No. 12556

Supreme Court of Illinois

Dart, et al

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vs.

Horn

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John McDonald
vs
John Horn

Opinion

166

12556

1858

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Rehearing

State of Illinois }
County of Cook } ss.

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas in and for the County of Cook and State of Illinois, at a regular term of said Cook County Court of Common Pleas, begun and holden at the Court House in the City of Chicago in said County and State of the Second Monday being the Fourteenth day of September in the year of our Lord one Thousand Eight Hundred and fifty Seven, and of the Independence of the United States of America the Eighty Second

Present the Honorable John M. Wilson Judge
Carlos Haven Pros Atty
John L. Wilson Sheriff
Attest Walter Kimball Clerk

Be it Remembered, that heretofore to wit, on the Seventeenth day of December A.D. Eighteen Hundred and fifty six, John Howe by Wilkinson & McElvoa his attorneys filed in the office of the Clerk of the Cook County Court of Common Pleas his Affidavit and Precipe for Replevin in the words and figure following, to wit,

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State of Illinois }
Cook County } SS.

John Horn on oath states that he the said affiant is the owner of Five (5) Stacks of Hay, containing from fifty to seventy five tons, being the property about to be replevined by him, and that he is lawfully entitled to the possession of said goods, and that the same or any part thereof has not been taken for any tax assessment or fine levied by virtue of any law of this State, nor seized under any execution or attachment against the goods and chattels of the said plaintiff, and that the said goods have been unlawfully taken by John H. Dart, David E. Lord, George G. Sutherland, & Henry Gould, and are now unlawfully detained by them in the County of Cook aforesaid, and that the said goods are of the value of about four hundred dollars.

John Horn

Sworn to before me
this 17th day of
December 1856
Walter Kimball Clerk
Cook Co Ct Com Pleas

State of Illinois }
Cook County } ss.

In the Cook Co Circuit
of Common Pleas
Replevin

John Horn
vs
John H Dart, David E.
Lord George E Southerland
and Henry Goold

Will the Clerk
please issue a writ of Replevin as above
directed, returnable at the next terme of said
Court and oblige

Wellington & McGilvra
Plffs attys

And afterwards to wit, on the same day and
year last aforesaid, there issued out of the
office of the Clerk of said Court, a writ of
Replevin, in the words and figures follow-
ing to wit,

State of Illinois }
Cook County } ss.

The People of the State of Illinois
to the Sheriff of said County — Greeting:
Whereas John Horn, plaintiff
complains, that John H Dart, David E. Lord
George E. Southerland & Henry Goold, defend-
ants, unlawfully and wrongfully have

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taken and do detain the following described goods and chattels, to wit, Five Stacks of Hay containing from fifty to seventy five tons, of the value of about Four Hundred Dollars.

Therefore we command you, That if the said plaintiff shall give bond with good and sufficient security, in double the value of the said goods and chattels, as required by law to prosecute it suit to effect and without delay, and to make return of the said goods and chattels, if return thereof shall be awarded, and to save and keep you harmless in replevying said goods & chattels, you cause the said goods and chattels to be replevied and delivered to the said plaintiff without delay. And also that you Summon the said defendant, to be and appear before the Cook County Court of Common Pleas for said County, on the first day of the next term thereof, to be holden at the City of Chicago in said County, on the 1st Monday January next to answer said plaintiff in the premises. And have you then and there this writ, With an endorsement thereon in what manner you have executed the same, together with the Bond which you shall have taken from the said plaintiff, as before commanded before

executing this writ.

Witness Walter Kimball Clerk of our said Court and the Seal thereof at Chicago in said County the 17th day of December 1856

Walter Kimball Clerk.

And afterwards, to wit on the Twenty third day of December in the year aforesaid the Sheriff returned said writ into the office of said Clerk, with the following Bond thereto annexed, and his Return thereon indorsed in the words and figures following to wit.

