No. 13245

Supreme Court of Illinois

Cruickshank

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vs.

Cogswell

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 24.

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THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

A. CRUICKSHANK, Plaintiff in Error,
vs.
ROBT. COGSWELL, Deft. in Error.

ERROR TO LA SALLE COUNTY COURT.

POINTS AND AUTHORITIES FOR PLAINTIFF.

E. F. BULL,
Of Counsel for Plaintiff.

Filed May 3-1861
L. Leland
Clerk

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ARGUMENT SUBMITTED ON THE PART OF THE PLAINTIFF IN ERROR.

MAY IT PLEASE YOUR HONORS:

The proof introduced on the trial of this cause in the Court below, shows that one Briggs sold to the plaintiff in error, in May, 1857, a dark or black horse; that the plaintiff paid for the horse the sum of $80; and that Briggs gave a bill of sale for the horse acknowledging the receipt of the money and stating in the bill of sale that the horse was subject to the order of the plaintiff in error at any time. There was no evidence showing that the horse was delivered to the plaintiff at the time of the sale, but there is evidence of a statement by the plaintiff, called out by defendant, on cross-examination of the witness Hardin, (page 23, Record,) showing that the plaintiff let the horse to Briggs for hire. On his cross-examination the witness Hardin testified that Briggs, during the year he had possession of the horse, after the execution of the bill of sale, paid to the plaintiff several small sums of money, amounting in all from $15 to $25, which the plaintiff, at the time, stated was paid by Briggs for the use of the horse. The witness Boermaker testifies that the horse was in possession of the plaintiff several months before he was taken by the defendant, and that he was brought to and placed in plaintiff's possession by Briggs as the property of plaintiff. The witness Hardin testifies, also, that Briggs said repeatedly that the horse belonged to the plaintiff; and Wm. Mitchell testifies that he kept the horse for the plaintiff several weeks; and Briggs himself, who is called on the stand by the defendant in error, testifies that he placed the horse in plaintiff's possession

under the bill of sale some time in the spring of 1858, for the express purpose of making the bill of sale good as against the creditors of Briggs. That at that time, *i. e.* the spring of 1858, one Norton had an execution against him, and that the plaintiff came to him and said he must have the possession of the horse under the bill of sale or else it would not be good. That he then delivered the possession of the horse to the plaintiff and it continued in plaintiff's possession until it was taken, on the 15th day of October, 1858, by the defendant, upon an execution against Briggs in favor of one Buck, and the proof shows in fact that the horse was turned out to the defendant in error by Briggs himself. The evidence on part of the defendant shows that the judgment against Briggs was obtained by confession on the 15th day of October, 1858, the same day of the levy, and six months after the plaintiff had obtained possession of the horse. That execution was immediately served out, and levied the same day upon the horse in controversy. Upon this state of facts, under the instructions of the Court below, the jury found for the defendant and a writ of *retorno* was awarded.

The position assumed by the counsel on the trial of this cause below was, and some of the instructions seem to be based upon the assumption that a sale of personal property, no matter how *bona fide*, was fraudulent *per se* as to all subsequent creditors of the vendor unless possession of the property sold was given to the vendee by the vendor at the time of the sale, a position which seems to me entirely untenable. Undoubtedly the sale would be void as to all creditors of the vendor that perfect their lein upon such property before an actual possession thereof by the vendee. But the position I shall assume is substantially set forth in the first point I make in my printed brief, *i. e.*, That a sale of personal property is good as between vendor and vendee without an actual delivery of the property sold, and a delivery at *any time* after the sale is good, unless the rights of third parties have intervened; and I think the authorities cited in my brief fully sustain the position I assume, viz:

Berry *vs.* Ensall, 2 Grattan (Va.) 333.
Syner *vs.* Gee, 4 Leigh, 535.
Ludwig *vs.* Fuller, 5 Shepley, 162.
Bartlett *vs.* Williams, 1 Pick. 288.
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Whisler *vs.* Roberts, 19 Ill. 274; 2 Aik. 115; 10 Pick. 199.

All of the above authorities come fully up to the principle I am contending for. Substantially the same question was raised in each case, and each time the Court say, in effect, that a sale of chattels, when the possession does not accompany the sale, is good if the vendee obtains possession of the same before the liens of the creditor attach, or before a subsequent vendee obtains possession. In *Ludwig* vs. *Fuller*, 5 Shepley (Maine,) 166, the Court say, "That the general rule of law is, that the payment of the price is sufficient to complete the sale between the seller and purchaser; but as respects a second purchaser or creditor having no notice, a delivery is necessary." And again, in the same case and on the same page, "If a third party

claiming title had notice of such sale before his rights accrued, he cannot allege any defect in such sale for want of delivery, because he was not injured by it."

The principle laid down in the case last cited will apply to the case at bar. In this case the price for the horse—$80—was paid by the plaintiff to Briggs. On that point there is no contradiction. That was sufficient to complete the sale as far as the plaintiff and Briggs were concerned; and if there had, in fact, been no delivery, the title to the horse would be in the plaintiff as against the defendant, if the defendant had notice, at or before the time he levied upon the horse, of the sale by Briggs to the plaintiff; and he must have had notice that plaintiff claimed some title to the horse at the time of the levy, for the horse was taken by him from the plaintiff's possession. But it is useless here to discuss that question, as the testimony of Briggs, (page 25 of Record,) a witness introduced by the defendant himself, clearly establishes the fact that he, Briggs, delivered the horse to the plaintiff in the spring of A. D. 1858, some six months before the levy of the execution by the defendant, and indeed some six months before the judgment was rendered upon which that execution was issued, and that the plaintiff had remained in possession of the horse ever since such delivery, and that such delivery was under the bill of sale, and was made for the express purpose of protecting the plaintiff's title to the horse in question.

It seems to me, that in the case of *Whisher* vs. *Roberts*, 19 Ill., this Court has in effect decided that, if the vendee obtain possession of the thing sold at any time after the sale, before other liens have intervened, that the sale will be valid unless, of course, it be a fraudulent sale. That case was one of a chattel mortgage containing no provision for the possession of the mortgaged property to remain in possession of the mortgagor, which, under our statute, is void as to creditors. But it is there decided, that even if the mortgagee obtain possession of the property mortgaged for a temporary purpose before other liens attach, that such possession is good as against creditors; and the mortgagee may retain possession of the property, notwithstanding the possession did not originally accompany the bill of sale, and was not, in fact, obtained when finally acquired under the bill of sale or mortgage.

In the case of *Sydner* vs. *Gee*, 4 Leigh (Va.) Rep., at the bottom of p. 542, the Court quote and approve the following: "When there is a deed executed, under which it is competent for a party to take possession immediately, (the very provision in the bill of sale in evidence,) and he does not do so for six months, I am not aware of any case which decides that such omission would be fraudulent, so as to make the deed void, under the statute of Elizabeth. If, indeed, the right of any third person intervened, it might be void as against them." In the same case, Cabell, J., says: "I am for affirming the judgment upon the ground that the vendee took possession of the property before the right of the creditor attached;" and in the same case, page 549, the same doctrine is reiterated by Tucker P. in the case just cited, and in which case the sale was held good. The possession of the property sold was not given by the vendor to the vendee until one year had elapsed after the sale, but possession was given before the rights of third parties had intervened.

The facts disclosed by the testimony, in *Berry* vs. *Ensell*, 2 Grattan (Virginia) R. 333, were, that the vendor of goods remained in possession without any actual delivery several months after the sale, at which time the vendee first came into possession of the goods, openly and visibly, employing the vendor as his agent to sell the same, and the Court held the sale good, no liens having attached. The Court decide, in *Bartlett* vs. *Williams*, 1 Pick. 288, that a bill of sale is good, as against creditors, where the vendee does not take possession of the property sold for eight months after the sale, no lien having attached.

In the last case cited the bill of sale was given on the 27th of October, 1819, and possession of the property sold obtained by the vendee June 26th, 1820. On the 3d of July, 1820, the property was seized on an attachment against the goods of the vendor. In the case at Bar, according to the testimony of the defendant's own witness, Briggs, the possession of the horse was delivered under the bill of sale in the spring of 1858, and it was levied upon by virtue of an execution issued October 15th, 1858, six months after the delivery, the property all the time remaining with the vendee. In *Shumway* vs. *Rutter*, 8 Pick. 447, the Court say, The transfer being *bona fide* and for a valuable consideration, slight evidence of a delivery is sufficient: and whether the delivery is formal or not, if the vendee, with the consent of the vendor, obtain possession before an attachment or second sale, the transfer is complete.

Joy vs. *Sears*, 9 Pick. 4, was a case of the sale of a vessel at sea, on the 11th of August; on the 22d of August she arrived at her home port, and sailed on the 29th of same month; on the 16th of September following, she returned, and September 17th was attached, and on September 23d was replevied by the vendee. Held the vendee's title was good. In the last case your Honors will see the attaching creditor's lien had been perfected before any delivery to the vendee, still the vendee's title was held good. In that case, however, no actual delivery could have been made at time of sale.

Adams vs. *Wheeler*, 10 Pick. 199, is also a case of a sale with no delivery accompanying the sale, but delivery given before subsequent liens attached. Held good. In *Fletcher* vs. *Howard*, 2d Aiken, 115, the Court say, "There is no doubt that property in personal chattels passes by a bargain and sale, for sufficient consideration, without delivery, as between the parties to the sale;" and they say further, in substance, that if the delivery is made before subsequent liens attach, the sale, being *bona fide*, will be good.

I have quoted thus largely from the cases cited, for the reason, that the defendant's counsel below took the position, and still seems to advance the opinion, that in order to make a sale of chattels good, as against creditors, there must not only be a sale, but an actual delivery of the thing sold *accompanying* and contemporaneous therewith—a position that is, as I think, untenable, an entirely different doctrine being laid down in all of the cases above cited, and in many more I might cite. But the rule clearly established by the books is, that a sale for a valuable consid-

eration, as between the vendor and vendee, is good, and a delivery at *any time* thereafter, *before* the rights of third parties have intervened, will make the sale good, as well against the creditors of the vendor as all the world.

The defendant seems to rely with great emphasis upon an expression used by this Court in *Warner* vs. *Carlton*, 22d Ill. 415, where this Court say, "Had there been an entire absence of all evidence of a change of possession accompanying the sale, then such an instruction, i. e., that the sale was fraudulent *per se*, would have been proper." But the Court will find, upon examination of that case, that there is no analogy between it and the one at Bar. In that case the vendor of a stock of goods and the vendee were of the same name throughout, with the exception of a middle initial letter, were father and son, and the vendee remained in possession of the same and carried on the business nearly the same as before, buying and selling. There was some evidence in that case of a delivery at the time of the sale and before the executions became a lien: the sale was but a few days before the execution issued, and the principal consideration of the sale was a prior indebtedness from the vendor to the vendee. Circumstances surrounded the case strongly tending to show fraud, but the jury having found the sale *bona fide*, the Court sustained the same. There the vendor was daily selling the goods, as the agent of the vendee; and the Court decide it was proper for the vendee to employ the vendor for that purpose; and although the Court seem to intimate that the possession must accompany the sale, I do not think by that language they intend, or do in fact say, that if the possession does not accompany the sale at the *time* of the sale, but does accompany it at any time before subsequent liens attach, that the sale is thereby *per se* fraudulent, much more if such possession has accompanied the sale for six months prior to the attaching of subsequent liens, as it did in the case at Bar.

I have, I think, upon authority, clearly established the position I assume in the first point made in my brief, and I have no doubt this Court will decide as the several Courts in the cases cited have decided, that the payment of the price, or even a bargain and sale, is sufficient to pass the title as between vendor and vendee, and that a subsequent delivery will be good, if made at any time before subsequent liens have attached, or before the rights of third parties have intervened.

I come now to treat of the question of fraud, so strenuously urged by counsel for defendant. I care but little in what light the bill of sale from Briggs to plaintiff in error is viewed, whether as a chattel mortgage or an absolute bill of sale, there is not the slightest evidence tending to show any fraud upon the part of the plaintiff; and no matter how fraudulent Briggs' intentions may have been, unless the plaintiff is connected with, and a party to them, his interests ought not to be, and will not be, prejudiced.

If you treat the bill of sale as a chattel mortgage, and as such it should be held absolutely void as to creditors and subsequent purchasers as long as the horse remained in Briggs' possession; still, if the horse had been delivered to plaintiff before such liens attached, it would be held good, I think, upon the authority of *Whisler* vs.

Roberts, 19 Ill. 274, and cases heretofore cited. But there is not the slightest evidence showing this to be a chattel mortgage; but, on the contrary, all go to show that it was an absolute bill of sale. The consideration, eighty dollars, was actually paid, a delivery of the horse made some six months before defendant's lien accrued, a continued possession of the horse by plaintiff, and the horse treated as the property of the plaintiff by all parties. There is no evidence tending to show fraud, and the only argument used by defendant for that purpose is, that, for some time after the sale, the horse remained in Briggs' possession, and that the horse was, he alleges, sold for less than its value. There is, however, great diversity of opinion among the witnesses as to the value of the horse, one witness, Hardy, placing the value at $80; Mitchell at $100; other witnesses at from $125 to $150; whilst Briggs himself places its value at $200. But let the value of the horse be what it may, the defendant or Buck, the execution creditor, stands in no position to find fault at the price for which the horse was sold, as it was sold over a year and a half before they were creditors of Briggs; and Briggs, as far as they were concerned, had a perfect right to dispose of the horse as he might see fit, even by gift, at the time he did dispose of it, and it would not have been fraudulent as to them. The fact that the horse, when it was delivered to the plaintiff, was delivered to protect plaintiff's interest from Norton's execution, even if it had been a bad delivery as far as Norton's execution was concerned, would have been good as to this execution held by defendant, which was issued upon a judgment rendered six months after the delivery was made.

The presumptions of law are in favor of honesty and fair dealing, and all that it was necessary for the plaintiff to show to entitle him to recover was, that he had purchased, paid for, and obtained possession of the horse before the defendant's lion attached. The law presumes the transaction to be fair and honest until the contrary is shown.

1 Scam. 365, 399.
4 Peters, 295.

If fraud is to be presumed anywhere, I should think there was much more ground for presuming fraud between Briggs and Buck than Briggs and plff. The judgment in favor of Buck was confessed by Briggs Oct. 15, 1858; execution sworn out by Buck and placed in defendant's hands to execute. Briggs goes with the defendant to plaintiff's stable, turns out the horse on the execution, and comes into Court for the purpose of swearing the horse back into his possession.

If the positions I have assumed are sound, then the instructions given by the Court below for the defendant, found on page 2d of the Abstract, are each erroneous, and were well calculated to mislead the jury. And from the testimony in the case, which is all embodied in the Bill of Exceptions, it seems to me impossible that the jury should have found for the defendant, unless they had been clearly misled by those instructions.

The first instruction makes no distinction between parties actually having a lien upon the horse at the time of the delivery, as execution creditors, and those entitled

to a lien as judgment creditors who have a right to an execution but have not, in fact, sued one out. The latter part of the instruction seems to imply, that an execution creditor might take the horse no matter how long it had been sued out after the delivery to the plaintiff; and the whole instruction goes upon the assumption that a sale of personal property without a delivery at the *time* of the sale, makes the sale absolutely void *per se*, and that no subsequent delivery could make the sale good, notwithstanding no liens had intervened before the delivery.

It seems to me the doctrine is, and should be, that third parties have no right to interfere with the sale of personal property, or to find fault therewith for want of delivery, unless their rights are prejudiced thereby, or their liens have attached *before* delivery is actually made.

The second instruction is also, I think, clearly erroneous, is in direct opposition to the doctrine laid down in *Whisler* v. *Roberts*, 19 Ill. 274, judgment creditors having no right to complain unless their judgments have at least been obtained before the delivery, much less if obtained months after the delivery under the sale.

The third instruction is directly in conflict with the doctrine laid down in 19 Ills. at the close of the opinion of the Court, in *Whisler* vs. *Roberts*, found on page 282, as well as the doctrine laid down in the other authorities cited by plaintiff.

The fourth instruction is also in conflict with all or nearly all, the authorities cited; the delivery of the property is not necessary for a sale of chattels as between vendor and vendee, and third parties have no right to complain if the delivery is made before their liens attach.

The ninth instruction assumes, contrary to the doctrine laid down in 1 Scam. and 4 Peters, that a person purchasing personal property must show he is *not guilty of fraud*, whereas I had supposed and still suppose the rule to be, that honesty and fair dealing were presumed by law, not fraud, and that a party attacking a sale must show fraud between the vendor and vendee, to which fraud both must be parties.

