<sub>No.</sub> 13267

# Supreme Court of Illinois

currier

VS.

Ford

71641



STATE OF HALINOIS, ss. KANE COUNTY CIRCUIT COURT.

HEZERIAH FORD, vs.

ERDIX T. CURRIER.

# ABSTRACT OF RECORD.

PAGE OF RECORD.

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On the 14th day of March, A. D. 1860, the plaintiff filed in this case an affidavit, 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 Replezia, commanding the Sheriff of Kane County, to levy &c.

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."

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 defendant. 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.

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.

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:

BILL OF EXCEPTIONS.

STATE OF ILLINOIS, Rane County Circuit Court, November Term.

KANE COUNTY. 8s. Kane County Circuit Court, November Term.

A. D. 1860.

Hezekiah Ford,

VS

REPLÉVIN.

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 fell who it did belong to.

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

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 re-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. Burdiet 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 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 vaer. We differed a lit le 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, 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 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 II. 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 Sanday night night I saw Heath carry hay to the horses, it was the usual time 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. Burdiet 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:

I know the horses, Heath started for California with the Lovell horses, from 18

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 occasion ally. 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 eith r 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 Gol!

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.



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 ILL NOIS, 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.



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 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 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 aworn, 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 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 countel 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 instruc-

tions:

"If the Jury believe from the evidence, that Lawrence Kennedy had sued out of the Kane Ceunty 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."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

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 con-23 tinued 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.

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.

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."

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

"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 contrivance of Heath and Ford in order to keep said horses from being jevied 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.

"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."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

"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."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

"If the Jury believe from the evidence, that Heath on the day of the purchase took said horres 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."

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

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 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 December 4th, 1860.

T. C. MOORE, Clerk.

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

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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.

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:

"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. II. 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 turther 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 afore said, 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 affirst 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 Jary not yet having agree 1 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 verdiet 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 verdiet 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.

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.

J. II. Mayborne being first duly sworn, doth depose and ray 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 verdicte; 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 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. II. 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. 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

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following, to wit:

"Know all Men by these presents that we Erdix T. Currier as principal, and 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.



L. KENNEDY,



JOHN KELLY.



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, KANE COUNTY.

Ss. 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.

Page or Recond.

## ERRORS AS IGNED:

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.

226 Commer Filo Offe 17, 1861

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

HEZEKIAH FORD, vs.
ERDIX T. CURRIER.

Action Replevin.

# ABSTRACT OF RECORD.

#### PAGE OF RECORD.

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On the 14th day of March, A. D. 1860, the plaintiff filed in this case an affidavit, 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 Replayin, commanding the Sheriff of Kana County, to levy &c. upon one span of horses of the value of \$200, which said Writ is endorsed as fol-

lows: "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 defendant. 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.

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.

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 at leged 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:

### BILL OF EXCEPTIONS.

STATE OF ILLINOIS, as. Kane County Circuit Court, November Term.

A. D. 1860.

Hezekiah Ford,
vs

Erdix T. Currier.

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:

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. Burdiet 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 re-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 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, 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. Burdiet 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 detendant 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 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 II. 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 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. Burdiet 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:

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 occasion ally. 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 Illinoisand 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. 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, The People of the State of Illinois to the Sheriff of KANE COUNTY. 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.

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 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. Burdiet 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 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 countel 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 instruc-

"If the Jury believe from the evidence, that Lawrence Kennedy had sued out of the Kane Ceunty 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."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

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.

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.

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 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 Early took the horses away with the contract price for said horses, but left the office of Lovell and procured Hezekiah, 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."

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

"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 contrivance of Heath and Ford in order to keep said horses from being jevied 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.

"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 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."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

"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."

Filed December 4th, 1860.

T. C. MOORE, Clerk.

"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."

"Filed December 4th, 1860.

T. C. MOORE, Clerk.

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 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 December 4th, 1860.

T. C. MOORE, Clerk.

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

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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.

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. II. 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 taid 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:

"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. II. 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 turther 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-

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 Bur 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 verdiet 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.

T. C. MOORE, Clerk.

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. J. II. Mayborne being first duly sworn, doth depose and tay 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 of 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 in. volved 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 verdicte; 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 ly the Court, that he should examine the case, and if he found himself differing from his fellow 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 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.

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 effice 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 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.



L. KENNEDY,



JOHN KELLY.



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, 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. Ourrier Ford abstract D'ilen Apri 18.1861

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# 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 See Edwards on Bailments 210 6" East Z7 2ª Prok 607 15" Mass 389

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 This instruction denies that, if such relation ceased to exist. 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.

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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## Supreme Court of the State of Illinois,

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vs.

HEZEKIAH FORD,

Appellee.

APRIL TERM, A. D. 1861.

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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.

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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 didnot 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

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

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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.

Espreme Comp

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vs.

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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.

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

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POINTS AND BRIEF.

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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.

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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 \$2±0. 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.

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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

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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,

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Supreme Count Filed April 22, 1861 Lelech

Curien 3 It's ordered in this case that the proprint heatofore entres reacing and Unand my this cause be to changed as to make the Lame a prospect of affirmance. Oct. 15. 1851

Solouton

P. H. Walland

Ling Theese

Cross and a kind of United States of Anarica & State of Allinois Mane County & Pleas before the Honorable Dage & Wilson Judge of the Shirteenth Judicial Dircult of the State of Collinois and presiding sidge of the Ocrait Court of Jage 1 Kane Comby in the State aforesaid aka regular term of said bourt begun and held at the Court House in Genera in said County on the Mind Monday being the Mineteenth day of November in the year of our Lord One Thousand Eight hundred and listy and of the And fenden of the United States The Eighty fifth Crisent The Honorable Dance & Atelian Judge Edward & Joseph States attorney Ethan & Men Sheriff Comb Of Stright Bush De it Remembered that heretofore to wit on the 14th day of March as1860, There ever filed in the office of the le lest of the le ircuit Court aforesaid, an affidavit which is in the words State of Clinois & Kane Camby Circul fourt Kano Centy & May Dern asses

Hezekiah Ward being first duly swom, 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 spaw of Harser of the value of Los Hundred ofifty dollars; That the said property is wrongefully taken and worngfully detouned by Order D. Querur, and that The Jame has not been taken for any tay, apepenent 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 Higekinh Ford hable to Execution or attachment Subscribed and sworn to before )
me this 13 th day of March & Alezekich Ford Cenus Cenus ax1860. M. J. Brown Notary Public The following andorsement appears on the said. officears to wit: Hill March 14# 1860 AN right Clists afterwards to with on the day and year last aforesaid there was filed in said Clerk's Office a Slaint which is in the words and figures follow - - mg to wit! Hezekish Ford Mane Camby Dermi Erdig D. Currier Const May Derm Alezekish Ford of Kano Hezekish Ford of Kano Kane Camby Corcint Comy Stato of Illinois complains of Endix .

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Currier of Nano Comity State of Illinois in a filea of worngfully taking and prongfully detain:

-ing his goods and Chattels to wit one show 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 13 assore My Brown

March 13 assore My Brown

Ally for Plaintiff

Which said hand is endozed as solowers with

Which said plant is enclosed as follows to wit:
"Tiled March 14th peo
2 Rellright Closh"

And afterwards to wit; on the day and year last agorround there was ifened ent of touis Clems Office and under the seal of said bourt a writ of Replevin which is in the words and figures fol-lowing to wit:

State of Illinois & The People of the State of Almois to the Sheriff of said

County Greeting!

