lumber to our arbitration. Hoodless put \$1,000 to abide by the award. Bishop agreed if he did not abide by the award, that \$1,000 might be deducted from the price of the lumber. The paper shown to me is our award; we notified parties of the award. After making the same, we asked what we should do with the \$1,000. Bishop said give it to Hoodless, as all he wanted was what was right,—his pay for the lumber.

61 *Cross Examined*—Hoodless and Bishop both testified before us as Arbitrators. Hoodless had a young man there to testify. Can't say whether we swore witnesses or not. Made our award at once.

Re-Examined.—We decided the inspection of lumber should be binding on the parties. Each paid us half our fees. This paper is our award. It is signed by all the Arbitrators.

The defendants then offered to read the said award in evidence, (said award being dated after the commencement of the Replevin suit,) which is as follows :

STATE OF ILLINOIS, } ss.
COUNTY OF COOK, }

" We, the undersigned, duly elected and
" appointed by the Board of Trade of the City of Chicago,
" as the Committee of Arbitration, for the said Board, do
" hereby certify, that on Tuesday evening, July 29th, A. D.
" 1856, personally appeared before us, as a part of the Commit-
" tee aforesaid, by verbal arrangement for that end, made previ-
" ous to the said day, James E. Bishop, Esq, of the City of
" Chicago, State aforesaid, and William R. Hoodless, of the same
" City, and State aforesaid; and the said James E. Bishop and
" and the said William R. Hoodless, having agreed between
" themselves to submit to us, the said Committee, all and every
" difference and disputes of every kind whatsoever, growing out of
" a certain purchase of lumber, made by the said William R. Hood-
" less, of the said James E. Bishop, on the 28th day of the month
" and year aforesaid; and the said William R. Hoodless, having
" pledged himself to abide by and act upon and consider final,
" the action of the said Committee, under a penalty of one
" thousand dollars, and having submitted a statement of his case
" in writing, to the said Committee; and the said James E.
" Bishop, having, by word of mouth, submitted his case to the
" said Committee, and his statements so made as aforesaid, being

“ verified by the oath of witnesses, sworn and examined at that
“ time, in his behalf, by the said Committee ; and the said James E
“ Bishop, having produced to us, the said Committee, the orig-
“ inal certificates of the several inspectors, who had measured and
“ inspected the lumber aforesaid, of which the following are true
“ and correct copies, to wit :

“ Chicago, July, 1856. This is to certify, that I inspected the
“ part cargo of Barque *S. B. Pomeroy*, purchased by Mr. Hoodless
“ of J. E. Bishop, and find the following quantities and qualities :
“ 1st clear, 8,198 feet ; 2nd do, 19,636 feet ; common, 62,69 feet ;
“ culls, 4,609 feet. Total—95,832 feet.

Signed. J. C. DAVIS, inspector.”

“ Chicago, July 24th, 1856. This is to certify, that I have
“ measured and inspected part Schooner *S. B. Pomeroy*’s cargo of
“ pine lumber, purchased by Messrs. W. R. Hoodless & sons, from
“ Mr. James E. Bishop, and I find the following qualities and
“ quantities, viz : Second class, 1,132 feet ; common, 157,871
“ feet ; refuse, 50,565 feet—Total, 209,568 feet.

“ Signed. NATHAN DYE, Inspector.”

“ And it having been made to appear satisfactorily to us, the
“ said Committee, that the said measurements in the said certifi-
“ cates mentioned were correctly made, and were binding on the
“ parties—We, the said Committee, having duly considered the
“ said matters and things to us referred, as aforesaid, decided the
“ said measurements to be binding on the parties, and that the said
“ William R. Hoodless should pay for the said lumber, accord-
“ ing to the said measurements. In testimony whereof, we have
“ hereunto set our hands, this thirtieth day of July, A. D. 1856.

‘ (Signed) TARLETON JONES,

“(Signed) M. C. STEARNES,

“(Signed) W. T. MATHER.

67 The plaintiff objected to the reading of the said award, and the
Court sustained the objection.

Cummings testified—Made a demand of Hoodless for the
balance of the pay on the lumber, after the award by the Board
of Trade ; think next morning. Hoodless declined to pay ; said he
would not abide by award.

68 Cross Ex. \$2,000 paid. Demanded balance. The lumber
was unloaded, and had finished surveying.

70 Defendants then read in evidence a letter from the Attorneys of
Hoodless, dated July 31, 1856, claiming repayment of \$2,000 on
account of the lumber replevied. Defendants then offered to
prove by a witness on the stand, that after the bringing of the

suit of replevin, and before writ was served, that Bishop demanded of Hoodless payment of the balance for the lumber, and he refused to pay ; and he also demanded a return of the lumber, and Hoodless refused to return the same. This testimony was excluded by the Court.

Hawley recalled. Upon reflection, I demanded payment of of Hoodless before the suing out of the replevin, and before the submission to the Board of Trade. He said he could not pay until Mr. Dye had finished the inspection. Dye was then engaged in making the inspection.

72 Defendants offered to prove, by a witness on the stand, that since the execution of the replevin bond by James Peck, it had been altered by erasing the name of Chapin Hurlburt, that it was not the bond James Peck executed ; that the bond he executed had the name of Chapin Hurlburt, and he signed with them as co-sureties, their names being on the bond first. This testimony the plaintiff objected to, and objection sustained.

74 Defendants rest. Loomis called for plaintiff. Am a lumber dealer. Am acquainted with Sagawaw lumber and its character. The plaintiff then asked the witness this question :

What was the value of 1st clear lumber, July 29th, 1856 ?

