No. 13267

Supreme Court of Illinois

currier

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vs.

Ford

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

1907

No. 226.

Carrier

vs

Ford

STATE OF ILLINOIS, } ss. KANE COUNTY CIRCUIT COURT.
KANE COUNTY. }

HEZEKIAH FORD, }
vs. } ACTION REPLEVIN.
ERDIX T. CURRIER. }

ABSTRACT OF RECORD.

PAGE OF RECORD.

2 On the 14th day of March, A. D. 1860, the plaintiff filed in this case an affi-
2&3 davit, also on same day a plaint, both signed by W. J. Brown, plaintiff's Att'y. Also, on same day there was issued out of the said Court, and under the Seal thereof a Writ of Replevin, commanding the Sheriff of Kane County, to levy &c.
3 upon one span of horses of the value of $200, which said Writ is endorsed as follows: "Executed the within Writ this 14th day of March, 1860, by Replevying "the within described property and delivering the same to the within named "Hezekiah Ford, also by reading this Writ to the within named E. T. Currier, "and by taking Bond of plaintiff, which is herewith annexed."

3 Also on the 14th day of March, A. D. 1860, there was filed in said cause a declaration in the usual form by W. J. Brown, plaintiff's Attorney.

On page 4th will be found the Bond. On page 5 will be found the commencement of defendant's pleas. 1st plea, *non cepet*. 2d plea, property in the defend.
5&6 ant. 3d plea, property in Loren Heath. 4th plea, an avowrey setting out in *heek verba* a Writ of Attachment, issued out of the Kane County Circuit Court on the 12th day of March, 1860, wherein Lawrence Kennedy is plaintiff and Loren Heath is defendant, which Writ was executed by levying upon the horses in the declaration mentioned.

7 On the 29th day of May, A. D. 1860, the plaintiff filed his replications to said pleas. To second plea a travers, that the said horses were the property &c., of said plaintiff, &c., the same as to the third plea.

8 Replications that the said property was not at said time &c., the property of said Loren Heath but of said plaintiff, &c., and also, that Currier was not, as alleged in said avowrey, a deputy Sheriff.

And afterwards to wit: on the 24th day of December A. D. 1860, there was filed in the Clerk's office, aforesaid, a Bill of Exceptions, which is in the words and figures following, to wit:

10 BILL OF EXCEPTIONS.

STATE OF ILLINOIS, } ss. Kane County Circuit Court, November Term.
KANE COUNTY. } A. D. 1860.

Hezekiah Ford, }
vs } REPLEVIN.
Erdix T. Currier. }

11 Be it remembered that heretofore, to wit: on the first day of December A. D. 1860, said day being one of the days of the November Term of said Kane County Circuit Court for A. D. 1860, said cause coming on to be heard a Jury was impaneled to try said cause. The plaintiff, in order to sustain the issue on his part, called Alonzo L. Lovell a witness, who being first duly sworn, testified in substance as follows: I reside at Courtland, DeKalb County, and was there March 1st, 1860. I was the owner of a span of horses at that time. Loren Heath came to me to purchase them; we agreed about it. He paid me $35 and was to pay $275 for the horses and two sets of harness. He then said I want you to go to Lodi with me. I said to him Hezekiah Ford is

here, may be you can get the money of him, he says where is Ford? I said to him he is in town, he then says don't tell Ford that I have paid you anything on the price. Soon after he came in with Ford, and as he came in Heath turned to Ford and pointed to the harness, says he that is the harness. Ford then said, $240, is that the amount you want? I replied yes. Ford handed me the money $240, then Heath said to me, "now Lov. I want you to understand this, when I pay Ford the $240, I am to have the horses, then we went to the door. Some man called Ford, and he stopped. I went on to the Barn with Heath. I led out one of the horses and gave it to Heath, and brought the other one around and gave it to Ford. Next day I sent the harness to Lodi to Ford. Shipped the harness to Ford, because they, Ford & Heath so directed. Can't say positively, but think it was Ford who gave me directions to do so. Ford was to have the horses until he was paid the $240.

Cross Examined.—This was on the first of March 1860. Heath came to me to buy the horses. We made the bargain. Heath paid me $35 down. He was gone ten or twenty minutes when he returned to my office. He paid me paper money. It was at my shop in Courtland. I saw Heath have other money at the time, *time* he paid me the $35. In his possession about $300, he took the $35 out of it that he paid me. Heath's money was done up lengthwise. I think the money paid by Ford was rolled up. Heath said Lov. I want you to understand this, when I pay Ford $240 I am to have the horses.

Re-examined.—When Heath took out the package of money he said the money did not belong to him.

Re-crossexamined.—Did not tell who it did belong to.

Barney McGuff, a witness, produced and sworn on the part of the plaintiff, testified in substance as follows:

12 I resided in Lodi on the first of March last, and was in the employ of Hezekiah Ford, was at work around Ford's store part of the time, and teaming some about the middle of March, (Identity of the property admitted.) The horses were kept in the Barn. Saw the horses the day they were brought from home. They were opposite Ford's Store. From that time I had charge of the horses for the plaintiff. I worked them on Ford's farm, plowing and putting in grain. (Here the taking of the horses in question was admitted.) Was there when the horses were returned after being taken.

Cross-Examined.—I am 20 years old, born in England, have lived in Lodi four years, worked for Ford three months last spring and three months this fall, began with him the first time in February, the middle of February worked near by Lodi. After leaving Ford, saw the horses the evening they were brought home, it was the first week in March, it was about the middle of the week, am not positive, think it was. I weighed grain, sold goods and measured wood about that time, did chores, tended the horses. Ford had no horses before these. It was the next day I took charge of them at Woodward's farm. Drew lumber to his farm, some days would draw a load as I went to plow. I dragged wheat with them, this I did after the horses were replevied. I did go to Courtland before the horses were replevied, a week before Ford and Ed. Burdict went with me. Ford drove in and out of town, I drove the balance of the time. Can't remember any other occasion on which I used them before they were replevied. I took charge of the horses the day after they were fetched from Courtland. After I began to take care of the horses, don't know that anybody else took care of them. I was absent perhaps two or three days. They were in the Woodward barn two weeks before they were levied upon by Currier. Currier kept them in his possession three or four days or a week. Don't know that Heath cared for the horses while they were in the barn. Heath did not use the horses to my knowledge, unless he used them in the night. I would sometimes carry

water to the barn and sometimes lead them. Heath did not, never heard that he did. Ford has conversed with me three or four times to-day and yesterday. I am engaged in his store and warehouse. Burdict did not use the horses prior to the levy, except in going to Courtland.

HERE THE PLAINTIFF RESTED.

Richard Van Vlack, a witness produced and sworn on part of the defendant, testified as follows: I live near Lodi, in this County, was at Lodi one evening
13 after the horses were purchased, was in the barn with Heath, where the horses were. This was three or four days after the horses were purchased, this was in the Woodward barn.

It was a very few days after the horses were brought to the barn I saw Heath in the barn. I was at Lodi one evening near the barn when Heath asked me in to see the horses. Heath went to work to take care of the horses, fed them oats and water. We differed a little in looking over the team. I said one was the best and he said the other was. Nothing was said who purchased, he called them his, this was at the Woodward Barn.

(The plaintiff objects to statements made by Heath. Court overruled objection. Plaintiff excepts.)

Nothing more said on that occasion. Had another conversation with him at at my house.

Cross-Examination.—Ford was not by at the conversation.

The defendant then called Samuel Hawley a witness, who being duly sworn testified as follows:

I know the horses in question. I reside at Lodi. I am a merchant there. I first saw the horses the day they were purchased. They were kept in the barn I occupied the first night. Heath brought them to my place and wanted to know of me if I could keep them. I said yes. He put them in the barn. The next day he paid me for the keeping and took them to the Woodward barn, which is right across the road from my place. Heath purchased from me a curry-comb and brush, they were taken across to the barn. For two or three days I saw Heath taking care of the horses. Some two or three weeks before I saw the horses at my barn Heath paid me some money. Saw him have money drafts, &c-, he said he had got his insurance money, his house had previously burned. I saw Barney McGuff take care of the horses after they were replevied; can't say whether he did before.

Cross-Examined.—The horses were brought to my barn just in the edge of the evening, could not say whether they were taken care of by any other person or not. Burdict kept his oxen in the Barn.

Hawley recalled.

The horses were in my barn three nights and two days. It was January the 20th that Heath paid me the money, he said he had got some money and he had checks, he said he was to wait a month before he could draw it, the money.

Hezekiah Smith, a witness produced and sworn on the part of the defendant,
14 and testified as follows:

I reside at Lodi and have for the past five years. I know the parties; I have seen the horses in question; saw them when Lovell owned them and often afterwards. I first saw them in Heath's possession, he was watering them, I was passing by him when he was watering them. He spoke and asked me how I liked his horses. I looked at them some and told him he had a pretty good span of horses. He said he thought he got the horses pretty cheap. (Plaintiff objected to Heath's statements being given. Court overruled objection.) Plaintiff excepts. He said he gave $250 or $275 for them. I saw him drive up one time in front of the depot and ask Ed. Burdict to take a ride; they were harnessed before a

lumber wagon, Burdict went with him. I have always understood that Burdict went to California with Heath. I have seen Heath water the horses once or twice since. The day Heath went to buy the horses I heard him say to Burdict he thought he would go up to Courtland and see the Lovell horses. I lived perhaps fifty rods from where he was watering them. It was at a well directly in front of Ford's house. It was the same week the horses were attached. I know Mr. Kennedy, I saw him at Lodi, I remember the night Currier was there, I think I sat up all night. There were some stones thrown that night. There was some property in the warehouse, it was an outfit for California. It was taken away by James Haynes, Amos Burdict, Shurtleff, Sol. White and Barney McGuff. Think that Barney McGuff was in the employ of Ford. Ford had a warehouse. I afterwards saw some of these same things brought out of Ford's warehouse. Ed. Burdict was helping, the same night. Lawrence Kennedy was there, did not see Ford that night as late as the rest of them. They left before 9 o'clock. I helped to take the goods out from the Car in the Galena warehouse in the day time, they remained in the warehouse about a week, they were removed the day the defendant and Kennedy arrived there.

Cross-Examined.—It is my impression it was Wednesday. The goods were marked Ed. Burdict. I did not see Sol. White or McGuff take out any of the goods. Ford was not there. Currier was at the depot. Hunter was at Lodi. Kennedy watched all night. I was in the habit of delivering freight, also was Amos Burdict. Ford was not connected with the delivery of these goods at the time. I had the Car with Heath. Ford was not around. I have been acquainted with Heath for some time, he brags a good deal about the property.

Hiram Palmer, a witness produced and sworn on part of the defendant, testified as follows:

I know the parties Heath and Ford. I reside at Lodi. I have seen Heath
15 ride one of the horses. I have seen the horses at Woodward's stable. (Plaintiff objected to Heath's statement given in evidence. Court overruled the objection and plaintiff excepted.) Heath asked me to go over to the stable. Heath carried some water to the horses and fed them some hay, while I was there he did not say anything about the ownership. I understood him to say that he intended to go to California with them. He asked me to go over and see his horses. I never saw him use either one of them at any other time, it was before they were levied upon.

Cross-Examined.—Don't know what time they were levied upon; did see Mr. Kennedy, had a conversation with him, but can't say what we talked about. I think I met him at Ford's store. Presume I had a conversation with him. Can't tell the day of the week nor month, it was along last spring, it might have been a week or two before the attachment of the property. I commenced the conversation with Heath. It was the only time I had a conversation with him.

James Goodridge, a witness produced and sworn on part of defendant, testified as follows:

I reside in Pampas about one and a half miles from Lodi. Know Heath and Ford, have seen the horses in question. I knew the horses before Lovell owned them. I was at home on the night spoken of by Smith. Heath started for California, before he left he was in Lodi at White's House. I was there, I saw Ford there, never saw them there but once. Heath used to stay at my house some, he was at my house from three to five nights, he wrote letters to his wife, none to Ford to my knowledge. I carried some of the letters. Heath was at Humaston's, think I saw Ford there once as late as nine o'clock, would not like to say. I had seen him there much after twelve o'clock at night. Know nothing of the contents of any of the letters. I was occasionally in Lodi and saw Ford, conversed with him, the only thing I heard him say was, how are the folks. I answered

He asked me the question as often as he and I met, as often say as every other day, say four or five times. Don't know where Heath stayed, the night before
16 he stayed at White's. The night after he stayed at my house. Ford has frequently asked me the question since, and I have answered him with reference to my own folks. Heath's family was at the time in Lodi 50 to 60 rods from White's. White is Ford's father-in-law. We left White's that night, couldn't say what time, and I stayed at Ford's. Can't say what was talked or sayed about at White's. Ford is a merchant at Lodi, and a man of wealth. Can't say how long it was. I saw Heath the last time before he left for California.

Cross-Examination.—I saw Ford at White's about the middle of March. Ford and myself were at Humaston's. Ford brought up a span of horses, the Lovell horses. Saw two hundred dollars paid. I saw a settlement between Heath and Ford. Saw $240 paid over. Heath said, there is the money for your horses. There was a conversation between them in regard to those horses. I saw the money counted, some of the money was in gold and some in paper. some twenty dollar pieces and some smaller. Never saw Heath after that time, it was in March, possible in April; I think it was the last of March. Heard some conversation about an old note, and the smaller amount was paid as I understood it. Don't know that Ford had any property in his possession that belonged to Heath. The defendant offered to prove the declaration of Heath in regard to the purchase of the horses and his owning them made to witness when neither the horses nor Ford was present, objected by plaintiff and the Court sustained objection. Defendant excepted. Heath was being secreted to keep away from his creditors, he told me he was willing to pay his honest debts, but that there were unjust demands against him that he did not mean to pay.

Edward H. Robertson, a witness produced and sworn on part of defendant, testified as follows:

I am station agent at Lodi, I know the parties Heath & Ford well, have seen the horses in question. Don't remember that I saw them in Heath's possession. Saw them in McGuff's possession. Saw Burdict ride one of them. Saw Heath twice during the time spoken of by Goodrich, once Sunday morning at my office, once, about nine o'clock in the evening when Ed. Burdict was with him. One Sunday night night I saw Heath carry hay to the horses, it was the usual time
17 of feeding. I saw Heath carrying some hay on his back to the stable, don't know that I ever saw him water them. His house was insured for $1,500. Heath told me that he received the insurance money. I think it was early in Spring, it was before he got the horses. Don't know that he got all of the money, mean to say that he got a part of it.

William Williams, a witness produced and sworn on the part of the defendant, testified as follows:

I reside at Lodi, was present on the night when Kennedy and Currier were there watching. There were stones and clubs thrown behind the wood pile. Saw persons before stones were thrown go behind the pile and come away just after. They were Barney McGuff and Sol. White. They went behind the wood pile and came away just after the stones and clubs were thrown.

Cross-Examined.—I knew Kennedy in Chicago; I went down to watch; Kennedy sent for me. Kennedy told me that there were goods there that belonged to Heath; did not tell me what kind. It appeared to me I saw Ford crossing the track to the depot, he was going home, this was before the throwing of the clubs and stones took place, saw him do nothing, have frequently seen McGuff there at the depot. I got up there about ten o'clock. I think it may be as early as nine, perhaps eight, can't tell anything about it.

Charles Thrall, a witness produced and sworn on part of defendant, testified as follows:

I reside at Lodi, saw the goods in Car, don't know the day. Saw Sol. White and Ed. Burdict moving the Car around to the warehouse. I did not see the goods in Ford's warehouse about a month before the horses were taken, heard Ford and Heath conversing. Heath said to Ford there had been two dollars more of his money paid for the wood than Ford's money, they were figuring up about it at the time. Saw Heath fetch the horses to Hawley's stable, once saw him water one of them, it might have been two days afterwards. Once saw him ride one of them the next day afterwards, don't know of any other occasion. One Sunday saw Ed. Burdict and Barney McGuff each riding one of the horses, this was before the replevy. Heath had wood by his house.

Cross-Examined.—Heath once came over with his little boy and wanted Mr. Hawley to let him put his horses into his barn until he could get another place for them. Kennedy told me to go to Herrington and he would tell me what he wanted to prove by me.

C. M. Humaston, a witness produced and sworn on part of defendant, testified as follows:

18 I know the horses, Heath started for California with the Lovell horses, from my house, about seven o'clock one Sunday evening.

Cross-Examined.—Ford brought up the horses on Saturday evening to my house. Heath paid him $240. Heath left on Sunday evening. There seemed to be some misunderstanding about a note, one claimed that it was paid and the other that it was not paid. I saw Heath pay two hundred or over. After they got through they went down to the stable and Ford turned out the horses, at the time of the conversation about the note, Heath was much excited, claiming that it had been paid. Can't say that Ford heard it. Don't know where Heath got the money to pay for the horses. Heath, I now recollect, borrowed some of the money of me to pay for the horses, when he paid the money he said, there Ford is the money for your horses.

Re-examined.—Heath was keeping quiet although out of the house occasionally. Ford is a bright active business man. (It was here admitted that Ethan J. Allen was Sheriff of Kane County and had been for the past two years.) The defendant then offered in evidence the appointment by Allen of defendant as deputy Sheriff and his oath of office. (Plaintiff objected. Court allowed them to go to the Jury. Plaintiff excepted.) That if Erdix T. Currier was deputy he was so appointed by and under said Allen. The defendant then offered and gave in evidence to the Jury the written appointment of said Erdix T. Currier, and the filing on the back thereof which is in the words and figures following:

Know all men by these presents, that I, Ethan J. Allen, Sheriff of the county of Kane, in the State of Illinois, have this day appointed and do hereby appoint
19 Erdix T. Currier of said County a Deputy Sheriff under me, and he is hereby authorized as such Deputy Sheriff to do and perform in my name any and all of the duties required of the Sheriff of said County.

Given under my hand at Geneva, this 8th day of September A. D. 1859.

E. J. ALLEN, Sheriff.

"Filed Nov. 28th, 1860, as of the 9th day of September, A. D. 1859, by order of the Court, and recorded in Court Record 8, Page 622.

P. R. WRIGHT, Clerk.

The defendant then offered and gave in evidence to the Jury the oath of office of the said Erdix T. Currier, and the filing on the back thereof, which is in the words and figures following:

STATE OF ILLINOIS, }
KANE COUNTY. } I Erdix T. Currier, do hereby solemnly swear that I will support the Constitution of the United States and the State of Illinois and that I will faithfully discharge the duties of deputy Sheriff of Kane County,

Illinois, to the best of my ability and understanding. And I do solemnly swear that I have not fought a duel, not sent or accepted a challenge to fight a duel, the probable issue of which might have been the death of either party, nor been second to either party, nor in any way or manner aided or assisted in such duel, nor been knowingly the bearer of such challenge or acceptance since the adoption of the Constitution; and that I will not be so engaged or concerned, directly or indirectly, in or about any such duel during my continuance in office. So help me God!

ERDIX T. CURRIER.

Sworn and subscribed to before me this 9th day of September, A. D. 1859.

P. R. WRIGHT,
Clerk of Kane County Circuit Court.

SEAL

Witness my hand and the seal of said Court at Geneva, in said County this 9th day of September, A. D. 1859.

P. R. WRIGHT, Clerk.

"Filed September 9th, 1859.

P. R. WRIGHT, Clerk.

The defendant then called Ethan J. Allen, who being duly sworn, testified as follows:

I am Sheriff of Kane County, have had a good many executions against Loren Heath within the past two years. Some of said Executions were from Chicago and some from this County. I could not collect anything on said Executions, he was brought here and given to me in charge on a *ca. sa.*, one of the last executions I had against him amounted to about $200. I could not collect it.

The defendant then offered in evidence a writ of attachment mentioned in the pleadings in the case, which is in the words and figures following:

STATE OF ILLINOIS, }
KANE COUNTY. } The People of the State of Illinois to the Sheriff of said County, Greeting.

Whereas, Lawrence Kennedy, hath complained on oath to Paul R. Wright, Clerk of the Circuit Court of Kane County, that Loren Heath is justly indebted to the said Lawrence Kennedy to the amount of two hundred dollars, and oath having been also made that the said Loren Heath is about to depart this State with the intention of having his effects removed therefrom, and the said Lawrence Kennedy having given bond and security according to the directions of the Act in such case made and provided: We therefore command you that you attach so much of the Estate, real or personal, of the said Loren Heath, to be found in your County, as shall be of value sufficient to satisfy the said debt and costs according to the complaint; and such Estate so attached in your hands to secure or so to provide that the same may be liable to further proceeding thereupon, according to law, at a Court to be holden at Geneva, for the County of Kane, upon the third Monday of May next so as to compel the said Loren Heath to appear and answer the complaint of the said Lawrence Kennedy, and that you also summon the Galena & Chicago Union Railroad Company, as Garnishee, to be and appear at the said Court on the said third Monday of May next, then and there to answer to what may be objected against him; when and where you shall make known to the said Court how you have executed this Writ, and have you then and there this Writ.

SEAL

Witness Paul R. Wright, Clerk of the said Court, this 12th day of March, in the year of our Lord one thousand eight hundred and sixty.

P. R. WRIGHT, Clerk.

The following endorsements appear on said Writ of Attachment, to wit:

"By virtue of the Writ, I have attached one span of mares, dark bay with white spots in the forehead, about seven years old. One yoke of steers four years

old, one dark red the other red and white with one horn broke off, and one two year old heifer, red, with white face and white on the back, as the property of Loren Heath, March 11, 1860. The within named Loren Heath not found in my county.

ETHAN J. ALLEN, Sheriff
of Kane County, by E. T. Currier, Deputy.