Wherens Alezekiah Ford planie.

tiff complains of Endix I. Consider in a plea of wrongfully laking and avongfully detaining his goods and Chattels to wit: One spaw of Horses of the value of Two hundred and fifty dollars.

Therefore we command you that if the said

plaintiff shall give you bond with good and saf: - ficient Decurity in double of the value of said Goods and Chattels, as regimned by Low 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 replenying sand goods and Chattels you cause the same to be replevied and delivered to the said plaintiff without delays and also that you Summon the said Ording I. Coursiar defendant to be and appear before our Corcuit Court for sand County on the first day of the next derw thereof to be holden at the Court House in Geneva in said County on the Third Monday of May next to curewer social placin -tiff in the perenises. And have you then, and there, This with an endorsement thereon in what manner you shall have executed the some, together with the 12 and which you shall take of the plaintiff Gore ex: - eenting this writ: Witness Saul Allright Clerk God Seals of our said Court and the sent thereof at Genera in said County this fourteenth day of March ax1860 P. R.Wright Clero It hich said Mir is endorsed as follows to wit Weented The within writ this 14 th day of March 1860 by replevying the within described property and delivering the same to the within named

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Page 3

Hezebuch Dord, also by reading this writ to the within named O. d. Currier and by taking Bondog plaintiff which is hereunto annexed. Ethan & Allen Sheriff of Nahu County by M. Restanter Defuty" also Wild Moh 17 #18tho Rewright Closs" Und afterwards to with on the soul 14" day of March in the year aforesoul There was filed in the dail Closhs Office a declaration which is in the words and figures fillowing to wit: Mare County Court Court Court Court Court Court Ordix Denvier & Many Derm ad 1860 Ordin I Carrier The defendant in this Drit was Summoned to curswer Hezekiah Ford the plaintiff in this suit of a plea wherefore he wrongfully looks the goods and Chattels to wit; one Spaw of horses of the said Hezekiah Food and wrongfully detained the same against furties and pleages until to. and therupon the said Areze: - Kinh Ford by M. J. Brown his attorney complains for that the said Elegendant on the thurteenth day of March as 1860 in the Country of Komo State of Allenois wrongfully both the goods and chattels to wit! "

Than of Horses of the soul plaintiff of great value to wit: of the value of two Alundras andfifty dollars and wrongfully detains the same against sureties and pleages until to wherefore the said plaintiff South that he is injured and hath enskumed damage to the amount of how Atundred and fifty dillars and therefore he brings his suit to by M. J. Brown alty for Plaintiff which said Declaration is Andorsel as follows vizy
"Tiled March 14th 1860 A. M. Wright Clisto" Und afterwards to wit: on the 17th day of March at 1860 There was filed in the said Clartis Office a Replevin Bond which is in The words and figures following to wit! Mon all May by these Presents that 100 Hezekiah dord and John Hathory are held and firmly bound buts Than J. Allen Sheriff of the Country of Nano in the State of Ali. nois and to his successors in office executors ad= - ministrators and apigns in the hend line of Their Hundred Dollars lawful money of the Contet States for the payment of which sun we do hereby fourly and severally buil ourselves our heirs executors and administrators. The condition of this when obligation

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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 Word sued out of the General Court of Nano County aforesied a writ of repleven against Order Of Currer defendant for the recovery ofthe following described goods and chattels property to wit: One Span of horses of the value of Low hundred rfifty dollars. Now if the said Hezekinh Ford plain: -tiff Ihall prosecute his suit to effect and without delay and make return of the said property of return thereof shall be awarded and dave and Keep harmless the said Sheriff in replevying the said property then this obligation to be word; Otherwise to remain in full force and Effect. Witness our hands and seals this 14 the day of March ax 1860 Digned Lealed and Delivered Hezekiah Ford To In presence of Johnstathorn Sen Fire Which Daid Bond appears endored asfollows to wir. Feled in the (ozcuit bourt the 1) day of March 1860 AR Mright Clero ab 1860 there was filed in the said bleshes

Service .

Office certain Cleas which are in the words Augekiah Ford Kane County Circuit

Cidio D. Currier Replevin Page or The defendant by Cartis & Henrington his attorneys says that he dill not take The sand one shaw sphorses in the said plain. tiffs declaration mentioned or either of them or any part thereof in manner and form as the plaintiff has above thereof conflamed against him and of this ho the soul defendant buts hurself whow the Country Ve. Cartis Merrington allys for Defts and the said plaintiff doth the like by Prown & Maytome his city 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 to was in hum the defendant without this, that the property of the said goods and chattels or either orany fract theroof We the daid time when to was in the said plaintiff as by the said declaration is above supposed and the the said defendant is ready to verify wherefore he prays judgment to Cartis & Herrington Defter alleys

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The defendant says that the property sylles said goods and Chattels in the said declaration mentimed at the said time when to was in Loven
Heath without this, that the said property of the
said Goods and Chattels to wit! me span if
Horses or either of them arany part thereof at the
said time when to was in the said plaintiff as
by the said declaration is above supposeds. and
This ho the said defendant is ready to verify

Therefore he prays judgment &c. Curtis V Herrington Defte any

and the said defendant conces and defends the wrong and injury when so and well avows the taking of the said one span of Horses in the said plaintiff's declaration mentioned and that justly be: = cause he says that at the said time when to in soid declaration mentioned the sould property in the Day'd declaration mentioned were the property of one Dosen Heath and not the property of the said plainty and that before the said time when so in said dec. -laration mentioned to wit: on the 12th day of March assite to wit; at Genera in Kand County and Stato of Illinois out of the Reno Office of the Kano Comity Court Court Lowernes Hennedy plainty Inest ont a writ of attachment against the Goods and Chattels Lands and benements of Lower death defen -dant for the som of Los Aundred dollars

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and afterwards to wit: On the 12 th day of March ast 860 Paul Allright who was then Jage 6 Clerk of the Cercuit Court of Kano Comity State of Ilmois duly Commissioned and sworn according to law to act as such Clers ifered said writ of attachment which the said Vaul Whright Clerk as agoreonil then other moder his hand as clest and the sent of said Court in due form of Low exceed in the words and Jugues following Drate of Ilmois ? Kano Comty to The People of the State South County Greeting; Whereas Lawrence Hemsely hath complained on out to Vand A. Might Clerty of the Circuit Court of Kano County that Down Akath is justly interted to the said Lawrence Hennedy to the amount of Stoo Hundret dollars and outh having been also made that the said Loven Stath is about to depart this Italo with the intention of having his Ifflets removed therefrom and the said Lawrence Hernedy having given bond and security according to the directions of the act in such case made and provided, The Therefore command you that

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you allach to much of the estato real or personal

of the said Lover Steath to be found in your County

as shall to of value sufficient to satisfy the

said debt and costs according to the complaint and such Estate so attached in your hands to Decure or so to provide that the same may be hable to further fire ceeding Therupon according to Low at a Court to be holden at Genera for the County of land whom the third Manday of Many next so as to compel the said Losen Heath to appear and answer the complaint of the said Layrence Henney and that you lumon the Falena Romeago Venion Rail Road Company as Darnished to be and appear at the said lout on the said Third Monday of May next then and there to auswer to what may be objected against him when and where you shall make Known to the said tout how you have executed this writ and have you then and there this writ. Witness Vand KWright Clerk of the

Deal?