Know all men by these presents, That we John Horn, Edmund Kramer are held & firmly bound unto John L. Wilson, Sheriff of the County aforesaid in the State of Illinois and to his successors in office, executors administrators and assigns in the penal sum of Eight Hundred Dollars lawful money of the United States for the payment of which sum, we do hereby jointly & severally bind ourselves, our heirs Executors & administrators.

The Condition of this Obligation is such that whereas on the Seventeenth day of December in the year of our Lord one thousand Eight hundred & fifty Six - the said

John Horn sued out of the Cook County Court of Common Pleas a writ of Replevin against John H Dart Daniel E. Lord Geo G. Southerland & Henry Gould, defendants, for the recovery of the following described goods & chattels, property to wit, Five Stack of Hay containing from fifty to seventy five tons, Now if the said John Horn plaintiff shall prosecute his said suit to effect and without delay, and make return of the said property if return thereof shall be awarded, and save and keep harmless the said Sheriff in replevying the said property, then the obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this Seventeenth day of December A.D. 1856.

John Horn Seal
Edm Kramer Seal

Copy of Return & Receipt.

The plaintiff having given Bond as herein annexed, I have taken two and one Eighth Stack of Hay, the within described property and delivered it to the plaintiff, as per his receipt hereon endorsed, this 18. day of December 56. Balance of said not being found in my County, And also by Summoning the within named John H Dart & Daniel E. Lord

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George G. Southerland vs Henry Goold this 23rd day of December 1856.

John L. Wilson Shiriff

By George Anderson Deputy

Received from John L. Wilson Shiriff of Cook County two & one Eighth Stacks of Hay, ~~etc~~ described in the within writ, the other two & a half not found, this 18th day of December 1856. John Brown

And afterwards, to wit on the Eighth day of January A.D. Eighteen Hundred and fifty seven the said plaintiff by his said attorneys filed in the office of the Clerk of said Court his Declaration in the words and figures, following, to wit.

State of Illinois } Cook County Court
Cook County } ss. of Common Pleas

At the Jan Term A.D. 1857

John A. Dark, David E. Lord George G. Southerland vs Henry Goold defendants in this suit, were summoned to answer John Brown plaintiff in this suit, of a plea wherefore they took Five Stacks of Hay containing from fifty to seventy five tons, of the said plaintiff and unjustly detained the same. And

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thereupon the said plaintiff by his attorneys Wilkinson & McGilvra complains for that the said defendants on the fifteenth day of December A.D. 1856, at the County of Cook aforesaid took two & 8 Stacks of Hay containing about Seventeen tons, of him the said plaintiff, of great value, viz of the value of about one hundred and fifty dollars, and wrongfully and unjustly detained the same. (against Sureties and pledges until &c.)

2nd Count

And for that the said defendants on the 15th day of Dec. A.D. 1856, at the County of Cook aforesaid took 2 7/8 Stacks of Hay containing about fifty tons of him the said plaintiff of great value viz of the value of about five Hundred Dollars, and wrongfully and unjustly detained the same, against Sureties and pledges, and continue to detain the same.

Wherefore the said plaintiff says that he is injured, and has sustained damage to the amount of Eight Hundred Dollars, and therefore he brings this suit &c. Wilkinson & McGilvra

Pltffs attorneys

9.

And afterwards to wit on the Twenty third day of January in the year last aforesaid, the said defendants by George Payson their Attorney filed in the office of the Clerk of said Court their Pleas to the said plaintiffs Declaration in the words and figures following to wit.

State of Illinois } Cook County Court
Cook County } ss. of Common Pleas
Of the January Term AD. 1857

John A Dard David E. Lord
George G. Southerland & Henry Gould
als
John Horn

First Plea

And J. A. Dard George G Southerland & Henry Gould defendants by George Payson their Attorney, come and defend the wrong and injury when &c. and say actio non &c. because they say that the said goods and chattels in the said declaration mentioned, at the said time when &c. were the property of one Charles Horn, and not of the said plaintiff as by the said declaration is above supposed. And this they the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them

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and they also pray return of the said goods and chattels together with their costs in this behalf according to the form of the Statute in such case made and provided to be adjudged to them &c.