Filed May 23, 1860.

P. R. WRIGHT, Clerk.

To the giving of which in evidence to the Jury in the case the plaintiff objected
21 which objection the Court sustained, for the reason that the existence of the Writ was admitted by the pleading, to which ruling of the Court the defendant made no objection.

The plaintiff then called J. D. Woodward as a witness, who being sworn, testified as follows:

Have seen the parties, resided at Lodi March last, remember of horses being in my barn, was in the barn occasionally; a young man by the name of McGuff and Ford had the charge of the horses. I know about the time they came. It was previous to three weeks before the first Tuesday in April, perhaps it was the 12th or 13th, perhaps between the 9th and 13th March. Did not see the horses brought there. Mr. Ford paid the rent of the stable for the horses.

Cross-Examined.—Ford paid $1 25. We called it six weeks. Ford spoke to me for the barn, Heath never spoke to me on the subject. He settled the account about the time of the National Convention in Chicago. Burdict had cattle in there along in February. The Barn belonged to Baldwin, of Oswego, or his brother, for whom he acted as agent. I do not know where the other Baldwin lived. I had authority from Baldwin, do not know of Heath's having any conversation with Baldwin. I rented the house, barn, and everything from Burdict, in the place; afterwards, when Baldwin came, he ordered me to occupy it. When I settled with Ford the account embraced many items, there was an item of $100 for money loaned, $200 account at his Store. My account against him was for barn rent and School orders. We settled in July; I now reside at Plano, in Kendall County. I saw Mr. Amos Burdict here to-day.

The plaintiff here rested, which was all the evidence either offered or given in by either party in the trial of this cause.

The plaintiff then asked the Court to give the following instructions, which is in the words and figures following:

A sale or a pledge of personal property may be valid as between the parties, although void as against creditors, and hence if the Jury, in the present case, believe from the evidence that Ford, the plaintiff, advanced $240 towards the purchase of the horses in question, and took the horses in pledge to secure the repayment of the 240 dollars, such a pledge would vest a special property in Ford. And if the Jury further believe that the defendant took the property on the writ of attachment, the plaintiff is entitled to recover; the defendant not having offered any proof that the plaintiff in the attachment was a creditor of Heath, is not in a position to attach the pledge as being void against the creditors of Heath.

Filed December 5, 1860.

T. C. MOORE, Clerk.

Which was by the Court given to the Jury. The giving of which instructions
22 to the Jury the defendant by his counsel then and there excepted. The Court then by its own motion gave to the Jury the following instructions:

"By the Court.—The declaration of Heath as to his ownership of the property in question, not made in the presence or hearing of Ford the plaintiff, cannot affect Ford unless the Jury believe from the evidence that at the time of making such declarations, Heath was in possession and exercising acts of ownership over the property by the permission of Ford.

Filed December 12, 1860.

T. C. MOORE, Clerk.

To the giving of which said instructions to the Jury, the defendant by his counsel then and there excepted. These were all the instructions given on the part of the plaintiff.

The defendant then asked the Court to give to the Jury the following instructions:

1 "If the Jury believe from the evidence, that Lawrence Kennedy had sued out of the Kane County Circuit Court, in the month of March 1860, a Writ of Attachment against Loren Heath, and said Writ was placed in the hands of Erdix T. Currier, a Deputy Sheriff of this county, and that said Currier by virtue of said Writ, levied upon and took possession of said horses, they being at the time of said seizure in the possession of said Heath, and owned by him, then the Jury will find the issues in favor of the defendant."

GIVEN.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

2 If the Jury believe from the evidence that the horses in question were bought by Heath and paid for either by him or his money, and that Heath took and continued in possession of them, and whilst so in possession they were taken up on, and by virtue of the Attachment Writ, named in the fourth plea herein, which is the same taking complained of in this cause, then the Jury must find for the defendant.

23

GIVEN

Filed December 5, 1860.

T. C. MOORE, Clerk.

which were given.

The defendant then asked the Court to give the Jury, as law in the case, the following instructions marked refused.

3 If the Jury believe from the evidence that the horses in question were levied upon and taken as in the 4th plea alleged, and that Heath was about to start for California, and that he purchased the horses in question from Lovell, and paid said Lovell a portion of the purchase money, and at the time of said partial payment exhibited to said Lovell money sufficient to have paid the entire contract price for said horses, but left the office of Lovell and procured Hezekiah Ford, the plaintiff, to come to the office of said Lovell and pay the balance of said purchase money which was the money of said Heath, and that Ford and Heath took the horses away with them, saying, that Ford should hold possession of said horses until Heath paid Ford, and that afterwards before and at the time of the levy, in the Attachment suit mentioned in the plea herein, Heath had possession of said horses, and whilst so in his possession the defendant herein took said horses upon and by virtue of said Attachment Writ, which is the same taking complained of in this case, then the Jury must find for the defendant."

REFUSED.

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

4 "If the Jury believe from the evidence, that Heath purchased the Horses in question from Lovell, and paid a portion of the purchase money and then procured Ford to pay the balance of the purchase with the money of him, Heath, and this was a c5ntrivance of Heath and Ford in order to keep said horses from being levied upon by the creditors of Heath, he being the owner of said horses, this is in law a fraud, and the Jury should find for the defendant."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

5 "That possession of the property in question must accompany the ownership that being one of the strongest evidences of title, for if the Jury believe from the evidence that Heath was the purchaser of the horses in question, and that Ford advanced a portion of the purchase money, and was to hold possession of

24 the horses as his security for said advanced money, and yet permitted Heath to be and remain in possession of said horses, and whilst so possessed of them, the defendant Currier being a deputy Sheriff, and having in his possession as such said Writ of Attachment in the 4th plea herein named, and that in virtue of said Writ he seized and took said horses, which is the taking complained of in this case, then the law says said horses were liable to be so taken by said officer, and the Jury must find for the defendant."

See 19 Ill. p. 594. Refused.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

6 "That if the Jury believe from the evidence, that Heath was the owner of the horses in question, and that Ford claimed a lien upon them, and that Currier being deputy Sheriff, and had in his possession the Attachment Writ named in the pleadings, to execute, and that he took the horses in question upon and by virtue thereof as Heath's, and from Heath's possession, which is the same taking complained of in this case, then the Law says said taking was lawful, and that Ford's claim to said property amounts to nothing in this case, and the Jury must find for the defendant."

See 19 Ill. 594. Refused.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

7 "If the Jury believe from the evidence, that Heath on the day of the purchase, took said horses in question to the stable of Hawley, in Lodi, where Heath and Ford resided, and procured Hawley to keep said horses three nights and two days, and that Heath then removed said horses to another stable in said village of Lodi, and there watered and fed and otherwise cared for said horses, and so continued until the levy and taking complained of in this case. This is in law and fact an actual possession on the part of Heath, and the Jury must find in this case for the defendant."

Refused.

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

8 Whilst it is true that fraud will not be presumed but must be proven by those alleging it, yet the jury have a right in determining the question of ownership in this case, to take into consideration the manner of the purchase of the horses in question, as shown by the evidence; also the mode of payment as shown by the evidence. The facts if such exist by the evidence that Heath was about to depart permanently from the State, and that Heath was, as in the Writ of Attachment shown indebted to Kennedy. That Heath was possessed of the money wherewith to have paid for said horses at the time of said purchase. That Heath afterwards did start for California in the night time with said horses. Finally, the Jury have the right to consider fully every fact and circumstance as shown by the evidence on the alleged question of ownership in this case; and if from said 25 evidence the jury believe that Heath and Ford were contriving to keep said property away from the creditors of Heath, the same in fact belonging to Heath, this in law is fraud, and the Jury should find for the defendant."

Refused.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

9 If the Jury believe from the evidence that Heath purchased the Horses in question, and was the owner thereof and paid partly for them, and that Heath then procured the plaintiff Ford in point of fact, to advance the balance of the purchase money, with the agreement between them that Ford was, as his security to take and retain possession of said horses until Heath should repay Ford the money so advanced, and that Heath was afterwards, and all the time of said levy found in the actual possession of said horses, he still being the owner thereof then in law it will be presumed that Heath had paid to said Ford the money so

advanced by Ford, and in such case the horses in question were liable to be seized and taken upon said Writ of Attachment as Heath's, and the Jury should find for the defendant."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

Each one of which instructions the Court wrote the word "refused" on the margin thereof and refused to give them as law to the Jury, to the ruling of the Court in refusing to give said instructions to the Jury as law the defendant by his counsel then and there excepted.

The Jury found the issue for the plaintiff. The defendant moved the Court for a new trial; upon the hearing of said motion for a new trial, A. M. Herrington, one of the Attorneys for the defendant read to the Court an affidavit in evidence which is in the words and figures following:

Hezekiah Ford, vs Erdix T. Currier. } ss. Kane County Circuit Court, November Term, A. D. 1860.

Augustus M. Herrington on oath states that he, as sole counsel conducted the defence of the above entitled cause. And that about the hour of eleven o'clock on the 4th day of December, A. D. 1860, which day was one of the days of the said November Term of said Court. The Jury retired from the bar of said Court to consider of their verdict in such cause under the charge of Jos. H. Whipple, one of the officers of said Court, and that said Jury, as this affiant states upon information, which information this affiant states he fully believes to be true, being unable to agree upon a verdict in said cause through and by their foreman, Alexander V. Sill, sent by their said officer about five o'clock in the evening of of the same day a written request to the Hon. Isaac G. Wilson the presiding Judge of said Court which was in substance as follows:

26 "If proper the Jury would respectfully ask is the copy of the Attachment as set forth in defendant's plea, evidence of Indebtedness.

Respect. &c,, A. V. SILL, Foreman.

And this affidavit further stating as aforesaid says that said officer shortly afterwards handed said written request as above set forth to said Judge of said Court, and that said Judge of said Court received said written request from the hands of said Whipple, officer as aforesaid, and after reading the same wrote upon the back of said written request of said Jury in substance as follows: "The Court cannot give any further instructions without consent of parties, but would refer the Jury to the wording of the instruction given on the part of the plaintiff.

I. G. WILSON."

And this affidavit stating upon information as aforesaid, says that immediately afterwards the said Jos. H. Whipple receiving from the hand of said Court said written request of said Jury and the written answer thereon of the said Court, and without any delay conveyed the same to the said Jury and gave the same to them. And this affiant states that neither himself nor the defendant nor any person or persons whatsoever on the part of said defendant had any knowledge, or gave in any manner their consent to said transaction, nor did this affiant or said defendant, or any person acting for the defendant know of and concerning the same until the Jury in said cause had given their verdict in said cause, and had been discharged from further service therein.

This affiant further stating upon information and belief says, that said written request on the part of said Jury, and the said reply of the said Judge as aforesaid, was by the said foreman A. V. Sill, with the residue of the papers belonging to said case given in charge to said Jury returned to the Bar of this Court, and by the said foreman handed to the Clerk of said Court for safe keeping.

And this affiant further stating says, that soon after the said Jury were dis-

27 charged by the Court from further service in said cause, he was for the first time informed of and concerning said transaction, and that the affiant soon after said information made search amongst the papers upon file in said case for said written request and the Court's answer thereon, but could not find the same. This affiant then procured others to aid him in said search for said paper, and full and thorough search was prosecuted in and about said Court room in all parts and places where the same could or would be likely to be found, and this affiant states that the same was not nor cannot be found, this affiant made enquiry of T. C. Moore, the Clerk of said Court, as to his knowledge of said paper who replied to this affiant that he had no knowledge whatever of and concerning the same, nor had he any remembrance of having seen the same, and this affiant states that he believes the same is lost or destroyed. This affiant further stating upon information as aforesaid, not having been present, that in the forenoon of the succeeding day, namely, the 5th day of December, said Jury not yet having agreed upon a verdict in said cause, were by said officer brought to the Bar of said Court, and were then interrogated by the Hon. Isaac G. Wilson, yet Judge of said Court in substance as follows:

"Gentlemen of the Jury, have you agreed upon a verdict?" to which question the said *said* Jury by their said foreman replied in substance as follows: "We have not." The said Judge of said Court then proceeded to instruct said Jury, upon his own motion, not in writing, and without the knowledge, consent or approval of the defendant or any one in his behalf, none being present to represent said defendant in substance as follows: "It is the duty of the Jury to agree upon a verdict in this case if they can. Whilst members of the Jury are not always to yield their convictions of right, yet it is their duty to agree upon a verdict if they can. Mistrials are embarrassing to the business of the Court and should be avoided if possible. It oftentimes happens that Jurors when they go out, having during the trial formed an opinion, express the same, become before they know of it partizans, and through pride of opinion fail to see the case in its true light, and fail to see the law and the evidence as given to them in their true bearings. It is much to be desired by the Court, that the Jury agree upon a verdict in this case. You will not be discharged, but return to your room and make further trial and see whether you may not agree in this case."

This affidavit further stating, says, that said Jury once more after said verbal instructions by and on the part of said Court so given, returned into Court with a verdict in said case, for the plaintiff, and further saith not.

Subscribed and sworn to before me this 11th day of December, A. D. 1860.
T. C. MOORE, Clerk.
} A. M. HERRINGTON.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

The plaintiff also offered in opposition to the motion the following affidavit.

Hezekiah Ford
vs.
Erdix T. Currier.
} Kane County Circuit Court, November Term of said Court for 1860.

STATE OF ILLINOIS,
28 KANE COUNTY. } J. H. Mayborne being first duly sworn, doth depose and say on oath, and say that he was one of the counsel who had charge of the above entitled suit, and assisted in the trial of the same and was present in Court when the Jury returned into Court and stated to the Court through their foreman Mr. Sill, in answer to the enquiry made by the Court if they had agreed on a verdict in the case, and he said Sill stated they had not. I also recollect very distinctly, the remarks by the Court, as I was paying particular attention to the matter, and I also can recollect as I believe, the words used by the Court in the remarks he made to the Jury on that occasion almost or quite verbatim in the

connection that they were made, as I had frequently heard the Court use very near or quite the same words in remarking to Juries on similar occasions, and the remarks made by the Court on that occasion to the Jury were in the following words as the affiant believes, to wit: The Judge said that he had reluctantly kept them together during the night, and had only done so from a sense of duty; that in view of the great expense that would attend a re-trial, and in view of the fact that the amount in controversy was not very large, it was very desirable that the Jury should agree. That the case was not of so serious a nature as if it involved the life and liberty of a person, and while on the one hand no Juror ought to disregard his honest conviction as to the effect of the evidence in the case, on the other he ought to endeavor to harmonize his views with his fellow Jurors, if he can consistently do so. That one of the objects of the Law in requiring unanimity among the Jurors was to guard against hasty verdicts; that in many cases it was not to be expected that they would agree on the first ballot, that it sometimes happened that Jurors having expressed a first impression upon going into the Jury room afterwards adhere to the opinion there expressed, partly from pride of opinion, without being conscious of it. That each Juror should examine his own mind and endeavor to ascertain whether he is influenced by any consideration except the evidence and the law as given by the Court, that he should examine the case, and if he found himself differing from his fellow Jurors, should
29 endeavor to ascertain whether their opinion might not be more nearly the truth than his own, in short that his efforts should be to agree rather than disagree, if it could be done without the sacrifice of his honest convictions after calm and full deliberation. The Jury then retired from the Court room under charge of the officer. And this affiant further states that R. G. Curtis, one of the counsel in the case for the defendant, was present and made no objections.

Sworn and subscribed to before me this 14th Dec. 1860. } J. H. MAYBORNE.
T. C. MOORE, Clerk. }

The above facts as set forth are as I recollect them, I being one of the counsel in the cause.

Subscribed and sworn to before me, December 15th, 1860. } W. J. BROWN.
T. C. MOORE, Clerk. }

Filed December 15th, 1860.

T. C. MOORE, Clerk.

Which was all the evidence heard or offered on the motion for a new trial. The statement contained in the foregoing affidavit of A. M. Herrington in relation to the written communication sent to the Court by the Jury and the Judge's reply is incorrect in this:

The Judge wrote upon the margin of the communication as follows: "The Court is not at liberty to give any additional instructions without the consent of the parties, the Jury must look to the instructions already given."

The Court did not write as is stated in said affidavit, "would refer the Jury to the wording of the instructions on the part of the plaintiff." Which motion for a new trial the Court after being fully advised overruled. To the ruling of the Court in overruling said motion refusing to grant said new trial, the defendant by his counsel then and there excepted, and tendered this his Bill of Exceptions and prayed that the same be signed and sealed and made a part and parcel of the record and proceedings in this cause.

Which is accordingly done. ISAAC G. WILSON.

Which said bill of exceptions is endorsed as follows:

Filed December 24th, 1860.

T. C. MOORE, Clerk.

And afterwards, to wit: on the 9th day of January, A. D. 1861, there was filed in the said Clerk's office an Appeal Bond which is in the words and figures

following, to wit:

"Know all Men by these presents that we Erdix T. Currier as principal, and
30 Loren Kennedy and John Kelly as surety are held and firmly bound unto Hezekiah Ford in the penal sum of three hundred dollars lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs and administrators, and every of them, jointly and severally. Witness our hands and seals this 19th day of December A. D. 1860.

The condition of this bond is this, that whereas heretofore at the November Term of the Kane County Circuit Court, there was a certain Replevin suit pending in the said Court, wherein the said Hezekiah Ford was plaintiff and the said Erdix T. Currier was defendant; and whereas upon a trial of said suit at said November Term of said Court the issues in said cause were found for said Ford, the said plaintiff. And whereas the said Currier has prayed an Appeal to the Supreme Court of the State of Illinois, which Appeal was allowed by the said Court upon the condition that said Erdix T. Currier would execute a bond to the said Ford, according to Law, in the penal sum of three hundred dollars with security to be approved by the Clerk of said Court. Now, if the said Erdix T. Currier shall prosecute his said Appeal with effect, and shall pay and satisfy all costs and judgments which may be rendered by said Supreme Court, either upon affirmance of the said judgment of the said Circuit Court, or upon dismissal of the same by the said Supreme Court, then this obligation to be void, otherwise to be and remain in full force and effect.

Witness our hands and seals the day and year first above written:

ERDIX T. CURRIER. SEAL

L. KENNEDY, SEAL

JOHN KELLY. SEAL

Taken and approved by me this 9th day of January, A. D. 1861.

T. C. MOORE, Clerk.

Which said bond is endorsed as follows:

Filed December 15th, 1860.

T. C. MOORE, Clerk.

State of Illinois, } ss.
Kane County. }

I, Thomas C. Moore, Clerk of the Circuit Court in and for the said County in the State aforesaid, do hereby certify that the foregoing is a complete record of all the proceedings in said Court, in the case of Hezekiah Ford, plaintiff, against Erdix T. Currier, defendant, in an action of Replevin, said Record comprising the process, pleadings, all orders of said Court, Bill of Exceptions, and Appeal Bond, issued, filed and entered of Record, in said Court in said case.

Witness my hand and the seal of said Court at Geneva, in said County, this 31st day of January, A. D. 1861.

T. C. MOORE, Clerk.

ERRORS ASSIGNED.

The Court erred in admitting improper evidence to go to the Jury.

The Court erred in refusing to allow the defendant to give competent and proper evidence to the Jury.

The Court erred in overruling the defendant's motion for a new trial.

The Court erred in giving the instructions asked for on part of the plaintiff, as the law of the case.

The Court erred in refusing to give to the Jury the defendant's instructions instructions asked for as the law of the case.

A. M. HERRINGTON,
Attorney for Appellant.

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Currier
v.
Ford

Abstract

Filed Apl 27. 1861
[illegible]
Clk

STATE OF ILLINOIS, } ss. KANE COUNTY CIRCUIT COURT.
KANE COUNTY. }

HEZEKIAH FORD, }
vs. } ACTION REPLEVIN.
ERDIX T. CURRIER. }

ABSTRACT OF RECORD.

PAGE OF RECORD.

2 On the 14th day of March, A. D. 1860, the plaintiff filed in this case an affi-
2&3 davit, also on same day a plaint, both signed by W. J. Brown, plaintiff's Att'y. Also, on same day there was issued out of the said Court, and under the Seal thereof a Writ of Replevin, commanding the Sheriff of Kane County, to levy &c.
3 upon one span of horses of the value of $200, which said Writ is endorsed as follows: "Executed the within Writ this 14th day of March, 1860, by Replevying "the within described property and delivering the same to the within named "Hezekiah Ford, also by reading this Writ to the within named E. T. Currier, "and by taking Bond of plaintiff, which is herewith annexed."

3 Also on the 14th day of March, A. D. 1860, there was filed in said cause a declaration in the usual form by W. J. Brown, plaintiff's Attorney.

On page 4th will be found the Bond. On page 5 will be found the commence-
5&6 ment of defendant's pleas. 1st plea, *non cepet*. 2d plea, property in the defendant. 3d plea, property in Loren Heath. 4th plea, an avowrey setting out in *hæc verba* a Writ of Attachment, issued out of the Kane County Circuit Court on the 12th day of March, 1860, wherein Lawrence Kennedy is plaintiff and Loren Heath is defendant, which Writ was executed by levying upon the horses in the declaration mentioned.

7 On the 29th day of May, A. D. 1860, the plaintiff filed his replications to said pleas. To second plea a travers, that the said horses were the property &c., of said plaintiff, &c., the same as to the third plea.

8 Replications that the said property was not at said time &c., the property of said Loren Heath but of said plaintiff, &c., and also, that Currier was not, as alleged in said avowrey, a deputy Sheriff.

And afterwards to wit: on the 24th day of December A. D. 1860, there was filed in the Clerk's office, aforesaid, a Bill of Exceptions, which is in the words and figures following, to wit:

10 BILL OF EXCEPTIONS.

STATE OF ILLINOIS, } ss. Kane County Circuit Court, November Term.
KANE COUNTY. } A. D. 1860.