Witness Vand Kleright Clerk of the said Court this 12 th day of Mourant in the year of our Lord One Thousand Eight hundred amb sinty

Which said writ of attachment before the said time when to in soid declaration mentioned and before the return day thereof on the 12th day of Hourch all 1860 to wit in said bounty of Kano aforesuit was delivered to the defendant then being one of the defendant then being one of the defends Sheriffs of said Kano County to execute

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according to law and afterwards to wit; on the sent 12th day of March ClDITTED at Logli in said County adversaid said defendant to being one of the defuty Sheriffs of said Have bornty afore -said under and by virtue of said writ of attach--ment and in Jursuance of the Statute in such Case made and provided levied whom the said one Span of Horses in the said declaration mentioned and detarned the same by virtue of sound attachment and leny to made as aforcoard as he lawfully might and this he is ready to verify wherefore he prays pragment 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 Inch case made and provided to be adjudged to hun Ourtes Merrington

Defter attys

Upon which said pleas appears the following endorse ment to wit; I Way 24 1860

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Mill May 24 1860

afterwards to wit: On the 29th day of May adrotes there was filed in the Clinis Office of said bourt a Replication which is in the words and figures following to wit;

Hezekiah Ford Nano Comity Cozcuit Court 1840 Erdix Tourier ( Nipler in And the said plaintiff as to the said plea of the said defendant by hun Secondly above pleaded says predudi non because he says that the said property goods and Chattels in the said declaration were at the said time when to property goods and Chattels of the said plaintiff as in the said declaration alledged and not the property goods and Chattels of the said degendant and This The sand plaintiff prays may be engund of by the country Trown & Mayborno ally for Olf Club the said plaintiff as to the send plea of The said defendant by him thirdly above pleaders Days producti non because he says that the soul property goods and chattels in that plea mentioned were not at the said time when we the property goods thattels of the said Aren Heath as in that plea alleged but wen the property goods and Chattels of the sand plainty as in The said declaration alleged and this the said plainty prays may be engruend of by the Country to I Frown I Mayborno Aut the said plaintiff as to the said plea of

the said defendant by him fourthly above pleaded by the leave of the Court to Days Page 8 predudi non because he says that the said goods and Chattels in that plea mentioned were not at the said time when so the forefurty goods and chattels of the soul Lover Ateritte as in that filea alledged and this the soil plaintiff hours may be engrund of by the Country to Brown & Mayborno City for Aff. Claud for purther replication to the said plea of the said defendant by him fourthly above pleaded by leave of the bout for this purpose first had and obtained the said plaintiff says preclude non because he says that the said defendant was not at the said time when to a deputy sheriff of said Mand lamity as in that plea alleged and this the said plaintiff is ready to verify wherefore he prays judgment to Brown & Mayborno. ally for Olf Which said Replication is endorsed as follows to wit: Dided May 29 #1860 and afterwards to wit: on the 8th day of fune as the days of the

May Denn of said bourt ast the following among other proceedings was had and entered of Record in said Court to wit: Hezekiah Ford
Replevin
Erdij J. Courier Shis Suit is continued at
Whis therefore the plaintiffs costs of term. Aris therefore Considered by the Const that the defendant have and never of the plaintiff his costs herein at this term Expended and have execution therefor. 'Und afterwards to wit' on the first day of Des - Cember ax1860 the same being one of the days of the Stovember Dern of Daid Court adt teo present the Honomble I saw Milson In Tgo Land Allright Olino Degnarcus Clash Sheriff Edward & Joseph Hates the following among other proceedings was had Alezekish Borb & Replevin Erdix D. Warrier & 7340 This day comes the plaintiff by Mayborno & Brown his atterneys and the defend aut by Herrington his attorney also comes and on motion of the plaintiff it is ordered by the

Court that a Juny come whereupon come a Juny of good and lawful men of the County to wit; Alson Annold Alphones Gates J. M. Burley Jage 9 ATT. Lickner Heram Very George J. Jech A.V. Dell Dr. L. Alexander Herain Scraffon S. J. Kimball William Fratt & Elisha Med who are duly tried elected & swoom to try the years formed herein and after hearing a portion of the Ividence the further hearing of this cause is postponed to the meeting of the Court on Monday morning next and consent of coursel it is ordered by the Court that the juny be allowed to disperse to need the Court on Monday norning. and afterwards to wition the of the day of Decem =ber ast too the same being as yet one of the days of the said November Dem of said Court present the Aton, I saw I Wilson Indge Thurs B. Logar States altoney Demarcies Clark Sheriff Thomas to Moore Wests the following among other proceedings were had and entered of record in said bout to with Atezekiah Dord Replevini

Berdin T. Cemrier This day again come the farties of this Smith by their respective attornies and the pary

herelofore unpannellub herein anno also como and after hearing the remainder of the evelence by agreement of counsel the funy is allowed. toddsperso to meet the court tomorrow morning at half past Eight Oclock

and afterwards to wir: on the 4th day of December as 1860 The same bening as yet one of the days of the said Nevenber deem of said Lourt present as aforesaid the following among other proceedings was had and entire ofrecord in said Court to wit!

Alezekiah Ford Replevin This day again come the parties by their respective attornees and the jury here -tofore empanuelled in said cause also come and after to hearing the arguments of coursel and instructions of the court reter in Charge of a swom Officer of this Court to consider of their verdick

afterwards to wit: on the of day of December Old 1860 The some being as yet one of the days of the said Nevember Derm of soul Court present as aforesaid the following among other proceedings was had and entired of record in said Court to wit:

Hezekiah Ford Replevin

Page 10

Page 10

This day This day again come the parties by their respective attorneys and the fory heretofor empanuelled also come and for their verdich day "We the juny find the ignes formed in pavor of the plantiff" Thereupon the defendant by Herning -ton Murtes his atterneys enters his motion for a new heat, And afterwards to wit i on the 13th day of December all 1860 the same being one of the days of the said November Germ of said lo mit present as aforesaid the following among other proceedings was had and entered of record in soul Court to aver,

Alegekiah Ford Replevin

Erding De wrier This day comes the plani-Court to wit; tiff by Brown and Mayborno his attorneys and the defendant by Akrington and Curtis his attorneys also Comes and the motion for a new trial heretofors entend herein by defendant coming on to be heard after hearing the argument of coursel the Court being July advised overrules soud motion.

It is therefore considered by the Court that the plaintiff have judgment against the defendant for the property replevies 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 therupon again comes the defendant by his attorneys and excepts to the ruling of the bourt herine and prays an appeal to the Supreme Court which is allowed by the bourt on condition that defendant file his vill of Exceptions herin within tendays and also his Bond in the Sum of Three Hundred Dollars in hursnance of the Statistici such case provided within thirty days with such sunties as may be approved by the Clock of this Court.