George Payson Defts Atty.

Second Plea

And for a Second plea in this behalf the said defendants by George Payson their Attorney come and defend the wrong & injury when &c. and say actio non &c. because they say that the said goods and chattels in the said declaration mentioned at the said time when &c. were the property of one Martin Horn and not of the said plaintiff as by the said declaration is above supposed, and this they the said defendants are ready to verify. Wherefore they pray Judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, and they also pray return of the said goods and chattels together with their costs in this behalf according to the form of the Statute in such case made and provided to be adjudged to them &c.

George Payson Defts Atty

Third Plea

And for a third plea in this behalf the said defendants by George Payson their Attorney

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come and defend the wrong and injury when &c. and say actio non &c. because they say that the said goods and chattels in the said declaration mentioned, at the said time when &c. were the property of one Charles Horn and one Martin Horn, and not of the plaintiff as by the said declaration is above supposed and this they the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them and they also pray return of the said goods & chattels together with their costs in this behalf according to the form of the Statute in such case made and provided to be adjudged to them &c.

George Payson Defts Atty

Fourth Plea

And the defendant Lord for a separate and independent plea in this behalf by George Payson his attorney comes and defends the wrong & injury when &c. and says that he did not detain, nor does he now continue to detain the said goods and chattels in the said declaration mentioned, or any or either of them or any part thereof in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the County &c.

George Payson Defts atty

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Fifth Plea

And for a third plea in this behalf the defendant Lord by George Payson his attorney comes and defends the wrong & injury when &c. and says actio non &c. because he says that the said Chattles in the said declaration mentioned, at the said time when &c. were the property of one Charles Lord and not of the said plaintiff as by the said declaration is above supposed, and this he the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have and maintain his aforesaid action thereof against him. And he also prays return of the said goods and Chattel. Together with his costs in this behalf according to the forms of the Statute in such case made & provided to be adjudged him &c.

George Payson

Defts Atty

And afterwards to wit on the Seventh day of February in the year last aforesaid the said plaintiff by his said attorneys filed in the office of the Clerk of said Court his Replication in the words and figures following to wit.

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State of Illinois }
Cook County } ss.

John Horn

vs

John H. Dart David E. Lord
Geo. G. Southerland & Henry Gould

In the Cook County Court
of Common Pleas
At the Feb. Term A.D. 1857

And the said plaintiff as to the first plea by the said Defendants Dart Southerland & Gould above pleaded says, precludi non, Because he says that the said goods and chattels at the time when &c. were not the property of one Charles Horn as by the said plea is alleged but that they were the property of the said plaintiff as the said plaintiff in his declaration has above thereof alleged and this the said plaintiff prays may be enquired of by the Country &c.

Wilkinson & McElvain
Plffs attys

Defendants likewise

Geo. Payson
Dft atty

And the said plaintiff as to the second plea by the said defendants above pleaded says precludi non. Because he says that the said goods

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& Chattels at the time when &c. were not the property of one Martin Horn as by the said plea it alleged. but that they were the property of the said plaintiff as he in his declaration has above thereof alleged. and of this he puts himself upon the Country &c.

Wilkinson & McGilvra
Plffs Attys

And the said plaintiff as to the third plea by the said defendants above pleaded says precludi non. Because he says that the said goods and Chattels at the time when &c. were not the property of one Charles Horn & one Martin Horn as by the said plea is alleged but that they were the property of the said plaintiff as he in his declaration has above thereof alleged, and of this he puts himself upon the Country &c.