To this question the defendants objected, claiming the rule of damages to be the value at the time the plaintiff refused to return the same. The Court overruled the objection, and the question was put, and decided that the value of lumber, at the time of the suing out of the writ, would control the matter. 75 Same question was asked and objected to, as to all the kinds of lumber, and answered by the witness as follows: 1st clear, \$40 to \$45 ; 2nd clear, \$35 ; common, \$15 to \$16. The account previously referred to was then read in evidence :

W. R. Hoodless bought of James E. Bishop :

8,918 feet 1st clear, at \$25,	\$222,95
20,768 feet 2d clear at 21,	436,13
220,540 feet common, at 12,	2,646,48
55,174 feet culls at 8,	441,39

\$3,746,95

The witness continues. *Cross Ex.* The prices I have given are retail prices ; prices by cargo same as sold to Hoodless. 78 Bishop sold the lumber for the going price. No rise in lumber between sale and 29th of July. Soon after lumber commenced to fall ; been falling ever since.

78 Dye Testified. Was lumber inspector in 1856. Inspected

this lumber ; paper shown to me was certificate. Part of lumber inspected, and then Hoodless called on me. Never had any conversation with Bishop in regard to the lumber. Value of lumber, July 28, 1856, as follows : 1st clear, \$40 ; 2d clear, \$30 to 35 ; common, \$14 to 16 ; refuse, \$10 to 12. Defendant objected to the value being proved of the lumber at that time. Objection overruled.

81 *Cross Ex.*—Prices given are the retail prices by the small quantities. Hoodless, son of Plaintiff. All the lumber had been replevied when inspected. When replevied third of cargo piled on the south side of the alley. Had assorted say 100 M, ready for piling ; the balance unpiled on the dock. Value increased by piling. Expense of piling \$1,25 to \$1,38 per M. ; paid men \$1,25 to \$1,38 per day to pile. 1st clear, worth \$40 ; 2d clear, \$35 ; common, \$16. I consider the enhanced value over cost to be price at retail, prior to July 1, '56. Had never had any experience in lumber. The prices I have given are retail prices, not prices by cargo.

Geer testified to value of lumber as the last witness, at retail.

The Court then decided that they should hold the rule of damages to be, as it was conceded that the lumber in question had been sold by Bishop to Hoodless, at the market value by the cargo, and that when replevied, was worth the same as when sold ; that the rule of damages, governing the case, should be the amount paid on the lumber with interest, and the expense of piling and handling the same, and reasonable compensation for the use of the dock. To all which rulings and decisions the defendant excepted.

This was all the testimony there was in the case. The Court refused all the instructions asked for by the Plaintiff, and refused the following instructions asked by the defendants :

"D." We pray the Court to instruct the jury, that if they find from the evidence that the lumber was to be paid for at the time of delivery, then the sale was only a conditional one, and did not, until the payment of the price, divest the property out of Bishop and vest it in Hoodless, although they may find that part of the purchase money was paid, and the whole property delivered. That if the jury find from the evidence, that Hoodless abandoned the contract of sale, after the institution of this suit, then he is not entitled to recover.

"E." If the jury should find from the evidence in the case, that the lumber was worth no more in the market than the price agreed to be paid for the same, the jury will not allow the plain-

tiff the whole value of the lumber, but only his interest therein, which was the amount paid on the same, together with the cost of placing the same in the yard.

"F." If the jury find from the evidence, that the sale in question was a cash one, and that only a part of the price was paid, the damages (upon the whole evidence in the case,) are the amount paid with interest in the discretion of the jury, and the costs to Hoodless of storing and piling up said lumber.

"G." If the jury find from the evidence that Bishop sold the lumber in controversy to Hoodless to be paid for on delivery ; if on the delivery of the lumber, Hoodless refused to pay for the same, Bishop had a right to replevy the same, and they will consider that in mitigation of plaintiff's damages, and will not in this action allow him the value of the lumber.

"H." If the jury find from the evidence in this case, that Bishop sold the lumber in controversy to Hoodless, to be paid for on the delivery of the lumber, Hoodless refused to pay for the same, Bishop had a right to replevy the same and they will consider that in mitigation of plaintiff's damages, and if they find such to be the case, they will not in this action allow the plaintiff the value of the property, even if they find Hoodless had made an advance of \$2,000 on the lumber, and had not tendered back the \$2,000.

To the refusal to give each of which, defendants excepted.

The Court gave the following instructions on their own motion.

"The jury are instructed, that the rule of damages in this case, is the amount of money advanced on the lumber, with interest thereon, and reasonable compensation for the use of the dock, and the expenses of piling it and handling it."

91

To the giving of which, the defendants excepted.

Defendants moved for a new trial, which motion was overruled and exception taken.

The errors assigned are—the Court erred

- 1st. In admitting improper evidence.
- 2nd. In deciding questions of law during the trial of the case.
- 3d. In excluding proper evidence offered by the defendants.
- 4th. In refusing each of the instructions asked for the defendants.
- 5th. In giving each of the instructions they did to the jury.
- 6th. The verdict below was contrary to the evidence.
- 7th. The verdict was too large.
- 8th. In refusing the motion for a new trial.

Points for the plaintiff in error.

1st. The Court had no right to strike the plea from the files. This is not a case in which an affidavit of merits is required by our statutes.

2nd. The verdict in the case was excessive, even under the rulings of the Court, and is not warranted by the testimony. This will be seen by calculation.

3d. The value of the property, at the time the *retorno habendo* was issued, should be the rule of damages ; or at least the value of it at the time the return was awarded, and not the value at the time the Replevin was sued out, 8 Metcalf R. 212. The damages were awarded in the original action.