What I have already said will apply with force to the 11th and 12th instructions given for defendant—the authorities already cited will apply to them. None of the instructions given were based upon testimony before the jury, and each and all were well calculated to mislead the jury in their finding, and those instructions alone are sufficient to reverse this cause even if actual fraud had been proved. The idea advanced by defendant's counsel in his argument that "if plaintiff had been guilty of fraud he has no right to complain of error in instructions," sounds well in a stump speech, but is worth little as a legal argument.

I come now, finally, to notice the *preliminary* questions mentioned by the defendant's counsel in his argument. He urges with great strenuousness that the court below had no right to allow the plaintiff to file copies of the lost writ and bond. The bond and writ were both lost; of that there is no question. It was necessary to supply them in order to get a complete record to bring into this court. Supplying the lost papers could not prejudice the defendant; indeed if the judgment below should

be sustained, would be beneficial instead of prejudicial to the defendant's interest. Hence he had no cause to complain. I have examined some of the authorities cited by defendant's counsel but cannot see that they are opposed to the principle I assume, but that on the contrary some of them tend to sustain it. I leave that question with this Court without a citation of any authorities on that point.

In the argument filed by defendant's counsel at the last term, he states that the defendant was not present in the court below when leave was given to file the replevin bond. The original record failed to show that fact, but the supplemental record does fully show it. It was at best but a technical point made upon a misprision of the clerk, but one which defendant's counsel knew did not exist in fact, as he was the attorney for the defendant below and was present when the leave was granted.

The defendant seeks to reverse the judgment of the court below in allowing the copies of the lost papers to be filed. It matters not to the plaintiff what is done with the judgment in that respect. As far as he is concerned he is willing that portion of the judgment should be reversed, but it would perhaps be well for the profession if the power of the court to supply lost papers was clearly defined.

What the plaintiff complains of and what he seeks to remedy, is the erroneous rulings and instructions of the court below, and the erroneous finding of the jury, which was, as he claims, clearly against the law and the evidence, against truth and justice.

The only question of real, practical importance being whether a sale of chatels is absolutely void as between *all* parties, if delivery to the vendee does not immediately accompany the sale; or if such a sale will be good if delivery to the vendee is made before the rights of third parties have intervened, or their liens attached, especially when, as in this case, the delivery was made months before such liens attached.

E. F. BULL,
Plaintiff's Attorney.

No. 24

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The principle laid down in the case last cited will apply to the case at bar. In this case the price for the horse—$80—was paid by the plaintiff to Briggs. On that point there is no contradiction. That was sufficient to complete the sale as far as the plaintiff and Briggs were concerned; and if there had, in fact, been no delivery, the title to the horse would be in the plaintiff as against the defendant, if the defendant had notice, at or before the time he levied upon the horse, of the sale by Briggs to the plaintiff; and he must have had notice that plaintiff claimed some title to the horse at the time of the levy, for the horse was taken by him from the plaintiff's possession. But it is useless here to discuss that question, as the testimony of Briggs, (page 25 of Record,) a witness introduced by the defendant himself, clearly establishes the fact that he, Briggs, delivered the horse to the plaintiff in the spring of A. D. 1858, some six months before the levy of the execution by the defendant, and indeed some six months before the judgment was rendered upon which that execution was issued, and that the plaintiff had remained in possession of the horse ever since such delivery, and that such delivery was under the bill of sale, and was made for the express purpose of protecting the plaintiff's title to the horse in question.

It seems to me, that in the case of *Whisher* vs. *Roberts*, 19 Ill., this Court has in effect decided that, if the vendee obtain possession of the thing sold at any time after the sale, before other liens have intervened, that the sale will be valid unless, of course, it be a fraudulent sale. That case was one of a chattel mortgage containing no provision for the possession of the mortgaged property to remain in possession of the mortgagor, which, under our statute, is void as to creditors. But it is there decided, that even if the mortgagee obtain possession of the property mortgaged for a temporary purpose before other liens attach, that such possession is good as against creditors; and the mortgagee may retain possession of the property, notwithstanding the possession did not originally accompany the bill of sale, and was not, in fact, obtained when finally acquired under the bill of sale or mortgage.

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The facts disclosed by the testimony, in *Berry* vs. *Ensell*, 2 Grattan (Virginia) R. 333, were, that the vendor of goods remained in possession without any actual delivery several months after the sale, at which time the vendee first came into possession of the goods, openly and visibly, employing the vendor as his agent to sell the same, and the Court held the sale good, no liens having attached. The Court decide, in *Bartlett* vs. *Williams*, 1 Pick. 288, that a bill of sale is good, as against creditors, where the vendee does not take possession of the property sold for eight months after the sale, no lien having attached.

In the last case cited the bill of sale was given on the 27th of October, 1819, and possession of the property sold obtained by the vendee June 26th, 1820. On the 3d of July, 1820, the property was seized on an attachment against the goods of the vendor. In the case at Bar, according to the testimony of the defendant's own witness, Briggs, the possession of the horse was delivered under the bill of sale in the spring of 1858, and it was levied upon by virtue of an execution issued October 15th, 1858, six months after the delivery, the property all the time remaining with the vendee. In *Shumway* vs. *Rutter*, 8 Pick. 447, the Court say, The transfer being *bona fide* and for a valuable consideration, slight evidence of a delivery is sufficient: and whether the delivery is formal or not, if the vendee, with the consent of the vendor, obtain possession before an attachment or second sale, the transfer is complete.

Joy vs. *Sears*, 9 Pick. 4, was a case of the sale of a vessel at sea, on the 11th of August; on the 22d of August she arrived at her home port, and sailed on the 29th of same month; on the 16th of September following, she returned, and September 17th was attached, and on September 23d was replevied by the vendee. Held the vendee's title was good. In the last case your Honors will see the attaching creditor's lien had been perfected before any delivery to the vendee, still the vendee's title was held good. In that case, however, no actual delivery could have been made at time of sale.

Adams vs. *Wheeler*, 10 Pick. 199, is also a case of a sale with no delivery accompanying the sale, but delivery given before subsequent liens attached. Held good. In *Fletcher* vs. *Howard*, 2d Aiken, 115, the Court say, "There is no doubt that property in personal chattels passes by a bargain and sale, for sufficient consideration, without delivery, as between the parties to the sale;" and they say further, in substance, that if the delivery is made before subsequent liens attach, the sale, being *bona fide*, will be good.

I have quoted thus largely from the cases cited, for the reason, that the defendant's counsel below took the position, and still seems to advance the opinion, that in order to make a sale of chattels good, as against creditors, there must not only be a sale, but an actual delivery of the thing sold *accompanying* and contemporaneous therewith—a position that is, as I think, untenable, an entirely different doctrine being laid down in all of the cases above cited, and in many more I might cite. But the rule clearly established by the books is, that a sale for a valuable consid-

eration, as between the vendor and vendee, is good, and a delivery at *any time* thereafter, *before* the rights of third parties have intervened, will make the sale good, as well against the creditors of the vendor as all the world.

The defendant seems to rely with great emphasis upon an expression used by this Court in *Warner* vs. *Carlton*, 22d Ill. 415, where this Court say, "Had there been an entire absence of all evidence of a change of possession accompanying the sale, then such an instruction, i. e., that the sale was fraudulent *per se*, would have been proper." But the Court will find, upon examination of that case, that there is no analogy between it and the one at Bar. In that case the vendor of a stock of goods and the vendee were of the same name throughout, with the exception of a middle initial letter, were father and son, and the vendee remained in possession of the same and carried on the business nearly the same as before, buying and selling. There was some evidence in that case of a delivery at the time of the sale and before the executions became a lien: the sale was but a few days before the execution issued, and the principal consideration of the sale was a prior indebtedness from the vendor to the vendee. Circumstances surrounded the case strongly tending to show fraud, but the jury having found the sale *bona fide*, the Court sustained the same. There the vendor was daily selling the goods, as the agent of the vendee; and the Court decide it was proper for the vendee to employ the vendor for that purpose; and although the Court seem to intimate that the possession must accompany the sale, I do not think by that language they intend, or do in fact say, that if the possession does not accompany the sale at the *time* of the sale, but does accompany it at any time before subsequent liens attach, that the sale is thereby *per se* fraudulent, much more if such possession has accompanied the sale for six months prior to the attaching of subsequent liens, as it did in the case at Bar.

I have, I think, upon authority, clearly established the position I assume in the first point made in my brief, and I have no doubt this Court will decide as the several Courts in the cases cited have decided, that the payment of the price, or even a bargain and sale, is sufficient to pass the title as between vendor and vendee, and that a subsequent delivery will be good, if made at any time before subsequent liens have attached, or before the rights of third parties have intervened.

I come now to treat of the question of fraud, so strenuously urged by counsel for defendant. I care but little in what light the bill of sale from Briggs to plaintiff in error is viewed, whether as a chattel mortgage or an absolute bill of sale, there is not the slightest evidence tending to show any fraud upon the part of the plaintiff; and no matter how fraudulent Briggs' intentions may have been, unless the plaintiff is connected with, and a party to them, his interests ought not to be, and will not be, prejudiced.

If you treat the bill of sale as a chattel mortgage, and as such it should be held absolutely void as to creditors and subsequent purchasers as long as the horse remained in Briggs' possession; still, if the horse had been delivered to plaintiff before such liens attached, it would be held good, I think, upon the authority of *Whisher* vs.

Roberts, 19 Ill. 274, and cases heretofore cited. But there is not the slightest evidence showing this to be a chattel mortgage; but, on the contrary, all go to show that it was an absolute bill of sale. The consideration, eighty dollars, was actually paid, a delivery of the horse made some six months before defendant's lien accrued, a continued possession of the horse by plaintiff, and the horse treated as the property of the plaintiff by all parties. There is no evidence tending to show fraud, and the only argument used by defendant for that purpose is, that, for some time after the sale, the horse remained in Briggs' possession, and that the horse was, he alleges, sold for less than its value. There is, however, great diversity of opinion among the witnesses as to the value of the horse, one witness, Hardy, placing the value at $80; Mitchell at $100; other witnesses at from $125 to $150; whilst Briggs himself places its value at $200. But let the value of the horse be what it may, the defendant or Buck, the execution creditor, stands in no position to find fault at the price for which the horse was sold, as it was sold over a year and a half before they were creditors of Briggs; and Briggs, as far as they were concerned, had a perfect right to dispose of the horse as he might see fit, even by gift, at the time he did dispose of it, and it would not have been fraudulent as to them. The fact that the horse, when it was delivered to the plaintiff, was delivered to protect plaintiff's interest from Norton's execution, even if it had been a bad delivery as far as Norton's execution was concerned, would have been good as to this execution held by defendant, which was issued upon a judgment rendered six months after the delivery was made.

The presumptions of law are in favor of honesty and fair dealing, and all that it was necessary for the plaintiff to show to entitle him to recover was, that he had purchased, paid for, and obtained possession of the horse before the defendant's lion attached. The law presumes the transaction to be fair and honest until the contrary is shown.

1 Scam. 365, 399.
4 Peters, 295.

If fraud is to be presumed anywhere, I should think there was much more ground for presuming fraud between Briggs and Buck than Briggs and plff. The judgment in favor of Buck was confessed by Briggs Oct. 15, 1858; execution sworn out by Buck and placed in defendant's hands to execute. Briggs goes with the defendant to plaintiff's stable, turns out the horse on the execution, and comes into Court for the purpose of swearing the horse back into his possession.

If the positions I have assumed are sound, then the instructions given by the Court below for the defendant, found on page 2d of the Abstract, are each erroneous, and were well calculated to mislead the jury. And from the testimony in the case, which is all embodied in the Bill of Exceptions, it seems to me impossible that the jury should have found for the defendant, unless they had been clearly misled by those instructions.

The first instruction makes no distinction between parties actually having a lien upon the horse at the time of the delivery, as execution creditors, and those entitled

to a lien as judgment creditors who have a right to an execution but have not, in fact, sued one out. The latter part of the instruction seems to imply, that an execution creditor might take the horse no matter how long it had been sued out after the delivery to the plaintiff; and the whole instruction goes upon the assumption that a sale of personal property without a delivery at the *time* of the sale, makes the sale absolutely void *per se*, and that no subsequent delivery could make the sale good, notwithstanding no liens had intervened before the delivery.

It seems to me the doctrine is, and should be, that third parties have no right to interfere with the sale of personal property, or to find fault therewith for want of delivery, unless their rights are prejudiced thereby, or their liens have attached *before* delivery is actually made.

The second instruction is also, I think, clearly erroneous, is in direct opposition to the doctrine laid down in *Whisler* v. *Roberts*, 19 Ill. 274, judgment creditors having no right to complain unless their judgments have at least been obtained before the delivery, much less if obtained months after the delivery under the sale.

The third instruction is directly in conflict with the doctrine laid down in 19 Ills. at the close of the opinion of the Court, in *Whisher* vs. *Roberts*, found on page 282, as well as the doctrine laid down in the other authorities cited by plaintiff.

The fourth instruction is also in conflict with all or nearly all, the authorities cited; the delivery of the property is not necessary for a sale of chattels as between vendor and vendee, and third parties have no right to complain if the delivery is made before their liens attach.

The ninth instruction assumes, contrary to the doctrine laid down in 1 Scam. and 4 Peters, that a person purchasing personal property must show he is *not guilty of fraud*, whereas I had supposed and still suppose the rule to be, that honesty and fair dealing were presumed by law, not fraud, and that a party attacking a sale must show fraud between the vendor and vendee, to which fraud both must be parties.

What I have already said will apply with force to the 11th and 12th instructions given for defendant—the authorities already cited will apply to them. None of the instructions given were based upon testimony before the jury, and each and all were well calculated to mislead the jury in their finding, and those instructions alone are sufficient to reverse this cause even if actual fraud had been proved. The idea advanced by defendant's counsel in his argument that "if plaintiff had been guilty of fraud he has no right to complain of error in instructions," sounds well in a stump speech, but is worth little as a legal argument.

I come now, finally, to notice the *preliminary* questions mentioned by the defendant's counsel in his argument. He urges with great strenuousness that the court below had no right to allow the plaintiff to file copies of the lost writ and bond. The bond and writ were both lost; of that there is no question. It was necessary to supply them in order to get a complete record to bring into this court. Supplying the lost papers could not prejudice the defendant; indeed if the judgment below should

be sustained, would be beneficial instead of prejudicial to the defendant's interest. Hence he had no cause to complain. I have examined some of the authorities cited by defendant's counsel but cannot see that they are opposed to the principle I assume, but that on the contrary some of them tend to sustain it. I leave that question with this Court without a citation of any authorities on that point.

In the argument filed by defendant's counsel at the last term, he states that the defendant was not present in the court below when leave was given to file the replevin bond. The original record failed to show that fact, but the supplemental record does fully show it. It was at best but a technical point made upon a misprision of the clerk, but one which defendant's counsel knew did not exist in fact, as he was the attorney for the defendant below and was present when the leave was granted.

The defendant seeks to reverse the judgment of the court below in allowing the copies of the lost papers to be filed. It matters not to the plaintiff what is done with the judgment in that respect. As far as he is concerned he is willing that portion of the judgment should be reversed, but it would perhaps be well for the profession if the power of the court to supply lost papers was clearly defined.

What the plaintiff complains of and what he seeks to remedy, is the erroneous rulings and instructions of the court below, and the erroneous finding of the jury, which was, as he claims, clearly against the law and the evidence, against truth and justice.

The only question of real, practical importance being whether a sale of chatels is absolutely void as between *all* parties, if delivery to the vendee does not immediately accompany the sale; or if such a sale will be good if delivery to the vendee is made before the rights of third parties have intervened, or their liens attached, especially when, as in this case, the delivery was made months before such liens attached.

E. F. BULL,
Plaintiff's Attorney.

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STATE OF ILLINOIS,

IN THE

SUPREME COURT.

POINTS, AUTHORITIES, AND ARGUMENTS

Filed April 28, 1860
La Salle Co. Clerk

OF

DANIEL EVANS:

Attorney for Defendant in Error.

LA SALLE, ILLINOIS:

T. K. BARRETT, (DEMOCRATIC STANDARD) BOOK AND JOB PRINTER.

1860.

State of Illinois, ss.

IN THE SUPREME COURT AT OTTAWA;
Of the April Term, A. D. 1860.

ALEXANDER CRUICKSHANK
PLAINTIFF IN ERROR

vs.