Wilkinson & McGilvra
Plffs attys

Defendants likewise

George Payson
Defendants atty

And the said plaintiff as to the first plea by the said defendant Lord above pleaded does the like Wilkinson & McGilvra
Plffs attys

Defendants likewise

George Payson Defts atty

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And the said plaintiff as to the second plea by the said defendants Lord above pleaded says Precludi non. Because he says that the said goods and chattels at the time when &c. were not the property of one Charles Horn as by the said plea is alleged, but that they were the property of the said plaintiff as he in his declaration has above thereof alleged and of this he puts himself upon the Country &c. Wilkinson & McGilvra

Plffs attys

Defendants likewise

George Payson

Defts atty

And afterwards. to wit on the Twenty fifth day of March in the year last aforesaid, said day being one the days of the February Term of said Cook County Court of Common Pleas. the following, among other proceedings was had in said Court, and entered of Record. to wit,

John Horn
vs
John H. Dand David E. Lord
George S. Sutherland & Henry Gould

Replevin

And now at this day comes the said plaintiff by

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Wilkinson & McGilvra his attorneys. And the said defendants by Payson & Ward their attorneys also come and issue being joined herein it is ordered that a jury come. And thereupon come a jury of good & lawful men to wit J. F. Irwin Charles P. Hill P. C. Sawlen William Fleming E. M. Barton Christian Oleson D. H. Howard John Devitt J. D. Carpenter John Casey J. A. Reed. P. McManus who being duly elected tried and sworn well and truly to try the issue joined as aforesaid. after hearing the evidence adduced, argument of counsel and instructions of the Court, retire to consider of their verdict. And afterwards the jury come into Court and say, we the jury find the property replivied in this cause to be in the plaintiff, and we assess the plaintiffs damages by occasion of the premises to the sum of Four Hundred and Five Dollars.

Therefore it is considered that the said plaintiff do have and recover of the said defendants his damages of Four Hundred and Five Dollars in form aforesaid by the jury herd assessed; and also his costs and charges by him about his suit in this behalf expended, and have execution therefor,

$405.00

And afterwards to wit on the Twenty sixth day of March in

the year last aforesaid, the said day being also one of the days of the February Term of said Cook County Court of Common Pleas, the following among other proceedings was had in said Court and entered of Record to wit,

John Hown
vs
John H. Dart, David E. Lord
George I. Sutherland & Henry Goold
} Replevin

And now come the said defendants by their said attorneys, and enter their motion for a new trial, and for arrest of judgment in this cause,

And afterwards, to wit, on the Eleventh day of April in the year last aforesaid, the said day being one of the days of the April Term of said Cook County Court of Common Pleas, the following among other proceedings, was had in said Court and Entered of Record to wit,

John Hown
vs
John H. Dart, David E. Lord
George I. Sutherland & Henry Goold
} Replevin

And now comes the said plaintiff by Wilkinson & McGilvra his attorneys, and the said defendants by Bayley

Ware their Attorneys also come, and on argument of the Counsel of the parties, of the motion in arrest of Judgment heretofore entered by the defendants herein, the Court now here being fully advised in the premises, it is Ordered that defendants said motion be sustained, and by consent of plaintiff it is ordered that a new trial of this cause be granted, and that leave be given to the said plaintiff to file herein a new Count in Trover to be added to his declaration filed in this cause,

And afterwards, to wit, on the same day and year last aforesaid, the said plaintiff by his said Attorneys filed in the office of the Clerk of said Court his Count in Trover in the words and figures following to wit

State of Illinois }
Cook County } ss.

John Horn
vs
John A. Dana
David E. Lord
George G. Southerland
Henry Goodell

In the Cook County Court of Common Pleas

And the said plaintiff

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for a further declaration in this Cause by leave of the Court, by his Attorneys Wilkinson & McGilvra comes and complains of the said defendants summoned &c. of a plea of Trespass on the Case,