Hezekiah Ford, }
vs } REPLEVIN.
Erdix T. Currier. }

11 Be it remembered that heretofore, to wit: on the first day of December A. D. 1860, said day being one of the days of the November Term of said Kane County Circuit Court for A. D. 1860, said cause coming on to be heard a Jury was impaneled to try said cause. The plaintiff, in order to sustain the issue on his part, called Alonzo L. Lovell a witness, who being first duly sworn, testified in substance as follows: I reside at Courtland, DeKalb County, and was there March 1st, 1860. I was the owner of a span of horses at that time. Loren Heath came to me to purchase them; we agreed about it. He paid me $35 and was to pay $275 for the horses and two sets of harness. He then said I want you to go to Lodi with me. I said to him Hezekiah Ford is

here, may be you can get the money of him, he says where is Ford? I said to him he is in town, he then says don't tell Ford that I have paid you anything on the price. Soon after he came in with Ford, and as he came in Heath turned to Ford and pointed to the harness, says he that is the harness. Ford then said, $240, is that the amount you want? I replied yes. Ford handed me the money $240, then Heath said to me, "now Lov. I want you to understand this, when I pay Ford the $240, I am to have the horses, then we went to the door. Some man called Ford, and he stopped. I went on to the Barn with Heath. I led out one of the horses and gave it to Heath, and brought the other one around and gave it to Ford. Next day I sent the harness to Lodi to Ford. Shipped the harness to Ford, because they, Ford & Heath so directed. Can't say positively, but think it was Ford who gave me directions to do so. Ford was to have the horses until he was paid the $240.

Cross Examined.—This was on the first of March 1860. Heath came to me to buy the horses. We made the bargain. Heath paid me $35 down. He was gone ten or twenty minutes when he returned to my office. He paid me paper money. It was at my shop in Courtland. I saw Heath have other money at the time, *time* he paid me the $35. In his possession about $300, he took the $35 out of it that he paid me. Heath's money was done up lengthwise. I think the money paid by Ford was rolled up. Heath said Lov. I want you to understand this, when I pay Ford $240 I am to have the horses.

Re-examined.—When Heath took out the package of money he said the money did not belong to him.

Re-crossexamined.—Did not tell who it did belong to.

Barney McGuff, a witness, produced and sworn on the part of the plaintiff, testified in substance as follows:

12 I resided in Lodi on the first of March last, and was in the employ of Hezekiah Ford, was at work around Ford's store part of the time, and teaming some about the middle of March, (Identity of the property admitted.) The horses were kept in the Barn. Saw the horses the day they were brought from home. They were opposite Ford's Store. From that time I had charge of the horses for the plaintiff. I worked them on Ford's farm, plowing and putting in grain. (Here the taking of the horses in question was admitted.) Was there when the horses were returned after being taken.

Cross-Examined.—I am 20 years old, born in England, have lived in Lodi four years, worked for Ford three months last spring and three months this fall, began with him the first time in February, the middle of February worked near by Lodi. After leaving Ford, saw the horses the evening they were brought home, it was the first week in March, it was about the middle of the week, am not positive, think it was. I weighed grain, sold goods and measured wood about that time, did chores, tended the horses. Ford had no horses before these. It was the next day I took charge of them at Woodward's farm. Drew lumber to his farm, some days would draw a load as I went to plow. I dragged wheat with them, this I did after the horses were replevied. I did go to Courtland before the horses were replevied, a week before Ford and Ed. Burdict went with me. Ford drove in and out of town, I drove the balance of the time. Can't remember any other occasion on which I used them before they were replevied. I took charge of the horses the day after they were fetched from Courtland. After I began to take care of the horses, don't know that anybody else took care of them. I was absent perhaps two or three days. They were in the Woodward barn two weeks before they were levied upon by Currier. Currier kept them in his possession three or four days or a week. Don't know that Heath cared for the horses while they were in the barn. Heath did not use the horses to my knowledge, unless he used them in the night. I would sometimes carry

water to the barn and sometimes lead them. Heath did not, never heard that he did. Ford has conversed with me three or four times to-day and yesterday. I am engaged in his store and warehouse. Burdict did not use the horses prior to the levy, except in going to Courtland.

HERE THE PLAINTIFF RESTED.

Richard Van Vlack, a witness produced and sworn on part of the defendant, testified as follows: I live near Lodi, in this County, was at Lodi one evening
13 after the horses were purchased, was in the barn with Heath, where the horses were. This was three or four days after the horses were purchased, this was in the Woodward barn.

It was a very few days after the horses were brought to the barn I saw Heath in the barn. I was at Lodi one evening near the barn when Heath asked me in to see the horses. Heath went to work to take care of the horses, fed them oats and water. We differed a little in looking over the team. I said one was the best and he said the other was. Nothing was said who purchased, he called them his, this was at the Woodward Barn.

(The plaintiff objects to statements made by Heath. Court overruled objection. Plaintiff excepts.)

Nothing more said on that occasion. Had another conversation with him at at my house.

Cross-Examination.—Ford was not by at the conversation.

The defendant then called Samuel Hawley a witness, who being duly sworn testified as follows:

I know the horses in question. I reside at Lodi. I am a merchant there. I first saw the horses the day they were purchased. They were kept in the barn I occupied the first night. Heath brought them to my place and wanted to know of me if I could keep them. I said yes. He put them in the barn. The next day he paid me for the keeping and took them to the Woodward barn, which is right across the road from my place. Heath purchased from me a curry-comb and brush, they were taken across to the barn. For two or three days I saw Heath taking care of the horses. Some two or three weeks before I saw the horses at my barn Heath paid me some money. Saw him have money drafts, &c-, he said he had got his insurance money, his house had previously burned. I saw Barney McGuff take care of the horses after they were replevied; can't say whether he did before.

Cross-Examined.—The horses were brought to my barn just in the edge of the evening, could not say whether they were taken care of by any other person or not. Burdict kept his oxen in the Barn.

Hawley recalled.

The horses were in my barn three nights and two days. It was January the 20th that Heath paid me the money, he said he had got some money and he had checks, he said he was to wait a month before he could draw it, the money.

Hezekiah Smith, a witness produced and sworn on the part of the defendant,
14 and testified as follows:

I reside at Lodi and have for the past five years. I know the parties; I have seen the horses in question; saw them when Lovell owned them and often afterwards. I first saw them in Heath's possession, he was watering them, I was passing by him when he was watering them. He spoke and asked me how I liked his horses. I looked at them some and told him he had a pretty good span of horses. He said he thought he got the horses pretty cheap. (Plaintiff objected to Heath's statements being given. Court overruled objection.) Plaintiff excepts. He said he gave $250 or $275 for them. I saw him drive up one time in front of the depot and ask Ed. Burdict to take a ride; they were harnessed before a

lumber wagon, Burdict went with him. I have always understood that Burdict went to California with Heath. I have seen Heath water the horses once or twice since. The day Heath went to buy the horses I heard him say to Burdict he thought he would go up to Courtland and see the Lovell horses. I lived perhaps fifty rods from where he was watering them. It was at a well directly in front of Ford's house. It was the same week the horses were attached. I know Mr. Kennedy, I saw him at Lodi, I remember the night Currier was there, I think I sat up all night. There were some stones thrown that night. There was some property in the warehouse, it was an outfit for California. It was taken away by James Haynes, Amos Burdict, Shurtleff, Sol. White and Barney McGuff. Think that Barney McGuff was in the employ of Ford. Ford had a warehouse. I afterwards saw some of these same things brought out of Ford's warehouse. Ed. Burdict was helping, the same night. Lawrence Kennedy was there, did not see Ford that night as late as the rest of them. They left before 9 o'clock. I helped to take the goods out from the Car in the Galena warehouse in the day time, they remained in the warehouse about a week, they were removed the day the defendant and Kennedy arrived there.

Cross-Examined.—It is my impression it was Wednesday. The goods were marked Ed. Burdict. I did not see Sol. White or McGuff take out any of the goods. Ford was not there. Currier was at the depot. Hunter was at Lodi. Kennedy watched all night. I was in the habit of delivering freight, also was Amos Burdict. Ford was not connected with the delivery of these goods at the time. I had the Car with Heath. Ford was not around. I have been acquainted with Heath for some time, he brags a good deal about the property.

Hiram Palmer, a witness produced and sworn on part of the defendant, testified as follows:

I know the parties Heath and Ford. I reside at Lodi. I have seen Heath ride one of the horses. I have seen the horses at Woodward's stable. (Plaintiff objected to Heath's statement given in evidence. Court overruled the objection and plaintiff excepted.) Heath asked me to go over to the stable. Heath carried some water to the horses and fed them some hay, while I was there he did not say anything about the ownership. I understood him to say that he intended to go to California with them. He asked me to go over and see his horses. I never saw him use either one of them at any other time, it was before they were levied upon.

Cross-Examined.—Don't know what time they were levied upon; did see Mr. Kennedy, had a conversation with him, but can't say what we talked about. I think I met him at Ford's store. Presume I had a conversation with him. Can't tell the day of the week nor month, it was along last spring, it might have been a week or two before the attachment of the property. I commenced the conversation with Heath. It was the only time I had a conversation with him.

James Goodridge, a witness produced and sworn on part of defendant, testified as follows:

I reside in Pampas about one and a half miles from Lodi. Know Heath and Ford, have seen the horses in question. I knew the horses before Lovell owned them. I was at home on the night spoken of by Smith. Heath started for California, before he left he was in Lodi at White's House. I was there, I saw Ford there, never saw them there but once. Heath used to stay at my house some, he was at my house from three to five nights, he wrote letters to his wife, none to Ford to my knowledge. I carried some of the letters. Heath was at Humaston's, think I saw Ford there once as late as nine o'clock, would not like to say. I had seen him there much after twelve o'clock at night. Know nothing of the contents of any of the letters. I was occasionally in Lodi and saw Ford, conversed with him, the only thing I heard him say was, how are the folks. I answered.

He asked me the question as often as he and I met, as often say as every other day, say four or five times. Don't know where Heath stayed, the night before
16 he stayed at White's. The night after he stayed at my house. Ford has frequently asked me the question since, and I have answered him with reference to my own folks. Heath's family was at the time in Lodi 50 to 60 rods from White's. White is Ford's father-in-law. We left White's that night, couldn't say what time, and I stayed at Ford's. Can't say what was talked or sayed about at White's. Ford is a merchant at Lodi, and a man of wealth. Can't say how long it was. I saw Heath the last time before he left for California.

Cross-Examination.—I saw Ford at White's about the middle of March. Ford and myself were at Humaston's. Ford brought up a span of horses, the Lovell horses. Saw two hundred dollars paid. I saw a settlement between Heath and Ford. Saw $240 paid over. Heath said, there is the money for your horses. There was a conversation between them in regard to those horses. I saw the money counted, some of the money was in gold and some in paper. some twenty dollar pieces and some smaller. Never saw Heath after that time, it was in March, possible in April; I think it was the last of March. Heard some conversation about an old note, and the smaller amount was paid as I understood it. Don't know that Ford had any property in his possession that belonged to Heath. The defendant offered to prove the declaration of Heath in regard to the purchase of the horses and his owning them made to witness when neither the horses nor Ford was present, objected by plaintiff and the Court sustained objection. Defendant excepted. Heath was being secreted to keep away from his creditors, he told me he was willing to pay his honest debts, but that there were unjust demands against him that he did not mean to pay.

Edward H. Robertson, a witness produced and sworn on part of defendant, testified as follows:

I am station agent at Lodi, I know the parties Heath & Ford well, have seen the horses in question. Don't remember that I saw them in Heath's possession. Saw them in McGuff's possession. Saw Burdict ride one of them. Saw Heath twice during the time spoken of by Goodrich, once Sunday morning at my office, once, about nine o'clock in the evening when Ed. Burdict was with him. One Sunday night night I saw Heath carry hay to the horses, it was the usual time
17 of feeding. I saw Heath carrying some hay on his back to the stable, don't know that I ever saw him water them. His house was insured for $1,500. Heath told me that he received the insurance money. I think it was early in Spring, it was before he got the horses. Don't know that he got all of the money, mean to say that he got a part of it.

William Williams, a witness produced and sworn on the part of the defendant, testified as follows:

I reside at Lodi, was present on the night when Kennedy and Currier were there watching. There were stones and clubs thrown behind the wood pile. Saw persons before stones were thrown go behind the pile and come away just after. They were Barney McGuff and Sol. White. They went behind the wood pile and came away just after the stones and clubs were thrown.

Cross-Examined.—I knew Kennedy in Chicago; I went down to watch; Kennedy sent for me. Kennedy told me that there were goods there that belonged to Heath; did not tell me what kind. It appeared to me I saw Ford crossing the track to the depot, he was going home, this was before the throwing of the clubs and stones took place, saw him do nothing, have frequently seen McGuff there at the depot. I got up there about ten o'clock. I think it may be as early as nine, perhaps eight, can't tell anything about it.

Charles Thrall, a witness produced and sworn on part of defendant, testified as follows:

I reside at Lodi, saw the goods in Car, don't know the day. Saw Sol. White and Ed. Burdict moving the Car around to the warehouse. I did not see the goods in Ford's warehouse about a month before the horses were taken, heard Ford and Heath conversing. Heath said to Ford there had been two dollars more of his money paid for the wood than Ford's money, they were figuring up about it at the time. Saw Heath fetch the horses to Hawley's stable, once saw him water one of them, it might have been two days afterwards. Once saw him ride one of them the next day afterwards, don't know of any other occasion. One Sunday saw Ed. Burdict and Barney McGuff each riding one of the horses, this was before the replevy. Heath had wood by his house.

Cross-Examined.—Heath once came over with his little boy and wanted Mr. Hawley to let him put his horses into hit barn until he could get another place for them. Kennedy told me to go to Herrington and he would tell me what he wanted to prove by me.

C. M. Humaston, a witness produced and sworn on part of defendant, testified as follows:

18 I know the horses, Heath started for California with the Lovell horses, from my house, about seven o'clock one Sunday evening.

Cross-Examined.—Ford brought up the horses on Saturday evening to my house. Heath paid him $240. Heath left on Sunday evening. There seemed to be some misunderstanding about a note, one claimed that it was paid and the other that it was not paid. I saw Heath pay two hundred or over. After they got through they went down to the stable and Ford turned out the horses, at the time of the conversation about the note, Heath was much excited, claiming that it had been paid. Can't say that Ford heard it. Don't know where Heath got the money to pay for the horses. Heath, I now recollect, borrowed some of the money of me to pay for the horses, when he paid the money he said, there Ford is the money for your horses.

Re-examined.—Heath was keeping quiet although out of the house occasionally. Ford is a bright active business man. (It was here admitted that Ethan J. Allen was Sheriff of Kane County and had been for the past two years.) The defendant then offered in evidence the appointment by Allen of defendant as deputy Sheriff and his oath of office. (Plaintiff objected. Court allowed them to go to the Jury. Plaintiff excepted.) That if Erdix T. Currier was deputy he was so appointed by and under said Allen. The defendant then offered and gave in evidence to the Jury the written appointment of said Erdix T. Currier, and the filing on the back thereof which is in the words and figures following:

Know all men by these presents, that I, Ethan J. Allen, Sheriff of the county of Kane, in the State of Illinois, have this day appointed and do hereby appoint
19 Erdix T. Currier of said County a Deputy Sheriff under me, and he is hereby authorized as such Deputy Sheriff to do and perform in my name any and all of the duties required of the Sheriff of said County.

Given under my hand at Geneva, this 8th day of September A. D. 1859.

E. J. ALLEN, Sheriff.

"Filed Nov. 28th, 1860, as of the 9th day of September, A. D. 1859, by order of the Court, and recorded in Court Record 8, Page 622.

P. R. WRIGHT, Clerk.

The defendant then offered and gave in evidence to the Jury the oath of office of the said Erdix T. Currier, and the filing on the back thereof, which is in the words and figures following:

STATE OF ILLINOIS, }
KANE COUNTY. } I Erdix T. Currier, do hereby solemnly swear that I will support the Constitution of the United States and the State of Illinois and that I will faithfully discharge the duties of deputy Sheriff of Kane County.

Illinois, to the best of my ability and understanding. And I do solemnly swear that I have not fought a duel, not sent or accepted a challenge to fight a duel, the probable issue of which might have been the death of either party, nor been second to either party, nor in any way or manner aided or assisted in such duel, nor been knowingly the bearer of such challenge or acceptance since the adoption of the Constitution; and that I will not be so engaged or concerned, directly or indirectly, in or about any such duel during my continuance in office. So help me God!

ERDIX T. CURRIER.

Sworn and subscribed to before me this 9th day of September, A. D. 1859.

P. R. WRIGHT,
Clerk of Kane County Circuit Court.

SEAL

Witness my hand and the seal of said Court at Geneva, in said County this 9th day of September, A. D. 1859.

P. R. WRIGHT, Clerk.

"Filed September 9th, 1859.

P. R. WRIGHT, Clerk.

The defendant then called Ethan J. Allen, who being duly sworn, testified as follows:

I am Sheriff of Kane County, have had a good many executions against Loren Heath within the past two years. Some of said Executions were from Chicago and some from this County. I could not collect anything on said Executions, he was brought here and given to me in charge on a *ca. sa.*, one of the last executions I had against him amounted to about $200. I could not collect it.

20 The defendant then offered in evidence a writ of attachment mentioned in the pleadings in the case, which is in the words and figures following:

STATE OF ILLINOIS, }
KANE COUNTY. } The People of the State of Illinois to the Sheriff of said County, Greeting.

Whereas, Lawrence Kennedy, hath complained on oath to Paul R. Wright, Clerk of the Circuit Court of Kane County, that Loren Heath is justly indebted to the said Lawrence Kennedy to the amount of two hundred dollars, and oath having been also made that the said Loren Heath is about to depart this State with the intention of having his effects removed therefrom, and the said Lawrence Kennedy having given bond and security according to the directions of the Act in such case made and provided: We therefore command you that you attach so much of the Estate, real or personal, of the said Loren Heath, to be found in your County, as shall be of value sufficient to satisfy the said debt and costs according to the complaint; and such Estate so attached in your hands to secure or so to provide that the same may be liable to further proceeding thereupon, according to law, at a Court to be holden at Geneva, for the County of Kane, upon the third Monday of May next so as to compel the said Loren Heath to appear and answer the complaint of the said Lawrence Kennedy, and that you also summon the Galena & Chicago Union Railroad Company, as Garnishee, to be and appear at the said Court on the said third Monday of May next, then and there to answer to what may be objected against him; when and where you shall make known to the said Court how you have executed this Writ, and have you then and there this Writ.

SEAL

Witness Paul R. Wright, Clerk of the said Court, this 12th day of March, in the year of our Lord one thousand eight hundred and sixty.

P. R. WRIGHT, Clerk.

The following endorsements appear on said Writ of Attachment, to wit:

"By virtue of the Writ, I have attached one span of mares, dark bay with white spots in the forehead, about seven years old. One yoke of steers four years

old, one dark red the other red and white with one horn broke off, and one two year old heifer, red, with white face and white on the back, as the property of Loren Heath, March 11, 1860. The within named Loren Heath not found in my county.

ETHAN J. ALLEN, Sheriff
of Kane County, by E. T. Currier, Deputy.

Filed May 23, 1860.

P. R. WRIGHT, Clerk.

To the giving of which in evidence to the Jury in the case the plaintiff objected
21 which objection the Court sustained, for the reason that the existence of the Writ was admitted by the pleading, to which ruling of the Court the defendant made no objection.

The plaintiff then called J. D. Woodward as a witness, who being sworn, testified as follows:

Have seen the parties, resided at Lodi March last, remember of horses being in my barn, was in the barn occasionally; a young man by the name of McGuff and Ford had the charge of the horses. I know about the time they came. It was previous to three weeks before the first Tuesday in April, perhaps it was the 12th or 13th, perhaps between the 9th and 13th March. Did not see the horses brought there. Mr. Ford paid the rent of the stable for the horses.

Cross-Examined.—Ford paid $1 25. We called it six weeks. Ford spoke to me for the barn, Heath never spoke to me on the subject. He settled the account about the time of the National Convention in Chicago. Burdict had cattle in there along in February. The Barn belonged to Baldwin, of Oswego, or his brother, for whom he acted as agent. I do not know where the other Baldwin lived. I had authority from Baldwin, do not know of Heath's having any conversation with Baldwin. I rented the house, barn, and everything from Burdict, in the place; afterwards, when Baldwin came, he ordered me to occupy it. When I settled with Ford the account embraced many items, there was an item of $100 for money loaned, $200 account at his Store. My account against him was for barn rent and School orders. We settled in July; I now reside at Plano, in Kendall County. I saw Mr. Amos Burdict here to-day.

The plaintiff here rested, which was all the evidence either offered or given in by either party in the trial of this cause.

The plaintiff then asked the Court to give the following instructions, which is in the words and figures following:

A sale or a pledge of personal property may be valid as between the parties, although void as against creditors, and hence if the Jury, in the present case, believe from the evidence that Ford, the plaintiff, advanced $240 towards the purchase of the horses in question, and took the horses in pledge to secure the repayment of the 240 dollars, such a pledge would vest a special property in Ford. And if the Jury further believe that the defendant took the property on the writ of attachment, the plaintiff is entitled to recover; the defendant not having offered any proof that the plaintiff in the attachment was a creditor of Heath, is not in a position to attach the pledge as being void against the creditors of Heath.

Filed December 5, 1860.