ROBERT COGSWELL
DEFENDANT IN ERROR.

ERROR TO LA SALLE.

THIS was an action of Replevin brought by Cruickshank, Plaintiff in Error, against Cogswell, for the recovery of a horse, and was tried at the March term of the County Court, A. D. 1859.

The Declaration was in the *cepit* and *detinet*, and the Pleas were 1st, *non detinet*; 2d, property in W. D. Briggs; 3d, property in Defendant; 4th, that W. D. Briggs was the owner of the horse, *whom*, &c., which was levied upon by the defendant, as a constable, by virtue of an execution in favor of John H. Buck against Briggs.

The Jury returned a verdict for the Defendant. The Plaintiff prayed an appeal to the Supreme Court, which was dismissed at the last Ottawa term thereof, and is now brought up on Writ of Error.

The record in this case presents some questions to be disposed of preliminary to the examination of the errors assigned by the plaintiff in error. At the June term of the county court, it appearing that the Writ of Replevin had been mislaid or lost, the plaintiff's counsel—the defendant's counsel being present — moved the court to grant leave to complete the records, and the court granted leave by filing a copy of the original Writ and Return, to which ruling of the court the defendant's counsel then and there excepted.

☞ (See Bill of Exceptions, pages 18 and 19.) ☜

The writ, with the officer's return thereon, is a part of the record. 4 Shep., 81.

1st. It is denied that the court had authority to allow the record to be amended or completed. It is insisted that the record could be amended as to other than clerical errors and matters of form, only at the term at which the judgment was rendered.

☞ (11 Ill. Rep. 57.)

The record itself must show something by which the amendment may be made.

The unquestionable verity which a record imports, requires that its alteration shall not depend upon anything so frail as memory.—

☞ 5. Pike, R. 208; Smith vs. Dudley, 2. Arkansas Reports, page 60; Blackmore's case 4, Coke's Reports, 452; State vs. Harrison, 10 Yerger, R. 542; 4 Iredell, 81.

2d. To complete a Record by supplying a lost part thereof cannot be regarded as an amendment of a Record as to mere matter of form or clerical error. The court therefore, had no authority at the June term to allow the counsel to complete the record by supplying the lost or mislaid Writ and Return, when the cause was tried at the previous March term. This Court seems to have decided this point in Troy vs. Reilly,

☞ (3. Scam. page 19: O'Connor vs. Mullen, 11 Illinos, 57.)

3. If the Court had such authority, it could only be done after the defendant had notice thereof.

☞ (11. Ill. 57.) ☜

The Bill of Exceptions shows,

☞ (Page 18 and 19.) ☜

The 13th day of June—one of the days of the term—the plaintiff by his counsel, moved to complete the record, by supplying the writ, and the leave of the court granted, was to supply the writ and return. (Mis-stated in the printed abstracts.) Of this proceeding the defendant had notice, as he appeared by his counsel, to resist the motion. On the 16th day of June, three days subsequent to the time leave was granted to supply the writ and return, further proceedings were had which transcended the order or leave of the court, and of which further proceedings the defendant had no notice. The order of the court on the 13th day of June was to supply a copy of the writ and return; on the 16th day of June the court allowed the plaintiff's attorney to go beyond the leave granted (Bill of Exceptions, page 19) of which defendant had notice, by supplying a copy not only of the writ and return thereon, which was the extent of the leave granted, but also by supplying a *copy of the Bond.* Surely, if the record could be so amended or completed, at a term subsequent to the one at which the judgment was rendered—and when it is evident there was nothing but vague and general recollection on which to rely—the defendant was entitled to notice of *all the lost* record, which it was proposed to supply. If notice to the defendant of the application to supply the writ and return thereon was necessary, it was equally so that he should have notice of the application to supply the lost Bond. If the court could approve a copy of the Bond and make it a part of the record without notice to the defendant, it was certainly unnecessary to trouble him with notice of the application to supply the writ and return.

The conclusions to which I have arrived from an examination of the authorities are, 1st, that the court had no authority to allow the record to be completed, because there was nothing in the record itself by which it could be done. The exercise of such an authority at the term in which judgment is rendered, is of very questionable propriety, frequently denied, and clearly forbidden at a subsequent term; 2d, because there is a palpable distinction between supplying a part of a lost record and amending a record as to matters of

form or clerical mistakes ; and 3d, because the Defendant had no notice of the application of the Plaintiff to supply the lost bond or the action of the court in approving the furnished copy thereof.

The questions presented by the assignment of errors in the Bill of Exceptions are two : 1st, whether the jury under the evidence introduced, were authorized to find a verdict for the Defendant ; 2 l. whether the court erred in giving the instructions asked for by the Defendant.

The jury were authorized to find a verdict for the Defendant from the following evidence. The pretended bill of sale executed and delivered by Briggs to Cruickshank, under which the Plaintiff claimed the horse, was made and dated the 1st of May, 1857.— The possession of the horse remained with Briggs for about fifteen months after the date of the bill of sale. Boermaker, the Plaintiff's witness, swears the horse came into the possession of Cruickshank two or three months before the month of October, 1858. During all this time Briggs had all the *indicia* of absolute ownership of the horse—the exclusive control and use of him—enabled to get credit thereby ; and when, about fifteen months after the pretended sale the horse was about to be taken on an execution recovered against Briggs, in favor of one Norton, the plaintiff *first* got possession of the horse by telling Briggs it was necessary to save the horse from Norton's execution. Plaintiff told Briggs that he would lead the horse behind his buggy the next day, and he, Briggs, then could have the use of him again. Thus the possession of the horse was at last got by promising to re-deliver him the next day to Briggs, and by operating on Briggs's fears, by representing that the horse would be taken on execution. The circumstances which surrounded the Plaintiff's getting possession of the horse and his representations to Briggs, are hardly compatible with the theory of a *bona fide* sale of the horse by Briggs to Cruickshank.

I insist that this mode of procedure, in obtaining possession of the horse, coupled with the fact of the long time that had elapsed from the date of the pretended sale before anything was known about it—and then only when it was necessary to protect the

property from levy upon a judgment recovered upon a debt against Briggs, originating perhaps, in the fact of his ownership—a fact perhaps, which gave him the means to obtain credit, are all strong circumstances militating against the good faith of the sale.

The witnesses (and they were numerous) with one exception, all testified that the value of the horse on the 1st May, 1857, at the time of this alleged sale was worth from $125 to $200. It was also proved that Briggs had deposited with Cruickshank some $25.

The obvious inadequacy of the price tends strongly to show the fraudulent character of the sale.

This court has decided in

(19 Ill., page 274, Whisler vs. Roberts,)

that where the testimony was conflicting, and there are no facts in the case to guide the court, it will be presumed that the jury, having superior opportunity for doing so, properly weighed the testimony.

It must be presumed that the jury were fully satisfied there was fraud in this transaction—the evidence preserved in the Bill of Exceptions authorized that presumption; and it is hardly necessary here to say that the plaintiff ought not to be encouraged to come into this Court with "unclean hands," to take advantage of his own wrongs, in order to assert a right, born in fraud, as against third parties. No error of Instruction could prejudice the plaintiff if his claim was founded in a fraudulent sale.

It is insisted that under no possible view of the evidence, could the plaintiff be entitled to a verdict.

The vendor (Briggs) retained absolute and unqualified possession of the horse for about fifteen months after the alleged sale. An absolute Bill of Sale imports possession in the grantee, and evidence to show an agreement as part of the contract, that the vendor should retain possession, is inadmissible, because it contradicts the bill of sale:

(4 Blackford 420, Foley et al vs. Knight; and Smith's Leading Cases, vol. 1, page 68, Law Library.)

In the case at Bar, the sale was fraudulent *per se*. There was no evidence whatever introduced showing or tending to show, that the possession of the horse accompanied the sale; but on the contrary, it was conclusively shown that possession not only did not accompany the sale, but that *more than a year elapsed* between *the sale and the possession*. This Court

(22 Ill., 524, Warner vs. Carlton)

say, that an instruction to the jury, that the sale in that case was fraudulent *per se*, would have been proper if there had been an entire absence of all evidence of a change of possession *accompanying the sale*. This is regarded as decisive of the present case, for there was not only an entire absence of evidence that the possession accompanied the sale, but there was the positive proof that it did not. This, in my view, disposes of the question of error in

* Also the contract [illegible] defendant, based upon the above [illegible] and Smith's Cases, [illegible] Sale 3 Cowen 189.

the Instructions of the Defendant assigned by the Plaintiff: for if any of the Instructions be erroneous, the plaintiff has not been prejudiced thereby, as it was shown by the testimony both of Boermaker and Briggs, and no conflicting evidence, that the sale upon which he relies is absolutely void.

(See Thorn vs. Watson, 5 Gilman, 30; Arenz vs. Reihle, 1 Scammon, 340.)

Nor is there any analogy between this case and where "a mortgagee of personal property—the mortgage not providing that the mortgagor may retain possession—may, if he gets possession peaceably, retain the property, unless other liens upon it had intervened while the mortgagor was in possession." If the Bill of Sale by Briggs to Cruickshank had been executed in good faith, and if evidence were admissible that the vendor might retain possession, it would then have been necessary to have the Bill of Sale acknowledged and recorded, as required by statute, (Scates' Statute, page 814, sec. 7) in order to bring it within the rule laid down in

(19 Ill., p. 274.)

The jury were fully warranted to believe that at the time of the making of this pretended bill of sale, there was no intention on the part of Briggs to deliver possession of the horse, or any expectation on the part of Cruickshank to have possession of him, that the possession was an after thought of the parties, originating in the existence of executions against Briggs; and it is insisted that the execution of a mere bill of sale without a contemporaneous intention to give possession, carries no title whatever to the purchaser as against existing or subsequent creditors of the seller—that the act of sale and the intention to give possession are the *essential elements* of the contract—without the co existence and co-operation of which there is no contract whatever—that the giving of the possession of the horse without an intention to sell, is as valid as the selling without an intention to deliver possession, and that neither by itself alone conveys any right whatever, at least as against any creditor of the vendor.

It might be urged were it necessary, that this case is distinguishable from that of a sale of personal property and an understanding between the parties that the vendor retain possession, or a sale where the purchaser fails or neglects to get the possession; such a transaction is good *as between the parties*, but it is urged that here there was NO SALE *whatever*, as there was no intention or understanding that there should be a change of possession, and therefore, even as between the parties, no rights or obligations were created by the execution of the pretended bill of sale.

The 2d, 3d and 12fth Instructions are based partly upon this view of the testimony, and the others require good faith in the parties to the sale, and the absence of fraud in the transaction, and only, in my judgment, enforce the settled principles of law, and apply the decisions of this Court, repeatedly made, to the case at Bar.

D Evans
for defendant in Error

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
} ss. **APRIL TERM, A. D. 1860.**

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
Error to La Salle County Court.

PLAINTIFF'S POINTS AND AUTHORITIES.

1st. A sale, as between vender and vendee, is good without delivery at the time, and a delivery at *any time* thereafter is good unless the rights of third parties have intervened, between the sale and delivery.

Berry vs. Ensell, 2 Grattan (Virg.) 333.
Sydner vs. Gee, 4 Leigh, 535.
Ludwig vs. Fuller, 5 Shepley, 162.
Bartlett vs. Williams, 1 Pick. 288.
Badlam vs. Tucker, 1 Pick. 388 and 389.
Shumway vs. Rutter, 8 Pick. 443.
Joy vs Sears, 9 Pick. 4.
Bissell vs. Hopkins, 3 Cowan, 189. *Note.*
Whisler vs. Roberts, 19 Illinois, 274.

2 Aiken 115
10 Pick. 199

2nd. The presumptions of the law are in favor of honesty and fair dealing, and all that it was necessary for the plaintiff to show to entitle him to recover was that he had purchased, paid for, and obtained possession of the property in question before the execution of Buck's became a lien, the law presumes the transaction to be fair and honest until the contrary is shown.

1 Scam. 365 and 399.
4 Peters, 295.

3rd. There was no proof showing or tending to show as is supposed by Deft's inst. No. 11, that sale from Briggs to plaintiff was intended as a security.

E. F. BULL, Plff's Atty.

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A. Cruickshank

vs

Robert Cogswell

Pffs Points & Authorities

Filed May 1. 1860

L Leland

Clerk

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
} ss. **APRIL TERM, A. D. 1860.**

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E. F. BULL, Plff's Atty.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
} ss. **APRIL TERM, A. D. 1860.**

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
Error to La Salle County Court.

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4 Peters, 295.

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E. F. BULL, Plff's Atty.

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A. Brickshank

vs

Robert Cogswell

Pffs Points & Authorities

Filed May 1. 1865

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

ALEXANDER CRUICKSHANK,
Plaintiff in Error,
vs.
ROBERT COGSWELL,
Defendant in Error.
} *Error to La Salle County Court.*

ABSTRACT OF SUPPLEMENTAL RECORD.

Page 2 Motion to perfect Record made June, A. D. 1860, and continued.
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E. F. BULL,
Attorney for Plaintiff.

No. 24

Comstock

vs.

Caperell

Abst. Suppl. Rec'd

Filed April 30 - 1861

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

ALEXANDER CRUICKSHANK,
Plaintiff in Error,
vs.
ROBERT COGSWELL,
Defendant in Error.
} *Error to La Salle County Court.*

ABSTRACT OF SUPPLEMENTAL RECORD.

Page 2 4 2

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E. F. BULL,
Attorney for Plaintiff.

No 24

Comanche

vs

Copsell

Abst. Suppl. Record

Filed Apr. 30 - 1861

L. Leland

Clerk

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

APRIL TERM, A. D. 1860.

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
Error to La Salle County Court.

ABSTRACT OF RECORD.

This is an action of Replevin in the cepit and detinet, brought by Plaintiff in Error against Defendant in Error to recover a dark or black horse. Pleas—1st, Non Detinet. 2nd, Property in Wm. D. Briggs. 3d, Property in Defendant. 4th, Property in said Briggs, judgment in favor of John H. Buck, execution issued on the same and placed in the hands of Defendant as Constable, and levy by virtue thereof on the horse in question.

To the first plea plff. filed general replication, and to the others replied property in himself and not in Briggs or defendant.

Page of Rec.

1 Filing of affidavit and for writ of replevin October 19th, 1858.

2 Copy of affidavit for replevin.

3 Plaint and declaration in replevin filed October 19th, 1859.

4 Writ of replevin to Sheriff of La Salle County issued Oct. 19th, 1858. Copy of same.

5 Copy of writ continued.

5 Writ of replevin returned October 20th, 1858.

6 Copy of return and endorsement of Sheriff.

6 Demurrer to plaintiff's declaration filed Dec. 7th, 1858, and copy of same.

7 Demurrer overruled December 7th, 1858.

7 Pleas by Defendant filed Dec. 8th, 1858.

8 1st plea non detinet, concluding to the country, similiter joined by plff.

8 & 9 2d plea by deft., property in Wm. D. Briggs.

9 3d plea by deft. of property in deft.

9, 10 & 11 4th plea by deft., property in Briggs, judgment against Briggs in favor of John H. Buck, execution issued on judgment and delivered to defendant as constable, and levy on property in question as the property of Briggs.

12 Several replications to defendant's pleas filed December 8th, 1858.

1st replication denies property in Briggs and claims property in plaintiff.

13 Replication to 2d plea denies property in defendant.

13 Replication to fourth plea denies property in Briggs and claims property in plaintiff.

14 & 15 Trial had December 14th, 1858, and Jury disagreed.

16 Second trial had 15th of March, 1859, and verdict for defendant. Motion for new trial by plaintiff overruled and exceptions.

17 March 16th, 1859, motion in arrest of judgment overruled, and exceptions by plaintiff.—Judgment for costs against plaintiff and order for return of property.

18 Appeal prayed to Supreme Court, and June 13th, 1859, leave to supply writ, bond and endorsements thereon, the writ and bond having been lost.

19 Copy of lost bond and writ presented and approved by Court, and ordered to be filed as a part of original record. In pages 2 to 5. Supplemental record

21 Bill of exceptions filed on 17th March, 1859, being one of the days of the March term, 1859, of said Court, shows that on the trial of said cause the plaintiff introduced as evidence the following bill of sale for the property in question :

21 *May 1st*, 1857.

ALEX. CRICKSHANK—Bought of W. D. BRIGGS, one dark or black Horse, now being used by him, subject to his (ac.) order at any time. $80.

Rec'd payment, W. D. BRIGGS.