4th. An action on a replevin bond cannot be sustained till the *retorno habendo* has issued and been returned ; and there is no proof that one issued in the case.

5th. That the damages awarded in the original case, when the return was awarded, settles all damages in this case, and renders improper all evidence offered in this case, going to show that Hoodless suffered damages.

6th. The bond had been altered in a material point, and it was the duty of the defendant in error, to account for that alteration. The name of Chapin Hurlburt has been, as appears on the face of the bond, erased. The *onus* is thrown upon the defendant in error, to show that these names had been erased before James Peck signed it. Hodge vs. Gilman 20 Ill. 437.

7th. At all events, Peck had no right to show that the name of Chapin Hurlburt had been erased since he signed it. It was a different obligation from what he undertook.

8th. Bishop had a right to replevy the property. When goods are sold for cash upon delivery, if the vendee refuses to pay the vendor the price, he may resume possession, by writ of Replevin, for the purpose of preserving his lien, and he is not bound, where part of the purchase money has been paid, to offer to return the same. 13 Johns R. 434.

By SHUMWAY, WAITE & TOWNE,

Plaintiff's Attorneys.

126

as per label

4

Shirley L. Carson
use

Abstract Point

Thiell April 26, 1859

Richard

Clark

James Peck et al }
John E. Wilson et al } Appeal from Cook Co

Brief for the Plaintiffs in Error.

The action below was on a Replevin Bond, in a case where the rights of property had not been settled in the Replevin suit. On the trial below, a verdict was rendered for the defendants in error, for \$2702⁵⁰. There are many errors claimed by us, which we will now proceed to notice.

There was no sufficient proof to maintain an action on the bond. There must have been a return habendo issued. There is no averment of the issuing of one, or any proof on the trial, that one had been issued. There must have been proof on the trial of the issuing of one. We were only bound to return the property in the legal way.

It cannot be said, that we by default admitted it. We only admit what is averred against us. We refer the Court to the case of Smith vs. Price, argued at this term. It is true, that this Court has intimated an opinion, that a return habendo is not necessary. We aver in the declaration 2 Scam. R. 344. Yet

we have looked through every case in our Reports on Replevin Bonds, and we find with that exception that there is an averment of a return habendo and we submit to the Court that a true construction of our present case and reason requires that there should be a return habendo. That was the condition of the Bond: that he would prosecute his suit with effect and make return if return be awarded &c

Now if the obligor pays the damages that were awarded, for not prosecuting the suit with effect and returned the property his bail would not be liable.

The sole and only damage for not prosecuting the suit with effect is the value of the use of the property 15 Cell. R 489

But we understand that the defendants in Error feeling the force of the argument, that there must be a return habendo, seek to obviate it by saying this is a case of default. We say the default only admits what is alleged in the pleadings. This question is settled by the case of London vs Stanton 12 Wm. R 123 and vs Price, in that case the defendant only plead non satisfaction

we have looked through every case in our Reports on Replevin Bonds, and we find with that exception that there is an averment of a return habendo and we submit to the Court that a true construction of our present case and reason requires that there should be a return habendo. That was the condition of the Bond: that he would prosecute his suit with effect and make return if return be awarded &c

Now if the obligor pays the damages that were awarded, for not prosecuting the suit with effect and returned the property his bail would not be liable.

The sole and only damage for not prosecuting the suit with effect is the value of the use of the property 15 Cell. R 489

But we understand that the defendants in Error feeling the force of the argument, that there must be a return habendo, seek to obviate it by saying this is a case of default. We say the default only admits what is alleged in the pleadings. This question is settled by the case of London vs Stanton 12 Wm. R 123 and vs Price, in that case the defendant only plead non satisfaction

The return of the property satisfies the other
claim. How is a return to be made, except
either by a demand actually made, or the
issuing of a writ, and the return of the same.
We submit whether the Statute is not simi-
lar to the South Carolinian Statute, cited in
Hawper R 214. How can they claim any
thing from the provision of the bond that the
Plaintiff did not prosecute his suit with
effect, because the breach is not in that clause,
but the one of not returning the property.

It follows if this be true that there is no
sufficient declaration, to support the action.
We say, the Court erred in striking the
plea from the files. The ground of striking
it from the record was because there
was no affidavit of merits. The Practice
act Page 322 Pulpas Statutes Sec. 3 that
when the suit is founded on a contract the
defendant shall file an affidavit of merits.
It can be contended with some force, that
the foundation of this action is not a con-

fact, but the suit in Replevin, and therefore
it follows that an affidavit of Merits is not
required, and it has been so decided 1 Philadel-
phia Reports 83 Side Paging 41 bottom Paging

An apsement was taken, and subse-
quently this was set aside, and a new apse-
ment ordered, the Court refusing to let
the defendants in to plead, because the
defendants on the apsements could make
their defence.

This brings us to consider whether
we had a right on the trial of the apse-
ment to show whether the property was
in Bishop. Our Courts have held that
on a trial by default, the defendants
can cross examine witnesses, and offer
evidence in mitigation of damages. 16
Wash 526. 20 Ill R 298. And in Bell vs
Washington 3 Gil & Co R 247 The exact
question at bar came up, in an action on
a Replevin Bond the defendants suffered
judgment & go by default, it was held
that on the trial of the right to apse

the damages the defendants had a right
to show that they had title to the property
replevied, in mitigation of damages. This
rule has been approved 1 Green Iowa R 13.
The defendant must mitigate the Plaintiff's
damages, to show the property to be in the
Plaintiff, and we think the above authorities
show our right to introduce any evidence ten-
ding to show title in the Plaintiff in Replevin.
It follows then that if the Court have ruled out,
any proper testimony which tends to show
title in the Plaintiff, they have erred. It
will be seen by the record Page 30, that it
was admitted on the trial, that the suit of
Replevin had not settled the title of the prop-
erty. On such cases by our Statute & decisions
the title of the property can be contested.
Laws 1847 Sec 62. 19 Ill R 607 13 Ill R.
622. 18 Ill R 83 And the authorities
above cited show that this can be as well
shown when there is no plea as when
the plea was pleaded.