T. C. MOORE, Clerk.

Which was by the Court given to the Jury. The giving of which instructions
22 to the Jury the defendant by his counsel then and there excepted. The Court then by its own motion gave to the Jury the following instructions:

"By the Court.—The declaration of Heath as to his ownership of the property in question, not made in the presence or hearing of Ford the plaintiff, cannot affect Ford unless the Jury believe from the evidence that at the time of making such declarations, Heath was in possession and exercising acts of ownership over the property by the permission of Ford.

Filed December 12, 1860.

T. C. MOORE, Clerk.

To the giving of which said instructions to the Jury, the defendant by his counsel then and there excepted. These were all the instructions given on the part of the plaintiff.

The defendant then asked the Court to give to the Jury the following instructions:

1 "If the Jury believe from the evidence, that Lawrence Kennedy had sued out of the Kane County Circuit Court, in the month of March 1860, a Writ of Attachment against Loren Heath, and said Writ was placed in the hands of Erdix T. Currier, a Deputy Sheriff of this county, and that said Currier by virtue of said Writ, levied upon and took possession of said horses, they being at the time of said seizure in the possession of said Heath, and owned by him, then the Jury will find the issues in favor of the defendant." GIVEN.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

2 If the Jury believe from the evidence that the horses in question were bought by Heath and paid for either by him or his money, and that Heath took and continued in possession of them, and whilst so in possession they were taken up on, and by virtue of the Attachment Writ, named in the fourth plea herein, which is the same taking complained of in this cause, then the Jury must find for the defendant. GIVEN

23

Filed December 5, 1860.

T. C. MOORE, Clerk.

which were given.

The defendant then asked the Court to give the Jury, as law in the case, the following instructions marked refused.

3 If the Jury believe from the evidence that the horses in question were levied upon and taken as in the 4th plea alleged, and that Heath was about to start for California, and that he purchased the horses in question from Lovell, and paid said Lovell a portion of the purchase money, and at the time of said partial payment exhibited to said Lovell money sufficient to have paid the entire contract price for said horses, but left the office of Lovell and procured Hezekiah Ford, the plaintiff, to come to the office of said Lovell and pay the balance of said purchase money which was the money of said Heath, and that Ford and Heath took the horses away with them, saying, that Ford should hold possession of said horses until Heath paid Ford, and that afterwards before and at the time of the levy, in the Attachment suit mentioned in the plea herein, Heath had possession of said horses, and whilst so in his possession the defendant herein took said horses upon and by virtue of said Attachment Writ, which is the same taking complained of in this case, then the Jury must find for the defendant." REFUSED.

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

4 "If the Jury believe from the evidence, that Heath purchased the Horses in question from Lovell, and paid a portion of the purchase money and then procured Ford to pay the balance of the purchase with the money of him, Heath, and this was a c5ntrivance of Heath and Ford in order to keep said horses from being levied upon by the creditors of Heath, he being the owner of said horses, this is in law a fraud, and the Jury should find for the defendant."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

5 "That possession of the property in question must accompany the ownership that being one of the strongest evidences of title, for if the Jury believe from the evidence that Heath was the purchaser of the horses in question, and that Ford advanced a portion of the purchase money, and was to hold possession of

24 the horses as his security for said advanced money, and yet permitted Heath to be and remain in possession of said horses, and whilst so possessed of them, the defendant Currier being a deputy Sheriff, and having in his possession as such said Writ of Attachment in the 4th plea herein named, and that in virtue of said Writ he seized and took said horses, which is the taking complained of in this case, then the law says said horses were liable to be so taken by said officer, and the Jury must find for the defendant."

See 19 Ill. p. 504. Refused.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

6 "That if the Jury believe from the evidence, that Heath was the owner of the horses in question, and that Ford claimed a lien upon them, and that Currier being deputy Sheriff, and had in his possession the Attachment Writ named in the pleadings, to execute, and that he took the horses in question upon and by virtue thereof as Heath's, and from Heath's possession, which is the same taking complained of in this case, then the Law says said taking was lawful, and that Ford's claim to said property amounts to nothing in this case, and the Jury must find for the defendant."

See 19 Ill. 504. Refused.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

7 "If the Jury believe from the evidence, that Heath on the day of the purchase, took said horses in question to the stable of Hawley, in Lodi, where Heath and Ford resided, and procured Hawley to keep said horses three nights and two days, and that Heath then removed said horses to another stable in said village of Lodi, and there watered and fed and otherwise cared for said horses, and so continued until the levy and taking complained of in this case. This is in law and fact an actual possession on the part of Heath, and the Jury must find in this case for the defendant."

Refused.

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

8 Whilst it is true that fraud will not be presumed but must be proven by those alleging it, yet the jury have a right in determining the question of ownership in this case, to take into consideration the manner of the purchase of the horses in question, as shown by the evidence; also the mode of payment as shown by the evidence. The facts if such exist by the evidence that Heath was about to depart permanently from the State, and that Heath was, as in the Writ of Attachment shown indebted to Kennedy. That Heath was possessed of the money wherewith to have paid for said horses at the time of said purchase. That Heath afterwards did start for California in the night time with said horses. Finally, the Jury have the right to consider fully every fact and circumstance as shown by the evidence on the alleged question of ownership in this case; and if from said
25 evidence the jury believe that Heath and Ford were contriving to keep said property away from the creditors of Heath, the same in fact belonging to Heath, this in law is fraud, and the Jury should find for the defendant."

Refused.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

9 If the Jury believe from the evidence that Heath purchased the Horses in question, and was the owner thereof and paid partly for them, and that Heath then procured the plaintiff Ford in point of fact, to advance the balance of the purchase money, with the agreement between them that Ford was, as his security to take and retain possession of said horses until Heath should repay Ford the money so advanced, and that Heath was afterwards, and all the time of said levy found in the actual possession of said horses, he still being the owner thereof then in law it will be presumed that Heath had paid to said Ford the money so

advanced by Ford, and in such case the horses in question were liable to be seized and taken upon said Writ of Attachment as Heath's, and the Jury should find for the defendant."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

Each one of which instructions the Court wrote the word "refused" on the margin thereof and refused to give them as law to the Jury, to the ruling of the Court in refusing to give said instructions to the Jury as law the defendant by his counsel then and there excepted.

The Jury found the issue for the plaintiff. The defendant moved the Court for a new trial; upon the hearing of said motion for a new trial, A. M. Herrington, one of the Attorneys for the defendant read to the Court an affidavit in evidence which is in the words and figures following:

Hezekiah Ford, vs Erdix T. Currier. } ss. Kane County Circuit Court, November Term, A. D. 1860.

Augustus M. Herrington on oath states that he, as sole counsel conducted the defence of the above entitled cause. And that about the hour of eleven o'clock on the 4th day of December, A. D. 1860, which day was one of the days of the said November Term of said Court. The Jury retired from the bar of said Court to consider of their verdict in such cause under the charge of Jos. H. Whipple, one of the officers of said Court, and that said Jury, as this affiant states upon information, which information this affiant states he fully believes to be true, being unable to agree upon a verdict in said cause through and by their foreman, Alexander V. Sill, sent by their said officer about five o'clock in the evening of of the same day a written request to the Hon. Isaac G. Wilson the presiding Judge of said Court which was in substance as follows:

26 "If proper the Jury would respectfully ask is the copy of the Attachment as set forth in defendant's plea, evidence of Indebtedness.

Respect. &c,, A. V. SILL, Foreman.

And this affidavit further stating as aforesaid says that said officer shortly afterwards handed said written request as above set forth to said Judge of said Court, and that said Judge of said Court received said written request from the hands of said Whipple, officer as aforesaid, and after reading the same wrote upon the back of said written request of said Jury in substance as follows: "The Court cannot give any further instructions without consent of parties, but would refer the Jury to the wording of the instruction given on the part of the plaintiff.

I. G. WILSON."

And this affidavit stating upon information as aforesaid, says that immediately afterwards the said Jos. H. Whipple receiving from the hand of said Court said written request of said Jury and the written answer thereon of the said Court, and without any delay conveyed the same to the said Jury and gave the same to them. And this affiant states that neither himself nor the defendant nor any person or persons whatsoever on the part of said defendant had any knowledge, or gave in any manner their consent to said transaction, nor did this affiant or said defendant, or any person acting for the defendant know of and concerning the same until the Jury in said cause had given their verdict in said cause, and had been discharged from further service therein.

This affiant further stating upon information and belief says, that said written request on the part of said Jury, and the said reply of the said Judge as aforesaid, was by the said foreman A. V. Sill, with the residue of the papers belonging to said case given in charge to said Jury returned to the Bar of this Court, and by the said foreman handed to the Clerk of said Court for safe keeping.

And this affiant further stating says, that soon after the said Jury were dis-

27 charged by the Court from further service in said cause, he was for the first time informed of and concerning said transaction, and that the affiant soon after said information made search amongst the papers upon file in said case for said written request and the Court's answer thereon, but could not find the same. This affiant then procured others to aid him in said search for said paper, and full and thorough search was prosecuted in and about said Court room in all parts and places where the same could or would be likely to be found, and this affiant states that the same was not nor cannot be found, this affiant made enquiry of T. C. Moore, the Clerk of said Court, as to his knowledge of said paper who replied to this affiant that he had no knowledge whatever of and concerning the same, nor had he any remembrance of having seen the same, and this affiant states that he believes the same is lost or destroyed. This affiant further stating upon information as aforesaid, not having been present, that in the forenoon of the succeeding day, namely, the 5th day of December, said Jury not yet having agreed upon a verdict in said cause, were by said officer brought to the Bar of said Court, and were then interrogated by the Hon. Isaac G. Wilson, yet Judge of said Court in substance as follows:

"Gentlemen of the Jury, have you agreed upon a verdict?" to which question the said *said* Jury by their said foreman replied in substance as follows: "We have not." The said Judge of said Court then proceeded to instruct said Jury, upon his own motion, not in writing, and without the knowledge, consent or approval of the defendant or any one in his behalf, none being present to represent said defendant in substance as follows: "It is the duty of the Jury to agree upon a verdict in this case if they can. Whilst members of the Jury are not always to yield their convictions of right, yet it is their duty to agree upon a verdict if they can. Mistrials are embarrassing to the business of the Court and should be avoided if possible. It oftentimes happens that Jurors when they go out, having during the trial formed an opinion, express the same, become before they know of it partizans, and through pride of opinion fail to see the case in its true light, and fail to see the law and the evidence as given to them in their true bearings. It is much to be desired by the Court, that the Jury agree upon a verdict in this case. You will not be discharged, but return to your room and make further trial and see whether you may not agree in this case."

This affidavit further stating, says, that said Jury once more after said verbal instructions by and on the part of said Court so given, returned into Court with a verdict in said case, for the plaintiff, and further saith not.

Subscribed and sworn to before me this 11th day of December, A. D. 1860.
T. C. MOORE, Clerk.

A. M. HERRINGTON.

Filed December 4th, 1860.

T. C. MOORE, Clerk.

The plaintiff also offered in opposition to the motion the following affidavit.

Hezekiah Ford
vs.
Erdix T. Currier.

Kane County Circuit Court, November Term of said Court for 1860.

STATE OF ILLINOIS,
KANE COUNTY.

28 J. H. Mayborne being first duly sworn, doth depose and say on oath, and say that he was one of the counsel who had charge of the above entitled suit, and assisted in the trial of the same and was present in Court when the Jury returned into Court and stated to the Court through their foreman Mr. Sill, in answer to the enquiry made by the Court if they had agreed on a verdict in the case, and he said Sill stated they had not. I also recollect very distinctly, the remarks by the Court, as I was paying particular attention to the matter, and I also can recollect as I believe, the words used by the Court in the remarks he made to the Jury on that occasion almost or quite verbatim in the

connection that they were made, as I had frequently heard the Court use very near or quite the same words in remarking to Juries on similar occasions, and the remarks made by the Court on that occasion to the Jury were in the following words as the affiant believes, to wit: The Judge said that he had reluctantly kept them together during the night, and had only done so from a sense of duty; that in view of the great expense that would attend a re-trial, and in view of the fact that the amount in controversy was not very large, it was very desirable that the Jury should agree. That the case was not of so serious a nature as if it involved the life and liberty of a person, and while on the one hand no Juror ought to disregard his honest conviction as to the effect of the evidence in the case, on the other he ought to endeavor to harmonize his views with his fellow Jurors, if he can consistently do so. That one of the objects of the Law in requiring unanimity among the Jurors was to guard against hasty verdicts; that in many cases it was not to be expected that they would agree on the first ballot, that it sometimes happened that Jurors having expressed a first impression upon going into the Jury room afterwards adhere to the opinion there expressed, partly from pride of opinion, without being conscious of it. That each Juror should examine his own mind and endeavor to ascertain whether he is influenced by any consideration except the evidence and the law as given by the Court, that he should examine the case, and if he found himself differing from his fellow Jurors, should
29 endeavor to ascertain whether their opinion might not be more nearly the truth than his own, in short that his efforts should be to agree rather than disagree, if it could be done without the sacrifice of his honest convictions after calm and full deliberation. The Jury then retired from the Court room under charge of the officer. And this affiant further states that R. G. Curtis, one of the counsel in the case for the defendant, was present and made no objections.

Sworn and subscribed to before me this 14th Dec. 1860. } J. H. Mayborne.
T. C. MOORE, Clerk. }

The above facts as set forth are as I recollect them, I being one of the counsel in the cause.

Subscribed and sworn to before me, December 15th, 1860. } W. J. Brown.
T. C. MOORE, Clerk. }

Filed December 15th, 1860.

T. C. MOORE, Clerk.

Which was all the evidence heard or offered on the motion for a new trial. The statement contained in the foregoing affidavit of A. M. Herrington in relation to the written communication sent to the Court by the Jury and the Judge's reply is incorrect in this:

The Judge wrote upon the margin of the communication as follows: "The Court is not at liberty to give any additional instructions without the consent of the parties, the Jury must look to the instructions already given."

The Court did not write as is stated in said affidavit, "would refer the Jury to the wording of the instructions on the part of the plaintiff." Which motion for a new trial the Court after being fully advised overruled. To the ruling of the Court in overruling said motion refusing to grant said new trial, the defendant by his counsel then and there excepted, and tendered this his Bill of Exceptions and prayed that the same be signed and sealed and made a part and parcel of the record and proceedings in this cause.

Which is accordingly done. ISAAC G. WILSON.

Which said bill of exceptions is endorsed as follows:

Filed December 24th, 1860.

T. C. MOORE, Clerk.

And afterwards, to wit: on the 9th day of January, A. D. 1861, there was filed in the said Clerk's office an Appeal Bond which is in the words and figures

following, to wit:

"Know all Men by these presents that we Erdix T. Currier as principal, and
30 Loren Kennedy and John Kelly as surety are held and firmly bound unto Hezekiah Ford in the penal sum of three hundred dollars lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs and administrators, and every of them, jointly and severally. Witness our hands and seals this 19th day of December A. D. 1860.

The condition of this bond is this, that whereas heretofore at the November Term of the Kane County Circuit Court, there was a certain Replevin suit pending in the said Court, wherein the said Hezekiah Ford was plaintiff and the said Erdix T. Currier was defendant; and whereas upon a trial of said suit at said November Term of said Court the issues in said cause were found for said Ford, the said plaintiff. And whereas the said Currier has prayed an Appeal to the Supreme Court of the State of Illinois, which Appeal was allowed by the said Court upon the condition that said Erdix T. Currier would execute a bond to the said Ford, according to Law, in the penal sum of three hundred dollars with security to be approved by the Clerk of said Court. Now, if the said Erdix T. Currier shall prosecute his said Appeal with effect, and shall pay and satisfy all costs and judgments which may be rendered by said Supreme Court, either upon affirmance of the said judgment of the said Circuit Court, or upon dismissal of the same by the said Supreme Court, then this obligation to be void, otherwise to be and remain in full force and effect.

Witness our hands and seals the day and year first above written:

ERDIX T. CURRIER. (SEAL)

L. KENNEDY, (SEAL)

JOHN KELLY. (SEAL)

Taken and approved by me this 9th day of January, A. D. 1861.

T. C. MOORE, Clerk.

Which said bond is endorsed as follows:

Filed December 15th, 1860.

T. C. MOORE, Clerk.

State of Illinois, } ss.
Kane County. }

I, Thomas C. Moore, Clerk of the Circuit Court in and for the said County in the State aforesaid, do hereby certify that the foregoing is a complete record of all the proceedings in said Court, in the case of Hezekiah Ford, plaintiff, against Erdix T. Currier, defendant, in an action of Replevin, said Record comprising the process, pleadings, all orders of said Court, Bill of Exceptions, and Appeal Bond, issued, filed and entered of Record, in said Court in said case.

Witness my hand and the seal of said Court at Geneva, in said County, this 31st day of January, A. D. 1861.

T. C. MOORE, Clerk.

ERRORS ASSIGNED.

The Court erred in admitting improper evidence to go to the Jury.

The Court erred in refusing to allow the defendant to give competent and proper evidence to the Jury.

The Court erred in overruling the defendant's motion for a new trial.

The Court erred in giving the instructions asked for on part of the plaintiff, as the law of the case.

The Court erred in refusing to give to the Jury the defendant's instructions instructions asked for as the law of the case.

A. M. HERRINGTON,
Attorney for Appellant.

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1861

Currier

v

Ford

Abstract

Filed Apr 18. 1861

A. deland

Clerk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

ERDIX T. CURRIER
vs.
HEZEKIAH FORD.

ARGUMENT AND BRIEF.

The bill of exceptions is printed at large, and will give the Court a clearer state of case than a condensed statement by me. The action is replevin; and to the fourth plea or avowry is the attention of the Court first directed. (See pages 5 and 6 of the Record.) Two replications were filed to it: one a denial that Currier was Deputy Sheriff; the other, a traverse of property, &c., admitting the existence of the writ of attachment, the possession thereof by the Deputy Sheriff, the levy, &c. Now the proof (see pages 19 and 20 of Record) shows that Currier was, at the time, &c., Deputy Sheriff, as in said avowry alleged. The officer did as he was in the writ commanded. This he was bound to do. Now, by the pleadings, the legal existence of said writ is admitted. The writ, then, was a complete justification to the officer. (See *Jackson* vs. *Hobson*, 4 Scam. 416—*Stephens* vs. *Frazier*, 2 Monroe, page 250.) The instructions, and each of them that were refused, on the authority of these cases, should have been given. In this connection, the Court is requested to read the eighth and ninth of the series. The agument in their defence is stated in the instructions; in fact the whole case is explained by the instructions. The plaintiff here could not be required to prove more that he had averred in his plea. He might have been required to have averred in his avowry that, at the time of the suing out of the writ of attachment, Heath was indebted to Kennedy. This question is fully discussed in the Kentucky case referred to. (2 Monroe, 250.)

Nor are the instructions given by the Court for the defendant in error, the law. (See page 22d of Record.) This is not the law of the case: first, because the evidence establishes that the

Sheriff took the property from the possession of Heath; in fact the proof shows that the property never, until after the levy, was in the possession of *Ford*. Second, the property being and remaining with Heath, the purchaser, the presumption of law is, that if the actual relation of pledgor and pledgee once did exist between Heath and Ford, (which is denied,) such had ceased to exist. This instruction denies that, if such relation had, by the act of Heath and Ford, been cancelled, the defedant below was entitled to prove the same. Can it be said with reason that the defendant below was bound to enter upon an expensive litigation in the attachment suit, and prove to the satisfaction of the jury that their was an actual indebtedness existing between Kennedy and Heath, outside of the writ, before the law would permit him to claim that the advancing of the money by Ford was, in point of fact, a fiction; or to show, by a just legal presumption, that said relation of pledgor and pledgee had, in point of fact, ceased to exist by the property held in pledge being permitted to remain with Heath? This cannot be the law.

See Edwards on Bailments 210 6" East 27 2d Peck 607 15" Mass 389

Now as to the instruction given on the part of the Court, it is not the law of the case, because the evidence tends to prove that Ford was conspiring with Heath to aid Heath in smuggling his property, so as to prevent the creditors of Heath from levying upon the same. The defendant below insisted, from the proof, that there was evidence tending to prove the conspiracy. (See the testimony of Goodridge, page 15 of Record—in fact, all the testimony of the case.) If there was proof tending to show a conspiracy, the defendant below should have been permitted to have proven it by the declarations of Heath, as offered. (See page 16 of Record.) There was evidence tending to prove the conspiracy. It was for the jury, and not the Court, to say whether the same was proven; therefore the instruction volunteered by the Court is not the law.

It must be remembered that there was evidence given of indebtedness aside from the writ, (see page 20 of Record,) evidence of E. J. Allen, the Sheriff.

Aside from this, the Court erred in refusing to grant the motion for a new trial. See page 26 of Record, the affidavit of A. M. Herrington. The Court on this evidence, which is not in the least contradicted, upon the authority of *Crabtree* vs. *Hagenbaugh*, 23 Ill. page 349; also *Fisher* vs. *The People*, page 292, same book, should have awarded a new trial. Clearly the Court had no power to correspond with the jury on the subject

of the law of the case in the manner shown by the proof. It will be observed that the plaintiff below filed a counter affidavit, fully agreeing in the statement of the case as made by A. M. Herrington, in his affidavit, but adding that Curtis was present, and did not object. I invite the attention of the Court to the fact that there is no pretence that Curtis, as counsel, participated in the trial of the case. I deny the authority of the Court to instruct the jury orally, except when consent is first asked, and given. Had the Court below know the authorities above quoted, no such hazard would have been taken, nor will it serve as a shield to the party in error that there is added in the bill of exceptions a qualification, to the effect that the Court is not correctly quoted in the affidavit. The proof is what is hoped will control this Court.