And afterwards to wit: on the 2st the day of Decem ber ad 1860 there was filed in the Clessis Office aforesaid a Bill of a ceptions which is in the words and figures following to wit:

State of Illinois \( \text{Mane County Coronit Mane County & Court November Dermi a E1860}\)

Hezekiah Ford

Hezekiah Ford Replevino
Endis J. Coursier

Be it remembered that henty

Page 11

to wit: on the 1st day of December ad 1860 sand day being one of the days of the November Derne of said Rans Comity Circuit Court for ast 860 Sand Cause coming on to be heard a jury was unfamuel ed to try said cause, the Plaintiff in order to sus= tam the your on his part called Honzo & Sovell a witness who being first duly sworn testified in substance as follows; Ariside at Courtland DeKall County and was there March first (14 1860, I was the owner of a shaw of horses, at that time, Loren Health come to me to purchase them; we agreed about it, I've paid me 35 and was & pay \$275 for the horses and two sets of Harness, It then said I want you to go to Lodi with mo I soud to him Hezekiah Ford is here, may be you can get the money of him, he days where is Ford, I said to him he is in town, he then says don't tell cors that I have fail you aughing on the price. Doon after he cano in with Ford and as he came in Skath hirmed to doord and housed to the harness days that he is the harness, Ford then said \$20+0. is that the amount you want, I replied yes Ford handed me the money \$ 240 then Heath said to no, now Lov. I want you to understand this when I pay Ford the \$250 - A and to have The horses then we want to the door. Dome man called Ford and he slopped, I went on to the Born with Healt, I led out no of the horses and

t K ( )

gave it to Heath and brought the other one
and and gave it to Ford, Next day sent
the harness to Logli to Ford, Shipped the harness to Ford because they Ford theath so direct
eds. Can't say positively but think it was Ford
who gave no directions to do so, Ford was to have
to horse antit he was paid the 240,—
Crop hamined
This was the first March 1860
Alath came to me to how the horses. We made

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Aleath came to me to bry the horses, He made the bargain. Heath fair mos 35 down, he was gow len or hoenly minutes when he returned to my of fice. He haid me frager money, he was at my shop in leant sand. I saw Atenth have other anoney at the time time he haid one the 35-in his profession about 300, he look the 35 out of that he fraid mo. I tenths money was done up lengthwise. I think the money was done up lengthwise. I that the money haid by Ford was rolled up. I tenth said Los I want you to understand this when I kay Dord 240 Sain to have the house of the war the house.

Re Examined.

I her Healt look out the package of money he soud the money did not belong to him
Re Crophy ammed, Did not tell me who it did

Barney Me Guff a vitness produced and swom on the part of the plaintiff testified in substance as

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follows: I resided in Lodi on the first day of March last and was in the employ of Alezekiah Hord was at work around Good's store front of the ene and learning some about the middle of March (I dentity of the property admitted) the Horses were Kept in the barn, I 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 Chamby, I worked them on Fords farm flowing and Inting in grain, Utere the taking of the horses in greation was admitted) Has there when the horses were returned after being brop Examined, & 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 C'elmany, the mildle of February worked near by Lodi, after leaving Ford sow the horse, the Evening they were brought brome it was the just week in March, it was about the suddle of the week and not positive, Thus it was, Liverghed grain, solo goods and measured wood about that time, did Chores, tended the horses, Forth had no horses before these, It was the next day of iroto charge of them at Moodward's barn. Drew lumber this fame, some days would draw a load as I went to

Page 12

plow. I drugged wheat with them, this I did after the horses were replevied, I did go to bond land before the horses were repleved; a week before Ford and Ed. Burdish went with me Strong drove in and out of town, I drove the balance of the time, bank remember tangother occasion in which I used them before they were repleved & took chargo of the horses The day after they were feletied from Court tand. after & began to lake care of the horses, don't know that any body Elso took can ofthem. I was absent purhaps. Two or three days, They were in the Stoodward barn two weeks before they were level upon by le urrier Currier kept them in his possession three or four days or a week, Don't know that Stath cared for the Horses while they were in the barn. Herst did not use the horses tomy knowledge miless he used Them in the night, I would sometimes carry water to The barn and sometimes lend them. Heath dul not, never heard that he did. Ford has corner -Sed with me three or four times today and yesterday I am en gaged in his store and wan house. Burdiet did not use the horses prior to the leng in cept in going to lowrhand. Here the Haintiff resters

Nichard Van Black a witness produced and Inorn on hast ofthe defendant testified as follows

Logli one evening after the horses were purchased Page 13 was in the barn with Heath, when the Horses were This was three or four days after the horses were Junchased, this was in the thoodward varie It was a very few days after the Horses were brought to the barn, I saw Heath in the barn, Iwas at Lodi one evening near the barn when Heath aske. me in to see the horses, Steath went to work to take can of the horses fed them outs rwater We differed a little in looking over the leane 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 Hordward barn The plaintiff objects to Statements made by Heath Court overmled Offiction, (Klaintiff Excepts) Nothing mon sand on that occusion. Had unother Conversation with him at my house. Crop examination Ford was not by at the conver.

The defendant then called Samuel Havely a witness who being duly sworn testi

- fied as follows:

The horses in question,

O reside at Logi. I am a neerchant there I first saw the horses the day they were purchased They were kept in the barn of occupied the first

might. It ath brought them to my place and wanted to benow of moif could leep them I said you he had them in the barn. The next day he haid no for the Keeping and took them to the Stood: ward varn which is right across the road from my place. Akat purchased from me a cumy count and brush, they wen taken acrof to the burn, for two or three days I saw that laking can of the Atorses Some how or three weeks before I saw the horses at my farm Steath paid no some money. Saw him have money, drafts to he said he had got hies hiser ance money, his house had provinsly burned I saw Barney The Suff Take care of the horses after they were repleved, count say whether he did before.

Orof Francis;
The shorses were brought to
Muy barn just in the edge of the evening could
not day whether they were taken care of by any
other herson or not. Burdick kept his oven in
the Poarm.

Hawly realled

The Horses were in my barn three nights and how days. It was farmary 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 number to before he could draw it, the money

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

follows: I reside at Logi and have for the past five years, I know the parties I have seen the horses in greation Daw Then when Soull owned them and often afterwards of first saw Them in Heath's propelion, he was watering them I was passing by him when he was watering them It 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 prolly theap ( Saintiff object sed to Heath's Statements being given. Court over-Fruled objection Claintiff Excepts, He said ho gave \$250 or 275 for them I sono him drive up one time infront of the depot and ask Ed Burdick to late a ride they were harriessed before a lumber Wagon, Burdick west with him I have always under stood that Burdech went to California with Steath. I have seen skath water the horses once or twice I we. The day / Heath went to byy the horses I heard him day to Burdiet he thought he would go up to Courtland and De the Lovel horses. I lived furhaps 511 rods from where he was watering them, It was at a well directly in front of Fords house it was the

same werk the horses were attached. Co know

Page 14

MorKennedy I saw him at Lodi Iremem - ber the night Currier was there I think I sakup all night. Then was some stones thrown that night There was some property in the warehous it was an ontit for California. It was taken away by James Haynes Amos Burdick Shurtleff The Sthite and Barney ING Luff think that Barney Inc Guff was in The employ of Ford Ford had a varchouse. I afterwards saw Some of these sauce things broughtout of Fords warehouse Ed Burdiet was helping the same might. Lowrence 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 care in the Galence warrhouse in the day time, they remained in the warehouse about a week, they were remond the day the defendant and Kennedy arrived There. brop reannied.

t i t i

It is my impression it was
Itednesday, The goods were marked Ed.
Burdick. I did not see Tol White or Mc
Inflore out any of the Goods Dord was
not there, Currier was at the depot. Itemter
was at Lodi. Hennesdy watched all night, I
was in the habit of delivering freight, also was
Omos Burdiet. Ford was not cormected with
the delivery of these goods at the time, I had the

74.71

B 17.