22 Plaintiff also introduced Henry Boermaker, who testified that he was in the employ of plaintiff in Oct., 1858, as stable keeper—that defendant came to the stable and took away the horse—that Briggs was with him—that horse was a dark or black horse, and had been delivered to plaintiff by Briggs some two or three months before that time. Defendant admitted it was the same horse in controversy.

Plaintiff also called Isaac N. Hardin, who testified that he had known the horse in controversy—that Briggs' signature to bill of sale, offered in evidence, was genuine—that plaintiff paid Briggs $80 for the horse—that Briggs told him the horse belonged to plaintiff—that Briggs left at the office of plaintiff a number of small sums of money, amounting in all from

23 $15 to 25, which plaintiff told witness at the time was for the use of the horse.

24 Plaintiff also introduced Wm. Mitchell who testified that in summer of 1858 he kept the horse in controversy for the plaintiff several weeks. At this point the defendant admitted that plaintiff had made a demand for the horse before bringing suit.

Defendant on his part called as a witness Isaac N. Hardin, who testified that he did not recollect the exact amount left by Briggs at plff's office.

Deft. then called Wm. D. Briggs, who testified that the reason why he gave the possession of the horse to the plaintiff in the summer of 1858 was that the plaintiff had a bill of sale of
25 the horse—that plaintiff told the witness he had been advised the bill of sale would not be good unless he had the possession of the horse under it—and that he gave him the possession of the horse for the purpose of strengthening the bill of sale—that in the spring of 1858 a constable was about to levy upon the horse as his property, and that plaintiff came and said he must have possession of the horse under the bill of sale to make it good; but that the next day he would lead the horse down behind the buggy and he might have him to use again. That the horse was delivered to plaintiff at that time, and he kept him till he was levied upon by the defendant.

26 Introduced transcript of record, execution, levy, &c., &c.

Briggs on his examination stated that the horse in controversy in May, 1857, was worth $200.

A. B. Hitchcock for plaintiff said it was not worth more than $125 or $130 at that time.

26 John Gallagher testified about the same as to the value.

26 Isaac Hardy that it was worth about $80.

27 James Egan for deft. testified it was worth about $150. Both parties here closed their case and no further testimony was offered by either party.

27 & 28 Instructions on the part of plaintiff from 1 to 4 inclusive.

29 The following instructions were given by the Court on the part of the defendant, to wit:

29 1st Inst. for Deft.—A sale of the horse by Briggs to Cruickshank without a delivery of the same passes no title of the horse sold, as against the creditors of Briggs having a lien, or entitled thereto, and a subsequent delivery of the horse not in pursuance of the sale, will not protect it from levy on an execution in favor of Briggs' creditors.

29 2d Inst. for Deft.—Both sale and delivery of personal property are necessary to give a valid title to the purchasers as against the creditors of the seller, and if at the time of sale a delivery of the property was not intended by the parties thereto, a subsequent delivery will pass no title as against judgment creditors of the seller.

29 & 30 3d Inst. for Deft.—In order to exempt personal property in the possession of the purchaser thereof from levy on execution in favor of the creditors of the seller, there must have been a sale and an intention at the time of the sale on the part of the purchaser to take, and on the part of the seller to deliver possession of the thing sold, or an actual delivery thereof, and if the seller should come into the possession of the property subsequently but not under the sale, such possession will not perfect the sale as to the creditors of the seller, or protect the property as against judgment creditors of the seller.

30 4th Inst. for Deft.—If at the time of the sale of the horse no time was appointed for the delivery of the same, such delivery must be made in a reasonable time, otherwise the sale will be deemed null, as against the creditors of the seller, and one year is not such reasonable time where no obstacle is shown to exist to a more speedy delivery.

32 9th Inst. for Deft.—The evidence, in order to enable the plaintiff to recover should establish by a preponderance of evidence that the sale to him was absolute and bona fide as against the creditors of Briggs, and that the horse sold was delivered within a reasonable time after the sale, if there was such sale.

32 & 33 11th Inst. for Deft.—If the title of the plaintiff arises solely from the bill of sale, and the jury believe the bill of sale to have been intended as a security, and for the purpose of defrauding the creditors of Briggs, and no delivery of the horse by Briggs to Cruickshank was intended by the parties, or given within a reasonable time, and the horse has been taken by virtue of an execution against Briggs, then the plaintiff is not entitled to recover.

33 12th Inst. for Deft.—A sale of the horse by Briggs to Cruickshank without a delivery of the same is void as against creditors of Briggs, and a subsequent delivery not in pursuance of the sale but for the purpose of preventing a levy on an execution against Briggs, is not such delivery as will make the sale not void as against creditors.

33 Plaintiff objected to the giving of each of above instructions and excepted to the ruling of the Court in giving the same.

34 Verdict of jury for deft. Motion by plff. for new trial overruled and exceptions. Motion in arrest of judgment overruled and exceptions.

35 Certificate of County Clerk.

Errors assigned:

1st. The Court erred in giving defendant's instructions to the jury.

2nd. The verdict of the jury was contrary to the law.

3rd. The verdict of the jury was against the evidence.

4th. The verdict of the jury was against the law and evidence.

5th. The Court erred in overruling the plaintiff's motion for new trial.

6th. The Court erred in overruling plaintiff's motion in arrest of judgment.

E. F. BULL, Plff's Atty.

246

A Conickshenck

vs

Robt. Capsull

Abst Record

Filed Oct. 30. 1860

Leland

Clk.

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

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

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the County Court of La Salle County, before the Judge thereof, between Alexander Chisholm

plaintiff, and Robert Bogwell

defendant, it is said manifest error hath intervened, to the injury of the aforesaid plaintiff

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

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 27th day of June in the Year of Our Lord one thousand eight hundred and fifty-nine

L. Leland

Clerk of the Supreme Court.

by J. B. Rees Deputy

62

Alexander Brucks Shawks

vs.

Robert A Boyswell

Writ of Error

This writ of Error is made a supersedeas and as such is to be obeyed by all concerned.

L. Leland Clk
by J. D. Rice Deputy

Filed June 27. 1859
L. Leland Clk

Filed Feb 29 - 1860
R. Linder Clk
Summit

Executed & Return to Feb Term 1860 of the County Court of Lake County Ohio

Mot to Co

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of La Salle ——— Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the County ——— Court of La Salle County, before the Judge thereof, between Alexander Brickshanks

plaintiff, and Robert Bogswell ———

defendant, it is said that manifest error hath intervened, to the injury of the said plaintiff ———

as we are informed by his complaint, ——— the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; **Therefore, We Command You,** That by good and lawful men of your County, you give notice to the said Robert Bogswell ———

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Robert Bogswell ———
——— notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 27th ——— day of June ——— in the Year of Our Lord One Thousand Eight Hundred and Fifty-nine.

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

~~1859~~ 6 2 24

Alexander Brucks Hawks

vs

Robert Cogswell

Scire Facias

Served this writ by reading to the within named Robert Cogswell this the thirteenth day of July 1859

Francis Warner shff
Per W. B. Hall Dpty

Serg RA ,60
15 m ,75
1,35

Filed April 24, 1860
L. Leland
Clerk

STATE OF ILLINOIS, } ss. April Term, A. D. 1861.
SUPREME COURT,
Third Grand Division.

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.

DEFENDANT'S POINTS AND AUTHORITIES.

1st. Supplying lost papers is amending the Record, and such amendment is not a matter of clerical error.
4. Coke, 452 & 460. Blackmore's case.

2d. The Court had no authority at its June Term, A. D. 1859, when the case had been tried at the previous March Term, and after an appeal had been taken to the Supreme Court by plaintiff, and dismissed by Defendant at the April Term, 1859, of said Court, to supply the lost writ of Replevin and endorsements thereon.—There must be something in a record by which it can be amended. The amendment cannot be made from mere memory.
5 Pike's Reports, 208.
10 Yerger's " 542, and authorities therein cited. Also authorities cited in printed argument, filed at the last term of this Court.

3d. A Record cannot be amended at a subsequent term of court even as to clerical errors, without notice to the opposite party. 11 Ill. R., page 57. Defendant had no notice of the application of plaintiff to supply the replevin bond, or the leave of the Court to do so.

4th. The record made at the June Term 1859, of the County Court of La Salle county, of the application to supply a writ and returns thereon cannot be so amended at the March Term of Court 1861, as to show that said application was to supply other papers, and that leave of Court was obtained to do so, and that defendant had notice thereof, when the record of said June Term is silent upon these subjects:
1st. Such an amendment is equivalent to making a new record;
2d. Because seven or eight terms of said Court had intervened from the time of making the record supplying the writ and return, and the making of the record supplying the replevin bond. [See authorities above recited.]

5th. If the Court had authority to make such a change of the record, after such a lapse of time, the evidence introduced, did di l not authorize it to be done.
11 Ill. R, 89.

6th. A sale of personal property, where no change of possession was contemplated by the parties, and where possession was given, a year or more after the sale, for the purpose of avoiding a judgement creditor, and where such possession was designed by both parties to be but temporary, is fraudulent against creditors.
1 Scammon R., 298.
3 Cowen. 189

7th. The 1st, 2d, 3d, 11th and 12th instructions are based on the principle that fraud will vitiate a sale as against creditors, and that a vendee can not set up a fraudulent sale as against subsequent creditors.

8th. The authorities cited by plaintiff to show, that where a vendee or mortgagee acquires possession of property before the levy of an execution, in favor of a judgment creditor he may hold the same, are cases where the good faith of the sale is not impeached.

9th. Gross inadequacy of consideration, the property remaining with the vendor twelve or fifteen months after sale, in "a case of absolute, unconditional sale where possession does not accompany the deed," (1. Scam. 298) and a conditional and temporary delivery of the property when it is made, are such circumstances from which, if they do not make the sale fraudulent *per se*, the jury have a right to infer fraud; and the jury having passed upon the question, this Court will not disturb their verdict.

DANIEL EVANS, *Deft's Att'y.*

24)

Cruikshank
vs
Cogswell-

Defts pets - & Cathcartes

Filed May 24-1861
L. Lalond
Clerk

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
} ss. **APRIL TERM, A. D. 1860.**

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
Error to La Salle County Court.

PLAINTIFF'S POINTS AND AUTHORITIES.

1st. A sale, as between vender and vendee, is good without delivery at the time, and a delivery at *any time* thereafter is good unless the rights of third parties have intervened, between the sale and delivery.

Berry vs. Ensell, 2 Grattan (Virg.) 333.
Sydner vs. Gee, 4 Leigh, 535.
Ludwig vs. Fuller, 5 Shepley, 162.
Bartlett vs. Williams, 1 Pick. 288.
Badlam vs. Tucker, 1 Pick. 388 and 389.
Shumway vs. Rutter, 8 Pick. 443.
Joy vs Sears, 9 Pick. 4.
Bissell vs. Hopkins, 3 Cowan, 189. *Note.*
Whisler vs. Roberts, ~~17~~ Illinois, 274.

2 Aikens 115
10 Pick. 199

19

2nd. The presumptions of the law are in favor of honesty and fair dealing, and all that it was necessary for the plaintiff to show to entitle him to recover was that he had purchased, paid for, and obtained possession of the property in question before the execution of Buck's became a lien, the law presumes the transaction to be fair and honest until the contrary is shown.

1 Scam. 365 and 399.
4 Peters, 295.

3rd. There was no proof showing or tending to show as is supposed by Deft's inst. No. 11, that sale from Briggs to plaintiff was intended as a security.

E. F. BULL, Plff's Atty.

24 62

A. Cruickshank

vs

Robert Cogswell

Pffs Points & Authorities

Filed May 1, 1860

Leland

Clerk

STATE OF ILLINOIS, } ss. April Term, A. D. 1861.
SUPREME COURT,
Third Grand Division.

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.

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DANIEL EVANS, *Deft's Att'y.*

24

Commissioners

vs

Caywood

Defts. plea of authorities

Filed May 4 - 1861

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

ALEXANDER CRUICKSHANK,
Plaintiff in Error,
vs.
ROBERT COGSWELL,
Defendant in Error.

} *Error to La Salle County Court.*

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E. F. BULL,
Attorney for Plaintiff.

No. 24

Cruickshanks

vs;

Copwell

Abst. suppl. Record

Filed Cfw. 30-1861

L. Leland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

ALEXANDER CRUICKSHANK,
Plaintiff in Error,
vs.
ROBERT COGSWELL,
Defendant in Error.
} *Error to La Salle County Court.*

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E. F. BULL,
Attorney for Plaintiff.

No. 24

Cruickshank
vs.
Coppell

Abst. Supplemental
Record

Filed Apr. 30 - 1861
L. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
} ss. APRIL TERM, A. D. 1860.

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
Error to La Salle County Court.

PLAINTIFF'S POINTS AND AUTHORITIES.

1st. A sale, as between vender and vendee, is good without delivery at the time, and a delivery at *any time* thereafter is good unless the rights of third parties have intervened, between the sale and delivery.

Berry vs. Ensell, 2 Grattan (Virg.) 333.
Sydner vs. Gee, 4 Leigh, 535.
Ludwig vs. Fuller, 5 Shepley, 162.
Bartlett vs. Williams, 1 Pick. 288.
Badlam vs. Tucker, 1 Pick 388 and 389.
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Whisler vs. Roberts, 1 Illinois, 274.

2 Aiken 115
10 Pick 199

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1 Scam. 365 and 399.
4 Peters, 295.

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E. F. BULL, Plff's Atty.

2482 - 125

A. Cruickshank

25

Robert Cogswell

Pffs Points & Authorities.

Filed May 1st 1880

L. Leland

Clerk

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.
} ss. **APRIL TERM, A. D. 1860.**

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
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Ludwig vs. Fuller, 5 Shepley, 162.
Bartlett vs. Williams, 1 Pick. 288.
Badlam vs. Tucker, 1 Pick. 388 and 389.
Shumway vs. Rutter, 8 Pick. 443.
Joy vs Sears, 9 Pick. 4.
Bissell vs. Hopkins, 3 Cowan, 189. *Note.*
Whisler vs. Roberts, 1 Illinois, 274.

2 Aiken 115
10 Pick 199—

2nd. The presumptions of the law are in favor of honesty and fair dealing, and all that it was necessary for the plaintiff to show to entitle him to recover was that he had purchased, paid for, and obtained possession of the property in question before the execution of Buck's became a lien, the law presumes the transaction to be fair and honest until the contrary is shown.

1 Scam. 365 and 399.
4 Peters, 295.

3rd. There was no proof showing or tending to show as is supposed by Deft's inst. No. 11, that sale from Briggs to plaintiff was intended as a security.

E. F. BULL, Plff's Atty.

A. Cruickshank

vs

Robert Cogswell

Pffs Points & Authorities

Filed May 1. 1860

L Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT, *Third Grand Division.* } ss. APRIL TERM, A. D. 1861.

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.

DEFENDANT'S POINTS AND AUTHORITIES.

1st. Supplying lost papers is amending the Record, and such amendment is not a matter of clerical error.
4. Coke, 452 & 460. Blackmore's case.

2d. The Court had no authority at its June Term, A. D. 1859, when the case had been tried at the previous March Term, and after an appeal had been taken to the Supreme Court by plaintiff, and dismissed by Defendant at the April Term, 1859, of said Court, to supply the lost writ of Replevin and endorsements thereon.—There must be something in a record by which it can be amended. The amendment cannot be made from mere memory.
5 Pike's Reports, 208.
10 Yerger's " 542, and authorities therein cited. Also authorities cited in printed argument, filed at the last term of this Court.

3d. A Record cannot be amended at a subsequent term of court even as to clerical errors, without notice to the opposite party. ☞11 Ill. R., page 57 ☜ Defendant had no notice of the application of plaintiff to supply the replevin bond, or the leave of the Court to do so.

4th. The record made at the June Term 1859, of the County Court of La Salle county, of the application to supply a writ and returns thereon cannot be so amended at the March Term of Court 1861, as to show that said application was to supply other papers, and that leave of Court was obtained to do so, and that defendant had notice thereof, when the record of said June Term is silent upon these subjects:
1st. Such an amendment is equivalent to making a new record;
2d. Because seven or eight terms of said Court had intervened from the time of making the record supplying the writ and return, and the making of the record supplying the replevin bond. [See authorities above recited.]

5th. If the Court had authority to make such a change of the record, after such a lapse of time, the evidence introduced, did di l not authorize it to be done.
11 Ill. R, 89.