In the 20 of Ill., page 151, this Court have said, "This presumption is not rebutted by a bill of exceptions, showing, &c." This authority is in point, in so far as it does not permit the judge below to qualify the testimony by adding in the bill of exceptions what did not appear as proof in the case. It is a remarkable fact, that the counsel, in conducting the trial of the case for the defense, being in attendance upon the Court, and engaged actively in the business of the Court-room, was not in the least advised or had any knowledge of said transactions until after their occurrence. It certainly would have been proper to have advised the party holding a responsible position to the case. It is expected and hoped that this Court will fully review the legal effect of the position the Court below as-sumed on this question.

A. M. HERRINGTON,
Attorney for Appellant.

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Cunnier
vs
Ford

Argument & Brief

Filed May 9- 1861

L. Leland
Clerk

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

ERDIX F. CURRIER,
Appellant,
vs.
HEZEKIAH FORD,
Appellee.

APRIL TERM, A. D. 1861.

Statement of the Case—Points and Brief.

STATEMENT OF THE CASE.

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The Plaintiff in the Replevin suit, as to the 2d plea, files his replication, traversing it as to the horses being the property of the Defendant, &c., same as to the 3d plea, and as to the 4th replies doubly: First, That the property was not the property of Heath. Secondly, That said Currier was not, as alleged in said plea, a deputy Sheriff.

The case was tried at the November Term of said Court for 1860, before Judge I. G. Wilson, presiding, and a Jury, and resulted in a verdict in favor of the Plaintiff in Replevin. Appellant moved for a new trial, which was overruled, and this case is brought by bill of exceptions, for review, to this Court.

The Appellee, to maintain the issue, on the trial, proved by one Alonzo L. Lovell, that he resides at Courtland, De Kalb Co., that on the 1st of March, he was the owner of the horses in question; that Loren Heath came to him to purchase them; that Heath purchased them—was to pay $275 for the horses, and a set of double harness. Vide Record, page 11. Heath paid him $35, and said, "I want you to go to Lodi with me." I said to him, "Hezekiah Ford is here, may be you can get the money of him." He said, "where is Ford?" I said to him, "he is in town," he said, "don't tell Ford that I have paid you anything on the price." Soon after came in with Ford, and pointed to the harness, and said he, "that is the harness." Ford then said "$240, is the sum you want;" I replied, "yes." Ford handed over the $240. Then Heath said to me, "now, Lovell, I want you to understand this—when I pay Ford $240 I am to have the horses." Then we went to the door; some man called Ford, and he stopped. I went to the barn with Heath. I led out one of the horses, and gave it to Heath, and brought the other one around, and gave it to Ford; next day, sent the harness to Lodi, to Ford; shipped the harness to Ford because they, Ford and Heath, so directed. (Lodi is about five miles from Courtland.) Can't say, positively, but think it was Ford who gave me directions to do so. Ford was to have the horses until he was paid the $240.

Barney McGuff testified that he lived at Lodi, on the first of March, 1860, was in the employ of Ford, was at work around Ford's store, part of the time, and teaming some, about the middle of March. (Identity of property admitted by Defendant.) The horses were kept in barn, saw the horses the day they were brought home, they were opposite Ford's store; from that time I had charge of them for Ford. I worked them on Ford's farm, harrowing, and putting in grain. (Here the Defendant admitted the taking of the horses in question.) Was there when the horses were returned after being taken.

C. M. Humaston, who was sworn on the part of the Appellant, stated that he knew the horses, (Vide Record, page 18,) that Heath started for California with the Lovell horses from his house, about seven o'clock, on Sunday evening, stated on cross examination that Ford brought up the horses on Saturday evening, to my house. Heath paid him $240. Heath left on the next Sunday evening. There seemed to be some mis-understanding about a Note; one claimed that it was paid, and the other that it was not paid. I saw Heath paying two hundred dollars, or over. After they got through, they went down to the stable, and Ford turned out the horses. At the time of the conversation about the Note, Heath was much excited, claiming that it was, or had been paid. Can't say that Ford hired it; don't know where Heath got the money to pay for the horses; Heath, I now recollect, borrowed some of the money of me, to pay for the horses, when he paid the money, he said "there, Ford, is the money for your horses?"

These are the main facts in the case, and they were uncontradicted by any evidence in the case. All the evidence in the case is pretty fully stated, in what purports to be the Abstract of Record, and by that the Court will be satisfied that Ford furnished to Heath $240, to pay for the purchase price, and that Heath did not repay Ford till about the first of April, 1860, some 20 days after the taking of the property by the Appellant in the writ of attachment. The Court will also see by reference to the testimony offered by the Appellant that he wholly neglected to prove the fact or offer any evidence whatever, on the trial of the case, to show or establish the fact that this Plaintiff in the attachment suit, (Kennedy,) was a creditor of Heath's, or that Judgment had been obtained on it in favor of the Plaintiff, or that it was still pending, or that Currier's appointment as deputy, had been recorded as required by the Statute.

The First error assigned by the Appellant is, that the Court allowed improper evidence to be given to the Jury on the trial of the case. This objection is not well taken, and there is no force in it, as there was no objection taken at the trial, by the Appellant, to any evidence that was offered to the Jury by the Appellee, and he having failed to make his objections then it is now too late to make them, and they be of any benefit to him. If there was occasion or reason for doing so, consequently it is unnecessary for us to pursue this point any further.

The Second point assigned is, that the Court erred in refusing to allow the Appellant to give competent and proper evidence to the Jury. The only objection made to the evidence offered by the Appellant on the trial, as appears by the Record, that he complains of, is in the examination of James Goodrich; and in sustaining the objection of the Appellee's counsel to the Appellant proving the declarations of Heath, in regard to statements of Heath, made long after the sale or purchase of the horses of Lovell, (as to the purchase of said horses, and his owning them by this witness, and this his own witness,) when neither the horses nor Ford were present. It seems to us no lengthy argument is required on this branch of the case, or the citation of authorities in support of the correctness of the ruling of the Court in excluding this evidence, for it comes within the rule so often and and frequently decided, that it is as familiar to all Lawyers, as the alphabet is to the scholar. First, because Heath was a competent witness, and and therefore, it was objectionable as being hearsay evidence. Secondly, Heath's declarations as to whether he purchased the horses, or was the owner of them, were inadmissible in evidence against Ford, or the bailee, unless they were

brought home to his knowledge, unless he stood connected with them, and that connection must first be shown. Vide case of Prier vs. White, 12 Ill. 261, which was not done, or offered to be proved in this case by the Appellant, nor is there any pretension that Ford had any knowledge of these declarations. In this case it was not only necessary to show that Heath acted fraudulently, but that Ford was connected with it, and participated in the fraudulent design, and this has not been done, therefore the evidence was not admissible.

The Third point is that the Court erred in giving the instructions asked on the part of the Appellee.

The law is correctly stated in the first instruction given for the Appellee. The same questions raised by this instruction was before the Court in the case of Isaac Cook vs. Jacob Miller, 11 Ill., 610, and the same rule was laid down. The Appellant having failed to prove that Kennedy was the creditor of Heath, he was not in a position to question the transaction, and insist that it was made to defraud the creditors of Heath, he having introduced no evidence on that point.

The law we insist is correctly laid down in the second instruction. The rule of law covering this point is considered and discussed in the case of Prier vs. White, 12 Ill., 261, which we have before referred to, and we do not deem it necessary to go over the same ground the second time.

Fourthly. The Appellant insists that a new trial should be granted, because the Court erred in refusing to give all the Instructions asked, to the Jury. In this case there were no less than nine Instructions asked by the Appellant, two of which were given by the Court, which covered the law in the case, as presented by the evidence, so far as his rights were involved.

The third Instruction asked by the Appellant does not state the facts in the case as proved. No such case had been shown by the Appellant as this Instruction assumes to have been made. First, Because there is no proof to show that it was Heath's money that Ford paid to Lovell, while on the contrary the evidence shows that it was Ford's, and that he advanced it. The fact of Heath's having money by him proves nothing, when he states that it is not his. Secondly, The Appellants had no right to attack that transaction, as they had not proven the essential fact so important to authorize them to do so, namely, that Kennedy was a creditor of Heath. Thirdly, They had not established the fact that Currier was a deputy Sheriff at the time of the serving of the Attachment. The appointment and taking the oath of office was not sufficient to do this. Before Currier could act as a deputy Sheriff, and execute papers, his appointment must be recorded. Vide Revised St. 1845, page 515, sec. 10, which is in these words: "It shall be "lawful for any Sheriff to appoint a deputy or deputies, which appointment shall "be in writing, and filed in the office of the Clerk of the Circuit Court, and re- "corded, and any deputy when so appointed, and having taken and subscribed "the several oaths required to be taken by the Sheriff, shall be, and is hereby "authorized to perform any and all of the duties required of the Sheriff," &c. Before a deputy is authorized to execute a process his appointment must be recorded in the Record of the Circuit Court, and till this is done, an essential step is omitted, that is requisite to constitute him such deputy, and this act had not been done in this case, by causing the Clerk of said Court to record it, at any rate the Appellant did not prove it, or offer to prove it, consequently he failed to make good his 4th plea, and establish the fact that he was deputy Sheriff, and as such, by virtue of the writ of Attachment he took and held said property.

And all the other instructions asked by the Appellant, and refused by the Court, were obnoxious on the same ground and for the same reason as were the first and second instructions given on the part of the Appellant, and therefore there was no error in the Court refusing to give them.

And the authority noted by the Appellant in the margin of the instruction No.

5 & 6, and cited by them, have no force or application to the principles of law involved in this case. Had the Appellant established the fact that Kennedy was the creditor of Heath, and that the Appellant was a duly appointed deputy Sheriff, fully authorized to execute legal processes, then there might have been some analogy between the cases, and so far as that analogy held good, and the same rule of law would apply, and consequently the case would have had some bearing on this, but here it has none, and they are deprived of its benefit, if any there was, or could have been derived from it. These instructions are to be tested by the rule of law laid down in the case of Cook vs. Miller, 11 Ill., 610, already referred to, and the same objections that we have mentioned and pointed out in the 3rd, 4th, 5th & 6th instructions referred to, will apply to the others. Assuming the right of the Appellant to have the Jury investigate the question, whether the transaction was a fraudulent one as to creditors, when they had not shown that they were such, or had any right to inquire into the matter, and from the facts in the case, the Appellants stand in the light of intermeddlers with other persons' business and matters, without any right or just purpose; whether they really had any or not, for these reasons alone we insist and maintain that these instructions were properly refused, although others might have been pre-

Fifthly. Did the Court err in this case in refusing to grant a new trial? We insist that it did not. First, because the verdict is right, and in conformity with the evidence, and such a verdict as the Judgment adopts and appears based upon the facts in the case. We maintain the Appellant having failed to establish the fact that there was any fraud on the part of the Appellee, or that he was endeavoring to cover up Heath's property and keep it from his creditors, therefore the verdict is right on the merits. There was nothing singular or strange in the conduct of Ford in letting Heath have the money. Ford was a monied man, and Heath wanted to get the horses, so Ford let him have the money, and took and held the horses till he got his money back. This is all there is in this branch of the case. Secondly, there was no error committed by the Court in reply to the communication from the Jury in the manner they did, and it is in no way a parallel case to that of Crabtree vs. Hoganbough, 23 Ill. 349. In this case now before the Court the Judge sent a written communication to the "Jury, stating, that "The Court is not at liberty to give any additional instructions "without the consent of the parties; the Jury must look to the instructions already "given." Vide Record, page 29. He could say nothing less than this, and treat the communication from the Jury with respect. He did not do as the Court did in the case in the 23d, retiring to the room of the Jury, and there had a conversation with them on the subject of the instructions which had been given to them; although not done with improper motives, yet this Court has said, and very properly, that such conduct was improper. But should the Court set aside the verdict in this case, for this reason, then there can be no communication between the Jury and the Court, no matter how important it is, or its character, but it would be a sufficient reason to set aside the verdict, for it cannot be urged that in this instance, that the communication of the Court to the Jury could have influenced them in any way, or injured the Appellant. The Court did not call the attention of the Jury as stated in the affidavit of Herrington to the Instructions given on the part of the Plaintiff, but simply stated that the Jury must look to the Instructions already given, (Vide the correction of said affidavit by the Court on page 29 of Record,) and then left it; could he say less and treat the Jury with proper respect?

Was there any error committed by the Court, and should the verdict be set aside, because the Court made the remarks he did to the Jury, on their coming into Court and advising him that they had not agreed? If so, then we have mistaken the object and purpose of a Jury trial. It appears to us that the Court only informed the Jury in a short, plain, and clear manner, the object and end sought to be obtained, and reached by Jury trials, and what should be their design and purpose, while deliberating. The same remarks, in substance, no doubt, have

been made in hearing of, and probably by your honors, scores of times, while on the Circuit. Mistrials have been very frequent of late years, owing to the stubbornness, or wilful conduct of one or more Jurymen, thereby consuming a large portion of the time of each term, without producing any beneficial result. But in this case the Appellant is not in a condition to raise any objections to the charge of the Judge in this case, because it was and is a fact, and so stated in the affidavit, which contains what I believe to be a verbatim statement of the Judge's remarks to the Jury, (Vide Record, page 28 & 29,) that one of the Counsel, R. G. Curtis, of the Appellants, was by, and heard all of the remarks to the Jury, and made no objection to them, and it will not do for Mr. Herrington to state that he is the sole Counsel in this case, for all, or nearly all of the papers filed in the case, on the part of the Appellant, are in the handwriting of said Curtis, as are also the original Instructions in the case. He was present at the trial, and assisted in it, and took the testimony, and it was understood by all, that Mr. Herrington was employed in it as I was, to help the original attorneys in the case, who were Brown and Curtis. From this fact, it fully appears who have had the control and management of the case. Curtis stood by, and made no objection to the remarks of the Judge to the Jury, or to their retiring to consider and deliberate further on their verdict. Having done this, should the Appellant be allowed to raise objections to, and seek to obtain a new trial on a matter that he made no objections to at the time that it did, or was occurring? Most certainly not, by any principle of law or justice. We insist, then, that the Court did nothing on the trial of this case, or after it, that should furnish any ground for a new trial in this cause, and the verdict being just right, and in accordance with the facts in the case, it should be permitted to stand, and the Appellee not again be put to the trouble and expense of re-trying it, to gratify the litigation spirit of his adversary.

J. H. MAYBORNE,
Atty. for Appellee.

Supreme Court

E. D. Curtis

v 224

H. Ford

Statement Points & Brief

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And all the other instructions asked by the Appellant, and refused by the Court, were obnoxious on the same ground and for the same reason as were the first and second instructions given on the part of the Appellant, and therefore there was no error in the Court refusing to give them.

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C. M. Humaston, who was sworn on the part of the Appellant, stated that he knew the horses, (Vide Record, page 18,) that Heath started for California with the Lovell horses from his house, about seven o'clock, on Sunday evening, stated on cross examination that Ford brought up the horses on Saturday evening, to my house. Heath paid him $240. Heath left on the next Sunday evening. There seemed to be some mis-understanding about a Note; one claimed that it was paid, and the other that it was not paid. I saw Heath paying two hundred dollars, or over. After they got through, they went down to the stable, and Ford turned out the horses. At the time of the conversation about the Note, Heath was much excited, claiming that it was, or had been paid. Can't say that Ford hired it; don't know where Heath got the money to pay for the horses; Heath, I now recollect, borrowed some of the money of me, to pay for the horses, when he paid the money, he said "there, Ford, is the money for your horses?"

These are the main facts in the case, and they were uncontradicted by any evidence in the case. All the evidence in the case is pretty fully stated, in what purports to be the Abstract of Record, and by that the Court will be satisfied that Ford furnished to Heath $240, to pay for the purchase price, and that Heath did not repay Ford till about the first of April, 1860, some 20 days after the taking of the property by the Appellant in the writ of attachment. The Court will also see by reference to the testimony offered by the Appellant that he wholly neglected to prove the fact or offer any evidence whatever, on the trial of the case, to show or establish the fact that this Plaintiff in the attachment suit, (Kennedy,) was a creditor of Heath's, or that Judgment had been obtained on it in favor of the Plaintiff, or that it was still pending, or that Currier's appointment as deputy, had been recorded as required by the Statute.

The First error assigned by the Appellant is, that the Court allowed improper evidence to be given to the Jury on the trial of the case. This objection is not well taken, and there is no force in it, as there was no objection taken at the trial, by the Appellant, to any evidence that was offered to the Jury by the Appellee, and he having failed to make his objections then it is now too late to make them, and they be of any benefit to him. If there was occasion or reason for doing so, consequently it is unnecessary for us to pursue this point any further.

The Second point assigned is, that the Court erred in refusing to allow the Appellant to give competent and proper evidence to the Jury. The only objection made to the evidence offered by the Appellant on the trial, as appears by the Record, that he complains of, is in the examination of James Goodrich; and in sustaining the objection of the Appellee's counsel to the Appellant proving the declarations of Heath, in regard to statements of Heath, made long after the sale or purchase of the horses of Lovell, (as to the purchase of said horses, and his owning them by this witness, and this his own witness,) when neither the horses nor Ford were present. It seems to us no lengthy argument is required on this branch of the case, or the citation of authorities in support of the correctness of the ruling of the Court in excluding this evidence, for it comes within the rule so often and and frequently decided, that it is as familiar to all Lawyers, as the alphabet is to the scholar. First, because Heath was a competent witness, and and therefore, it was objectionable as being hearsay evidence. Secondly, Heath's declarations as to whether he purchased the horses, or was the owner of them, were inadmissible in evidence against Ford, or the bailee, unless they were

brought home to his knowledge, unless he stood connected with them, and that connection must first be shown. Vide case of Prier vs. White, 12 Ill. 261, which was not done, or offered to be proved in this case by the Appellant, nor is there any pretension that Ford had any knowledge of these declarations. In this case it was not only necessary to show that Heath acted fraudulently, but that Ford was connected with it, and participated in the fraudulent design, and this has not been done, therefore the evidence was not admissible.

The Third point is that the Court erred in giving the instructions asked on the part of the Appellee.

The law is correctly stated in the first instruction given for the Appellee. The same questions raised by this instruction was before the Court in the case of Isaac Cook vs. Jacob Miller, 11 Ill., 610, and the same rule was laid down. The Appellant having failed to prove that Kennedy was the creditor of Heath, he was not in a position to question the transaction, and insist that it was made to defraud the creditors of Heath, he having introduced no evidence on that point.

The law we insist is correctly laid down in the second instruction. The rule of law covering this point is considered and discussed in the case of Prier vs. White, 12 Ill., 261, which we have before referred to, and we do not deem it necessary to go over the same ground the second time.

Fourthly. The Appellant insists that a new trial should be granted, because the Court erred in refusing to give all the Instructions asked, to the Jury. In this case there were no less than nine Instructions asked by the Appellant, two of which were given by the Court, which covered the law in the case, as presented by the evidence, so far as his rights were involved.

The third Instruction asked by the Appellant does not state the facts in the case as proved. No such case had been shown by the Appellant as this Instruction assumes to have been made. First, Because there is no proof to show that it was Heath's money that Ford paid to Lovell, while on the contrary the evidence shows that it was Ford's, and that he advanced it. The fact of Heath's having money by him proves nothing, when he states that it is not his. Secondly, The Appellants had no right to attack that transaction, as they had not proven the essential fact so important to authorize them to do so, namely, that Kennedy was a creditor of Heath. Thirdly, They had not established the fact that Currier was a deputy Sheriff at the time of the serving of the Attachment. The appointment and taking the oath of office was not sufficient to do this. Before Currier could act as a deputy Sheriff, and execute papers, his appointment must be recorded. Vide Revised St. 1845, page 515, sec. 10, which is in these words: "It shall be "lawful for any Sheriff to appoint a deputy or deputies, which appointment shall "be in writing, and filed in the office of the Clerk of the Circuit Court, and re- "corded, and any deputy when so appointed, and having taken and subscribed "the several oaths required to be taken by the Sheriff, shall be, and is hereby "authorized to perform any and all of the duties required of the Sheriff," &c. Before a deputy is authorized to execute a process his appointment must be recorded in the Record of the Circuit Court, and till this is done, an essential step is omitted, that is requisite to constitute him such deputy, and this act had not been done in this case, by causing the Clerk of said Court to record it, at any rate the Appellant did not prove it, or offer to prove it, consequently he failed to make good his 4th plea, and establish the fact that he was deputy Sheriff, and as such, by virtue of the writ of Attachment he took and held said property.

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J. H. MAYBORNE,
Atty. for Appellee.

The general rule is that liens at law on personal property exist only in cases where the party entitled to them has the possession of the goods. and if he once part with possession after the lein attaches the lein is gon

Edwards on Bailments 210-
Lickbarrow vs Mason 6 East 27

And if the ~~paw~~ pawnee Voluntarily surrender the possession of the pawn by delivering it back to the pawnor his lein will be thereby terminated.

Homer vs Crane 2d Pick 607
Davis vs Rogers 15 Mass 389

applying this ~~doc~~ doctrine in its letter and Spirit the plaintiff below had no right of action as against the Officer. for as has already been Said the plaintiff below

never pretended to be the owner of the property in question. He certainly was not in the actual possession of it when it was seized by the officer. He had no title or claim because the law says if he ever had a claim he parted with it when he parted with the possession.