For that whereas the said plaintiff heretofore, to wit, on the 15th day of December A.D. 1856, at the County aforesaid was lawfully possessed as of his own property of two and seven Eighths Stacks of Hay containing about fifty tons of the value of Five Hundred Dollars, and being so possessed the said plaintiff afterwards to wit on the day and year aforesaid at the County aforesaid casually lost the said two and seven Eighths Stacks of Hay containing about fifty tons out of his possession, and the same afterwards to wit on the day and year aforesaid, came to the possession of the said defendants by finding, yet the said defendants well knowing the said two and seven Eighths Stacks of Hay containing about fifty tons to be the property of the plaintiff and of right to belong to and appertain to him, but contriving and intending to defraud the said plaintiff in this behalf, have not as yet delivered the said two & 7/8 Stacks of Hay containing about fifty tons to the said plaintiff, although often requested so to do, and afterwards, to wit, on the day and year aforesaid converted and dis-

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posed of the said two 7/8 Stacks of Hay containing about fifty tons to their own use. To the damage of the said plaintiff to the amount of Eight Hundred Dollars and therefore he brings this suit &c.

Wilkinson & McGilvra
Plffs Attys

And afterwards - to wit on the Twelfth day of April in the year last aforesaid - the said defendants - by their said Attorney filed in the office of the clerk of said Court their Plea to the said plaintiffs Count in Trover in the words and figures following to wit.

State of Illinois }
Cook County } ss.

Dart et al } Cook County Court
ads } of Common Pleas
John Horn } June Special Term AD. 1857

And the defendants by George Payson their Attorney say that they are not guilty of the premises above laid to their charge in manner and form as the plaintiff has above thereof complained against them and of this the defendants put themselves upon the Country &c.

George Payson Defts Attys

And the said plaintiff does the like
Wilkinson & McGelora
Plffs Attys

And afterwards to wit. on the Eighteenth day of June in the year last aforesaid the said day being one of the days of the June Special Term of said Cook County Court of Common Pleas. the following among other proceedings was had in said Court and entered of Record to wit.

John Horn
vs
John W. Dart David E. Lord
George G. Sutherland & Henry Gould
} Replevin

And now at this day comes the said plaintiff by Wilkinson & McGelora his Attorneys, and the said defendants by Payson & Ward their Attorneys also come, and issue being joined herein, it is Ordered that a jury come, and thereupon come a jury of good and lawful men to wit. Peter Brackett P. H. Kelly. A. Blinden J. Campbell. A. T. Richards S. J. Francis. E. R. Howland. M. Jenks. S. Dallaby. B. H. Craven. A Sutton. & William J. Hauke. who being duly elected tried and sworn well and truly to try the issue joined herein as aforesaid. after hearing the evidence adduced the said plaintiff asks leave of the Court to with-

draw a Juror from the panel. which is allowed by the Court. on said Plaintiff paying all the costs which accrued in this suit to this time.

And afterwards. to wit. on the First day of October. in the year last last aforesaid said day being one of the days of the September Term of said Court County Court of Common Pleas. the following among other proceedings was had in said Court and entered of Record. to wit.

John Howe
vs
John W. Davis David E. Lord
George G. Sutherland & Henry Goold
} Replevin

This day comes the plaintiff by Wilkinson & McGibra his attorneys. and also the defendants by Payson & Ware their attorneys. whereupon issue being joined let a jury come. whereupon come the Jurors of a jury of good & lawful men. To wit. A. M. Chase. Wm Coleman E. W. Pratt J. Garrison. M. S. Nichols. Patrick Kelly. P. A. Barker. J. R. Allen. E. R. Howland. Edward Crafts. Wm Arbuckle & Wm Flemming. who being well and truly elected tried and sworn. to well and truly try the issue joined as aforesaid. after

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hearing the evidence adduced, arguments of Counsel and instructions of the Court, retire to consider of their Verdict, and afterwards return into Court and say, We the Jury find for the plaintiff on the first Count in his declaration mentioned, and the property replevied under the writ issued herein to be in the said plaintiff, and further find that said defendants are guilty under second Count in declaration, and we assess said plaintiffs damages herein, to the sum of Two hundred and Eighty dollars.