The next point assumed by us is that
the rule of damages is the value of the property
at the time the return of the property was awarded.

and not at the time of the going out of the writ
of Replevin. It was conceded that Lumber
had fallen from the date of the Replevin. We
think the force of this point will be seen by
the Statute Sec 6 - If any Plaintiff in any action
of Replevin shall fail to prosecute his suit
with effect, and without delay, or shall suffer
his suit to be discontinued, or if the right of
property shall be adjudged against him, the
Court shall give judgment for the return
of the property to him, and damages for the use
of the property. And it is shown by the record
Page 249, that a judgment was rendered
against Bishop for \$440. The Statute
says - use of the property - What can be the
use of Lumber? What was the \$440 for?
We are to pay that sum and the value of
the Lumber when replevied with interest from
that date. What is to be done with \$440?
It is to be collected and yet the rule of damages
is other than we contend for. By the terms
of the Bond we were not bound to return the
property till a return was awarded, and
at that period of time \$440 is awarded.
We cite on this point 8 Metcalf R 218

He also call the Courts attention to the breach of the bond assigned. I was not prosecuting the suit, but for not returning the property. When did the breach of that condition occur, when the suit was instituted, or when the order of return was awarded? This suit is against the bail. We did not agree to return the property till a return was awarded. Then and then only was Peck required to return the property. If there was a conversion when did that conversion take place, certainly not before the order for a return. If there has been a breach of the bond when did that breach occur? At least not before the order for the return.

The Court erred in permitting the bond to be read in evidence without the erasure of the name of Chapman being explained. There was the signature with simply a line drawn through it. The onus of accounting for the erasure is thrown upon the defendant in error 20 Ill 437 3 Gilm. R 353

That this is ~~apparent~~ material in its
effect upon the rights of Peck is apparent.
The question, whether he as surety shall
pay all or have a co-surety contribute.
The materiality of this alteration is
shown by the following authorities
3 Conn. U.S. R 92 Pauling v U.S.
2 Conn. U.S. R 277 Hoop v Peeder
1 Watts 21 3 Green 460

We offered on the trial and
could have proved that when Peck
signed the bond that the name of Chapin
Houlburt was on the bond and had
not been erased. The court should have
permitted us to have proved it.

We say from the evidence adduced
in the case that the Plaintiff Bishop had
a right to replevy the lumber; the same
being for cash on delivery and when
we failed to pay that Bishop had
a right to replevy the lumber. This right
is conceded, but it is claimed by the
defendants in error that Bishop before
he replevied the lumber should have
tendered back the \$2000. This we deny.

If when goods are sold, payable on delivery, if the vendee refuses to pay, the vendor has a lien for the price and may resume possession, for the purpose of preserving his lien. 13 Conn R 434 19 Barb R 266. It is not rescinding the contract, but a resuming of possession, for the purpose of preserving the lien. The mistake of the argument of the defendant in error, is that they reason from the cases of rescinding of contract. In all that class of cases the party rescinding must restore the other back. But while there is an apparent analogy, there is no real one between the two classes of cases. It is not a rescission of the contract. We imagine that when a party has sold another goods, for which he was to pay cash on delivery & upon delivery the vendee refused to pay, the vendor might replevy them, and upon doing so, could sell them at once, and could sue the vendee for difference in price between what was to be paid, and what they brought. Would not such an action be clearly maintainable? if so then it is not a rescission of the contract, but a reclaiming of the property for the purpose of preserving the lien. Can there

be any difference between this case & when a party has agreed to buy property and made an advance upon it, then refuses to receive the property. Suppose a party had agreed to build a ship for \$20,000, half cash in advance, and the balance on delivery. He constructs the ship putting the \$10,000 received into it, & delivers the ship, & demands his \$10,000. The vendee refuses to pay. He has no excuse for declining; the ship is according to contract. He will not pay the cash. He as the builder raises \$10,000, and tender it before replevying the ship. If he replevies it, it will be as useless as have an elephant, and he will have to sell it. If he sells it, he certainly can sell the vendee for the difference. Now we say the bare statement of this proposition shows that he would not be bound to tender back the \$10,000; that any such law as required it, would be simply absurd; that the replevying the ship under such circumstances is simply placing the party back where he was before he delivered the vessel. This is the doctrine of *Palmer vs. Haug*, 13 Conn. R. 33, in which case there had been an advanced payment of \$100, and it is not pretended or claimed that he should tender the \$100, but the replevin of the property was

deemed a resumption of the possession of the property for the purpose of preserving the lien. The distinction made by us is clearly recognized in *Mason vs Oliver & Smead & Marshall* 1838. Of this view of the law is correct the Court below erred in refusing the instructions marked "D. E. & H."

The Court erred in refusing to give instructions marked "D. E. & H." The principles which underlie these instructions applicable will be seen in our previous discussion of the questions involved in this case.

The Court certainly erred in giving the charge given to the jury Page 91.