Jaga 105

Car with Heath, Ford was not around. I have been acquaintent with Heath for some time, he brags a good deal about his property.

and sworn on hart of the defendant testified as

follows!

I know the practices Iteath and Fords I reside at Lodi I have seen the horses at wood.

The horses I have seen the horses at wood.

Wards Stable. (Plaintiff objected to Heath: Statesmut.)

being given in evidence. Court overwied objection

the Huntiff exceptus) At ath asked me to go

over to the Stable. Heath carried some water to the

Atto ases and fed them some hay, while I was

there he did not say anything about the owner

Ship. I understood him to say that he intended

to go to balifornia with them. He asked me to

go over and see his horses. I never some him use

Either one of them at any other time, it was before

they were levied whon.

Conf Ruon what time they were levich upon; did see Car 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. lean't let the day of the verk nor month it was along last Spring, it milt have been a work or how 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 Iworn on part of defendant testified as follows I reside in Panepas about no and a half miles from Sodi. Know Steath and Ford, have seen the horses in question. I Knew the horses before Lovel owned them I was at home on the right spoken of by D. mith Neath Started for California before he left he was in Logli at white's house I was there I saw Ford there never saw them there but ones. 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 fonce of the letters Heath was at Armaston's think I saw Ford There once as late as mine Octobo, would not like to day I had seen him there much after hours Octock at night, Anow nothing of the contents of any of the letters Conversed with him, the only thing heard hun day was, how are the folks, I answered He asked me the question as often as he and I met as often day as every other day, say

four or fore trenes don't know where Neath Stayed the night before he stayed at White's Page 16 The night after, he stayed at my house Growth has frequently asked me the question Lines and I have answered him with org: enrice to my own folks. Hath's family was at the time in Lodi on to 60 rods from Whiteis. White is Fords father in law we left White's that night, could not say what time and I Stayed at Fords, Can't say what was Talked or sayed about at Athitis Ford is a merchant at Sodi and a man of sealth Can't say how long it was I saw I kath the last time before he left for California Crop Examination Jans Dord at Sthites about the middle of March, Ford and my: self were at Hamastonis. Ford brought up a span of Horses the Lovel horses, Saw Two hundris dollars paid I saw a settle ment between Heath and Dord. Daw 240 fail over. Heath said there is the nursey for your horses. There was a conversation between there in regard to those horses. I saw the money counted somo gold and some paper Some twenty dollar pieces and some smuller Never Dan Stath after that time: it was in March possible in April I thoul it was the

defict, he was going home, this was before the throwing of the Our and Stones took place Saw him do nothing, have frequently seen me Suff there at the depot, I get up there about ten oclock, I think it may be as early as nine perhaps eight cant tell any thing about it.

Chas Ihrall a witness produced Yswom on hart of dependant testified asfollows: I reside at Lodi saw the goods in our don't know the day, Saw Sol White and & Durdick moving the car around to the warehouse. I did not see the goods in Ford's warrhouse about a month before the horses wentaken, heard J'ord and Heath conversing, Heath smilt Food that there had been two dollars more of his money paid for the wood than Corts money, they were Jiguring ap about it at the time. Daw Hat fetch the Horses to Hawley's Stable, once saw have water one of them it might have been two days afterwards Ince saw him ride no of them the next day afterwards don't know Ed. Burdiet amb Barney Me Suff each juding one of the horses this was before the repling Heath had wood by his house

Crop & annied Healt mee came over with his little boy and wanted Mr Stavley to let Pays 18 here fait his horses into his barn until he Could get another place for them Kennedy told me to go to Averrington and he would tell me what he wanted to prove by me 6 M Humaston a witness produced and Levori on hart of defendant testified asfollows It know the horses, Hath Started for California with the Levell Horses from my house about I oclock one Dunday Eve: loop of anniel Tan Hard brought up the horses on Saturday evening to my house Heath bail him 200 Heath left on Sunday Evening, then Deemed to be some misunder: Standingabout a note one claused that it was paid and the other that it was not haid. I Sow Heath hay how hundred or over. after they got through they went down to the stable and Ford himed out the horses, at the time of the Conversation about the note. Heath was much sy cited, claiming it had been haid beant say that Ford heard it, don't know when Huth got the money to pay for the horses. Heath

I now receolies for rown some of the money of mo to pay for the horses when he haid the money he sould there Dord is the money for your horses. He Ex annied Hath was keeping gmet although out of the house occasionally. Ford is a bright active business man. It was here admitted that Than & Allen was Theriff 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 outh of office. I Haintiff Abjected, Const allow -ed them to go to the gury. Plaintiff Excepted! Shat if Endis D. Courier was deputy he was so appointed by and under said Allen. The defendant then offered and gard an Evidence to the grory the written appointment of said Ording O. Courier and the file pon theback thereof which is in the words and Jigurus following: Mon all May by these presents that & Ethan & Allen Sheriff of the County of Hand in the State of Ilmois have this day appointed and do hereby appoint Erdin 2. leurner of said County a Defauty Theriff under me and he is hereby authorized as such

Defruty Sheriff to do and perform in my name any dand all of the duties required of the Sherif Genera this out day September ast 859 Page 19 E. J. Allen Sheriff "Dide't Nov 28th 1860 as of the 9th day of Deplember and 1839 by order of the bank and recorded in bonst Record 8 Vage 622 AN Wright Clerks The defendant then offered and gave in evidence to the grow the oath of office of the said Ording I, Currier and the filing on the back thereof which is in the words and figure follow " State of Selinois ? Have County Jo & Erdix D. Currier do Tolemnly swear that dwell support the Constitution of the United States and of the State of Allinois, and that Dwell faithfully des charge the duties of Deputy Dheriff of Kane County Allmois to the best ofmy ability and understanding - and a do soleme - by Divear that I have not fought a duel nor fent or accepted as chillenge to fight a duel the probable ifene of which might have been the death of either party wor been a second to either harty nor an any way or manner auded or

aprished in such duel nor been knowingly the bearer of such challenge or acceptance suce The adoption of the Constitution and that dwell not be to engaged or concerned directly or indirectly in or about any such dueb deoring my continuance un office, Do help me Tod! Erdin J. Currier I worn and Subscribed to before me this 9th day of Referent Gert
Deptember ad 1839 Replace Colorent Gert 6 Jears Hetness my hand and the seal of paid Court at Genera in said Comy this 9th day of Deprember ast 1859 C.P. It right Clerto" "Filed Septimber 97.7859 P. Pringht Colerto" The defendant then called than & allen who being duly sworn testified as follows; I am & heriff of Kam Canty, have had a good many recution against Loven Heath Within the past two years, Some of Anil Execution were from Chicago and some from this County. I crued not collect any thing on said Cer centions to was brought hereand given to mo in Charge 14. 4 on a Ca. da, one of the last executions of had against him amounted to about 200. I could