6th. A sale of personal property, where no change of possession was contemplated by the parties, and where possession was given, a year or more after the sale, for the purpose of avoiding a judgement creditor, and where such possession was designed by both parties to be but temporary, is fraudulent against creditors.
1 Scammon R., 298.
3 Cowen. 189

7th. The 1st, 2d, 3d, 11th and 12th instructions are based on the principle that fraud will vitiate a sale as against creditors, and that a vendee can not set up a fraudulent sale as against subsequent creditors.

8th. The authorities cited by plaintiff to show, that where a vendee or mortgagee acquires possession of property before the levy of an execution, in favor of a judgment creditor he may hold the same, are cases where the good faith of the sale is not impeached.

9th. Gross inadequacy of consideration, the property remaining with the vendor twelve or fifteen months after sale, in "a case of absolute, unconditional sale where possession does not accompany the deed," (1. Scam. 298) and a conditional and temporary delivery of the property when it is made, are such circumstances from which, if they do not make the sale fraudulent *per se*, the jury have a right to infer fraud; and the jury having passed upon the question, this Court will not disturb their verdict.

DANIEL EVANS, *Deft's Att'y.*

24 — 125

Cruikshanks
vs
Cogswell

Defts Pltys authorities

Filed May 4 - 1861
L. Leland
Clerk

State of Illinois } Third Grand Division
Supreme Court } April Term A.D. 1860.

A. Buckbank
Plaintiff in Error
vs.
Robert Cogswell
Defendant in Error

Error to La Salle Co Court.

L. Evans being first duly sworn on oath deposes and says that he was attorney for the defendant below, on the trial of the said cause which took place at the March Term 1859 of said County Court.

Affiant further says that at the June Term of the said County Court he was informed by one of the plaintiff's attornies that the Writ of Replevin in said cause was lost, and that he would make application at said Term to have a copy thereof supplied.

Affiant further states that upon some day of the June Term - The Record says the 13th day of June - the application was made to perfect the Record.

Affiant says that he has no recollection whatever of knowing or being informed that the Bond in said cause was lost, and that he has a distinct

Recollection of the application to dismiss the Writ— and that the first ~~knowledge~~ knowledge he had as he is confidently of the lost bond was on examining the Certified Record of the Case in this Court. which shows the bond was dismissed—

Affiant further says that he cannot well be mistaken upon this question because he says that said Case was appealed to this court, and that affiant dismissed the appeal at the last Term of this Court for this Division— and affiant as attorney for defendant brought suit against defendant and his Security on the Appeal Bond— sometime in May 1869. and affiant says that up to that time he could not have known that the Bond was lost as he remembers distinctly Discussing with himself whether to bring suit on the said Bond or on the Appeal Bond— that he concluded to bring suit on the latter, and that since he has had due Recollection and does not believe he knew that the Bond was lost or had been dismissed until within a few weeks. he examined the Bill of Exceptions in this Court with a view to preparing a brief therein— and affiant believes that he derived his information from said Bill of Exceptions and from no other source whatever.

he was informed or

Affiant further says that the Bill of Exceptions shows that on the 13th day of June A.D. 1859 - application was made to complete the Record, and leave granted to do so by filing a copy of Writ & return thereon - Affiant further says that the Minutes of the Judges docket shows that Leave was granted to perfect the Record at the same time. Affiant further says that the affidavit referred to in the application for a continuance of this case - as stating that the Bond as well as Writ was lost - was made as it appears from the date thereof after the application and after the Leave granted to amend the Record - the affidavit is dated the 14th day of June and appears originally to have been dated the 16th as affiant thinks is manifest from an inspection thereof, although it appears from Clerk's indorsement to have been filed the 13th day of June when the Leave was granted to perfect the Record on the 13th and the copies of the lost record ordered filed the 16th day of June. ~~Affiant Makes this affidavit for the purpose of having the order of Continuance in said Cause set aside.~~

~~David Eccord~~

~~Defts Attys.~~

Affiant further says that his points
and authorities has been submitted
and that ~~some days~~ yesterday he was informed
by telegraph to come up to Court in the afternoon
before the day the order of Continuance was
made and that he consequently learning
that arrived in Court a few minutes
after the Continuance had been
granted. Affiant says that he then informed Plaintiff's attorney he would move to set aside the order for a Continuance
this affidavit in order to have
the order of Continuance set
aside in said cause, and that it was inconvenient for him before now to do so.
in consequence

Subscribed & sworn to Daniel Evans
before me this 7. 1865
Leland Clk.

Filed
Order of Continuance
Affidavit

State of Illinois } Third Grand Division
Supreme Court. } April Term 1866

D. Buckshank }
vs } Error To La Salle County Court
Robert Cogswell }

Application to set aside the order for a Continuance in said Cause and to dispense the Certiorari granted therein -

Suggestions of Defendant's Counsel

The plaintiff suggested a diminution of the Record for the reason - that the Judges' docket shows that at the term after the trial of the cause the Plaintiff made application to perfect the Record - that said Judges' docket shows that leave was granted "to perfect the Record", and that the Clerk's docket shows that leave was granted to perfect the Record by filing a Copy of the Writ and Return. It is this restriction of the leave to perfect the Record as reported by the Clerk on his docket. which is the ground for the suggestion of diminution which has been made -

The Defendant by his Counsel insists - that upon such a Record

determination can not be suggested.
The Record in this Case is fully certified. and determination can not be alleged of a thing which is fully certified —
See Tomlin's Law Dictionary and the Cases there cited — Vol 1 — under the title determination / page 355 —

2d — The notes made by the Judge on the docket are not a part of the Record. Nor Evidence for any purpose. Nor can a judgement be amended by them — Boon vs Boon — 8. J & Mc. 318. U S Digest. (Annual) Vol 1 page 34 Articles 34 & 35 —
Where it is proposed. because the Judges docket shows that leave was granted to perfect the Record to make it appear that the Clerk's docket is wrong in reciting in what respect leave to perfect was granted — The Judge's docket can not be used for this purpose —
The Record which the Clerk is required to make is the final Record of the cause conforming to the judgement

Roll of the Common Law,
and is the only legal Evidence of
the judgement - to be Established
by the Production of the Record
itself or an attested Copy by the
Clerk - Ansley vs Carlos 9 Ala. 973.
U S Digest. Vol 1. Page 122. article 16.

3rd Is the minutes of the judges docket
are not Evidence for any purpose
as decided in the above Elected case -
It does not appear that any application
has been made to perfect the Record
beyond what the Bill of Exceptions.
shows. Surely at this Stage of the case at
Bar - when it has before been dismissed
from this Court on appeal -
and after being brought up on
Writ of Error - and Error joined
and defendant's argument submitted,
it is too late to ask for a Continuance
upon the Ground that the plaintiff
desires to get the Record of the
Cause amended -
It is certainly not a good reason
for a Continuance of a Cause in
this Court because the party
applying therefor - says he thinks
he can get a different Record in

the Case.

48. Under all these circumstances it is apparent that the Court below if application be made further to perfect the Record would not be exercising a reasonable discretion in allowing it to be done. It is insisted that if they make application again to perfect the Record - it will be after when four terms of the Court have elapsed since the previous application for this purpose - and so dangerous and doubtful a power as that of amending Records ought to have some limitation of time in which it may - if at all, be exercised —

Daniel Breen
Attorney for defendant

Appellant's Counsel to file Transcript of Record in this Court to Continue the Order for a Continuance of the Cause to the next Term of the Court —

D. Breen
Atty for Appt

Filed May 29. 1859
A. Edmund
Clerk

42 24

State of Illinois } Third Grand Division
Supreme Court } April Term A.D. 1860.

A. Buckbank
Plaintiff in Error
vs. } Error to La Salle Co Court
Robert Cogswell
Defdt in Error

D. Evans being first duly sworn on oath deposes and says that he was attorney for the defendant below on the trial of the said cause which took place at the March Term 1859 of said County Court.

Affiant further says that at the June Term of the said County Court he was notified by one of the plaintiff's attornies that the Writ of Replevin in said cause was lost, and that he would make application at said Term to have a copy thereof supplied.

Affiant further states that upon some day of the June Term - The Record says the 13th day of June - the application was made to perfect the Record.

Affiant says that he has no recollection whatever of knowing or being informed that the Bond in said cause was lost, and that he has a distinct

Recollection of the application to dismiss the Writ— and that the first ~~knowledge~~ Knowledge he had as he is informed of the lost bond was on examining the certified Record of the Case in this Court which shows the bond was dismissed—

Affiant further says that he cannot well be Mistaken upon this question because he says that said Case was appealed to this court, and that affiant dismissed the Appeal at the Last Term of this Court for this decision— and affiant as attorney for defendant brought suit against defendant and his Security on the Appeal Bond— sometime in May 1859— and affiant says that up to that time he could not have known that the Bond was lost as he remembers distinctly Questioning with himself whether to bring suit on the said Bond or— on the Appeal Bond— that he concluded to bring suit on the latter, and that since he has had due Recollection and does not believe he Knew that the Bond was lost or had been dismissed until within a few weeks— he examined the Bill of Exceptions in this Court with a view to preparing a brief therein— and affiant believes that he derived his information from said Bill of Exceptions and from no other Source whatever.

he was informed or

State of Illinois } ss Third Grand Division
Supreme Court } April Term 1860

A. Carrickshank }
v } Error LaSalle Co. Court
Robt. Copsell }

E.F. Bull atty for said plff being first duly sworn says that he has had the management of said cause in this court. That at the time leave was given by the court below at the June term 1859 to complete Record in said cause said defendant by his atty Evans told affiant that he did not care about being present when a copy of the last record was presented for filing. and affiant supposed until he examined said depts. bill & joints that the record showed when dfts atty was present leave to file both writ & bond, - That such was the leave asked for by affidavit made for leave to amend or complete record in court below. and affiant believes that from the minutes of the court below he will be enabled at next June term of said County Court to obtain an amendment of the record so as to show that leave was

given to file copies of both original bond and writ

Subscribed & sworn to before me this 2d. May 1860 —

E. H. Bell

L. Leland Clerk of Sup. Court
by J. B. Rice Deputy

Filed May 1 1860
L. Leland
Clerk

No 24
A. Arnold Plaintiff
vs
Robt. Caponnis

Know all Men by These Presents, That we Alexander Crickshenk as principal, and Richard Cody as security, are held and firmly bound unto Robert Cogswell in the penal sum of four hundred Dollars ($400)— good and lawful money of the United States, for the payment of which, well and truly to be made, the said Alexander Crickshenk & Richard Cody bind themselves & their heirs, executors, and administrators, jointly, severally, and firmly by these Presents.

Witness, our hands and seals this 24th day of June A. D. 1859

The Condition of the above Obligation is such, That, whereas, the above named ~~Alexander Crickshenk~~ Robert Cogswell did, at the March Term of the County Court, held in and for the County of LaSalle in the State of Illinois, A. D. 1859 recover a judgment against the above bounden Alexander Crickshenk in an action of replevin for the costs of suit, and also for a writ of return heredin ~~for the sum of~~ to reverse which said judgment, the said Alexander Crickshenk has sued out a Writ of Error from the Supreme Court, within and for the Third Grand Division of said State. Now if the said Alexander Crickshenk shall duly prosecute said Writ of Error, and pay, or cause to be paid, the amount of said judgment & all judgments, costs, interest and damages which the said Supreme Court shall adjudge against him and abide the order and judgment of said Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

Alexander Crickshenk [SEAL.]

Richard Cody [SEAL.]

[SEAL.]

[SEAL.]

Just had time to get this signed

State of Illinois }
LaSalle County } ss

E. F. Bull being first duly sworn according to law deposes & says he is well acquainted with the pecuniary circumstances of Richard Cody & that he considers him worth at least one thousand dollars over & above all homestead or other exemptions and over and above his debts

E. F. Bull

Subscribed & sworn before me
this 25th day of June A.D. 1859
L. Leland Clerk of the Sup Court
by J. B. Rice Deputy

Filed June 24 1859
L. Leland
Clerk

Alexander Bruce Respondent
vs
Robert Caswell
Sands, Board &
Affidavit of Justice.

53 25

State of Illinois } ss. Third Grand Division
Supreme Court } May April Term A.D. 1860

A. Comickshank
Plff. in Error
vs.
Robert Coppard
Deft. in Error
} Error to LaSalle County Court.

Suggestions on behalf of Plaintiff in Error to defendants motion to set aside continuance in above cause —

1st. It seems to me manifestly unfair and unjust that the defendant should at this late day obtain an order setting aside ~~said~~ the continuance herein, especially when his suggestions were filed at the time the application for a continuance was made and the court has passed upon the questions presented by the parties both plaintiff and defendant — The order for a continuance was entered some time since and this is the first time this motion is made. If the defendant had had no opportunity to be heard and had not in fact been heard upon the original motion he might now claim this privilege with a better grace —

2nd. The court will see by the very case presented by the defendant which appears in a still stronger light from the affidavits made and filed herein in support of said continuance, that leave was given in the court below to perfect

the record and the affidavit upon which that leave was granted set up the fact that both bond and writ were lost and asked leave to perfect record by filing copies of same, ~~then clerk made up &~~ which leave was granted and three days thereafter during a term of the court the copies were presented to the court and after examination and proof were approved and ordered filed, the same affidavits also show that at that time the Defendants attorney D. Evans Esq was present at the time leave was given but fails to show that he was present at time the same were filed. Now one of the points he makes in this court is that it was error for the court to give leave to file bond in absence of Defts. atty without any notice to him, when the facts are that he was present at the time the leave was given and the certiorari granted herein was to enable plaintiff to perfect the record so as to show those facts, If there is nothing in the point the defendant ought not to have made, if there is I submit the plaintiff has a right to have the mistakes of the clerk of the court below corrected Do as to show the facts and not allow the Defs. to take advantage of mistake of the clerk as they exist & for these reasons this court I presume granted said continuance and as no bad faith, or fraud is charged nor one of the facts set forth in the affidavits for continuance denied, I am slow to believe that this court will go back of its former decision at this late day, specially when such manifest

wrong must be done the plaintiff by such a course —

3rd. The court below has the undoubted right to correct the misprision of the clerk in entering up the record, and when the affidavits and minutes, from which record was made show that leave was granted to file copy of bond and writ when the defts. atty was present and the clerk has so made up the record as to show another state of facts to exist, or rather fails to show the facts as they exist, it seems to me clearly the duty and right of the courts to correct such mistakes, especially when parties seek to take advantage of them, and argue that the court erred in moving in the matter during their absence when they in fact were present —

4th. In regard to the 3rd point made by Defts. I dont think any laches can be imputed to the plaintiff. It appears from the affidavits on file that the plaintiff was not aware of the mistake made by the clerk until the point was presented by the Defendant in this Court, and as the Deft. seeks to take advantage of the fact that the record fails to show that he was present when leave was given to file copy of bond, when he was in fact present and there are facts enough befor the court below to show that the record failed to show the Defts. presence or that of his atty Evans, through a mistake of the clerk. It seems to me eminently proper that the certiorari should be granted and cause continued and such was the decision of this court on the motion for continuance

5th & The last point made by Defendants atty. is in short a recapitulation of his argument for setting aside this continuance, admitting as he virtually does, that the errors I claim were made by the clerk in the court below, seeking here to take advantage of those errors, claiming that the court below has committed an error which he asserts is fatal to the plaintiff, admitting that such apparent error is caused by the mistake of the clerks, and even fighting against the correction of that mistake places it seems to me the Defts in no very enviable situation.

Respectfully
E. F. Bull
Atty Plffs

The plaintiff desires also to refer to the affidavits on file made for in support of the Motion for continuance, the truth of which the Defts attorney does not seek to or attempt to controvert. I know nothing personally about the apparent "difference" between the date of filing and date of affidavit there may be an apparent difference but if there is it is clearly a clerical mistake, the filing of the affidavit ought to govern.

E. F. Bull
Plffs Atty

Suggestion by Plffs Atty
Mo. to set aside Continuance

Filed May 29, 1860
L. Leland
Clerk

Clerk's file writs Papers
E. F. Bull
Plffs Atty

Affidavits
Plff's Motion
Affidavit Opposed
Deft's Motion
Affidavit in Support

State of Illinois } Third Grand Division
Supreme Court } April Term A.D. 1860

A. Quinchbank
vs
Robert Oglesbee } Error to Lasalle County
Court.

The Counsel for defendant in Error, would resist the motion of plaintiff in Error for a Continuance, founded upon a Suggestion of a diminution of the record, & the affidavits filed in support of said Suggestion, for the following reasons among others.—

The affidavits do not show any diminution of the record.—

On the contrary thereof they do show that the Clerk of the Court below, had certified a full & perfect copy of the record, & that the plaintiff in Error, by this motion, seeks an opportunity to apply to the Court below to add to said record that which is not now included therein.—

Should such opportunity be afforded Third.— If the Plaintiff refused to in the affidavits to amend at all, during one year that elapsed since such

mistake was committed, & plaintiff in Error had had ample opportunity to correct the same long ere this, & his failure to do so can only be accounted for upon the ground of gross negligence & wilful design.—

The copy of the record on file in this case, was obtained as early as June 27. 1859, at the same was filed in this Court on that day.