The jury are instructed that the rule of damages in this case is the amount of money paid on the lumber with interest thereon and reasonable compensation for the use of the dock and the expenses of piling. Now we submit whether the defendant could recover \$440 in the other action & then demand for money advanced. What is to be done with the \$440? Or Bishop to pay both? We think a bare statement of the proposition will show that he is not entitled to interest.

The Court should have admitted the award of the arbitrators, the objection and the only objection that can be urged against it is that it bears date after the running out of the writ of Replevin. By a Special Statute the Board of Trade are authorized to appoint a Committee of arbitration whose award is binding, whether the submission be by parol or in writing. We say that even if the right of action or title to the property was not perfect in Bishop when he sued out the replevin, if it became perfect after the running out of the writ of Replevin and before the commencement of the action on the bond such evidence is admissible 18 Ill. R. 87 20 Ill. R. 603.

The mistake the Court made was in confining us to facts occurring before the bringing of the Replevin and on that ground excluding the award. This question is settled by both principle and authority. We ask the careful attention to the case of Chun vs McCoy 20 Ill. R. 603. The plea in that case says the answer "sets out that the jury found for the defendant solely in consequence of the plaintiff's failure to prove a demand for the mare before suit brought as the Court

instructed them, and the right of property
said mare was not determined in said
case". That case had been tried on the merits,
and Mr. Eaton Judge held the plea good,
Warner v. Matthews 18 Ill. 187.

It was held admissible to prove
that since the going out of the writ of Replevin
the defendant had become the ^{absolute} owner of the
property. This testimony certainly tended
to show that Woodless has no claim to the
property. The defendant undertook to
question the inspection, it settled that
question.

Plaintiff in Error offered to show
a demand of the lumber, before the writ of
Replevin was issued, but after it was issued,
Page 71. This certainly was admissible.

Even under the instructions of the
Court the amount of the verdict of \$2702.50
cannot be ascertained. This is conceded
by the Court below, that there is a mistake
in the calculation. If the Court had then
had the power it would have granted a
new trial. The Court was unwilling to
permit the motion of a new trial to be
argued and the same in the hour of

of business at the close of the term could
not give it much thought. After overruling
the motion the Court stated the amount of the
verdict could not be sustained under the in-
struction, and if the cause was in the ~~case~~
Court he would order the Plaintiff to remission
granted a new trial. We claim for this state-
ment so much attention from the Court
that they should make a careful calculation
for themselves. And to enable them to do so will
make a calculation.

Arbitr advanced	\$ 2000 00
Sub from July 25 1836 to	
date of the trial below	310. 00
Expense of piling & handling	
Said Coe 10¢ @ 11¢ a mosh	
Exorbitant price	138. 00

This is all there ~~was~~ ^{was} \$2448. 00
any proof to es-
tablish, on this proof the jury gave
\$2700. It cannot be said it was for
use of dock. There is no proof of the value of the
use of dock, but allowing any reasonable
for use of dock, and it cannot make
verdict stand. Nor can any calculation
based upon the instruction & the evidence sustain
the verdict and judgment

Shumway Waite & Fenne
Attys for the Plaintiff's Motion

ABSTRACT.

JAMES PECK, ET AL. }
vs. } *Appeal from Cook County Court*
JOHN L. WILSON, USE, &c. } *of Common Pleas.*

Action below on a replevin bond where the action of replevin was not tried on the merits, but was dismissed for want of prosecution.

8—20 Declaration on replevin bond for the replevy, by Bishop, of 8,918 feet 1st clear lumber, 207,197 2d clear lumber, 220,540 common, 55,174 culls. Declaration contains two counts, neither of them allege the issuing of a *Returno Habendo*.

14 The first count avers, for breach "that the said James E. Bishop has at no time since, returned or offered to return said goods, in pursuance to the order and judgment of said Court, but so to do has utterly failed and refused."

The record alleges for breach, "that the defendant, Bishop, although often requested, did not or would not, return the said goods, &c, although a return thereof was awarded, &c."

21 Defendants, Sept. 10, file a plea, that the property replevied, at the time of suing out the writ, was the property of the said Bishop, and the merits of the replevin suit had not been tried, &c. "No affidavit of merits was filed."

23 Sept. 18, the Plaintiff amended, by leave, his declaration, by increasing the damages.

24 Plea struck from the files for want of affidavit of merits, and judgment, by default; for want of plea, entered against defendants, and jury called, and damages assessed at \$4,520.

28 Defendants file a motion to *set aside the judgment*, which is sustained so far as the assessment is concerned.

33 The assessment had before a jury,—and they assess the damages at \$2,702.50. Defendant moves for a new assessment, which the Court overrules.

42 On the trial, the plaintiff offered the following evidence :

The affidavit in the replevin suit.—In this affidavit the lumber was stated to be of the value of about \$4,000, and is sworn to July 29, 1856. The plaintiff stated they read the same for the purpose of proving the value of the lumber replevied. The defendant objected, and objections overruled.

The plaintiff then offered in evidence the following bond :

247-126

James Beck Esq

or

John L. Nelson

Esq

Brief for
Plaintiffs in Error

Filed May 18. 1859

L. Leland
Clerk

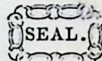
17

Shumway Wait & Young
Attys. for Plffs.

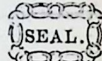
45—47 “ Know all men by these presents, that we, James E. Bishop
“ and James Peck, are held and firmly bound, unto James S.
“ Beach, Coroner, and *ex-Officio* Sheriff for the County of Cook,
“ in the State of Illinois, and to his successor in office, execu-
“ tors, administrators and assigns, in the penal sum of eight
“ thousand 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 con-
“ dition of this obligation is such, that whereas, on the 29th day
“ of July, in the year of our Lord, one thousand eight hundred
“ and fifty-six, the said James E. Bishop sued out of the Cook
“ County Court of Common Pleas, a writ of Replevin against
“ William R. Hoodless, defendant, for the recovery of the follow-
“ ing described goods and chattels, property, to wit: 8,918 feet
“ 1st clear lumber, 20,767 feet 2nd clear lumber, 220,540 feet
“ common lumber, 55,174 feet culls, of the value of four thousand
“ dollars.