And thereupon come the said defendants by their attorneys aforesaid, and move the Court for a new trial herein and in arrest of Judgment

And afterwards, to wit on the same day and year last aforesaid, the said defendants by Payson & Ware their Attorneys filed in the office of the Clerk aforesaid Court a certain Motion in the words and figures following to wit,

John H. Dant et al, } Cook County Court
ads } of Common Pleas
John Horn } September Term 1857

The defendant in the above named suit, after verdict and before Judgment, come and move

the Court, to set aside the said Verdict, and arrest the Judgment. First because the said Verdict is Contrary to law, Second because the said Verdict is Contrary to evidence, Third because the said Verdict is contrary to the law and evidence, and pray that a new trial be granted &c, &c

Paynter & Ware
Defendants Attorneys

And afterwards, to wit, on the Twentyeighth day of November in the year last aforesaid said day being one of the days of the November Special Term aforesaid both Counties Court of Common Pleas, the following among other proceedings was had in said Court and entered of Record, to wit,

John Horn
vs
John H. Dant David E. Lord
George L. Sutherland & Henry Goold
} Replevin

This day come again the parties, by their attorneys aforesaid, and the Court having fully considered the motion heretofore made, for a new trial & in arrest of Judgment, overrules the same, which overruling, was thereupon excepted to by said defendants. Wherefore it is considered

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by the Court that said plaintiff, by the verdict of the Jury as aforesaid, ~~was~~ do have and retain the property replevied in this cause, and have and recover the damages assessed to the sum of Two Hundred & Eighty Dollars, together with his costs and charges by him in this behalf expended and have execution therefor.

And thereupon came the said defendants by their Attorneys as aforesaid, and prayed an appeal of this cause to the Supreme Court, which was allowed by the Court, upon the filing of Bond, during this term of the Court, in the sum of Five Hundred Dollars, to be approved by the Judge of this Court.

And afterwards to wit, on the Nineteenth day of December in the year last aforesaid said day being one of the days of the November Special Term of said Cook County Court of Common Pleas, the said defendant by his said attorney, filed in the office of the Clerk of said Court his Appeal Bond and Bill of Exceptions in the words and figures following to wit,

Know all men by these presents that we James L. Reynolds, David J. Ely & James A. Parsons of Chicago, County of Cook and State of Illinois holden and firmly bound unto John Horn of said Chicago in the sum of Five Hundred Dollars to be paid to the said John Horn, Executors, Administrators or Asigns, to the which payment well and truly to be made we bind our heirs, Executors and administrators firmly by these presents. Sealed with our Seals, dated the Fourteenth day of December in the year of our Lord one thousand Eight hundred & fifty seven—

The condition of the above Obligation is such, that whereas in a suit now pending in the Cook County Court of Common Pleas, between the said John Horn plaintiff, and John A. Dart & others defendants, the said defendants have at the November Special

Term of said Court A.D. 1857. prayed an appeal from the decision of said Court to the Supreme Court of the State of Illinois.

Now then if the defendants in said cause shall well and truly prosecute said appeal before said Court. and shall pay the judgments costs interest and damages in case the judgment shall be affirmed. this obligation shall be void and of no effect. otherwise to be in full force.

In presence of

Jas L. Reynolds Seal
D. J. Ely Seal
Jas A Parsons Seal
D. E. Lord L S

Endorsed

Approved. John M. Wilson Judge &c.

John Horn

vs

John A Dana. David E. Lord. Geo. S. Sutherland & Henry Gould

Cook County Court of Common Pleas September Term A.D. 1857.

Replevin with count in Trover

Be it Remembered. That at the September Term A.D. 1857 of said Court. to wit on the 1st day of October A.D. 1857. the parties to the above suit came into Court. and the cause was called for trial: and a jury having

been Empannelled. the plaintiffs offered in evidence, first, a bill of sale dated before the commencement of this suit from Martin & Charles Howe Sons of the plaintiff, to the plaintiff, but the sole object of said bill of sale being to prove that the plaintiff was the owner of the hay in question, and this being admitted by the defendants, for the purposes of this appeal, said bill of sale is not incorporated verbatim in this Bill of Exceptions.