No less than three terms of the Lasalle County Court, have been held since that date, & yet no effort has been made to have said record corrected.—

And shall said plaintiff in Error, at this late hour, into all this case is about to be reached in its regular order on the docket, be allowed to take advantage of his own wrong

If this motion prevails, a delay of one year is obtained, & then he will be rewarded for a failure to make due preparation of his case, & instead of being stimulated to greater diligence in future, will be encouraged to try the same, or some other equally objectionable experiment

Daniel Logan
for defendant in Error

24 ~~2~~

A Conick & Shank
vs
Cogswell
" c

Objections to Auditors
Report Continued
" c

Filed May 1st 1860
L. Leland
Clerk

State of Illinois } ss Third Grand Division.
Supreme Court } April Term 1860

A. Carrickshank
Plff. in Error
vs
Robt. Coppell
Deft. in Error

Error to LaSalle
Co Court

E. Follett Bullbring first duly sworn according to law on oath says that he was one of the attorneys for said plaintiff in the trial of said cause below. That said cause was tried at the March Term of the County Court of LaSalle County for the year A.D. 1859. That after said Term of the County Court, upon an application of said plaintiff to the Clerk of said Court for a certified copy of the record in said cause it was discovered that the original writ of replevin and the replevin bond were lost, and that at the June Term 1859 of said Court an application was made by affiant to the court for leave to perfect the record, and that the affidavit upon which the leave was granted states that the bond and writ

of replevin were both lost and leave was asked by Plff. to supply the same that at the time such leave was asked and granted D. Evans attorney for said Deft. was present. That the Judges docket for the June Term of the said County Court shows that leave was given to perfect record, that the clerks docket shows that leave was granted to file copy of original writ, and that the record appears to have been made from the clerks docket and not from the Judges. Affiant makes this affidavit for the purpose of obtaining a continuance of said cause and enabling Plaintiff to obtain a correction of the record in said County Court — Affiant further states that page nineteen of the record should show that leave was given to complete record by a copy of said original writ and return thereon endorsed and by a copy of the original replevin bond, whereas it only shows that leave was given to file copy of writ and return —

E. Follett Bull

Subscribed & sworn to before me this 25th day of May 1860

R. Lindley, Clk

E. D. Smith Dep

State of Illinois }ss
LaSalle County } E. L. Hunick being first duly sworn on oath says that he is Deputy Clerk of LaSalle County Court and was during the whole of the year A.D. 1859. that he had charge of and kept the Clerks docket of said court for both the March and June Terms of said year, and was in constants attendance at each of said Terms - That in the Case of Alexander Smickebank against Robert Coyne the Affidavit for leave to complete record made at June Term of said Court shows that the original writ and Bond in said Cause was lost, that the ~~Clerks~~ Judges docket shows that leave was granted to complete record ~~which leave was granted on said affidavit~~ - That the record shows that at that time D. Evans as attorney for Defendant was present - That the Clerks docket kept by Affiant shows only that leave was granted to file copy of original writ and return thereon endorsed and that the record in this Cause

was made up from the clerks docket and not from the Judges —

Subscribed & sworn to before me this 30th day of April 1863

L. L. Derrick

P. Lindley Clerk

No 24

H. Comstock &c
Pff in error
vs
Wm. C. Goodale
Deft. in error

Pff. for cont. and
Irregularities of Practice
of Record

Filed May 1st 1863
T. Lilburn
Clerk

State of Illinois } ss Third Grand Division
Supreme Court } April Term 1860

A. Comstock
Plff in error
vs
Robt. Cornell
Deft. in error
} Error to La Salle Co. court —

The Plff. suggest the following diminution of record viz:
The record shows page 19 "that leave was given to complete record by filing a copy of original writ and return which is lost." whereas it should show that "leave was given to complete record by filing copy of original Bond and original writ and return thereon" and that Defts atty appeared and excepted —
— See affidavits filed herewith —
See record pge 19 —

E. H. Bull
Plffs atty

~~2~~ 24

A. Comickshank
Pff in error
vs
Robt. Coyne
Deft in error

Suggestion &c & Rule

Filed May 1st 1860
L. Leland
Clerk

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

APRIL TERM, A. D. 1860.

Alexander Cruickshank, Plaintiff in Error, vs. Robert Cogswell, Defendant in Error.
Error to La Salle County Court.

ABSTRACT OF RECORD.

This is an action of Replevin in the cepit and detinet, brought by Plaintiff in Error against Defendant in Error to recover a dark or black horse. Pleas—1st, Non Detinet. 2nd, Property in Wm. D. Briggs. 3d, Property in Defendant. 4th, Property in said Briggs, judgment in favor of John H. Buck, execution issued on the same and placed in the hands of Defendant as Constable, and levy by virtue thereof on the horse in question.

To the first plea plff. filed general replication, and to the others replied property in himself and not in Briggs or defendant.

Page of Rec.

1 Filing of affidavit and for writ of replevin October 19th, 1858.

2 Copy of affidavit for replevin.

3 Plaint and declaration in replevin filed October 19th, 1859.

4 Writ of replevin to Sheriff of La Salle County issued Oct. 19th, 1858. Copy of same.

5 Copy of writ continued.

5 Writ of replevin returned October 20th, 1858.

6 Copy of return and endorsement of Sheriff.

6 Demurrer to plaintiff's declaration filed Dec. 7th, 1858, and copy of same.

7 Demurrer overruled December 7th, 1858.

7 Pleas by Defendant filed Dec. 8th, 1858.

8 1st plea non detinet, concluding to the country, similiter joined by plff.

8 & 9 2d plea by deft., property in Wm. D. Briggs.

9 3d plea by deft. of property in deft.

9, 10 & 11 4th plea by deft., property in Briggs, judgment against Briggs in favor of John H. Buck, execution issued on judgment and delivered to defendant as constable, and levy on property in question as the property of Briggs.

12 Several replications to defendant's pleas filed December 8th, 1858.
1st replication denies property in Briggs and claims property in plaintiff.

13 Replication to 2d plea denies property in defendant.

13 Replication to fourth plea denies property in Briggs and claims property in plaintiff.

14 & 15 Trial had December 14th, 1858, and Jury disagreed.

16 Second trial had 15th of March, 1859, and verdict for defendant. Motion for new trial by plaintiff overruled and exceptions.

17 March 16th, 1859, motion in arrest of judgment overruled, and exceptions by plaintiff.—Judgment for costs against plaintiff and order for return of property.

18 Appeal prayed to Supreme Court, and June 13th, 1859, leave to supply writ, bond and endorsements thereon, the writ and bond having been lost.

19 Copy of lost bond and writ presented and approved by Court, and ordered to be filed as a part of original record. see pages 2 to 5 Supplemental Record

21 Bill of exceptions filed on 17th March, 1859, being one of the days of the March term, 1859, of said Court, shows that on the trial of said cause the plaintiff introduced as evidence the following bill of sale for the property in question :

21 *May 1st*, 1857.

ALEX. CRICKSHANK—Bought of W. D. BRIGGS, one dark or black Horse, now being used by him, subject to his (ac.) order at any time. $80.

Rec'd payment, W. D. BRIGGS.

22 Plaintiff also introduced Henry Boermaker, who testified that he was in the employ of plaintiff in Oct., 1858, as stable keeper—that defendant came to the stable and took away the horse—that Briggs was with him—that horse was a dark or black horse, and had been delivered to plaintiff by Briggs some two or three months before that time. Defendant admitted it was the same horse in controversy.

Plaintiff also called Isaac N. Hardin, who testified that he had known the horse in controversy—that Briggs' signature to bill of sale, offered in evidence, was genuine—that plaintiff paid Briggs $80 for the horse—that Briggs told him the horse belonged to plaintiff—that

23 Briggs left at the office of plaintiff a number of small sums of money, amounting in all from $15 to 25, which plaintiff told witness at the time was for the use of the horse.

24 Plaintiff also introduced Wm. Mitchell who testified that in summer of 1858 he kept the horse in controversy for the plaintiff several weeks. At this point the defendant admitted that plaintiff had made a demand for the horse before bringing suit.

Defendant on his part called as a witness Isaac N. Hardin, who testified that he did not recollect the exact amount left by Briggs at plff's office.

Deft. then called Wm. D. Briggs, who testified that the reason why he gave the possession of the horse to the plaintiff in the summer of 1858 was that the plaintiff had a bill of sale of
25 the horse—that plaintiff told the witness he had been advised the bill of sale would not be good unless he had the possession of the horse under it—and that he gave him the possession of the horse for the purpose of strengthening the bill of sale—that in the spring of 1858 a constable was about to levy upon the horse as his property, and that plaintiff came and said he must have possession of the horse under the bill of sale to make it good, but that the next day he would lead the horse down behind the buggy and he might have him to use again. That the horse was delivered to plaintiff at that time, and he kept him till he was levied upon by the defendant.

26 Introduced transcript of record, execution, levy, &c., &c.

Briggs on his examination stated that the horse in controversy in May, 1857, was worth $200.

A. B. Hitchcock for plaintiff said it was not worth more than $125 or $130 at that time.

26 John Gallagher testified about the same as to the value.

26 Isaac Hardy that it was worth about $80.

27 James Egan for deft. testified it was worth about $150. Both parties here closed their case and no further testimony was offered by either party.

27 & 28 Instructions on the part of plaintiff from 1 to 4 inclusive.

29 The following instructions were given by the Court on the part of the defendant, to wit:

29 1st Inst. for Deft.—A sale of the horse by Briggs to Cruickshank without a delivery of the same passes no title of the horse sold, as against the creditors of Briggs having a lien, or entitled thereto, and a subsequent delivery of the horse not in pursuance of the sale, will not protect it from levy on an execution in favor of Briggs' creditors.

29 2d Inst. for Deft.—Both sale and delivery of personal property are necessary to give a valid title to the purchasers as against the creditors of the seller, and if at the time of sale a delivery of the property was not intended by the parties thereto, a subsequent delivery will pass no title as against judgment creditors of the seller.

29 & 30 3d Inst. for Deft.—In order to exempt personal property in the possession of the purchaser thereof from levy on execution in favor of the creditors of the seller, there must have been a sale and an intention at the time of the sale on the part of the purchaser to take, and on the part of the seller to deliver possession of the thing sold, or an actual delivery thereof, and if the seller should come into the possession of the property subsequently but not under the sale, such possession will not perfect the sale as to the creditors of the seller, or protect the property as against judgment creditors of the seller.

30 4th Inst. for Deft.—If at the time of the sale of the horse no time was appointed for the delivery of the same, such delivery must be made in a reasonable time, otherwise the sale will be deemed null, as against the creditors of the seller, and one year is not such reasonable time where no obstacle is shown to exist to a more speedy delivery.

32 9th Inst. for Deft.—The evidence, in order to enable the plaintiff to recover should establish by a preponderance of evidence that the sale to him was absolute and bona fide as against the creditors of Briggs, and that the horse sold was delivered within a reasonable time after the sale, if there was such sale.

32 & 33 11th Inst. for Deft.—If the title of the plaintiff arises solely from the bill of sale, and the jury believe the bill of sale to have been intended as a security, and for the purpose of defrauding the creditors of Briggs, and no delivery of the horse by Briggs to Cruickshank was intended by the parties, or given within a reasonable time, and the horse has been taken by virtue of an execution against Briggs, then the plaintiff is not entitled to recover.

33 12th Inst. for Deft.—A sale of the horse by Briggs to Cruickshank without a delivery of the same is void as against creditors of Briggs, and a subsequent delivery not in pursuance of the sale but for the purpose of preventing a levy on an execution against Briggs, is not such delivery as will make the sale not void as against creditors.

33 Plaintiff objected to the giving of each of above instructions and excepted to the ruling of the Court in giving the same.

34 Verdict of jury for deft. Motion by plff. for new trial overruled and exceptions. Motion in arrest of judgment overruled and exceptions.

35 Certificate of County Clerk.

Errors assigned:

1st. The Court erred in giving defendant's instructions to the jury.

2nd. The verdict of the jury was contrary to the law.

3rd. The verdict of the jury was against the evidence.

4th. The verdict of the jury was against the law and evidence.

5th. The Court erred in overruling the plaintiff's motion for new trial.

6th. The Court erred in overruling plaintiff's motion in arrest of judgment.

E. F. BULL, Plff's Atty.

62

A. Comichaheuk

vs

Robt. Coppock

Abst Record

F. C. S. Appl. 20. 1865.

Stelandelk.

State of Illinois
La Salle County ss.

Pleas, Proceedings and Judgments, held and taken in and before the La Salle County Court, in the State of Illinois, at a regular term thereof commenced and held at the Court House in Ottawa in said county on the Sixth day of December A.D. 1858 and of the Independence of the United States of America the Eighty third

Present: Hon. John C. Champlin Judge
Philo Lindley clerk
Francis Warner Sheriff.

Page 1

Be it remembered that heretofore to wit on the Nineteenth day of October A.D. 1858, Alexander Chickchanta filed in the office of the clerk of said La Salle county Court his affidavit, and plaint in Replevin, praying for a writ of Replevin, which affidavit and plaint are in the words and figures following to wit

Affidavit

State of Illinois } ss County Court for said county.
La Salle County } December Term thereof A.D. 1858

Alexander Cruickshank being first duly sworn according to law on oath deposes and says that he is the owner, and is now lawfully entitled to the possession of the following described goods and chattels to wit, one dark or black horse formerly purchased by affiant of W. D. Briggs, of about the value of one hundred dollars, Affiant further states that the said horse has not been taken for any 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 said affiant, liable to execution or attachment, Affiant further states that said horse has been unlawfully and wrongfully taken and that the same is now unlawfully and wrongfully detained from the possession of said affiant by one Robert Cogswell of said La Salle county. Affiant therefore prays for a writ of replevin pursuant to the Statute in such case made & provided. — A. Cruickshank

Affidavit

Subscribed & sworn to before me
this 18th day of October A.D. 1858
Daniel Cosgrove J.P.

Plaint -

3

State of Illinois } County Court for said County
La Salle County } December Term thereof A.D. 1858

Alexander Brickshank

vs

Robert Cogswell

Replevin

Strain & Bull Attorneys

Alexander Brickshank, the plaintiff in this suit by Strain & Bull his attorneys complains of Robert Cogswell the defendant, in a plea of Replevin, for that heretofore to wit: on the fifteenth day of October A.D. 1858 at the county aforesaid, the said plaintiff was the owner, and was possessed of the following described personal property to wit: One Dark or Black Horse formerly purchased by said plaintiff of one H. D. Briggs, and that afterwards to wit: on the day and year last aforesaid the said Robert Cogswell did then and there unlawfully and wrongfully take and now doth unlawfully and wrongfully detain the possession of said property from said plaintiff. The said plaintiff therefor prays for a writ of replevin for said property directed to the sheriff of said county commanding him to replevy the said goods and chattels from the possession of said defendant, and that the same may be

1

placed in the possession of said plaintiff
Alexander Cruickshank
By Strain & Bull
His attys -

And afterwards to wit, on the said 19th day of October A.D. 1858, a writ of Replevin issued out of the Clerk's office of said court in the words and figures following, to wit

Writ of Replevin

State of Illinois } ss.
La Salle County }

The People of the State of Illinois,
To the Sheriff of said County - Greeting
If Alexander Cruickshanks of said county of La Salle shall give you good and sufficient security to prosecute his suit to effect and without delay, and to make return of the following described goods and chattels, the property of said Alexander Cruickshanks, to wit
One dark or black horse of about the value of One Hundred dollars. - which Robert Cogswell also of said County, forcibly and unlawfully took, and unjustly detains - and return the said property, if return thereof be awarded - and further to save and keep you harmless in replevying said property; then

2

you are to cause the said goods and chattels to be replevied and delivered to said Plaintiff without delay. And summon the said Defendant personally to be and appear before our County Court in and for said LaSalle County, on the first day of the next term thereof, to be holden at the Court House in said LaSalle County, on the first Monday of December A.D. 1858, to answer to the said plaint of the said Plaintiff for wrongfully taking & unjustly detaining the goods and chattels aforesaid, and make due return of the Bond to be taken of the said Plaintiff as aforesaid, together with this writ, to the Clerk of our said Court, with an endorsement hereon as to your doings in the premises

Witness Philo Lindley Clerk of said Court, and the seal thereof, at Ottawa in said County, this this 19th day of October A.D. 1858

Seal

Philo Lindley Clerk

E.L. Merrick Dep't

And afterwards to wit on the 20th day of October A.D. 1858, said writ of Replevin was returned to the office of the Clerk of said Court, with the following endorsement.