Page 20

not collect it. The defendant then offered in evidence a writ of attachment mentioned in the pleadings in the case which is in the vords and Jegures following! State of Illinois ? The People of the Mane County of State of Illinois to the Theriff of said Country Greeting It hereas & augrence Kennedy hath Complained on oath to Sand A. Mright Week of the Corcuit Court of Kone Comity that Loren Health is justly indebted to the said Lowerne Kennedy to the amount of Dwo Hundred Dollars and oath having been also made that the Soul Loren Heath is about to depart this State with the intention of having his effects removed therefrom and the said & aurence Mennely 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 Sterth to be found in your tounty as shall be of val - ne Inflicient to datisfy the said debt and costs as-- cording to the complanit; and such Estato so attach -en in your hands to secure or so to provide that The sains may be liable to fur their proceeding there - whon according to law at a Court to be holden at Genera for the County of Komo upon the third

Manday of May next so as to compet the Said Loren Steath To appear and answer the Complaint of the said Sourence Kennedy and that you also summon the Dalena Chiengo Union Kail Boad Company as garnishee to be and appear at the boart 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 lours how you have executed this writ and have you then and there this writ. Witness Paul K. Wright Clark of the said loger this 12th day of March in the year of our Lord One thousand eight hundred and AN Mright Clerto The following endorsements appear on soul writ of allactment to wit: "Try virtue of the writ I have attached one I pan of Mares dark boy with white Spots in the forcher & about seven years old one you of Steers four years old me dark red the other red and white with one from broke off and one two year old heifer red with white face and white In the back as the property of Low Heath not found in my county.

Page 21

Pag To the giving of which in evidence to the Jury in the case the plaintiff objected which objection the bourt sustained, for the reason that the Ex istence of the writ was admitted by the placeding to which ruling of the love the defendant made no objection, The plaintiff then called of D. Woodward as a witness who being soon testified asfollows; Have Seen the parties, resided at Lodi in March last, remember of Horses being in my barn was in the barn occasion -ally a young man by the name of Me Guff and Ford had charge of the Horses, I know about the time they came, It was previous to I weeks before the 1st Inesday in April freshaps it was the 12 to 13th perhaps between the 9th and 13th Illourch did not see The horses brought there, Mr Fard part for the rent of the stable for the horses. broker amined. Dord paid 1 25 we called it 6 weeks. Fare spoke to mo for the barn Weath never spoke to me on to subject. We

Dettled the account about the time of the Ha-- tional Convention in Chicago, Burchet had Cattle in there along in Debruary. The barn belonged to Baldion of Oswego or his brother for whom he ached as agent, I don't Know where the other / Faldwin leved, I had anthority from Baldion, do not know of Heath's having any conversation with Baldwin I rented the house barn and every thing from Burdiet in the place, afterwards when Back--win came he authorized no to occupy it; when I settled with dord the account embraced many items there was an item of 500 - for money loaned \$200. account at his store, My account against him was for barn rent and school or--ders. He settlet in July I now reside at Plano in Kendall County, I saw The amos Durdick here today.

The Plaintiff here rested which was all the evidence either offered or given in by either

harry in the trial of this cause

The Plantiff then asked the Lourt to give the following instruction which is in the words and Jignes followings

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

Page 22 four chare of the Horses in question and look the horses in pledge to secure the repayment of the 240 dollars such pledge would west a special property in Dard; and if the Jury further believe that the defendant took the property or try on the writ of attachment the plaintiff is entitled to recover - the defendant not have ing offered any proof that the plaintiff in the little chinent was a creditor of that is not in a position to attach the please as king onit against the Indian Deer 5" Iteo.

3, let Moore Clerk"

Which was by the Court given to the Jury, The

Which was by the bourt given to the Jury, The giving of which instructions to the Jury the defendant of his commel then and there except = ed. The bourt then of its own motion gave to the Jury the following instructions "By the bourt

The declarations of Akath as to his
Ownership of the property in greation not made
in the presence or hearing of Tord the peff.
Camor affect Ford incless the sung believe from
the evidence that at the time of making such
declarations Heath was in properties and exercising
acts of ownership over the Property by the permilein of Ford.

2

Milil Dec 5-17860 D. C. Mgone Clerts " To the giving of which said Instructions to the Jury the defendant by his counsel her and there excepted, These were all the instruc--tions goven on the hart of the plaintiff. The defendant then asked the Course to give to the my the following is -"If the piny believe from the evidence = (motions; that Lowrence Kennedy had sued out of the Mand County Coronit Court in the month of March 1860 a writ of attachment against Lozen Heath and soul wir was placed in the hands of Ordix Harrier a deputy Sheriff of this County and that south Currier by virtue of said writ level whom and took hossession of Soul Horses they being at the time of said Deiguro in the poplepion of sand death and owned by him then the fury will find the spaces in gavor of the defendant."

2

I the Jury believe from the evidence that the

Horses in greation were bought by Heath and paid for either by nine or his money and that I teath took

in popepion they were taken when and by virtue of

2

内众之

Tage 23 the down of attachment with named in the fourth filen herein which is the same taking Complained of in this case Then the jury must find for the defendant. " Heled Dec 5-1860 Who Morro Clerk" which were given. The dependant then asked the Court to give the Jury as law in the case the 3 If the in her If the pury believe from the evidence that the Horses in greation were level 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 greation from Loyell and haid sand Loyell a portion of the furchase money and at the time of said fraction fragment whited to said Lovell money sufficient to have haid the entire contract frice for said horses but left the office of Loyell Throcur -en Hezekiah Ford the plaintiff to come to the Office of fait Loyel and hay the balance of sout Jourchase money which was the money of sand Heath and that Dord and dreath look the horses away with them saying that Tout should should possession of said Horses until Heath hard Ford and that afterwards before and at the time of the lever in the attachment sait mentioned in the plea herein Healt had propepion found Horses and

whilst so in his possession the defendant herein took said horses whon and by writtee of said attach ment writ which is the same taking complained of in this case then the formy must find for the define -ant." "Dulin Ded 4 th 1860

De les Moores Clerk" "If the Jury believe from the evidence that Heath purchased the Horses in grestion from Lovell and haid a portion of the hurchase money and then brocured Fort to pay the balance of the hurchase with the money of luin, Heath and that this was a Contrivance of Heath and Ford in order to Rech fait Horses from being levied whom by the Credition of Heath he being the owner of said horses this is in law a grand and the pary should find for the defendant