Supreme Court of the State of Illinois,

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vs.
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These are the main facts in the case, and they were uncontradicted by any evidence in the case. All the evidence in the case is pretty fully stated, in what purports to be the Abstract of Record, and by that the Court will be satisfied that Ford furnished to Heath $240, to pay for the purchase price, and that Heath did not repay Ford till about the first of April, 1860, some 20 days after the taking of the property by the Appellant in the writ of attachment. The Court will also see by reference to the testimony offered by the Appellant that he wholly neglected to prove the fact or offer any evidence whatever, on the trial of the case, to show or establish the fact that this Plaintiff in the attachment suit, (Kennedy,) was a creditor of Heath's, or that Judgment had been obtained on it in favor of the Plaintiff, or that it was still pending, or that Currier's appointment as deputy, had been recorded as required by the Statute.

The First error assigned by the Appellant is, that the Court allowed improper evidence to be given to the Jury on the trial of the case. This objection is not well taken, and there is no force in it, as there was no objection taken at the trial, by the Appellant, to any evidence that was offered to the Jury by the Appellee, and he having failed to make his objections then it is now too late to make them, and they be of any benefit to him. If there was occasion or reason for doing so, consequently it is unnecessary for us to pursue this point any further.

The Second point assigned is, that the Court erred in refusing to allow the Appellant to give competent and proper evidence to the Jury. The only objection made to the evidence offered by the Appellant on the trial, as appears by the Record, that he complains of, is in the examination of James Goodrich; and in sustaining the objection of the Appellee's counsel to the Appellant proving the declarations of Heath, in regard to statements of Heath, made long after the sale or purchase of the horses of Lovell, (as to the purchase of said horses, and his owning them by this witness, and this his own witness,) when neither the horses nor Ford were present. It seems to us no lengthy argument is required on this branch of the case, or the citation of authorities in support of the correctness of the ruling of the Court in excluding this evidence, for it comes within the rule so often and and frequently decided, that it is as familiar to all Lawyers, as the alphabet is to the scholar. First, because Heath was a competent witness, and and therefore, it was objectionable as being hearsay evidence. Secondly, Heath's declarations as to whether he purchased the horses, or was the owner of them, were inadmissible in evidence against Ford, or the bailee, unless they were

brought home to his knowledge, unless he stood connected with them, and that connection must first be shown. Vide case of Prier vs. White, 12 Ill. 261, which was not done, or offered to be proved in this case by the Appellant, nor is there any pretension that Ford had any knowledge of these declarations. In this case it was not only necessary to show that Heath acted fraudulently, but that Ford was connected with it, and participated in the fraudulent design, and this has not been done, therefore the evidence was not admissible.

The Third point is that the Court erred in giving the instructions asked on the part of the Appellee.

The law is correctly stated in the first instruction given for the Appellee. The same questions raised by this instruction was before the Court in the case of Isaac Cook vs. Jacob Miller, 11 Ill., 610, and the same rule was laid down. The Appellant having failed to prove that Kennedy was the creditor of Heath, he was not in a position to question the transaction, and insist that it was made to defraud the creditors of Heath, he having introduced no evidence on that point.

The law we insist is correctly laid down in the second instruction. The rule of law covering this point is considered and discussed in the case of Prier vs. White, 12 Ill., 261, which we have before referred to, and we do not deem it necessary to go over the same ground the second time.

Fourthly. The Appellant insists that a new trial should be granted, because the Court erred in refusing to give all the Instructions asked, to the Jury. In this case there were no less than nine Instructions asked by the Appellant, two of which were given by the Court, which covered the law in the case, as presented by the evidence, so far as his rights were involved.

The third Instruction asked by the Appellant does not state the facts in the case as proved. No such case had been shown by the Appellant as this Instruction assumes to have been made. First, Because there is no proof to show that it was Heath's money that Ford paid to Lovell, while on the contrary the evidence shows that it was Ford's, and that he advanced it. The fact of Heath's having money by him proves nothing, when he states that it is not his. Secondly, The Appellants had no right to attack that transaction, as they had not proven the essential fact so important to authorize them to do so, namely, that Kennedy was a creditor of Heath. Thirdly, They had not established the fact that Currier was a deputy Sheriff at the time of the serving of the Attachment. The appointment and taking the oath of office was not sufficient to do this. Before Currier could act as a deputy Sheriff, and execute papers, his appointment must be recorded. Vide Revised St. 1845, page 515, sec. 10, which is in these words: "It shall be "lawful for any Sheriff to appoint a deputy or deputies, which appointment shall "be in writing, and filed in the office of the Clerk of the Circuit Court, and re- "corded, and any deputy when so appointed, and having taken and subscribed "the several oaths required to be taken by the Sheriff, shall be, and is hereby "authorized to perform any and all of the duties required of the Sheriff," &c. Before a deputy is authorized to execute a process his appointment must be recorded in the Record of the Circuit Court, and till this is done, an essential step is omitted, that is requisite to constitute him such deputy, and this act had not been done in this case, by causing the Clerk of said Court to record it, at any rate the Appellant did not prove it, or offer to prove it, consequently he failed to make good his 4th plea, and establish the fact that he was deputy Sheriff, and as such, by virtue of the writ of Attachment he took and held said property.

And all the other instructions asked by the Appellant, and refused by the Court, were obnoxious on the same ground and for the same reason as were the first and second instructions given on the part of the Appellant, and therefore there was no error in the Court refusing to give them.

And the authority noted by the Appellant in the margin of the instruction No.

5 & 6, and cited by them, have no force or application to the principles of law involved in this case. Had the Appellant established the fact that Kennedy was the creditor of Heath, and that the Appellant was a duly appointed deputy Sheriff, fully authorized to execute legal processes, then there might have been some analogy between the cases, and so far as that analogy held good, and the same rule of law would apply, and consequently the case would have had some bearing on this, but here it has none, and they are deprived of its benefit, if any there was, or could have been derived from it. These instructions are to be tested by the rule of law laid down in the case of Cook vs. Miller, 11 Ill., 610, already referred to, and the same objections that we have mentioned and pointed out in the 3rd, 4th, 5th & 6th instructions referred to, will apply to the others. Assuming the right of the Appellant to have the Jury investigate the question, whether the transaction was a fraudulent one as to creditors, when they had not shown that they were such, or had any right to inquire into the matter, and from the facts in the case, the Appellants stand in the light of intermeddlers with other persons' business and matters, without any right or just purpose; whether they really had any or not, for these reasons alone we insist and maintain that these instructions were properly refused, although others might have been pre-

Fifthly. Did the Court err in this case in refusing to grant a new trial? We insist that it did not. First, because the verdict is right, and in conformity with the evidence, and such a verdict as the Judgment adopts and appears based upon the facts in the case. We maintain the Appellant having failed to establish the fact that there was any fraud on the part of the Appellee, or that he was endeavoring to cover up Heath's property and keep it from his creditors, therefore the verdict is right on the merits. There was nothing singular or strange in the conduct of Ford in letting Heath have the money. Ford was a monied man, and Heath wanted to get the horses, so Ford let him have the money, and took and held the horses till he got his money back. This is all there is in this branch of the case. Secondly, there was no error committed by the Court in reply to the communication from the Jury in the manner they did, and it is in no way a parallel case to that of Crabtree vs. Hoganbough, 23 Ill. 349. In this case now before the Court the Judge sent a written communication to the "Jury, stating, that "The Court is not at liberty to give any additional instructions "without the consent of the parties; the Jury must look to the instructions already "given." Vide Record, page 29. He could say nothing less than this, and treat the communication from the Jury with respect. He did not do as the Court did in the case in the 23d, retiring to the room of the Jury, and there had a conversation with them on the subject of the instructions which had been given to them; although not done with improper motives, yet this Court has said, and very properly, that such conduct was improper. But should the Court set aside the verdict in this case, for this reason, then there can be no communication between the Jury and the Court, no matter how important it is, or its character, but it would be a sufficient reason to set aside the verdict, for it cannot be urged that in this instance, that the communication of the Court to the Jury could have influenced them in any way, or injured the Appellant. The Court did not call the attention of the Jury as stated in the affidavit of Herrington to the Instructions given on the part of the Plaintiff, but simply stated that the Jury must look to the Instructions already given, (Vide the correction of said affidavit by the Court on page 29 of Record,) and then left it; could he say less and treat the Jury with proper respect?

Was there any error committed by the Court, and should the verdict be set aside, because the Court made the remarks he did to the Jury, on their coming into Court and advising him that they had not agreed? If so, then we have mistaken the object and purpose of a Jury trial. It appears to us that the Court only informed the Jury in a short, plain, and clear manner, the object and end sought to be obtained, and reached by Jury trials, and what should be their design and purpose, while deliberating. The same remarks, in substance, no doubt, have

been made in hearing of, and probably by your honors, scores of times, while on the Circuit. Mistrials have been very frequent of late years, owing to the stubbornness, or wilful conduct of one or more Jurymen, thereby consuming a large portion of the time of each term, without producing any beneficial result. But in this case the Appellant is not in a condition to raise any objections to the charge of the Judge in this case, because it was and is a fact, and so stated in the affidavit, which contains what I believe to be a verbatim statement of the Judge's remarks to the Jury, (Vide Record, page 28 & 29,) that one of the Counsel, R. G. Curtis, of the Appellants, was by, and heard all of the remarks to the Jury, and made no objection to them, and it will not do for Mr. Herrington to state that he is the sole Counsel in this case, for all, or nearly all of the papers filed in the case, on the part of the Appellant, are in the handwriting of said Curtis, as are also the original Instructions in the case. He was present at the trial, and assisted in it, and took the testimony, and it was understood by all, that Mr. Herrington was employed in it as I was, to help the original attorneys in the case, who were Brown and Curtis. From this fact, it fully appears who have had the control and management of the case. Curtis stood by, and made no objection to the remarks of the Judge to the Jury, or to their retiring to consider and deliberate further on their verdict. Having done this, should the Appellant be allowed to raise objections to, and seek to obtain a new trial on a matter that he made no objections to at the time that it did, or was occurring? Most certainly not, by any principle of law or justice. We insist, then, that the Court did nothing on the trial of this case, or after it, that should furnish any ground for a new trial in this cause, and the verdict being just right, and in accordance with the facts in the case, it should be permitted to stand, and the Appellee not again be put to the trouble and expense of re-trying it, to gratify the litigation spirit of his adversary,

J. H. MAYBORNE,
Atty. for Appellee.

Supreme Court

E. D. Cusmir

vs

Ed. Ford

Statement Points & Brief

Filed April 22. 1861

L. Lebeau

Clerk

Carriers
or
Death

It is ordered in this case that the judgment heretofore entered vacating and annulling this cause be changed so as to make the same a judgment of affirmance. Oct. 15. 1851

J. D. Carson
P. H. Warren
Sidney Reese

United States of America }
State of Illinois Kane County } ss

Pleas before the Honorable Isaac G. Wilson Judge of the Thirteenth Judicial Circuit of the State of Illinois and presiding Judge of the Circuit Court of Kane County in the State aforesaid at a regular term of said Court begun and held at the Court House in Geneva in said County on the Third Monday (being the Nineteenth day) of November in the Year of our Lord One Thousand Eight hundred and Sixty and of the Independence of the United States the Eighty fifth

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Present The Honorable Isaac G Wilson Judge
Edward S Joslyn States attorney
Ethan J Allen Sheriff

Attest
Paul B Wright Clerk

Be it Remembered that heretofore to wit: on the 14th day of March A.D. 1860, there was filed in the office of the Clerk of the Circuit Court aforesaid, an affidavit which is in the words and figures following to wit:

State of Illinois } Kane County Circuit Court
Kane County } ss May Term A.D. 1860

Hezekiah Ford being first duly sworn upon his oath deposes and says; that he is the owner, and lawfully entitled to the possession of the following described property to wit: One span of Horses of the value of Two Hundred & fifty dollars; That the said property is wrongfully taken and wrongfully detained by Erdix D. Carrier, and that the same has not been taken for any tax, assessment or fine levied by virtue of any law of this State nor seized under any Execution or attachment against the goods and chattels of said Hezekiah Ford liable to Execution or attachment

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Subscribed and sworn to before me this 13th day of March A.D. 1860. } Hezekiah Ford

W. J. Brown Notary Public

Dem's Cert's

The following endorsement appears on the said affidavit to wit:

"Filed March 14th 1860

R. R. Wright Clerk"

And afterwards to wit: on the day and year last aforesaid there was filed in said Clerk's Office a Plaint which is in the words and figures following to wit:

Hezekiah Ford vs Erdix D. Carrier } Kane County Circuit Court May Term A.D. 1860

Hezekiah Ford of Kane County State of Illinois complains of Erdix D.

Carrier of Kane County State of Illinois in a plea of wrongfully taking and wrongfully detaining his goods and Chattels to wit one span of horses of the value of Two hundred and fifty dollars and gives security to prosecute his said complaint and return the same goods and chattels if return thereof shall be adjudged

March 13th A.D. 1860 W. J. Brown
Atty for Plaintiff

Which said plaint is endorsed as follows to wit:

"Filed March 14th /60
R R Wright Clerk"

And afterwards to wit: on the day and year last aforesaid there was issued out of said Clerks Office and under the seal of said Court a writ of Replevin which is in the words and figures following to wit:

State of Illinois }
Kane County } ss The People of the State of Illinois to the Sheriff of said County Greeting:

Whereas Hezekiah Ford plaintiff complains of Erdix F. Carrier in a plea of wrongfully taking and wrongfully detaining his goods and Chattels to wit: One span of Horses of the value of Two hundred and fifty dollars.

Therefore we command you that if the said

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Plaintiff shall give you bond with good and sufficient security in double of the value of said Goods and Chattels, as required by Law to prosecute his suit in this behalf to effect, without delay and to make return of the said Goods and Chattels if return thereof shall be awarded and to save and keep you harmless in replevying said goods and Chattels you cause the same to be replevied and delivered to the said Plaintiff without delay; and also that you summon the said Erdix T. Garrison defendant to be and appear before our Circuit Court for said County on the first day of the next Term thereof to be holden at the Court House in Geneva in said County on the third Monday of May next to answer said Plaintiff in the premises. And have you then, ~~and~~ there this writ with an endorsement thereon in what manner you shall have executed the same, together with the Bond which you shall take of the Plaintiff before executing this writ.

Witness Paul R Wright Clerk of our said Court and the Seal thereof at Geneva in said County this fourteenth day of March A.D. 1860

Seal

P. R. Wright Clerk

Which said writ is endorsed as follows to wit

"Executed the within writ this 14th day of March 1860 by replevying the within described property and delivering the same to the within named

"Hezekiah Ford, also by reading this writ to the
" within named E. T. Barrier and by taking Bond of
" plaintiff which is hereunto annexed.
"
" Ethan J. Allen Sheriff
" of Kane County
" by W. R. Hunter Deputy"

also
"Filed March 17th 1860
R. R. Wright Clerk"

And afterwards to wit: on the said 14th day of
March in the year aforesaid there was filed in the
said Clerks Office a declaration which is in the
words and figures following to wit:

Hezekiah Ford
vs
Erdix T Barrier } Kane County Circuit Court
May Term AD 1860

Erdix T Barrier the defendant
in this suit was summoned to answer Hezekiah
Ford the plaintiff in this suit of a plea wherefore he
wrongfully took the goods and chattels to wit: one
span of horses of the said Hezekiah Ford and
wrongfully detained the same against sureties and
pledges &c. And thereupon the said Heze-
kiah Ford by W. J. Brown his attorney complains for
that the said defendant on the thirteenth day of March
AD 1860 in the County of Kane State of Illinois
wrongfully took the goods and chattels to wit: one

span of Horses of the said Plaintiff of great value to wit: of the value of Two Hundred and fifty dollars and wrongfully detains the same against Sureties and pledges until &c wherefore the said Plaintiff saith that he is injured and hath sustained damage to the amount of Two Hundred and fifty dollars and therefore he brings his suit &c by

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W. J. Brown
Atty for Plaintiff

which said Declaration is endorsed as follows viz

"Filed March 14th 1860
R. C. Wright Clerk"

And afterwards to wit: on the 17th day of March A.D. 1860 there was filed in the said Clerks Office a Replevin Bond which is in the words and figures following to wit:

"Know all Men by these Presents that we Hezekiah Ford and John Mathers are held and firmly bound unto Ethan J. Allen Sheriff of the County of Kane in the State of Illinois and to his successors in office executors administrators and assigns in the penal sum of Five Hundred Dollars lawful money of the United States for the payment of which sum we do hereby jointly and severally bind ourselves our heirs executors and administrators.

The condition of this ~~bond~~ obligation

is such that whereas on the 14th day of March in the Year of our Lord One Thousand Eight hundred and sixty the said Hezekiah Ford sued out of the Circuit Court of Kane County aforesaid a writ of replevin against Erdix D. Carrier defendant for the recovery of the following described goods and chattels property to wit: One span of horses of the value of two hundred & fifty dollars.

Now if the said Hezekiah Ford plaintiff shall prosecute his suit to effect and without delay and make return of the said property if return thereof shall be awarded and save and keep harmless the said Sheriff in replevying the said property then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 14th day of March AD 1860

Signed Sealed and Delivered } Hezekiah Ford [Seal]
In presence of } John Hathorn Sen [Seal]
" W. R. S. Hunter "

Which said Bond appears endorsed as follows to wit: Filed in the Circuit Court the 17 day of March 1860

R. R. Wright Clerk

And afterwards to wit: On the 24th day of May AD 1860 there was filed in the said Clerks

Office certain Pleas which are in the words and figures following to wit:

Hezekiah Ford } Kane County Circuit
vs } Court May Term A.D 18.0
Eldin D. Warner } Replevin

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1 The defendant by Curtis & Herrington his attorneys says that he did not take the said one span of horses in the said plaintiffs declaration mentioned or either of them or any part thereof in manner and form as the plaintiff has above thereof complained against him and of this he the said defendant puts himself upon the country &c.

Curtis & Herrington
Attys for Defts

And the said plaintiff doth the like
by Brown & Maytorne his atty

2 And for a further plea in this behalf the defendant says that the property of the said goods and chattels in the said declaration mentioned at the said time when &c was in him the defendant without this, That the property of the said goods and chattels or either or any part thereof at the said time when &c was in the said plaintiff as by the said declaration is above supposed and this the said defendant is ready to verify wherefore he prays judgment &c

Curtis & Herrington Defts attys.

3d And for a further plea in this behalf the defendant says that the property of the said goods and Chattels in the said declaration mentioned at the said time when &c was in Loren Heath without this, that the said property of the said Goods and Chattels to wit: one span of Horses or either of them or any part thereof at the said time when &c was in the said plaintiff as by the said declaration is above supposed. And this he the said defendant is ready to verify, therefore he prays judgment &c.

Curtis & Herrington Defts attys

4 And the said defendant comes and defends the wrong and injury when &c and well avows the taking of the said one span of Horses in the said plaintiff's declaration mentioned and that justly because he says that at the said time when &c in said declaration mentioned the said property in the said declaration mentioned were the property of one Loren Heath and not the property of the said plaintiff and that before the said time when &c in said declaration mentioned to wit: on the 12th day of March A.D. 1860 to wit: at Geneva in Kane County and State of Illinois out of the Clerk's Office of the Kane County Circuit Court Lawrence Kennedy plaintiff sued out a writ of attachment against the Goods and Chattels Lands and tenements of Loren Heath defendant for the sum of Two Hundred dollars

Page 6

And afterwards to wit: On the 12th day of March A.D. 1860 Paul R. Wright who was then Clerk of the Circuit Court of Kane County State of Illinois duly commissioned and sworn according to law to act as such Clerk issued said writ of attachment which the said Paul R. Wright Clerk as aforesaid then & there under his hand as Clerk and the Seal of said Court in due form of Law issued in the words and figures following to wit:

State of Illinois }
Kane County } ss. The People of the State of Illinois to the Sheriff of said County Greeting: Whereas Lawrence Kennedy hath complained on oath to Paul R. Wright Clerk of the Circuit Court of Kane County that Loren Heath is justly indebted to the said Lawrence Kennedy, in the amount of Two Hundred dollars and oath having been also made that the said Loren Heath is about to depart this State with the intention of having his effects removed therefrom and the said Lawrence Kennedy having given bond and security according to the directions of the act in such case made and provided, We therefore command you that you attach so much of the estate real or personal of the said Loren Heath to be found in your County as shall be of value sufficient to satisfy the

said debt and costs according to the complaint and such Estate so attached in your hands to secure or so to provide that the same may be liable to further proceedings thereupon according to Law at a Court to be holden at Geneva for the County of Kane upon the third Monday of May next so as to compel the said Lorenzo Heath to appear and answer the complaint of the said Laurence Kennedy and that you summon the Galena & Chicago Union Rail Road Company as Garnishee to be and appear at the said Court on the said Third Monday of May next then and there to answer to what may be objected against him when and where you shall make known to the said Court how you have executed this writ and have you then and there this writ.