“ Now if the said James E. Bishop, 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 Sheriff in replevying the said prop-
“ erty, then this obligation to be void, otherwise to remain in full
“ force and effect. Witness our hands and seals this twenty-
“ ninth day of July, A. D. 1856.

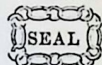
JAMES E. BISHIOP,



CHAPIN HURLBUT,



JAMES PECK.



In the bond, the words, “Chapin Hurlbut,” and “seal,” are
erased by a line drawn through them. To the reading of which
the defendant objected, because the bond on its face appeared to
have been altered, which objection was overruled. Plaintiff then
read the following judgment in the replevin suit:

48 “Sept. 23d, 1857. James E. Bishop vs. William R. Hoodless.
“ Replevin. This day comes the said plaintiff by Hooper, his
“ attorney, and the said defendant, by Hervey, his attorney, and
“ upon agreement of parties, it is ordered, that defendant have
“ return of the property replevied in this cause, and reference is
“ had to the Court to assess the damages herein hereafter, and
“ suit to be dismissed at plaintiff's cost. It is therefore consid-
“ ered, that said defendant have a return of the property, goods

"and chattels replevied in this cause, and damages to be assessed
"by the Court, and also his costs and charges, and a writ of
"returno habendo for the return of the property replevied.

"June 10th, 1858. James E. Bishop vs. William R. Hoodless,
"Replevin. This day again comes the said plaintiff, by his at-
"torney, Hooper, and the Court under and by an agreement of
"the parties herein heretofore entered in this cause, whereby judg-
"ment was entered for a return of the property replevied, to the
"possession of the said defendant, declared to be the rightful
"owner thereof, having now heard allegations and proof submitted
"as to the amount of damages sustained by the said defendant,
"by the detention of the said property, and being fully advised
"in the premises, assessed the damages of the said defendant, to
"the sum of four hundred and forty dollars. Therefore it is con-
"sidered, that the said defendant do have and recover of the said
"plaintiff his damages of four hundred and forty dollars, in form
"aforesaid, by the Court assessed, and also his costs and charges
"in this behalf, expended, and have execution therefor."

50 The plaintiff then admitted that there had been no trial of the
previous suit, and the title of the property had not been settled
51 and rested their case. *Deft. then called* Hawley, who testified,
he was present about the 14th or 15th of July, 1856, when Hoodless
bought a cargo of lumber, off the Brig *Banner*, of Bishop; the
sale was for *cash* on delivery, by qualities: \$8 for culls, \$21 2nd
53 clear, \$25 1st clear. The lumber was to be inspected by Mr. Da-
vis. When the sale was made, a canal boat was unloading from the
brig. The bill shown to me is in my handwriting. Lumber to
be delivered on Hoodless' dock. Lumber all discharged at
Hoodless' dock. Brig went there to deliver it. Don't recollect
demanding pay for the balance of lumber after delivery.

55 *Cross Examined.*—Sale made on board the vessel. Hoodless,
Bishop, and myself present. By my memorandum, I find sale
made 16th July. Think Mr. Cummings and Mr. Dugal present
at sale. \$2,000 credited to Hoodless, while lumber being deliv-
ered. Only know it as book keeper. Lumber charged and
money credited. Only done as memorandum. My knowledge
of the \$2,000, only derived from the check drawn by Hoodless, of
\$2000, dated July 22d, is endorsed in Bishop's handwriting.
56 Could not say I ever saw check before. Took very near a week
to unload vessel. Some of the lumber removed after sale, before
vessel went to Hoodless' dock; done by agreement.

59 *Stearnes testifies.*—He was a member of the Committee of Ar-

60 bitration of the Board of Trade of Chicago, with Tarleton Jones and William T. Mather. Bishop and Hoodless both came before the committee, Mr. Mather, Mr. Jones and myself, and referred the question of inspection of lumber to our arbitration. Hoodless put \$1,000 to abide by the award. Bishop agreed if he did not abide by the award, that \$1,000 might be deducted from the price of the lumber. The paper shown to me is our award; we notified parties of the award. After making the same, we asked what we should do with the \$1,000. Bishop said give it to Hoodless, as all he wanted was what was right,—his pay for the lumber.

61 *Cross Examined*—Hoodless and Bishop both testified before us as Arbitrators. Hoodless had a young man there to testify. Can't say whether we swore witnesses or not. Made our award at once.

Re-Examined.—We decided the inspection of lumber should be binding on the parties. Each paid us half our fees. This paper is our award. It is signed by all the Arbitrators.