Filed Die 4 1860 Ile Moore Colem" That hopepion of the aroperty in greation must accompany the ownership that being one of the strongest evidences of title, for if the fun oclare from the evidence that Neath was the fur-- Chaser of the horses in grestion and that Ford ad-- vanced a portion of the harchase money and was to hold propersion of the horses as his security for sand advanced money, and get permited Heath

to be und remain in kopepion of doub horses and

whilst so properled of them the defendant Currier being a deputy heriff and having in his frofte fin as such said writ of attachment in the fourth plea herein named and that in vortee of saul writ he seig Eld and look said horses, which is the laking com: I planed of in this case then the law days said hor= - ses were liable to be so taken by said officer and the Jury must and for the defendant," Miled Dec 4 1860 O, le, Moore Clerso" That if the sning believe from the evidence that Hath was the owner of the horses in grestion and Le 19 See 374 that Ford claimed a lien whom them, and that Currier being deputy Shariff that in his propepion The attachment writ named in the pleadings to ex-- Leute and that he took the horses in grestion upon I by virtue thereof as Heath's and from Heath's hos= session which is the same taking complained of in This case then the Law Jup Dail taking was lawful and that Dords claim to sand property amounts to nothing in this case, and the jung must find for the defendant." Tides Ded 4 1860 Dles Moore Clush" on the day of the purchase took said horses in gnestion to the Stable of Hawley in Logic where Henth tours much and procured Hawly to

that Heath then removed their horses to an other State in Said Village of Logic and there watered and fed and otherwise cared for said horses and so continued mill the levy and taking complained of his case, this is in law and fact an actual horsesion on the hart of Heath - and the pury must find in this case for the defendant"

Dules De 4 1860

8 It hilst it is true that found will mot be fore =

I le Mon Clisto"

Africans

Sumed but must be brown by those alleging it yet the jury have a right in determining the gnestion of ownership in this case to take into consideration the manner of the frurchase of the horses in question as shown by the evidence also the mode of hayment as shown by the evidence the facts if such exist by the evidence that skath was about to depart permanently from the State and that Skath was as in the writ of attractment shown indebrib to Kennedy that Skeath was fropefeed of the money wherewith to have faut for Daid Horses at the time of said four chase

That Heath afterwards did Start for le alefornia in

the might time with said horses, finally the Jury

have the right to consider fully every fact & cir = Cumstance as shown by the evidence on the alleged

question of ownership in this case and if from

Represent

ing my my

Said evidence the jury believe that Ateath and Page 20 Ford were contriving to Keep said property Ciway from the creditors of Heath the same in fact belonging to Heath this in Law is fraud and the jury should gind for the defendant" "Adub Dec 4 1860 Dles Moore Clerk" If the Jury believe from the evidence that Heath purchased the Horses in grestion and was the owner thereof and paid partly for them and that Steath then procured the plaintiff Ford in point of fact to advance the balance of the hurchase Money with the agreement between Then that Ford was as his security to lake and retain propersion of soul Horses until Heath Should repay Ford the money so advanced and that Heath was afterward and at the time of said levy found in the actual popepion of said horses he still being the owner (f) thereof then in law it will be presumed that Neath had hard to said Ford the money to advanced by Ford and in Inch case The horses in grestion were hable to be seized and taken whon fait wit of attachment as treather and the Inry should find for the defendant." Filed Dec 4 18tes D. le. Moore Wherto" Each one of which instructions the least wrote the word "refused on the margin theref and 

refused to give them as law to the Juny to the rolling of the Court in refusing to give said instructions to the Jury as law the defendant by his counsel then and there excepted. The many found the ipue for the plain tiff. The defendant mived the Court for a new trial; upon the hearing of saul motion for a new trial. a Merrington one of the allornies for the defendant mad to the bourt an affidavit in evidence which is in the words and figures fol Stezekiah Ford & Kane Canty Circuit
VS Const.
Erdig D. Gurier & November Derm astites Hugustus Il Nerriegton on out Italis that he as sole coursel conducted the de = = Jence of the above entitled cause. And that about the hour of Eleven oclock on the 4th day of December Ox 18tes which day was one of the days of the said Morember Derw of said Court - The gary retired from the beer of said least to consider of Their verdict in said cause under the Charge of for 14. Whipple one of the officers of said land and that said Jury as this affrant States whom information which information this affrant States he gully believes to be true being mable to agree upon a verdect in said cause through and by their forman Hexander V. Sill sent by their said officer about five odoch in the

Evening of the same day a written regnest to the Page 2de How drand SWilson The firesiding Judgo of said Court which was in substance as follows: of proper the sury would respectfully ask is the copy of the attachment as set forth in dependants flew evidence of indebtutness. Caspect to AV Sill forman" and this affiant further Italing as aforesaid stays that down Officer Shortly afterwards handed said written regnest as above set forth to soul Judgo of said Oour and that send fridge of said bound received said written regnest from the hand of said It hipple officer as aforesund and after reading the same wrote upon the back of said written request of said fary in substance as follows! The Court cannot give any further instructions without consent of parties but would refer the Jung to the coording of the instruct -long given on the part of the planitiff J. G. Wilson " and this afficient Drating whom information as aforesaid spays that immediately afterwards the said Josef It Whipple receiving from The hand of said lourt said written request of Daid Jung and the written auswer theren of the said Court and without any delay conveyor the same to the said say and gave the same

To them. And strike afficient states that neither himself nor the defendant nor any herson or freezone whitsourer on the hart of said defendant and had any knowledge or gave in any manner their consent to said transaction nor did this afficient or said defendant or any fursion acting for the defendant know of and concerning the same until the same in said cause had given their verdict in said cause that been discharged from further service therein.

This afficient further Italing infrom informa. It is and belief says that said written request on the paid frage as a foresaid was by the said gorenan a.N. Sill with the residue of the payeers belonging to said case given in charge to said forman hand to the bar of this bart and by the said foreman hand - end to the Clerk of said board for safe keeping.

Soon after the senil sury were discharged by the Const from sur the review in said cause he was for the first time informed of and concerning said transaction, and that this affiant from after said information made search amongst the papers when file in said case for south written request and the Court's answer thereof our could not find the same this affiant then procured others to aid him in Said Learch for said paper and full and therough

Con 3.5

Page 27

learch was prosecuted in and about said Court room in all frants and places where The same could or would be lekely to be found and this affiant States that The same was not nor camed be found, This affinit made engine of Del Mogro the Clerk of said out as this knowledge of said paper who replied to this affront that he had no knowledge whatever of and concerning the same nor had he any re-- membrance of having seen the same and this affrant States that he believes the same is loster destroyed. This affair further stating whom information as aforesaid not having been present -ent that in the forenoon of the succeeding day namely the fifth day of December said Juny not yet having agreed upon a verdiet in sand cause were by said Officer brought to the bar of said lourt I were Then interrogated by the Hon, I saad & Milson yet Indgo of said loout in substance as follows

Sentlemen of the pay have you agreed whowa verdict"! to which greation of the said prodge of said Court the said said sorry by their said forement replied in substance as follows: "In have prot" The said sondge of said Court then howceeded to instruct said Juny when his own motion not in writing and without the knowledge consent or approval of the defendant or any one in his be=

in substance as follows! It is the duty of the Juny to agree upon a verdict in this case if they can, It helst members of the Jury are not alwaystogical 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 fourors when they go out having dering the trial formed an opinion Thress 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 Low and the evidence as given to them in their true bearings, It is much to be desired by the lours that the Jung agree upon a verdict in this case. You will not be discharged out return to your room and make gurther trial and see whether you may not agree in this case," Dhis difficult further Statung says that said fung mee more after said verbal instructions Trons of and on the fast of said out so given retired to their room and in a short time thereafter returned into bourt with a verdict in soul Can for the plaintiff and fur ther south not. Dabseribed and sworn to I before no this 11th day of A.M. Sterrington December and 1860 Dle Mogre Clerk