Sheriffs return on writ.

therein, to wit -

"Executed the within writ by replevying the property therein named, and delivering the same to the plaintiff, also by reading the same to the within named defendant this 20th day of October A.D. 1859.

Eri L. Hatemann Sheriff
per H. B. Chapman Dep't"

Afterwards to wit on the Seventh day of December A.D. 1858, one of the days of the December Term of said Court, said defendant by D. Evans his attorney filed a demurrer in said cause in the words and figures following to wit:

Demurrer

Alexander Brickshank
vs.
Robert Cogswell

In the County Court of La Salle County December Term A.D. 1858

The said defendant by his attorney Daniel Evans, says that the plaintiffs declaration and the matters therein contained in the manner and form as they are therein set forth are not sufficient in Law.

D. Evans.

7

And afterwards to wit on the said 7th day of December 1858, being one of the days of said term of said court certain proceedings were had and entered of record in said court in said cause in the words and figures following to wit:

Alexander Brickshanks
vs.
Robert Bogwell
} Replevin -

This day comes the defendant by Evans his attorney and files his demurrer to the declaration herein - whereupon comes the plaintiff by Strain & Bull his attorneys and after hearing the arguments of counsel said demurrer is overruled by the court, and on motion leave given to defendant to plead herein.

Demurrer overd

And afterwards to wit on the 8th day of December A.D. 1858, said defendant by his said attorney filed several pleas in said cause in the words and figures following to wit:

8

State of Illinois } In the County Court of
La Salle County } said County. December
Term A.D. 1858

Alexander Brickshank

vs. Replevin

Robert Cogswell

Plea.

1 And the said defendant by his attorney D. Evans comes and defends &c, and says that he did not at the said time when & where &c wrongfully detain the goods and chattels in the said plaintiffs declaration mentioned or any part thereof, in manner and form as therein alleged, and of this he puts himself upon the country &c —

D. Evans
atty for defendant

And the plain doth
the like by Strain & Bull
His attys.

2 And for another and further plea, in this behalf, by leave of Court &c the Defendant says actio non because he says that the said goods & chattels in said declaration mentioned, at the said time when where &c were the property of one William D. Briggs, and not the property of the plaintiff, and

this he is ready to verify, wherefore he prays
Pl. 9 judgment if the said plaintiff ought to
have his aforesaid action thereof against
him &c

3. And for another & further plea in this
behalf by leave of Court &c the defendant says
actio non because he says that the said goods
& chattels in the said declaration mentioned
at the time when &c were the property of the
defendant and not the property of the
plaintiff. And this he is ready to verify
Wherefore he prays judgment
if the said plaintiff ought to have his
aforesaid action thereof against him
D. Evans atty for deft

4. And for another & further plea in this
behalf by leave of Court, the defendant says
actio non, because he says that one William
D. Briggs at the time when &c was the
owner of the goods & chattels in the said
declaration mentioned, and that on the
fifteenth day of October 1858 John H. Buck
did recover a judgment against the said
William D. Briggs, before Daniel Cosgrove
a justice of the peace in and for La Salle
County, State of Illinois, in the words and
figures following: viz.

this he is ready to verify, wherefore he prays
Pl. 9 judgment if the said plaintiff ought to
have his aforesaid action thereof against
him &c

3. And for another & further plea in this
behalf by leave of Court &c the defendant says
actio non because he says that the said goods
& chattels in the said declaration mentioned
at the time when &c were the property of the
defendant and not the property of the
plaintiff. And this he is ready to verify
Wherefore he prays judgment
if the said plaintiff ought to have his
aforesaid action thereof against him
D. Evans atty for deft

4. And for another & further plea in this
behalf by leave of Court, the defendant says
actio non, because he says that one William
D. Briggs at the time when &c was the
owner of the goods & chattels in the said
declaration mentioned, and that on the
fifteenth day of October 1858 John H. Buck
did recover a judgment against the said
William D. Briggs, before Daniel Cosgrove
a justice of the peace in and for La Salle
County, State of Illinois, in the words and
figures following: viz.

p. 10

John H. Buck
vs
William D. Briggs

1858. October the 15th this day came before me the defendant. William D. Briggs, and confessed judgment on his note in favor of John H. Buck, for the sum of One hundred dollars debt, and thirty eight cents costs of suit. Said note was made to Genge H. Buck February the 4th 1858 for the sum of $97.00 with use.

costs 38.
Execution & oath 31.

October the 15th 1858 appeared Genge H Buck and swore out Execution. Gave writ to Robert Cogswell Constable,

Which said writ delivered to Robert Cogswell a qualified constable in said La Salle county. State of Illinois, was in the words and figures following viz -

State of Illinois } The People of the State of Illinois
La Salle County } To any constable of said County
Greeting -

We command you, that of the goods and chattels of William D. Briggs in your county you make the sum of One hundred dollars debt and ~~dollars~~ and thirty eight cents costs which John H. Buck lately recovered before me in a certain plea against the said William D. Briggs, and hereof make due return to me within seventy days from

P. 11

this date. Given under my hand, & seal
this 15th day of October A.D. 1858

Daniel Cosgrove [L.S.]
Justice of the Peace

Which said Execution was indorsed in the words & figures following viz

"John H. Buck
vs.
William D. Briggs
Execution
demand $100.
costs 38-
Execution & with 31-

Received this 14 Oct 15th at 3 O.clock P.M. R. B. Cogswell Const.

Served this 14 by levying on one Black Gelding Horse, Saddle, Bridle Martingals, One single Harness, one string sleigh bells, two horse blankets, two set singles, and one Buggy this 15th day of October 1858

R. B. Cogswell Const"

By virtue of which said Execution at the time when where &c this defendant was possessed of the goods and chattels in said declaration mentioned and this he is ready to verify. Wherefore he prays judgment if the plaintiff ought to have his aforesaid action thereof against him

D. Evans Defts atty

And afterwards to wit on the said 8th day of December A.D. 1858. being one of the days of said term of said Court, said plaintiff by Strain & Bull his attorneys filed his several replications to the defendants pleas filed herein, in the words and figures following to wit:

State of Illinois } County Court, December
La Salle County } Pl. Term thereof A.D. 1858

Alexander Merickshank

vs.

Robert Cogswell } Replevin

Replications

And the said plaintiff says he ought not to be barred of his action aforesaid by reason of the defendants second plea because he says that the said property at the time when &c was the property of the plaintiff as alleged in his declaration and not the property of the said William D. Briggs, as is by said plea supposed. and of this he puts himself upon the country, by

Strain & Bull,
His attys.

& Defendant doth the like

D. Evans Defts atty.

13

And the plaintiff as to the defendants third plea says, precludi non because he says that the said property at the time when &c was the property of the plaintiff as in said declaration alleged, and not of the defendant, as by said plea is above supposed, and of this he puts himself upon the country.

By Strain & Bull
his attys.

& defendant doth the like

And the plaintiff as to the defendants fourth plea says precludi non because he says that the said goods at the time when &c, were the goods of the plaintiff, as by said declaration is alleged, and that they were not the property of said Briggs and were not seized & possessed by the defendant in the time & manner set forth in said plea, and of this the said plaintiff puts himself upon the country by

Strain & Bull
his attys

Defendant doth the like

Defts atty. D. Evans

14

And afterwards to wit on the Fourteenth day of December A.D. 1868, (one of the days of said term) certain other proceedings in said cause were had and entered of record in said court in the words and figures following to wit.

Alexander Dinckshank
vs.
Robert Cogswell
Replevin

This day comes the plaintiff by Strain & Bull his attorneys, and the defendant by Evans his attorney. Whereupon came the following jurors of a jury to wit - O. B. Bignall, Jarnell Cooper, M. H. Dinock, James Morse Alexander Monger, Samuel Sharp, Daniel Samsworth, Martin Phelps, A. G. Gay, Darlin Thompson Joseph Avery and John Morrill, who were duly elected tried and sworn to well and truly try the issues herein according to the evidence - and after hearing the evidence and arguments of counsel, the jury retire to consider of their verdict, with leave to seal the same and return into Court to morrow morning

Jury

15

Afterwards to wit on the fifteenth day of December A.D. 1858. the same being one of the days of the said December term of said court, other proceedings in said cause were had and entered of record in said court in the words and figures following to wit:

Alexander Cruickshank

vs.

Robert Cogswell

Replevin

This day again came the parties herein by their said attorneys together with the jury sworn herein - who say they are unable to agree upon a verdict - whereupon they were discharged from further consideration of the cause

And afterwards to wit on the 15th day of March A.D. 1859. the same being one of the days of the March term 1859 of said court further proceedings were had and entered of record in said court in said cause in the words and figures following to wit:

16

Alexander Brickshank

vs.

Robert Bogwell

Replevin -

This day comes the plaintiff by Strain & Bull his attorneys and the defendant by Daniel Evans his attorney, whereupon come the following jurors of a jury to wit. Thomas Larkin Edward Atkins John Stout William Clayton Justus Harris, Ab. Putnam C. C. Campbell, D. D. Whitman, H. L. Dunnaway, E. H. Raymond, Stephen Morey, and Daniel Freeman, who were duly elected tried and sworn to well and truly try the issues herein according to the evidence, and after hearing the evidence and arguments of counsel the jury retire to consider of their verdict and after due deliberation thereon had return into court the following verdict to wit. "We the jury find the issues herein for the defendant"

Verdict for deft.

Whereupon the plaintiff's attorneys enter their motion herein for a new trial, which motion after hearing the arguments of counsel is overruled by the court, to which ruling of the court the said plaintiff by his said attorneys

Mo. for new trial

Mo. ovrd.

5

17

then and there excepted.

And afterwards to wit on the 16th day of March A.D. 1859, one of the days of said March Term of said court, further proceedings in said cause were had and entered of record in said court in the words and figures following to wit:

Alexander Brickshank

vs. Replevin.

Robert Cogswell

This day again comes the plaintiff by Strain & Bull his attorneys, and enter their motion in arrest of Judgment - whereupon come the defendant by D. Evans his attorney, and after hearing the arguments of counsel said motion in arrest is overruled by the court.

Motion in arrest

Overd,

It is therefore considered by the court that said defendant have and recover of said plaintiff his costs and charges by him herein expended and that he have execution therefor,

Judgment.

And ordered that a writ of return habendo issue herein

Appeal prayed

Whereupon the plaintiff prays an appeal which is allowed upon his entering into an appeal bond in the sum of Four Hundred dollars with Richard Cody, Geng H. King, or Alexander P. Hitchcock as security, conditioned as the statute requires, said bond to be filed within thirty days from the rising of Court.

Afterwards to wit on the 13th day of June A.D. 1859, one of the days of the June Term 1859 of said Court certain further proceedings in said cause were had and entered of record in said Court in the words and figures following to wit.

Alexander Brickhaus

vs. Replevin

Robert Bogsnell

This day comes the plaintiff by Strain & Ball his attorneys and the defendant by D. Evans his attorney and upon motion of said plaintiff by his said attorneys, and it also appearing that the writ issued herein is lost

14

Leave granted to Plff. to file copy of writ & bond

leave is granted to complete record by a copy of said original writ and return thereon endorsed. to which ruling of the court in thus allowing said records to be supplied the defendant by his said attorney then and there excepted.

And thereafter to wit on the 16th day of June A.D. 1859, another of the days of said term of said court, other proceedings in said cause were had and entered of record in said court, in the words and figures following to wit.

Alexander Brickshank

vs. Replevin

Robert Coyswell

Copy writ & bond filed

This day again comes the plaintiff by Strain & Ball his attorneys and presented a copy of the writ, return, bond, and affidavits; which are approved ~~by the Court~~ and ordered to be filed as part of the original record in substitution of that part thereof which was lost.

B. Ex

21

Afterwards to wit on the Seventeenth day of March A.D. 1859, one of the days of the said March Term 1859, of said Court, said Plaintiff by Strain & Bell his attorneys filed in the office of the clerk of said court his Bill of Exceptions in said cause in the words and figures following to wit:

State of Illinois } County Court.
La Salle County } ss. March Term A.D. 1859

Alexander Brickshank

vs. Replevin

Robert Cogswell

Be it remembered

Bill of Exceptions

That on the 15th day of March A.D. 1859, being one of the days of said term of said court, on the trial of the above cause the plaintiff to maintain the issues on his part gave in evidence to the Jury a paper in the words and figures, to wit:

May 1st. May 1857

Alexr Brickshank

Bought of W. D. Briggs

Bill of Sale

one Dark or Black Horse now being used by him - subject to his (a c) order at any time - $80 - Recd. Payment

Ellt

W. D. Briggs,

Be it further remembered that on the trial of said cause the plaintiff to maintain the issues on his part examined as a witness Henry Boermaker, who testified in substance that he was in the employ of the plaintiff in the month of October A.D. 1858, as stable keeper in the city of Penn: that sometime during that month William D. Briggs and the defendant Bogswell came to the plaintiff's stable: that Briggs had a bridle which he put on the horse, that the defendant had a saddle which he put on to him & that they took him away: that the horse was a dark or black horse, that said Briggs had brought to the stable of the plaintiff some two or three months before that time, which horse was admitted by the defendant, on the trial of this cause to be the same horse in controversy in this suit.

Be it further remembered that the plaintiff to maintain the issues on his part, examined as a witness before the jury in said cause Isaac N. Harding, who testified in substance, that he had known that the horse in question was in the possession of the plaintiff: that said Briggs

had told him the horse in controversy
23 was the property of the plaintiff - and
that the plaintiff had a bill of sale of
said horse - and that the signature to
the bill of sale as given above herein, was
the signature of said Briggs, and that
the plaintiff had paid $80. for the horse
in question. And on cross examination
said witness testified that he was in the
front office of the plaintiff in his employ
as a clerk, that the plaintiff and said
Briggs came from the plaintiff's back
office, to the front office, when the witness
was; that the plaintiff remarked to said
Briggs in the hearing of the witness "This
horse is still mine" and that said
Briggs in reply thereto said "Yes". and the
witness on cross-examination stated, that
said Briggs left at the office of the
plaintiff at various times - in small
sums - money amounting to $15. $20, or
$25. which the plaintiff told the witness
was paid to him by said Briggs for
the use of the horse in question.

Be it further remembered
that the plaintiff also produced and
examined in said cause as a witness
William Mitchell - that the value of

the horse in question in May 1857 from $125. to $150. that in the summer or fall of 1858, he. witness had kept said horse on his farm for the plaintiff for some two or three weeks, and that at that time the horse was worth about $100.

At this stage of the trial it was admitted to the jury by the defendant that the plaintiff before the bringing of this suit had demanded the horse in question from the defendant.

Here the plaintiff rested his case

Be it further remembered that the defendant to maintain the issues on his part, called as a witness Isaac N. Harding, who testified that he did not remember the amount of the money left or paid in by Briggs at the office of the plaintiff but thought it might be as much as $25.

The defendant then called as a witness the said William D. Briggs who testified in substance as follows. That the reason why he gave the possession of the horse to the plaintiff in the summer of 1858 was because the plaintiff had a Bill of sale of the horse, that the plaintiff

25

told the witness that he had been advised that the bill of sale would not be good unless he - plaintiff had the possession of the horse under it, and that he gave him the possession for the purpose of strengthening the Bill of Sale.

(Before the examination of this witness the plaintiff objected to his examination on the ground of competency - which objection was by the court then and there overruled - to which ruling of the court the plaintiff then and there excepted) Briggs further testified that sometime in the spring of 1858 there was an execution in favor of one Norton against him (Briggs) and the constable was about to levy his execution on said horse, when Cruickshank told Briggs that he plaintiff must have possession of the horse to make the Bill of Sale good, but that the next day he would lend the horse down behind his buggy, and he Briggs could have him to use again. That the horse was then delivered to Cruickshank, who kept the horse from thenceforth till he was levied on by the defendant.