Witness Paul R Wright Clerk of the said Court this 12th day of March in the Year of our Lord One Thousand Eight hundred and sixty

Seal

P. R. Wright

Clerk

Which said writ of attachment before the said time when &c. in said declaration mentioned and before the return day thereof on the 12th day of March A.D. 1860 to wit in said County of Kane aforesaid was delivered to the defendant then being one of the deputy Sheriffs of said Kane County to execute

according to law and afterwards to wit: On the said 12th day of March A.D 1860 at Lodi in said County aforesaid said defendant to being one of the deputy Sheriffs of said Ware County aforesaid under and by virtue of said writ of attachment and in pursuance of the Statute in such case made and provided levied upon the said one Span of Horses in the said declaration mentioned and detained the same by virtue of said attachment and levy so made as aforesaid as he lawfully might and this he is ready to verify wherefore he prays judgment and a return of the said one Span of Horses in said declaration mentioned that he may sell the same to satisfy whatever judgment may be obtained in said suit of attachment together with his costs in this behalf expended according to the form of the Statute in such case made and provided to be adjudged to him

Curtis V Herrington
Defts Attys

Upon which said plea appears the following endorsement to wit: "

Filed May 24 1860
C.M. Wright Clerk"

And afterwards to wit: On the 29th day of May A.D 1860 there was filed in the Clerks Office of said Court a Replication which is in the words and figures following to wit:

Hezekiah Ford
v
Erdix T Currier
} Kane County Circuit Court 1860 Replevin

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded says precludi non because he says that the said property goods and chattels in the said declaration were at the said time when &c property goods and chattels of the said plaintiff as in the said declaration alledged and not the property goods and chattels of the said defendant and this the said plaintiff prays may be enquired of by the Country &c.

Brown & Mayborne
atty for Plff

And the said plaintiff as to the said plea of the said defendant by him thirdly above pleaded says precludi non because he says that the said property goods and chattels in that plea mentioned were not at the said time when &c the property goods & chattels of the said Lyon Heath as in that plea alleged but were the property goods and chattels of the said plaintiff as in the said declaration alleged and this the said plaintiff prays may be enquired of by the Country &c

Brown & Mayborne
Plff atty

And the said plaintiff as to the said plea of

the said defendant by him fourthly above pleaded by the leave of the Court &c says precludi non because he says that the said goods and Chattels in that plea mentioned were not at the said time when &c the property goods and chattels of the said Lorenzo Hewitt as in that plea alledged and this the said plaintiff prays may be enquired of by the Country &c

Brown & Mayborne
Atty for Plff.

And for further replication to the said plea of the said defendant by him fourthly above pleaded by leave of the Court for this purpose first had and obtained the said plaintiff says precludi non because he says that the said defendant was not at the said time when &c a deputy Sheriff of said Kane County as in that plea alleged and this the said plaintiff is ready to verify wherefore he prays judgment &c

Brown & Mayborne
Atty for Plff

which said Replication is endorsed as follows to wit: Filed May 29th 1860
P. R. Wright Clerk

And afterwards to wit: on the 8th day of June A.D. 1860 the same being one of the days of the

May Term of said Court AD 1860 the following among other proceedings was had and entered of Record in said Court to wit:

Hezekiah Ford
v
Erdix T. Barrier
} Replevin

7240

This suit is continued at the plaintiffs costs of term. It is therefor considered by the Court that the defendant have and recover of the plaintiff his costs herein at this term expended and have execution therefor.

And afterwards to wit: on the first day of December AD 1860 the same being one of the days of the November Term of said Court AD 1860 present the Honorable Isaac G. Wilson Judge

Demarcus Clark Sheriff
Edward S. Joslyn Attorney
Saml A. Wright Clerk

the following among other proceedings was had and entered of record in said Court to wit

Hezekiah Ford
v
Erdix D. Barrier
} Replevin

7240

This day comes the plaintiff by Maybone & Brown his attorneys and the defendant by Herrington his attorney also comes and on motion of the plaintiff it is ordered by the

Court that a Jury come whereupon come a Jury
of good and lawful men of the County to wit:
Page 9 Alson Arnold Alphonso Yates J. V. Burley
J. V. Tichner Hiram Perry George J. Peck
A. V. Dill D. L. Alexander Hiram Scrafford
S. J. Kimball William Pratt & Elisha Reed
who are duly tried elected & sworn to try the issues
joined herein and after hearing a portion of the
evidence the further hearing of this cause is postponed
to the meeting of the Court on Monday morning next
and by consent of counsel it is ordered by the Court
that the jury be allowed to disperse to meet the
Court on Monday morning.

And afterwards to wit on the 3rd day of Decem
=ber A.D. 1860 the same being as yet one of the days
of the said November Term of said Court
present The Hon. Isaac G. Wilson Judge
Amos B. Lazear States attorney
Demarcus Clark Sheriff
Thomas C. Moore Clerk
the following among other proceedings was had
and entered of record in said Court to wit:

Hezekiah Ford
7240 v } Replevin
Erdix T. Currier

This day again come the
parties to this suit by their respective attornies and the jury

heretofore impannelled herein ~~came~~ also come and after hearing the remainder of the evidence by agreement of counsel the jury is allowed to disperse to meet the Court tomorrow morning at half past Eight Oclock

And afterwards to wit: on the 4th day of December AD 1860 the same being as yet one of the days of the said November Term of said Court present as aforesaid the following among other proceedings was had and entered of record in said Court to wit:

3240 Hezekiah Ford } Replevin
v
Erdix D. Currier }

This day again come the parties by their respective attornies and the jury heretofore empannelled in said cause also come and after the hearing the argument of counsel and instructions of the Court retire in charge of a sworn officer of this Court to consider of their verdict

And afterwards to wit: on the 5th day of December AD 1860 the same being as yet one of the days of the said November Term of said Court present as aforesaid the following among other proceedings was had and entered of record in said Court to wit:

Hezekiah Ford
v
Erdix T. Currier
} Replevin

No 3411

Page 40

This day again come the parties by their respective attorneys and the jury heretofore empannelled also come and for their verdict say "We the jury find the issues joined in favor of the plaintiff."

Thereupon the defendant by Herrington & Curtis his attorneys enters his motion for a new trial.

And afterwards to wit: on the 13th day of December A.D. 1860 the same being one of the days of the said November Term of said Court present as aforesaid the following among other proceedings was had and entered of record in said Court to wit:

Hezekiah Ford
v
Erdix T. Currier
} Replevin

No 3410

This day comes the plaintiff by Brown and Mayborne his attorneys and the defendant by Herrington and Curtis his attorneys also comes and the motion for a new trial heretofore entered herein by defendant coming on to be heard after hearing the argument of counsel the Court being fully advised overrules said motion.

It is therefor considered by the Court that the plaintiff have judgment against the defendant for the property replevied herein: And also that the plaintiff have and recover of the defendant his costs in this suit expended and that he have judgment and execution therefor.

And thereupon again comes the defendant by his attorneys and excepts to the ruling of the Court herein and prays an appeal to the Supreme Court which is allowed by the Court on condition that defendant file his Bill of Exceptions herein within ten days and also his Bond in the sum of Three Hundred Dollars in pursuance of the Statute in such case provided within thirty days with such Sureties as may be approved by the Clerk of this Court.

And afterwards to wit: on the 24th day of Decem-ber AD 1860 there was filed in the Clerks Office aforesaid a Bill of Exceptions which is in the words and figures following to wit:

State of Illinois } Kane County Circuit
Kane County } ss Court November Term
AD 1860

Hezekiah Ford
vs
Erdix T. Carrier } Replevin

Be it remembered that heretofore

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to wit: On the 1st day of December A.D. 1860 said day being one of the days of the November Term of said Kane County Circuit Court for A.D. 1860. said cause coming on to be heard a jury was impannel-ed to try said cause. The Plaintiff in order to sus-tain the issue on his part called Alonzo L. Lovell a witness who being first duly sworn testified in substance as follows: I reside at Courtland DeKalb County and was there March first (1st) 1860, I was the owner of a span of horses, at that time, Loren Heath came to me to purchase them; we agreed about it. He paid me $35- and was to pay $270- for the horses and two sets of Harness. He then said I want you to go to Lodi with me I said to him Hezekiah Ford is here, may be you can get the money of him, he says where is Ford, I said to him he is in town, he then says dont tell Ford that I have paid you anything on the price. Soon after he came in with Ford and as he came in Heath turned to Ford and pointed to the harness says that is the harness. Ford then said $240. is that the amount you want. I replied yes Ford handed me the money $240 then Heath said to me, Now Lov. I want you to understand this when I pay Ford the $240- I am to have the horses then we went to the door. Some man called Ford and he stopped, I went on to the Barn with Heath, I led out two of the horses and

gave it to Heath and brought the other one around and gave it to Ford. Next day sent the harness to Lozli to Ford, Shipped the harness to Ford because they Ford & Heath so directed. Cant say positively but think it was Ford who gave me directions to do so, Ford was to have the horses until he was paid the $240.—

Cross Examined

This was the first March 1860 Heath came to me to buy the horses, We made the bargain. Heath paid me $35 down, He was gone ten or twenty minutes when he returned to my office. He paid me paper money, It was at my shop in Courtland. I saw Heath have other money at the time time he paid me the $35- in his possession about $300, he took the $35- out of it that he paid me. Heaths money was done up lengthwise. I think the money paid by Ford was rolled up. Heath said Loo. I want you to understand this when I say Ford $240 I am to have the horses

Re Examined.

When Heath took out the package of money he said the money did not belong to him

Re Cross Examined, Did not tell me who it did belong to.

Barney McGuff a witness produced and sworn on the part of the plaintiff testified in substance as

follows:

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I resided in Lodi on the first day of March last and was in the employ of Hezekiah Ford was at work around Fords store part of the time and leaving some about the middle of March (Identity of the property admitted) The Horses were kept in the barn, and the horses the day they were brought home, they were opposite Fords Store. From that time I had charge of the horses for the Plaintiff. I worked them on Fords farm plowing and putting in grain. (Here the taking of the horses in question was admitted) I was there when the horses were returned after being taken.

Cross Examined. I am 20 years old, born in England, have lived in Lodi four years, worked for Ford three months last Spring and three months this fall, began with him the first time in February, the middle of February worked near by Lodi, After leaving Ford saw the horses the evening they were brought home it was the first week in March, it was about the middle of the week and not positive, think it was, I weighed grain, sold goods and measured wood about that time, did chores, tended the horses. Ford had no horses before these. It was the next day I took charge of them at Woodwards barn. Drew lumber to his farm, some days would draw a load as I went to

plow. I dragged wheat with them, this I did after the horses were replevied. I did go to Courtland before the horses were replevied; a week before Ford and Ed. Burdict went with me Ford drove in and out of town. I drove the balance of the time, Cant remember any other occasion on which I used them before they were replevied I took charge of the horses the day after they were fetched from Courtland. After I began to take care of the horses, dont know that any body else took care of them. I was absent perhaps two or three days. They were in the Woodward barn two weeks before they were levied upon by Cosnier Cosnier kept them in his possession three or four days or a week. Dont know that Heath cared for the Horses while they were in the barn. Heath did not use the horses to my knowledge unless he used them in the night. I would sometimes carry water to the barn and sometimes lend them. Heath did not, never heard that he did. Ford has conversed with me three or four times today and yesterday I am engaged in his store and ware house. Burdict did not use the horses prior to the levy except in going to Courtland.

Here the Plaintiff rested

Richard Van Black a witness produced and sworn on part of the defendant testified as follows

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I live near Lodi in this County, was at Lodi one evening after the horses were purchased was in the barn with Heath, when the Horses were This was three or four days after the horses were purchased, this was in the Woodward barn

It was a very few days after the Horses were brought to the barn. I saw Heath in the barn, I was at Lodi one evening near the barn when Heath asked me in to see the horses. Heath went to work to take care of the horses fed them oats & water We differed a little in looking over the team I said one was the best and he said the other was. Nothing was said who purchased he called them his, this was at the Woodward barn (The plaintiff objects to statements made by Heath Court overruled objection, Plaintiff excepts.) Nothing more said on that occasion. Had no other conversation with him at my house.

Cross Examination

Ford was not by at the conversation.

The defendant then called Samuel Hawley a witness who being duly sworn testified as follows:

I know the horses in question. I reside at Lodi. I am a Merchant there I first saw the horses the day they were purchased They were kept in the barn I occupied the first

night. Heath brought them to my place and wanted to know of me if I could keep them I said yes. he put them in the barn. The next day he paid me for the keeping and took them to the Woodward barn which is right across the road from my place. Heath purchased from me a curry comb and brush, they were taken acrop to the barn, for two or three days I saw Heath taking care of the Horses Some two or three weeks before I saw the horses at my barn Heath paid me some money. Saw him have money drafts so he said he had got his insurance money, his house had previously burned I saw Barney McGuff take care of the horses after they were replevied. Cant say whether he did before.

Crop Examined:

The horses were brought to my barn just in the edge of the evening could not say whether they were taken care of by any other person or not. Burdict kept his oxen in the Barn.

Hawley recalled

The Horses were in my barn three nights and two days. It was January the 20th that Heath paid me the money, he said he had got some money and he had checks he said he was to wait a month before he could draw it, the money

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Hezekiah Smith a witness produced and sworn on the part of the defendant and testified as follows:

I reside at Lodi and have for the past five years. I know the parties I have seen the horses in question saw them when Lovell owned them and often afterwards I first saw them in Heath's possession, he was watering them I was passing by him when he was watering them He spoke and asked me how I liked his horses I looked at them some and told him he had a pretty good span of horses, he said he thought he got the horses pretty cheap (Plaintiff objected to Heath's statements being given. Court overruled objection Plaintiff excepts) He said he gave $200 or $270 for them I saw him drive up one time in front of the depot and ask Ed Burdict to take a ride they were harnessed before a lumber wagon, Burdict went with him I have always understood that Burdict went to California with Heath. I have seen Heath water the horses once or twice since. The day Heath went to buy the horses I heard him say to Burdict he thought he would go up to Courtland and see the Lovell horses. I lived perhaps 50 rods from where he was watering them. It was at a well directly in front of Ford's house it was the same week the horses were attached. I know

Mr Kennedy I saw him at Lodi I remember the night Currier was there I think I sat up all night. There was some stores thrown that night There was some property in the warehouse it was an outfit for California. It was taken away by James Haynes Amos Burdict Shurtleff Sol White and Barney McGuff Think that Barney McGuff was in the employ of Ford Ford had a warehouse. I afterwards saw some of these same things brought out of Fords warehouse Edd Burdict was helping the same night. Laurence Kennedy was there did not see Ford that night as late as the rest of them They left before 9 oclock. I helped take the goods out from the Cars in the Galena warehouse in the day time, they remained in the warehouse about a week, they were removed the day the defendant and Kennedy arrived there.

Cross Examined.

It is my impression it was Wednesday. The goods were marked Edd Burdict. I did not see Sol White or McGuff take out any of the Goods Ford was not there. Currier was at the depot. Hunter was at Lodi. Kennedy watched all night. I was in the habit of delivering freight, also was Amos Burdict. Ford was not connected with the delivery of these goods at the time I had the

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car with Heath, Ford was not around. I have been acquainted with Heath for some time. He brags a good deal about his property.

Hiram Palmer a witness produced and sworn on part of the defendant testified as follows:

I know the parties Heath and Ford I reside at Lodi I have seen Heath ride one of the horses I have seen the horses at Woodwards Stable. (Plaintiff objected to Heath's statements being given in evidence. Court overruled objection Plaintiff excepted) Heath asked me to go over to the Stable. Heath carried some water to the horses and fed them some hay, while I was there he did not say anything about the ownership. I understood him to say that he intended to go to California with them. He asked me to go over and see his horses. I never saw him use either one of them at any other time, it was before they were levied upon.

Cross Examined

Dont know what time they were levied upon; did see Car Kennedy had a conversation with him but cant say what we talked about. I think I met him at Ford's Store presume I had a conversation with him. Cant tell the day of the week nor month it was along last Spring, it must have been a week or two before

the attachment of the property. I commenced the conversation with Heath. It was the only time I had a conversation with him.

James Goodridge a witness produced and sworn on part of defendant testified as follows

I reside in Pampas about one and a half miles from Lodi. Know Heath and Ford, have seen the horses in question. I knew the horses before Lovell owned them I was at home on the night spoken of by Smith Heath started for California before he left he was in Lodi at White's house I was there I saw Ford there never saw them there but once. Heath used to stay at my house some he was at my house from three to five nights he wrote letters to his wife, none to Ford to my knowledge I carried some of the letters Heath was at Hannaston's think I saw Ford there once as late as nine o'clock, would not like to say I had seen him there much after twelve o'clock at night. Know nothing of the contents of any of the letters I was occasionally in Lodi and saw Ford Converzed with him, the only thing I heard him say was, how are the folks. I answered He asked me the question as often as he and I met as often say as every other day, say

four or five times dont Know where Heath
stayed the night before he stayed at Whites
Page 16 The night after he stayed at my house
Ford has pregnently asked me the question
since and I have answerd him with ref=
=erence to my own folks. Heaths family was
at the time in Lodi 50 to 60 rods from
Whites. White is Fords father in law we
left Whites that night, could not say what time
and I stayed at Fords. Cant say what was
talked or sayed about at Whites Ford is
a merchant at Lodi and a man of wealth
Cant say how long it was I saw Heath the
last time before he left for California
Cross Examination
I saw Ford at Whites
about the middle of March, Ford and my=
self were at Hamastons. Ford brought up
a span of Horses the Lovell horses. Saw
Two hundred dollars paid. I saw a settle
=ment between Heath and Ford. Saw $240
paid over. Heath said there is the money for
your horses. There was a conversation betwen
them in regard to those horses. I saw the
money counted some gold and some paper
some twenty dollar pieces and some smaller
Never saw Heath after that time. It was in
March possible in April I think it was the

depot, he was going home, this was before the throwing of the clubs and stones took place saw him do nothing, have frequently seen Mc Guff there at the depot. I got up there about ten o'clock. I think it may be as early as nine perhaps eight cant tell anything about it.

Chas Thrall a witness produced & sworn on part of defendant testified as follows:

I reside at Lodi saw the goods in car dont know the day. Saw Sob White and Ed Burdict moving the car around to the warehouse. I did not see the goods in Ford's warehouse about a month before the horses were taken, heard Ford and Heath conversing, Heath said to Ford that there had been two dollars more of his money paid for the wood than Ford's money, they were figuring up about it at the time. Saw Heath fetch the Horses to Hawley's stable, once saw him water one of them it might have been two days afterwards Once saw him ride one of them the next day afterwards dont know of any other occasion, One Sunday saw Ed. Burdict and Barney Mc Guff each riding one of the horses this was before the replevy Heath had wood by his house

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Cross Examined

Heath once came over with his little boy and wanted Mr Hawley to let him put his horses into his barn until he could get another place for them Kennedy told me to go to Herrington and he would tell me what he wanted to prove by me

C M Thurston a witness produced and sworn on part of defendant testified as follows

I know the horses, Heath started for California with the Lovell horses from my house about 7 oclock one Sunday Evening.

Cross Examined

Ford brought up the horses on Saturday evening to my house Heath paid him $240 Heath left on Sunday Evening, There seemed to be some misunderstanding about a note one claimed that it was paid and the other that it was not paid. I saw Heath pay two hundred or over. After they got through they went down to the stable and Ford turned out the horses, at the time of the conversation about the note. Heath was much excited, claiming that it had been paid Cant say that Ford heard it, dont know where Heath got the money to pay for the horses. Heath

I now recollect borrowing some of the money of me to pay for the horses when he paid the money he said there Ford is the money for your horses.

Re Examined

Heath was keeping quiet although out of the house occasionally. Ford is a bright active business man. It was here admitted that Ethan J Allen was Sheriff of Kane County and had been for the past two years. The defendant then offered in evidence the appointment by Allen of defendant as deputy Sheriff and his oath of office. Plaintiff objected. Court allowed them to go to the Jury. Plaintiff excepted. That if Erdix D. Currier was deputy he was so appointed by and under said Allen.

The defendant then offered and gave in evidence to the Jury the written appointment of said Erdix D. Currier and the following on the back thereof which is in the words and figures following:

Know all Men by these presents that I Ethan J Allen Sheriff of the County of Kane in the State of Illinois have this day appointed and do hereby appoint Erdix D. Currier of said County a Deputy Sheriff under me and he is hereby authorized as such

Deputy Sheriff to do and perform in my name any and all of the duties required of the Sheriff of said County.

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Given under my hand at Geneva this 8th day of September AD 1859

E. D. Allen Sheriff"

"Dated Nov 28th 1860 as of the 9th day of September. AD 1859 by order of the Court and recorded in Court Record 8 Page 622

P. R. Wright Clerk"

The defendant then offered and gave in evidence to the Jury the oath of office of the said Erdix D. Currier and the filing on the back thereof which is in the words and figures following;

"State of Illinois }
Kane County } ss I Erdix D. Currier do solemnly swear that I will support the Constitution of the United States and of the State of Illinois, and that I will faithfully discharge the duties of Deputy Sheriff of Kane County Illinois to the best of my ability and understanding— And I do solemnly swear that I have not fought a duel nor sent or accepted a Challenge to fight a duel the probable issue of which might have been the death of either party nor been a second to either party nor in any way or manner aided or

assisted in such duel nor been knowingly the bearer of such challenge or acceptance since the adoption of the Constitution and that I will not be so engaged or concerned directly or indirectly in or about any such duel during my continuance in office, So help me God!

Erdix T. Currier.

Sworn and Subscribed to
before me this 9th day of
September AD 1859 R.R. Wright
Clerk of Kane Co Circuit Court

Witness my hand and the seal of said
Court at Geneva in said County this
9th day of September AD 1859
R.R. Wright
Clerk"

Seal

"Filed September 9th 1859
R.R. Wright Clerk"

The defendant then called Ethan S Allen who being duly sworn testified as follows:

I am Sheriff of Kane County, have had a good many Executions against Loren Heath within the past two years. Some of said Executions were from Chicago and some from this County. I could not collect any thing on said Executions he was brought here and given to me in Charge on a Ca. Sa., One of the last executions I had against him amounted to about $200. I could

not collect it.