The plaintiff then introduced Martin Howe a Son of the plaintiff, who testified that he was not present when the hay in question was sold nor when it was levied on, but the defendant Dana the Deputy Sheriff told his brother in his presence that he he had sold it. He went to the defendant Lord and asked him if he had bought the hay, and Lord said he had nothing to do with it. He saw men come with horses and wagons and carry away hay from the lot of hay which is in question, to the Stable of Sutherland & Gould, two of the defendants. He inquired for said defendants at their said Stable, and a man who said his name was Sutherland or Gould, witness did not remember which came forward, and witness told him that no more of that hay must be taken away as the hay belonged to the plaintiff. Subsequently

witness saw several loads taken and carried to the same place. Witness was paid one dollar a day by the plaintiff for watching the hay. and saw seven or eight loads in all taken away. and carried to the stable of Sutherland & Gould. There were five stacks of Hay containing seventy or eighty tons. At the time of the Service of this Writ of Replevin there were about thirty or forty tons remaining. the rest having been taken away after witness first saw said teams. Witness cut said hay and judged of its amount by his eye. has never weighed it. He made a demand on all the defendants. as agent of the plaintiff before the suit was brought.

On Cross Examination he stated that he did not see the hay sold. and did not hear the defendants Lord bid on the same. the hay was taken away in large loads he should think they averaged over a ton each. He saw seven or eight taken. Hay was worth at that time ten dollars a ton on the ground. The plaintiff then introduced Charles Horn who testified that he was a son of the plaintiff. He thought there were about sixty or seventy tons of Hay in the stacks but was not a good judge. The plaintiff then introduced Henry Lagerman who testified that in his opinion the amount of hay taken was about

forty or fifty tons. On cross examination he testified that he judged of the amount of hay taken by the amount remaining after they had stopped hauling it away and knowing the amount that originally was there. He judged only by sight. He did not know the men who took it away. Nor when they carried it.

The plaintiff here rested his case. The defendants then read the deposition of John L. Curtis of Madison Indiana, who testified that he knew all the defendants, and had been book keeper in the employ of Sutherland & Gould from November A.D. 1856. to April A.D. 1857. He knew about the buying of hay alleged to have belonged to the plaintiff. It was bought about the sixteenth day of December of Reynolds Ely & Co. of Chicago. Sutherland & Gould contracted with Reynolds Ely & Co. through Lord their agent for fifty tons of hay. The amount received by Sutherland & Gould was thirteen tons and nine hundreds, and no more. The amount he could not state accurately without referring to the books. - but he was certain it was less than fourteen tons. He knew the amount of the hay by the weigh bills, which were brought to him as book keeper of Sutherland & Gould.

The said way bills were brought with each load as the hay was brought in, and Witness examined each load as it came in.

On cross examination the Witness stated that he knew of his own knowledge the amount of hay so brought by Sutherland & Gould, and how many tons of hay were brought into town by said Sutherland & Gould.

He did not draw any of said hay himself, but it was all drawn under his direction and knowledge. It was his business to see to the getting of the hay, and no hay could have been drawn from the place from which the hay was brought to Sutherland & Gould's without his knowledge. The hay was weighed and the weigh bills of each load were given to him as the hay came in.

This was all the evidence given on the trial either on the part of the plaintiff or defendants.

The Court instructed the Jury as follows.

"If the Jury believe from the evidence that "the hay in question was the property of the "plaintiff, they will find on the Count in Replevin, that the property was the property "of the plaintiff"

"If the Jury believe from the evi- "dence that the plaintiff was the owner of the "hay in question, at the time it was taken as

" proved by the witnesses, the Jury will find
" a verdict for the plaintiff on the Count in
" Trover for the hay so taken, at the value of the
" hay as proved by the evidence".

To each of which instructions the defendants then and there respectfully excepted.