The defendant then gave in

evidence to the jury the Transcript of a judgment (which is set forth in said defendants fourth plea) in favor of one John H. Buck against said William D. Briggs for the sum of $100. & costs rendered by Daniel Cosgrove a Justice of the peace of said county, which judgment was confessed by said Briggs on the 15th day of October 1858 on which judgment an execution, (which is also set forth in said Defendants fourth plea) was on the same day sworn out by one George H. Buck, and delivered to the defendant as a constable of said county, who on the same day levied it on the house in question.

Be it further remembered that said witness Briggs on his aforesaid examination stated that said house on the 1st of May 1857 was worth $200.

Be it further remembered that the plaintiff then called as a witness one Alexander B. Hitchcock who testified that said house on the first of May 1857 was worth from $125. to $130. and John Gallagher who testified that said house on the 1st of May 1857 was worth from $125. to $135, and Isaac Handy who testified that at that

time the horse was worth about $80.

27 And the defendant called as a witness James Egan who testified that May 1st 1857 the horse was worth about $150. And here the defendant rested his cause - and no other & further proof was given by either of the parties on the trial of Be it further remembered that on the trial of said cause said cause, the Court at the request of the plaintiff gave to the jury the following instructions to wit.

1st " "The Jury are instructed on the part of the plaintiff, that although the possession of the horse may not have been given by Briggs to the plaintiff at the time of the execution of the Bill of Sale by Briggs to the plaintiff: yet if it was afterwards delivered by Briggs to the plaintiff under the Bill of sale - and before the delivery of the execution, such delivery would be a good delivery unless it was made to defraud the creditors of Briggs - But the Jury are not to presume in the absence of proof - that the sale and transfer was fraudulent as to the creditors of Briggs -

Given -

2nd " "The Jury are instructed that they in ascertaining the nature of the transaction

28 between the plaintiff and Briggs, will disregard all parol proof, so far as such proof may tend to vary, control, or add to the Bill of Sale in proof, unless they believe the Sale to have been fraudulent as to the creditors of Briggs"

Given

3d "The Jury are instructed that inadequacy of price, in the absence of fraud - does not invalidate a sale - and if a price has been fixed by the parties to the sale, in the absence of fraud, the parties to the sale, are bound by such contract of sale."

Given

4th "The Jury are instructed that if the proof shows that Briggs after the execution of the Bill of Sale paid money to the plaintiff for the use of the house, they have a right to take that circumstance into consideration in determining whether the possession of Briggs at and during the time covered by such payment was not the possession of the plaintiff."

Given

3 B. F.

29

Be it further remembered that on the trial of said cause the defendant asked the court to instruct the Jury in his behalf as follows:

1st. "A Sale of the house by Briggs to Buckshank, without a delivery of the same passes no title to the house sold, as against the creditors of Briggs having a lien, or entitled thereto, and a subsequent delivery of the house not in pursuance of the Sale, will not protect it from levy on an execution in favor of Briggs creditors

Given

2d "Both Sale and delivery of personal property are necessary to give a valid title to the purchaser as against the creditors of the seller, and if at the time of Sale a delivery of the property was not intended by the parties thereto, a subsequent delivery will pass no title as against judgment creditors of the seller."

Given.

3d "In order to exempt personal property in the possession of the purchaser thereof from levy on Executions in favor of the creditors of the seller, there must have been a Sale, and an intention at the time of the Sale

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on the part of the purchaser to take, and on the part of the seller to deliver possession of the thing sold, or an actual delivery thereof, and if the seller should come into the possession of the property subsequently but not under the sale, such possession will not perfect the sale as to the creditors of the seller, or protect the property as against judgment creditors of the seller."

Given

4th "If at the time of the sale of the horse no time was appointed for the delivery of the same, such delivery must be made in a reasonable time, otherwise the sale will be deemed null, as against the creditors of the seller, and one year is not such reasonable time, where no obstacle is shown to exist to a more speedy delivery."

Given

5th "If the sale of the horse by Briggs to Brickbank, although absolute on its face, was intended by the parties thereto to operate only as a security for an indebtedness due from one to the other, such sale must be regarded between the parties only as a Security, and such

Refused

Sale not accompanied with a delivery
31 of the horse to operate as a security must
be in writing duly acknowledged and
recorded."

6th " A bill of Sale of personal property intended
by the parties thereto to be in the nature
of a security, and no delivery of the
property provided for, as intended by
the parties, at the time of such sale, is
void, and a mere subsequent delivery
alone will not protect the property
from the creditors of the vendor."

Refused

7th " "If the witness Briggs sold the horse to
the plaintiff, and the plaintiff be defeated
in this suit, then the witness would be
liable to pay the plaintiff the present
value of the horse, and if that value
is greater than the amount of the Execution
levied by the defendant upon the horse
the witness is interested to the amount
of the excess, to testify in favor of the
plaintiff, and against the defendant.

Refused

8th "If the jury think it is doubtful from all the evidence, whether the plaintiff has shown a right to the house, as against creditors they should find for the defendant.

Refused

9th The evidence, in order to enable the Plaintiff to recover should establish by a preponderance of evidence that the sale to him was absolute, and bona fide as against the creditors of Briggs, and that the house sold was delivered within a reasonable time after the sale, if there was such sale.

Given

10th "If the Jury believe that the Bill of Sale was intended as in the nature of a security and the possession of the house remained with Briggs, then Briggs had a legal interest which was liable to be taken on Execution, the purchaser succeeding to the rights of Briggs.

Refused

11th "If the title of the plaintiff arises solely from the Bill of Sale, and the jury believe the Bill of Sale to have been intended as a security, and for the purpose of

defrauding the creditors of Briggs, and no delivery of the horse by Briggs to Cruickshank was intended by the parties, or given within a reasonable time, and the horse has been taken by virtue of an execution against Briggs then the plaintiff is not entitled to recover"

Given

12th "A Sale of the horse by Briggs to Cruick-shank without a delivery of the same is void as against creditors of Briggs and a subsequent delivery not in pursuance of the Sale but for the purpose of preventing a levy on an execution against Briggs, is not such delivery as will make the sale not void as against creditors."

Given

To the giving of each and all of which the plaintiff by his attorneys then and there objected - which objections were then and there overruled by the Court, (except as to 5th, 6th, 7th, 8th and 9th of said instructions which the Court then and there refused to give to the jury aforesaid) and said instructions with the exceptions aforesaid were given by the Court to the Jury aforesaid, to the overruling of which objections, and

the giving of which instructions the plaintiff then and there excepted.

And the jury aforesaid then and there thereupon retired to consider of their verdict, and afterwards the said Jury on the same day returned into Court with a verdict in favor of the defendant on the issues aforesaid.

Be it further remembered that the plaintiff then and there entered a motion for a new trial in said cause, which motion was by the court then and there overruled, to which the plaintiff then and there excepted.

Be it further remembered that on the sixteenth day of March A.D. 1859 being one of the days of said March Term of said County Court, the said plaintiff then and there moved the court in arrest of Judgment in said cause, which motion was by the Court then and there overruled. to the over= ruling of which motion the plaintiff then and there excepted and prays that this his bill of exceptions may be signed and sealed by the court, which is done accordingly.

S. C. Champlin Seal

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State of Illinois } ss
La Salle County }

I Philo Lindley Clerk
of the La Salle County Court do certify
the above and foregoing to be a true
full and complete copy of the record
of the the proceedings in the cause
wherein Alexander Brickhaust is plain-
tiff and Robert Cogswell is defendant,
and of the papers in said cause,
as appear of record and on file in
my office In Testimony whereof I have
hereunto set my hand and
affixed the seal of said Court
at Ottawa this 21st day of
June A.D. 1859

Philo Lindley Clk
L. J. Brenick Dep

Fees for Record $7.50 paid by Sr Ball

Let a supersedeas issue in this cause
Bond ~~three~~ four hundred dollars.
Richard Eddy Justy.

J D Caton

State of Illinois } Supreme Court. Third
La Salle County } ss Grand Division

Alexander Cornick Stephenk
vs
Robert Cogswell } County Court.

And now comes the said Alexander Cornick Stephenk and says that in the record and proceedings aforesaid there is manifest error in this to wit.

1st The Court erred in giving the instructions of the defendant to the jury

2nd The verdict of the jury was contrary to the law

3rd The verdict of the jury was against the evidence.

4th The verdict of the jury was against the law and evidence.

5th The Court erred in overruling the plaintiffs motion for a new trial.

6th The Court erred in overruling the plaintiffs motion ~~for a new trial~~ in arrest of judgment.

D. F. Bull
Plffs Atty

And now comes the defendant in Error and says there is no Error in the said Record A. Eccles
Deft in Error Atty

Cunningham
vs 24
Cogswell

Record &
Argt. of Errors

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Filed June 28, 1859
T. Leland
Clk

Page 1 - State of Illinois
LaSalle County ss

Record of the Proceedings Orders, Judgments and Decrees held and Taken in and before the LaSalle County Court at a regular term Thereof commenced and held at the Court House in Ottawa in said county on Monday the Fourth day of June A.D. Eighteen hundred and Sixty - and of the Independence of the United States of America the Eighty fourth

Present Hon J. C. Champlin Judge
Philo Lindley Clerk
Francis Warner Sheriff

Be it remembered that heretofore to wit on the Fifth day of June A.D. 1860, one of the days of said June Term 1860 of said Court certain Proceedings in a certain cause then in said Court pending, wherein Alexander Cruickshanks was plaintiff and Robert B. Cogswell was defendant, were had and entered of record in said Court in the words and figures following to wit

Alexander Cruickshanks
vs
Robert B. Cogswell

Replevin

This day comes the plaintiff by E. F. Buel his attorney and the defendant by D. Evans his attorney, whereupon the plaintiff by his attorney enters his motion to perfect the record herein which motion by agreement is continued to the next term.

And afterwards to wit on the 26th day of March A. D. 1861, one of the days in the March Term 1861, of said Court certain further proceedings in said cause were had and entered of record in said court in the words and figures following, to wit:

Alexander Cruickshanks
vs
Robert B. Cogswell

Replevin

This day again comes the plaintiff by E. F. Buel his attorney and the defendant by Daniel Evans his attorney and it appearing to the court that on the thirteenth day of June A. D 1859 one of the days of the June Term A. D. 1859 of this court the

Page 3.

following record was made in this Court viz:- "This day comes the plaintiff by Strain & Bull his attorneys, and the defendants by D. Evans his attorney and and upon motion of said plaintiff by his said attorney, and it also appearing that the writ issued herein is lost, leave is granted to complete record by a copy of said original writ and return thereon endorsed, to which ruling of the Court in thus allowing said records to be supplied the defendants by his said attorney then and there excepted"

And it now appearing to this Court that the affidavit upon which said leave was granted and the minutes made by the Judge of this Court at the time said leave was granted that the original writ in this suit and return thereon endorsed as well as the original replevin bond were lost and that leave was granted to supply the same by filing copies thereof- It is ordered that the Clerk of this Court enter the following order in lieu of the said order entered on the said thirteenth day of June A.D. 1859 as of said last mentioned day of March last mentioned date

day viz. This day comes the plaintiff by Strain & Ball his attorneys and the defendant by D. Evans his attorney. It appearing to the court that notice has been served upon the defendant that application would be made by the plaintiff, on the thirteenth day of June A. D. 1859, one of the days of the June Term of this court for the year A. D. 1859 to this court for leave to file a copy of the original writ of replevin herein which is lost, the return thereon endorsed and a copy of the original bond which is also lost. And it also appearing to the court that said original writ of replevin, and the return thereon endorsed as well as the original replevin bond herein are lost - leave is given said plaintiff upon motion of his said attorneys to file a copy of said original writ of replevin which is lost - the return thereon endorsed, and a copy of the original replevin bond.

To which order of the court in granting said leave and in permitting said copies to be filed the said defendant by his counsel then and there excepted

And on motion of said defendant

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by his said attorney leave is given to tender a bill of exceptions herein within ten days from the last day of this term of this Court.

And afterwards to wit on the 18th day of March A.D. 1861, a certain Bill of Exceptions was filed in the Clerks office of said Court in the words and figures following to wit:

In the County Court of LaSalle County, March Term thereof 1861.

Alexander Crickshanks
vs
Robert Cogswell
Rep'levin.

Be it remembered that on this Sixth day of March A.D. 1861 one of the days of said term of said County Court on the determination of said cause, which was an application on the part of the plaintiff further to perfect the record in said cause by correcting a misprision of the clerk in entering up the order made (hereinafter referred to) at the June Term of this Court for A.D. 1859

which record had been previously amended on the application of the plaintiff at the June Term of said County Court A. D. 1859, on the Seventh day of said term being the thirteenth day of June as the Clerk's docket shows so far as to allow a copy of the writ of Replevin and the return thereon in said suit which were alleged to be lost, to be filed and made a part of the original Record in said cause, (which was tried at the March Term of said County Court A. D. 1859) (This application made at the June Term of this Court A. D. 1860 to amend or perfect the record by correcting a misprision of the Clerk has been continued from term to term by agreement until the present term.) The plaintiff moved further to amend the record so as to show that the application of plaintiffs attorney at the said June Term of said Court A. D. 1859 was to supply a copy of the Bond in said cause as well as the writ of Replevin and the returns endorsed thereon and that the order of the Court at the time of said application in said June Term of said Court A. D. 1859 was to supply a copy of the Bond as well as the writ of Replevin and returns thereon and to

Pap 8

Alexander Cruickshank

vs.

Robert Cogswell

} Motion of Plaintiff to complete Record by making Copy writ. Leave granted.
10. Copy. Writ and Bond &c filed and approved.

(The figures in the above dockets indicate the day of the Term of the Court, but the minutes on the Judges docket made at said June Term A.D. 1859 at the time said leave was given fail to show the day of said June Term. upon which said leave to perfect said record was given,)

Which was the entire Entry of said Clerk in said Dockets for said June Term A.D. 1860.

The Plaintiff then introduced in evidence the following affidavit

State of Illinois } County Court for said
LaSalle County ss } County June Term
Thereof A.D. 1859.

Alexander Cruickshank

vs. } Replevin

Robert Cogswell

Pap 9—

E. Follett Buel being first duly sworn according to law on oath deposes and says that he is one of said plaintiffs attorneys, that said cause was tried at the March Term of said Court. That the original writ of replevin in said cause and the replevin bond therein are not now on the files of this court but that the same are lost, and cannot now be found. That they were on the files of this court, as affiant verily believes, but are now lost. Affiant makes this affidavit for the purpose of obtaining the leave of said Court perfect the record in said cause.

Subscribed & sworn to before me this 14th day of June A.D. 1859

E. Follett Buel

Phile Lindley Clk

E. L. Herrick dep'ty

Which said affidavit appears to have been filed upon the 13th day of June A.D. 1859, which filing is in the words and figures following to wit: "Filed June 13- 1859. Phile Lindley Clk

Herrick"

The plaintiff then and there submitted his case to the Court. The foregoing being all the evidence introduced in said cause for or against said motion by the plaintiff to amend said record. Whereupon the Court then and there made the order entered of record in said Court in said cause on the 5th day of March A.D. 1861.

To the introduction of said Judges docket and Clerks docket in Evidence and the affidavits aforesaid and to the ruling of the Court to allow the Records to be amended and to the said order and Judgment of the Court the defendants then and there excepted and pray the said Court would set their hands and seals to this Bill of Exceptions which is done accordingly

P. C. Champlin Esq

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State of Illinois
LaSalle County ss

I Philo Lindley Clerk of the County Court in and for said County hereby certify the above and foregoing to be a true and complete Transcript of the orders of said Court made at and subsequent to the June Term A.D. 1861 thereof, and of the Bill of Exceptions taken by the defendants at the March Term A.D. 1861, of said Court, in the cause wherein Alexander Cruickshanks is Plaintiff and Robert Ogsmet is defendants, as the same appear of record and on file in my office.

Witness my hand and the seal of said Court at Ottawa this 17th day of April A.D. 1861

Philo Lindley Clk

E. J. Crawford
Deputy

Clerks fees for this
Transcript $4.00 paid by E. T. Bull.

No. 24

Alexander Cornickshank
Plff. in error
vs.

Robert B. Cogswell
Deft. in error

Supplemental Record

Filed April 17. 1861
L. Lebrun
Clerk

E. H. Bell
Plff's Atty

No. 24 — 125

Alex^r. Cornickshank. Plff.
in error
vs

Robt. Cogswell. Deft
in error

Record and Supplemental Record

E. H. Bell
Plff's Atty