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The defendant then offered in evidence a writ of attachment mentioned in the pleadings in the case which is in the words and figures following:

State of Illinois } The People of the
Kane County } ss State of Illinois to the
Sheriff of said County Greeting

Whereas Laurence Kennedy hath complained on oath to Paul R. Wright Clerk of the Circuit Court of Kane County that Loren Heath is justly indebted to the said Laurence Kennedy to the amount of Two Hundred Dollars and oath having been also made that the said Loren Heath is about to depart this State with the intention of having his effects removed therefrom and the said Laurence Kennedy having given bond and security according to the directions of the act in such case made and provided: We therefore command you that you attach so much of the Estate real or personal of the said Loren Heath to be found in your County as shall be of value sufficient to satisfy the said debt and costs according to the complaint; and such Estate so attached in your hands to secure or so to provide that the same may be liable to further proceeding thereupon according to law at a Court to be holden at Geneva for the County of Kane upon the Third

Monday of May next so as to compel the said Loren Heath to appear and answer the complaint of the said Lawrence Kennedy and that you also summon the Galena & Chicago Union Rail Road Company as garnishee to be and appear at the [illegible] Court on the said Third Monday of May next then and there to answer to what may be objected against him; when and where you shall make known to the said Court how you have executed this writ and have you then and there this writ.

Witness Paul R. Wright Clerk of the said Court this 12th day of March in the Year of our Lord One thousand eight hundred and sixty

Seal

P. R. Wright Clerk

The following endorsements appear on said writ of attachment to wit:

"By virtue of the writ I have attached one span of Mares dark bay with white spots in the forehead about seven years old one yoke of Steers four years old one dark red the other red and white with one horn broke off and one two year old heifer red with white face and white on the back as the property of Loren Heath

March 11 1860 The within named Loren Heath not found in my County.

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Ethan J Allen Sheriff of
Kane County
by E. D. Carrier Deputy."

"Filed May 23/60
R. R. Wright Clerk"

To the giving of which in evidence to the Jury in the case the plaintiff objected which objection the Court sustained, for the reason that the Existence of the writ was admitted by the pleading to which ruling of the Court the defendant made no objection.

The plaintiff then called J. D. Woodward as a witness who being sworn testified as follows:

Have seen the parties, resided at Lodi in March last, remember of Horses being in my barn one in the barn occasionally a young man by the name of McGoff and Ford had charge of the Horses. I know about the time they came. It was previous to 3 weeks before the 1st Tuesday in April perhaps it was the 12th or 13th perhaps between the 9th and 13th March did not see the horses brought there. Mr Ford paid for the rent of the stable for the horses.

Cross Examined.

Ford paid $1.25 we called it 6 weeks. Ford spoke to me for the barn Heath never spoke to me on the subject. We

settled the account about the time of the Na-
-tional Convention in Chicago, Burdict had
cattle in there along in February. The
barn belonged to Baldwin of Oswego or his
brother for whom he acted as agent, I dont
know where the other Baldwin lived. I had
authority from Baldwin, do not know of
Heath's having any conversation with Baldwin
I rented the house barn and every thing from
Burdict in the place, afterwards when Bald-
-win came he authorized me to occupy it; when
I settled with Ford the account embraced
many items there was an item of $100- for money
loaned $200. account at his store. My account
against him was for barn rent and school or-
-ders. We settled in July I now reside at
Plano in Kendall County, I saw Mr Amos
Burdict here to day.

The Plaintiff here rested which was all
the evidence either offered or given in by either
party on the trial of this cause

The Plaintiff then asked the Court to
give the following instruction which is in the
words and figures following.

A sale or a pledge of personal property
may be valid as between the parties although void
as against creditors; and hence if the jury in
the present case believe from the evidence that

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Ford the plaintiff advanced $240 towards the purchase of the Horses in question and took the horses in pledge to secure the repayment of the 240 dollars such pledge would vest a special property in Ford: And if the Jury further believe that the defendant took the property on the writ of attachment the plaintiff is entitled to recover - the defendant not having offered any proof that the plaintiff in the attachment was a creditor of Heath is not in a position to attack the pledge as being void against the creditors of Heath."

Given

"Filed Dec 5th 1860.

D. W. Moore Clerk"

which was by the Court given to the Jury, the giving of which instructions to the Jury the defendant by his counsel then and there excepted. The Court then of its own motion gave to the Jury the following instructions

"By the Court

The declarations of Heath as to his ownership of the property in question not made in the presence or hearing of Ford the plff. cannot affect Ford unless the Jury believe from the evidence that at the time of making such declarations Heath was in possession and exercising acts of ownership over the property by the permission of Ford."

Given

Filed Dec 5th 1860

D. C. Moore Clerk

To the giving of which said Instructions to the Jury the defendant by his Counsel then and there excepted. These were all the instructions given on the part of the plaintiff.

The defendant then asked the Court to give to the Jury the following instructions:

1 "If the jury believe from the evidence that Lawrence Kennedy had sued out of the Kane County Circuit Court in the month of March 1860 a writ of attachment against Lorin Heath and said writ was placed in the hands of Erdix D. Carrier a deputy Sheriff of this County and that said Carrier by virtue of said writ levied upon and took possession of said Horses they being at the time of said seizure in the possession of said Heath and owned by him then the jury will find the issues in favor of the defendant."

Given

Filed Dec 5th 1860

D C Moore Clerk"

2 If the Jury believe from the evidence that the Horses in question were bought by Heath and paid for either by him or his money and that Heath took and continued in possession of them and whilst so in possession they were taken upon and by virtue of

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Given

the writ of attachment writ named in the fourth plea herein which is the same taking complained of in this case then the jury must find for the defendant."

Dated Dec 5th 1860

D. C. Moore Clerk"

which were given.

The defendant then asked the Court to give the Jury as law in the case the following instructions marked refused

3 If the jury believe from the evidence that the Horses in question were levied upon and taken as in the 4th plea alleged and that Heath was about to start for California and that he purchased the horses in question from Lovell and paid said Lovell a portion of the purchase money and at the time of said partial payment exhibited to said Lovell money sufficient to have paid the entire contract price for said horses but left the office of Lovell & procured Hezekiah Ford the plaintiff to come to the Office of said Lovell and pay the balance of said purchase money which was the money of said Heath and that Ford and Heath took the horses away with them saying that Ford should hold possession of said Horses until Heath paid Ford and that afterwards before and at the time of the levy in the attachment writ mentioned in the plea herein Heath had possession of said Horses and

Refused

whilst so in his possession the defendant herein took said horses upon and by virtue of said attachment writ which is the same taking complained of in this case then the jury must find for the defendant."

"Filed Dec 4th 1860
D. le Moore Clerk"

4 "If the jury believe from the evidence that Heath purchased the Horses in question from Lovell and paid a portion of the purchase money and then procured Ford to pay the balance of the purchase with the money of him, Heath and that this was a contrivance of Heath and Ford in order to keep said Horses from being levied upon by the Creditors of Heath he being the owner of said horses this is in law a fraud and the jury should find for the defendant."

4 Refused

"Filed Dec 4 1860
D le Moore Clerk"

5 "That possession of the property in question must accompany the ownership that being one of the strongest evidences of title, for if the jury believe from the evidence that Heath was the purchaser of the horses in question and that Ford advanced a portion of the purchase money and was to hold possession of the horses as his security for said advanced money, and yet permitted Heath to be and remain in possession of said horses and

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Refused Dec 19 Dec 1874

whilst so possessed of them the defendant Currier being a deputy Sheriff and having in his possession as such said writ of attachment in the fourth plea herein named and that in virtue of said writ he seized and took said horses, which is the taking complained of in this case then the law says said horses were liable to be so taken by said officer and the jury must find for the defendant."

"Filed Dec 4 1860
D. W. Moore Clerk"

6 "That if the jury believe from the evidence that Heath was the owner of the horses in question and that Ford claimed a lien upon them, and that Currier being deputy Sheriff had in his possession the attachment writ named in the pleadings to execute and that he took the horses in question upon & by virtue thereof as Heath's and from Heath's possession which is the same taking complained of in this case then the Law says said taking was lawful and that Ford's claim to said property amounts to nothing in this case, and the jury must find for the defendant."

Refused

"Filed Dec 4 1860
D W Moore Clerk"

7 "If the jury believe from the evidence that Heath on the day of the purchase took said horses in question to the stable of Hawley in Lodi where Heath & Ford resided and procured Hawley to

keep said Horses three nights & two days and that Heath then removed said horses to an other Stable in said Village of Lodi and there watered and fed and otherwise cared for said horses and so continued until the levy and taking complained of in this case, this is in law and fact an actual possession on the part of Heath - and the jury must find in this case for the defendant"

Refused

"Filed Dec 4 1860
D le Moor Clerk"

5 Whilst it is true that fraud will not be presumed but must be proven by those alleging it yet the jury have a right in determining the question of ownership in this case to take into consideration the manner of the purchase of the horses in question as shown by the evidence also the mode of payment as shown by the evidence the facts if such exist by the evidence that Heath was about to depart permanently from the State and that Heath was as in the writ of attachment shown indebted to Kennedy that Heath was possessed of the money wherewith to have paid for said Horses at the time of said purchase that Heath afterwards did start for California in the night time with said horses, finally the jury have the right to consider fully every fact & circumstance as shown by the evidence on the alleged question of ownership in this case and if from

Refused

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said evidence the jury believe that Heath and Ford were contriving to keep said property away from the creditors of Heath the same in fact belonging to Heath this in Law is fraud and the jury should find for the defendant"

"Filed Dec 4 1860
D. C. Moore Clerk"

9 If the Jury believe from the evidence that Heath purchased the Horses in question and was the owner thereof and paid partly for them and that Heath then procured the plaintiff Ford in point of fact to advance the balance of the purchase money with the agreement between them that Ford was as his security to take and retain possession of said Horses until Heath should repay Ford the money so advanced and that Heath was afterwards and at the time of said levy found in the actual possession of said horses he still being the owner thereof then in law it will be presumed that Heath had paid to said Ford the money so advanced by Ford and in such case the horses in question were liable to be seized and taken upon said writ of attachment as Heaths and the Jury should find for the defendant."

Refused

"Filed Dec 4 1860
D. C. Moore Clerk"

Each one of which instructions the Court wrote the word "refused" on the margin thereof and

refused to give them as law to the Jury to the ruling of the Court in refusing to give said instructions to the Jury as law the defendant by his counsel then and there excepted.

The Jury found the issue for the plaintiff. The defendant moved the Court for a new trial; upon the hearing of said motion for a new trial. A W Herrington one of the attornies for the defendant read to the Court an affidavit in evidence which is in the words and figures following:

Hezekiah Ford vs Erdix D. Currier } Kane County Circuit Court. November Term A.D. 1860

Augustus W Herrington on oath states that he as sole counsel conducted the defence of the above entitled cause. And that about the hour of Eleven o'clock on the 4th day of December A.D. 1860 which day was one of the days of the said November Term of said Court - the Jury retired from the bar of said Court to consider of their verdict in said cause under the charge of Jos. H. Whipple one of the officers of said Court and that said Jury as this affiant states upon information which information this affiant states he fully believes to be true being unable to agree upon a verdict in said cause through and by their foreman Alexander V Sill sent by their said officer about five o'clock in the

Evening of the same day a written request to the Hon Isaac G Wilson the presiding Judge of said Court which was in substance as follows:

"If proper the Jury would respectfully ask is the copy of the attachment as set forth in defendants plea evidence of indebtedness"

Respectfully

A V Sill foreman"

And this affiant further stating as aforesaid says that said officer shortly afterwards handed said written request as above set forth to said Judge of said Court and that said Judge of said Court received said written request from the hand of said Whipple officer as aforesaid and after reading the same wrote upon the back of said written request of said Jury in substance as follows: "The Court cannot give any further instructions without consent of parties but would refer the Jury to the wording of the instructions given on the part of the plaintiff

I. G. Wilson"

And this affiant stating upon information as aforesaid says that immediately afterwards the said Jos. H. Whipple receiving from the hand of said Court said written request of said Jury and the written answer thereon of the said Court and without any delay conveyed the same to the said Jury and gave the same

to them. And this affiant states that neither himself nor the defendant nor any person or persons whatsoever on the part of said defend=ant had any knowledge or gave in any manner their consent to said transaction nor did this affiant or said defendant or any person acting for the defendant know of and concerning the same until the jury in said cause had given their verdict in said cause & had been dis=charged from further service therein.

This affiant further stating upon informa=tion and belief says that said written request on the part of said jury and the said reply of the said Judge as aforesaid was by the said foreman A.V. Sill with the residue of the papers belonging to said case given in charge to said jury returned to the bar of this Court and by the said foreman hand=ed to the Clerk of said Court for safe keeping.

And this affiant further stating says that soon after the said jury were discharged by the Court from further service in said cause he was for the first time informed of and concerning said transaction, and that this affiant soon after said information made search amongst the papers upon file in said case for said written request and the Court's answer thereon but could not find the same this affiant then procured others to aid him in said search for said paper and full and thorough

search was prosecuted in and about said Court room in all parts and places where the same could or would be likely to be found and this affiant states that the same was not nor cannot be found, this affiant made enquiry of D. L. Moore the Clerk of said Court as to his knowledge of said paper who replied to this affiant that he had no knowledge whatever of and concerning the same nor had he any remembrance of having seen the same and this affiant states that he believes the same is lost or destroyed. This affiant further stating upon information as aforesaid not having been present that in the forenoon of the succeeding day namely the fifth day of December said Jury not yet having agreed upon a verdict in said cause were by said Officer brought to the bar of said Court & were then interrogated by the Hon. Isaac G. Wilson Yet Judge of said Court in substance as follows

"Gentlemen of the Jury have you agreed upon a verdict"? to which question of the said Judge of said Court the said said Jury by their said foreman replied in substance as follows: "We have not" The said Judge of said Court then proceeded to instruct said Jury upon his own motion not in writing and without the knowledge consent or approval of the defendant or any one in his behalf none being present to represent said defendant

in substance as follows: "It is the duty of the Jury to agree upon a Verdict in this case if they can. Whilst members of the Jury are not always to yield their convictions of right yet it is their duty to agree upon a verdict if they can. Mistrials are embarrasing to the business of the Court and should be avoided if possible. It oftentimes happens that Jurors when they go out having during the trial formed an opinion express the same become before they are aware of it partizans, and through pride of opinion fail to see the case in its true light and fail to see the Law and the evidence as given to them in their true bearings. It is much to be desired by the Court that the Jury agree upon a verdict in this case. You will not be discharged but return to your room and make further trial and see whether you may not agree in this case."

This affiant further stating says that said Jury once more after said verbal instructions by and on the part of said Court so given retired to their room and in a short time thereafter returned into Court with a verdict in said case for the plaintiff— and further saith not.

Subscribed and sworn to before me this 11th day of December A.D. 1860

A. M. Herrington

D. C. Moore Clerk

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"Dated Dec 11th 1860
D. L. Moore Clerk"

The plaintiff also offered in opposition to this motion the following affidavit:

Hezekiah Dark vs Erdix Currier } Kane Co Circuit Court of the November Term of said Court for 1860

State of Illinois }
Kane County } ss. I. N. Mayborne being first duly sworn doth depose and say on oath that he was one of the Counsel who had charge of the above entitled suit and assisted in the trial of the same and was present in Court when the Jury returned into Court and stated to the Court through their foreman Mr Sill in answer to the enquiry made by the Court if they had agreed on a verdict in the case and he said Sill stated they had not. I also recollect very distinctly the remarks by the Court as I was paying particular attention to the matter and I also can recollect as I believe the words used by the Court in the remarks he made to the Jury on that occasion almost or quite verbatim in the connection that they were made as I had frequently heard the Court use very near or quite the same words in remarking to Juries on similar occasions and the remarks made

by the Court on that occasion to the Jury were in the following words as this affiant believes to wit: That the Judge said that he had reluctantly kept them together during the night and had only done so from a sense of duty; that in view of the great expense that would attend a retrial and in view of the fact that the amount in controversy was not very large it was very desirable that the Jury should agree. That the case was not of so serious a nature as if it involved the life and liberty of a person and while on the one hand no Juror ought to disregard his honest convictions as to the effect of the evidence in the case, on the other he ought to endeavor to harmonize his views with his fellow Jurors if he can consistently do so. That one of the objects of the Law in requiring unanimity among the Jurors was to guard against hasty verdicts that in many cases it was not to be expected that they would agree on the first ballott that it sometimes happened that Jurors having expressed a first impression upon going into the Jury room afterwards adhere to the opinion there expressed partly from pride of opinion without being conscious of it. That each Juror should examine his own mind and endeavor to ascertain whether he is influenced by any consideration except the evidence and the law as given by the Court, that he should examine the case

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and if he found himself differing from his fel=low jurors should endeavor to ascertain whether their opinion might not be more nearly the truth than his own, in short that his efforts should be to agree rather than disagree if it could be done without a sacrifice of his honest convictions after calm & full deliberation. The Jury then retired from the Court room under charge of the officer. And this affiant further states that R. G. Banks one of the Counsel in the case for the defendant was present and made no ob=jections

Sworn & Subscribed to } J. N. Harrington
before me this 14th Dec 1860 }
D. C. Moore Clerk }

The above facts as set forth are as I recollect them. I being one of the Counsel in the cause.

Subscribed and Sworn to } W. F. Brown
before me Dec 15th 1860 }
D C Moore Clerk }

"Filed Dec 15th 1860
D C Moore Clerk"

which was all the evidence heard or offered on the motion for a new trial. The Statement contained in the foregoing affidavit of J. N. Harrington in relation to the written Communica=tion sent to the Court by the Jury and the

Judges reply thereto is incorrect in this:

The Judge wrote upon the margin of the Communication as follows: "The Court is not at liberty to give any additional instructions without the consent of the parties the Jury must look to the instructions already given"

The Court did not write as is stated in said affidavit "would refer the Jury to the wording of the instructions on the part of the plaintiff" Which motion for a new trial the Court after being fully advised over-ruled. To the ruling of the Court in over-ruling said motion refusing to grant said new trial the defendant by his Counsel then and there excepted and tendered this his bill of Exceptions and prayed that the same be signed and sealed and made a part and parcel of the record and proceedings in this cause.

Which is accordingly done

Isaac G. Wilson (Seal)

Which said bill of exceptions is endorsed as follows: "Filed Dec 24th 1860

D C Moore Clerk"

And afterwards to wit: On the 9th day of January A.D. 1861 there was filed in the said Clerks Office an appeal bond which is in the words and

figures following to wit:

"Know all Men by these presents that we Erdix D Carrier as principal and Loren Kennedy & John Kelley as surety are held and firmly bound unto Hezekiah Ford in the penal sum of three hundred dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs and administrators and every of them jointly and severally. Witness our hands and seals this 19th day of December AD 1866

The condition of this bond is this that whereas heretofore at the November Term of the Kane County Circuit Court there was a certain replevin suit pending in the said Court wherein the said Hezekiah Ford was plaintiff and the said Erdix D. Carrier was defendant; and whereas upon a trial of said suit at said November Term of said Court the issues in said cause were found for said Ford the said plaintiff and whereas the said Carrier has prayed an appeal to the Supreme Court of the State of Illinois which appeal was allowed by the said Court upon the condition that said Erdix D. Carrier would execute a bond to the said Ford according to Law in the penal sum of three hundred dollars with security to be approved by the Clerk of

said Court. Now if the said Erdix D. Carrier shall prosecute his said Appeal with effect and shall pay and satisfy all costs and judgments which may be rendered by said Supreme Court either upon affirmance of the said judgment of the said Circuit Court or upon dismissal of the same by the said Supreme Court then this obligation to be void otherwise to be and remain in full force and effect

Witness our hands and seals the day and year first above written

Erdix D. Carrier (Seal)
L. Kennedy (Seal)
John Kelly (Seal)

Taken and approved by me
this 9th day of January A.D. 1861
D. L. Moore Clerk

Which said bond is endorsed as follows:
"Filed Jany 9 1861
D L Moore Clerk"

State of Illinois }
Kane County } ss I Thomas L. Moore
Clerk of the Circuit Court in and for the said County in the State aforesaid do hereby certify that the foregoing is a complete record of all the proceedings in said Court in the case of Hezekiah Dorsh plaintiff against Erdix

D. Currier defendant in an action of Replevin
said record comprising the process, pleadings
all orders of said Court bill of exceptions and
Appeal Bond issued filed and entered of record
in said Court in said case.

Witness my hand and the
Seal of said Court at Geneva
in said County this 31st day of
January A.D. 1861

D. C. Moore
Clerk

Supreme Court. State of Illinois. April Term. AD 1861. Third Grand Division

Erdix J Currier
v Appellant
Hezekiah Ford

And now comes the said Erdix J Currier Appellant. and assigns the following errors in the above entitled cause

1st The Court erred in admitting improper evidence to go to the Jury.

2d " The Court erred in refusing to allow the defendant to give competant and proper evidence to the Jury

3d " The Court erred in overruling the defendants Motion for a new trial

4th " The Court erred in giving the instructions asked for on the part of the plaintiff as the law of the case

5th " The Court erred in refusing to give to the Jury the defendants instructions asked for as the law ~~of the~~ case

The said Appellant therefore prays that the Judgment may be reversed &c

Purington & Wells
Attys for Appellant

And now comes Hezekiah Ford & pleads by Maybon Leland & Leland ~~and says~~ his attys and says that there

no Error in the proceedings and records & and prays that the said judgment may be affirmed &c

Maybon & Leland
Atty for Appellee

Emile Bourrier
v
Appellant
Hezekiah Ford

Assignment of Errors

226 84

Name to Cir. Court

Hezekiah Ford

v

Erdix D. Currier

Record

Filed Apl 17, 1861

L. Leland

Clk.