"Diled Dec 11th 1860

The plantiff also offered in opposition to this motion the following affidavit;

Atezekinh Dord Mane to lix land

Vs

Erdin Currier of said bout for 1860 State of Illinois ? Kano Comity & J St. Mayborne being first duly Iwom doth depose and say on outh find say that he was one of the Counsel who had charge of the above entitle & suit and apifeted in the treal of the same and was pres--ent in lourt when the Jung returned into lourt and Italed to the lour through their foreman her Oll in answer to the engine made by the lour if they had agreed on a verdict in the case and he said Odl Strated they had not. also rec: - well of very distinctly the remarks by the bourt as I was haying particular attention to the matter and I also can recorlect as I believe the words used by the boart in the viswarks he made to the day on that occasion almost or quite verbatin in the connection that they were made as I had frequently heard the lour use very near or grite The same words in remarking to funds ow similar occasions and the remarks made

by the bount on that occasion to the Juny were in the following words as this affiant believes to wit: The Judge said that he had reluctant -by kept there together during the might and had only done so from a sense of duty; that in Orew of the great expense that would allend a retreal and in view of the fact that the amount in Controversey was not very large it was very desi-= rable that the Juny should agree, That the case was not of so serious a neture as if it suvolved the life and liberty of a person and while on the one hand no surer ought to dis regard his honest convictions as to the effect of the evilence in the case, on the other he ought to endeavor to harmonize his views with his sellow Journs if he can consistently do so, What me of The objects of the Low in requiring unanimity among the foriging was to quard 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 whow going into the Juny room afterwards adhere to the opinion there expressed partly from finite of Thinion without being conscious of it. That each foror should by anime his own sund and en leavor to ascertain whether he is influenced by any considera: -tion weekt the evidence and the law as given by the boord, mut he should examine the case

and if he found hinself differing from his fel--low grovers should endraver to ascertain whether their oficion might not be more nearly the truth Than his own, in short that his efforts should be to a gree rather than disagree if it could be done without a sacrifice of his honest convictions after calm sfull deliberation, the strong them retired from the Court room under Charge of the Officer. And this affiant further states that R. G. Carts one of the counsel in the case for the defendant was present and made no 06= = pections J. A. Maybons Doorn & Inbronibed to before me this 14 Dec 1860 a. les. Morro le leno The above facts as set forth are as I recolled them. I being one of the cormelin the causo. Interibut and swom to IM. & Brown before me Ded 15th 18tes 2 6 Mgore Clino " D'elul Ded 13th 8tho Hom Coleno" which was all the evidence heard or offered on the motion for a new treat. The Thatement contained in the foregoing affedavir of A.M. Atterrugtor in relation to the wroten Communicus - hon sent to the bourt by the day and the

1 0 1 Indges reply thereto is meanier in this: The Indge wrote whom the margin of the Communication as follows: The Court is not at liberty to give any additional instructions without the consent of the furties the Juny must look To the instructions already given" The Court did not write as is stated in said affedavit "would refer the Jung to the wording of the instructions on the hours of the plaintiff" Which motion for a new trial the court after being fully advised over. - ruled. To the ruling of the logest in over-- miling Soul motion refusing to grant sail new treat the defendant by his coursel then and there excepted and tendered this his bill of Exception and prayed that the some be signed and Dealed and made a part and parcel of the record and proceedings in this cruse. Which is accordingly done Donac & Milson Eas Which said bile of Exceptions is endorsed as follows! "Diled Dec 2st # 1860 Des Moore blesso"

and afterwards to wit! On the 9th day of faminary and 1861 theremifiled in the said believes Office anappeal boud which is in the words cand

F. F. C.

Jace 30 Throw all Men by these presents that we Ordix a lourner as principal and Loren Hennedy to how Helly as surety and held and firmly bound into Hezekiah Dord in the french sum of chree hundred dollars lawful money of the Knited Drates for the payment of which well and truly to be made we buil our. -selves our heirs and administrators and every of them forty and severally. Witness our hunds and seals this 19 th day of December ast 860 The condition of the bond is this That whereas heretofore at the Movember Derm of the Kane Comity Corout Court There was a Certain replever duit frending in the said Court when the said Hezekiah Dord was plantiff and the said Ording V. Cor--trier was dependant; and whereas upon a trial of said Don't at said November Derne of said Court the issues in said cause were found for said sout the said plaintiff and whereas the said Currier has prayed an appeal to the Supremo of Court of the State of Illinois which appeal was allowed by the said lourt when the Condition that said 6 rdis D. Carrier would ex-- Leute a boud to the sould Ford according to Law in the french some of three hundred dol-

dars with security to be approved by the leleshor

said lower. Now if the said Ording. Currier Shall prosecute his soul appeal with effect and shall fray and satisfy all costs and judgments which may be rendered by said Dapremo Court either whom affirmance of the said judgment of the said Corcuit Court or whon disniful of the same by the said supreme Court then this obligation to be void otherwise to be and remain in full force undreffect Nitness our hands and seals the day and year first above written Dec 3 Erdin D. Carrier Lohn Kelly Ex D Jeans Daken and approved by me this 9th day of January as 1861 D. C. Moore Clero Which said bond is endorsed as follows!
"Diche fany 9 1861
"De Moore Clerk" State of Allmois & Thomas les More

for the said bornty in the State aforesaid do hereby certify that the foregoing is a complete record of all the proceedings in said loust in the case of Hezekah Donb plaintif against Endin

D. Courser defendant in an action of Replevin said record comprising the process, pleadings all orders of said bourt bill of Exceptions and appeal Bond ifened filed and entered of record in said bourt in said case. It itness my hand and the Deal of said bourt at Genera in sout bonny this 31 erday of Jaman all 1861 D. C. Mogra Celent

1. ... Suprem Cant. State of Illiens. April Jenn, ad 1861. This Grand Dirrien Erdix O Currier W appellant Heyskiah Food And now Comes the said Erdix Oburrier appellant, and assigns the following errors in the above artitled Course the Court arred in admitting miproper evilence to go to the carry. 2 " . In Court erred in orfusing to allow the defendant to give Competant and proper evidence to the dary 3, The Court erred in overreling the defendant, motion for a new trial 4th The Court erred in giving the instructions asked for in the part of the plaintiff as the law of the Case The Court erred in refusing to your to the Juny the defendant, his trucking asker for as the law regitters, Case In said apprecant therefore prays that the Judgment may be reversed Arrington Mells atty for appellant Ford a pfulle by Mayborn Lebrid & Lebrid & Lebrid his arrays and says that then

and seconds branch prays thats
the sord frank may
be offered to
Maybour & Leleine
ally for spelling

Leaving I Currier to African Agreement of Brown of Brown

Name 6 6 or 6 ourt Hezekiah Ford Cordin Di Currier Record Fils Obplis) 1861 Lileland Cer.