The defendants then offered to read the said award in evidence, (said award being dated after the commencement of the Replevin suit,) which is as follows :

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

“ We, the undersigned, duly elected and
“ appointed by the Board of Trade of the City of Chicago,
“ as the Committee of Arbitration, for the said Board, do
“ hereby certify, that on Tuesday evening, July 29th, A. D.
“ 1856, personally appeared before us, as a part of the Commit-
“ tee aforesaid, by verbal arrangement for that end, made previ-
“ ous to the said day, James E. Bishop, Esq., of the City of
“ Chicago, State aforesaid, and William R. Hoodless, of the same
“ City, and State aforesaid; and the said James E. Bishop and
“ and the said William R. Hoodless, having agreed between
“ themselves to submit to us, the said Committee, all and every
“ difference and disputes of every kind whatsoever, growing out of
“ a certain purchase of lumber, made by the said William R. Hood-
“ less, of the said James E. Bishop, on the 28th day of the month
“ and year aforesaid; and the said William R. Hoodless, having
“ pledged himself to abide by and act upon and consider final,
“ the action of the said Committee, under a penalty of one
“ thousand dollars, and having submitted a statement of his case
“ in writing, to the said Committee; and the said James E.
“ Bishop, having, by word of mouth, submitted his case to the
“ said Committee, and his statements so made as aforesaid, being

“ verified by the oath of witnesses, sworn and examined at that
“ time, in his behalf, by the said Committee ; and the said James E
“ Bishop, having produced to us, the said Committee, the orig-
“ inal certificates of the several inspectors, who had measured and
“ inspected the lumber aforesaid, of which the following are true
“ and correct copies, to wit :

“ Chicago, July, 1856. This is to certify, that I inspected the
“ part cargo of Barque *S. B. Pomeroy*, purchased by Mr. Hoodless
“ of J. E. Bishop, and find the following quantities and qualities :
“ 1st clear, 8,198 feet ; 2nd do, 19,636 feet ; common, 62,69 feet ;
“ culls, 4,609 feet. Total—95,832 feet.

Signed. J. C. DAVIS, inspector.”

“ Chicago, July 24th, 1856. This is to certify, that I have
“ measured and inspected part Schooner *S. B. Pomeroy's* cargo of
“ pine lumber, purchased by Messrs. W. R. Hoodless & sons, from
“ Mr. James E. Bishop, and I find the following qualities and
“ quantities, viz : Second class, 1,132 feet ; common, 157,871
“ feet ; refuse, 50,565 feet—Total, 209,568 feet.

“ Signed. NATHAN DYE, Inspector.”

“ And it having been made to appear satisfactorily to us, the
“ said Committee, that the said measurements in the said certifi-
“ cates mentioned were correctly made, and were binding on the
“ parties—We, the said Committee, having duly considered the
“ said matters and things to us referred, as aforesaid, decided the
“ said measurements to be binding on the parties, and that the said
“ William R. Hoodless should pay for the said lumber, accord-
“ ing to the said measurements In testimony whereof, we have
“ hereunto set our hands, this thirtieth day of July, A. D. 1856.

“(Signed) TARLETON JONES,

“(Signed) M. C. STEARNES,

“(Signed) W. T. MATHER.

67 The plaintiff objected to the reading of the said award, and the
Court sustained the objection.

Cummings testified—Made a demand of Hoodless for the
balance of the pay on the lumber, after the award by the Board
of Trade ; think next morning. Hoodless declined to pay ; said he
would not abide by award.

68 Cross Ex. \$2,000 paid. Demanded balance. The lumber
was unloaded, and had finished surveying.

70 Defendants then read in evidence a letter from the Attorneys of
Hoodless, dated July 31, 1856, claiming repayment of \$2,000 on
account of the lumber replevied. Defendants then offered to
prove by a witness on the stand, that after the bringing of the

suit of replevin, and before writ was served, that Bishop demanded of Hoodless payment of the balance for the lumber, and he refused to pay ; and he also demanded a return of the lumber, and Hoodless refused to return the same. This testimony was excluded by the Court.

Hawley recalled. Upon reflection, I demanded payment of of Hoodless before the suing out of the replevin, and before the submission to the Board of Trade. He said he could not pay until Mr. Dye had finished the inspection. Dye was then engaged in making the inspection.

72 Defendants offered to prove, by a witness on the stand, that since the execution of the replevin bond by James Peck, it had been altered by erasing the name of Chapin Hurlburt, that it was not the bond James Peck executed ; that the bond he executed had the name of Chapin Hurlburt, and he signed with them as co-sureties, their names being on the bond first. This testimony the plaintiff objected to, and objection sustained.

74 Defendants rest. Loomis called for plaintiff. Am a lumber dealer. Am acquainted with Saganaw lumber and its character. The plaintiff then asked the witness this question :

What was the value of 1st clear lumber, July 29th, 1856 ?

75 To this question the defendants objected, claiming the rule of damages to be the value at the time the plaintiff refused to return the same. The Court overruled the objection, and the question was put, and decided that the value of lumber, at the time of the suing out of the writ, would control the matter. Same question was asked and objected to, as to all the kinds of lumber, and answered by the witness as follows : 1st clear, \$40 to \$45 ; 2nd clear, \$35 ; common, \$15 to \$16. The account previously referred to was then read in evidence :

W. R. Hoodless bought of James E. Bishop :

8,918 feet 1st clear, at \$25,	\$222,95
20,768 feet 2d clear at 21,	436,13
220,540 feet common, at 12,	2,646,48
55,174 feet culls at 8,	441,39

\$3,746,95

78 The witness continues. *Cross Ex.* The prices I have given are retail prices ; prices by cargo same as sold to Hoodless. Bishop sold the lumber for the going price. No rise in lumber between sale and 29th of July. Soon after lumber commenced to fall ; been falling ever since.

78 Dye Testified. Was lumber inspector in 1856. Inspected

this lumber ; paper shown to me was certificate. Part of lumber inspected, and then Hoodless called on me. Never had any conversation with Bishop in regard to the lumber. Value of lumber, July 28, 1856, as follows : 1st clear, \$40 ; 2d clear, \$30 to 35 ; common, \$14 to 16 ; refuse, \$10 to 12. Defendant objected to the value being proved of the lumber at that time. Objection overruled.

81 *Cross Ex.*—Prices given are the retail prices by the small quantities. Hoodless, son of Plaintiff. All the lumber had been replevied when inspected. When replevied third of cargo piled on the south side of the alley. Had assorted say 100 M, ready for piling ; the balance unpiled on the dock. Value increased by piling. Expense of piling \$1,25 to \$1,38 per M. ; paid men \$1,25 to \$1,38 per day to pile. 1st clear, worth \$40 ; 2d clear, \$35 ; common, \$16. I consider the enhanced value over cost to be price at retail, prior to July 1, '56. Had never had any experience in lumber. The prices I have given are retail prices, not prices by cargo.

Geer testified to value of lumber as the last witness, at retail.

The Court then decided that they should hold the rule of damages to be, as it was conceded that the lumber in question had been sold by Bishop to Hoodless, at the market value by the cargo, and that when replevied, was worth the same as when sold ; that the rule of damages, governing the case, should be the amount paid on the lumber with interest, and the expense of piling and handling the same, and reasonable compensation for the use of the dock. To all which rulings and decisions the defendant excepted.

This was all the testimony there was in the case. The Court refused all the instructions asked for by the Plaintiff, and refused the following instructions asked by the defendants :

" D." We pray the Court to instruct the jury, that if they find from the evidence that the lumber was to be paid for at the time of delivery, then the sale was only a conditional one, and did not, until the payment of the price, divest the property out of Bishop and vest it in Hoodless, although they may find that part of the purchase money was paid, and the whole property delivered. That if the jury find from the evidence, that Hoodless abandoned the contract of sale, after the institution of this suit, then he is not entitled to recover.

" E." If the jury should find from the evidence in the case, that the lumber was worth no more in the market than the price agreed to be paid for the same, the jury will not allow the plain-

tiff the whole value of the lumber, but only his interest therein, which was the amount paid on the same, together with the cost of placing the same in the yard.

"F." If the jury find from the evidence, that the sale in question was a cash one, and that only a part of the price was paid, the damages (upon the whole evidence in the case,) are the amount paid with interest in the discretion of the jury, and the costs to Hoodless of storing and piling up said lumber.

"G." If the jury find from the evidence that Bishop sold the lumber in controversy to Hoodless to be paid for on delivery ; if on the delivery of the lumber, Hoodless refused to pay for the same, Bishop had a right to replevy the same, and they will consider that in mitigation of plaintiff's damages, and will not in this action allow him the value of the lumber.

"H." If the jury find from the evidence in this case, that Bishop sold the lumber in controversy to Hoodless, to be paid for on the delivery of the lumber, Hoodless refused to pay for the same, Bishop had a right to replevy the same and they will consider that in mitigation of plaintiff's damages, and if they find such to be the case, they will not in this action allow the plaintiff the value of the property, even if they find Hoodless had made an advance of \$2,000 on the lumber, and had not tendered back the \$2,000.

To the refusal to give each of which, defendants excepted.

The Court gave the following instructions on their own motion.

"The jury are instructed, that the rule of damages in this case, is the amount of money advanced on the lumber, with interest thereon, and reasonable compensation for the use of the dock, and the expenses of piling it and handling it."

91 To the giving of which, the defendants excepted.

Defendants moved for a new trial, which motion was overruled and exception taken.

The errors assigned are—the Court erred

- 1st. In admitting improper evidence.
- 2nd. In deciding questions of law during the trial of the case.
- 3d. In excluding proper evidence offered by the defendants.
- 4th. In refusing each of the instructions asked for the defendants.
- 5th. In giving each of the instructions they did to the jury.
- 6th. The verdict below was contrary to the evidence.
- 7th. The verdict was too large.
- 8th. In refusing the motion for a new trial.

Points for the plaintiff in error.

1st. The Court had no right to strike the plea from the files. This is not a case in which an affidavit of merits is required by our statutes.

2nd. The verdict in the case was excessive, even under the rulings of the Court, and is not warranted by the testimony. This will be seen by calculation.

3d. The value of the property, at the time the *retorno habendo* was issued, should be the rule of damages ; or at least the value of it at the time the return was awarded, and not the value at the time the Replevin was sued out, 8 Metcalf R. 212. The damages were awarded in the original action.

4th. An action on a replevin bond cannot be sustained till the *retorno habendo* has issued and been returned ; and there is no proof that one issued in the case.

5th. That the damages awarded in the original case, when the return was awarded, settles all damages in this case, and renders improper all evidence offered in this case, going to show that Hoodless suffered damages.

6th. The bond had been altered in a material point, and it was the duty of the defendant in error, to account for that alteration. The name of Chapin Hurlburt has been, as appears on the face of the bond, erased. The *onus* is thrown upon the defendant in error, to show that these names had been erased before James Peck signed it. Hodge vs. Gilman 20 Ill. 437.

7th. At all events, Peck had no right to show that the name of Chapin Hurlburt had been erased since he signed it. It was a different obligation from what he undertook.

8th. Bishop had a right to replevy the property. When goods are sold for cash upon delivery, if the vendee refuses to pay the vendor the price, he may resume possession, by writ of Replevin, for the purpose of preserving his lien, and he is not bound, where part of the purchase money has been paid, to offer to return the same. 13 Johns R. 434.

By SHUMWAY, WAITE & TOWNE,

Plaintiff's Attorneys.

⁷⁻¹⁰⁰
Ezra C. Read et al
~~vs. Read et al~~

6 829
John L. Wilson
Attest & Points

Filed April 26, 1849
L. H. Read
Clerk