The Jury brought in a verdict for the plaintiff on both Counts, and on the Count in Trover assessed the damages at two hundred and Eighty dollars

The defendants then moved the Court to grant a new trial, and also in arrest of Judgment, 1st because said verdict was against the law, and 2nd because the said verdict was against the evidence — But said motions were overruled. To the overruling of the said motions, the defendants then and there excepted, and prayed the Court to sign and seal this bill of exceptions which is done, of the February Term for the September Term nunc pro tunc by stipulation.

John M. Wilson [Seal]

State of Illinois }
County of Cook } ss.

I, Walter Kimball Clerk of the Cook County Court of Common Pleas within and for said County do hereby Certify that the above and foregoing is a full and true transcript of the papers on file in my office, and the proceedings entered of Record in said Court, in the case in which John Horn is plaintiff and John A. Dana David E. Lord, George T. Sutherland and Henry Gould are defendants

In Testimony Whereof, I have unto Subscribe my name and affix the Seal of said Court at the City of Chicago in said County this 9th day of March A.D. 1858

Walter Kimball Clerk

[1256-176]

11327

Cook Co. Clk. of Com. Pleas

166

John Horn

vs

John A. Dark

et al

Record and Transcript

Filed April 20, 1885

L. Leland

Clk

Transcript

George Payson

Counsel for

Appellants

Supreme Court of the State of Illinois
At the April Term AD. 1858. Appeal.

John A. Hart et al Defendants & Appellants

vs

John Dorr Plaintiff & Appellee

And now come the said Appellants John A. Hart, David E. Lord, George G. Sutherland & Henry Gould by George Payson their Attorney and say that in the record and proceedings aforesaid and in the giving of Judgment aforesaid there is manifest error in this to wit

First. The court erred in giving the two instructions for the plaintiff

Second The court erred in overruling the motions for a new trial and in arrest of Judgment

George Payson
Counsel for
Appellants

Supreme Court of the State of Illinois
At the April Term AD 1858
John Dorr vs John A. Hart et al
And now comes the Appellee

by S. S. McClure his attorney and says that in the record & proceedings & judgment in the above entitled cause there is not any error and because he prays that the judgment heretofore rendered in said cause be affirmed

S. S. McClure
for self

Supreme Court
of Illinois

Hart et al
vs
Horn

Error to Payson
Counsel for
Plaintiffs

State of Illinois } John Horn
Cook County ss } vs
Hart et al

Supreme Court of Illinois
April Term AD 1858

Hart et al }
vs } Appeal
Horn }

It is hereby stipulated that the above case be decided ~~on~~ written argument to be filed at any time during the term.

George Payson
Counsel for Appellants
J J McGilvra
Atty for Appellee

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Supreme Court

John W Dart
Stat
vs
John Horn

Stipulation

Filed April 22. 1858
L. Leland
Clk.

Supreme Court of the State of Illinois.

JOHN H. DART *et. al.*
Appellants,
vs.
JOHN HORN, *Appellee.*

GEORGE PAYSON, *for Appellants.*

J. J. MCGILVRA, *for Appellee.*

JOHN HORN,
vs.
JOHN H. DART *et. al.*

COOK COUNTY COURT OF COMMON PLEAS.

REPLEVIN for five stacks of hay. The sheriff returned the writ with the indorsement that he had taken two and one-eighth stacks, the rest not found.

The declaration contained two counts.

The first, in the *detinuit*, for two and one-eighth stacks.

The second, in the *detinet*, for two and seven-eighths stacks.

The defendants, Dart, Sutherland & Gould, pleaded three pleas:

First, Property in Charles Horn.

Second, Property in Martin Horn.

Third, Property in Charles and Martin Horn.

The defendant Lord, pleaded:

First, *Non-detinuit* and *non-detinet*.

Second, Property in Charles Horn.

Issue was joined on all the above pleas; and the case was tried before WILSON, Judge, and a jury, March 25th, 1857, in the absence of the defendant's counsel, when the following verdict was returned by the jury: "We, the jury, find the "property replevied to be in the plaintiff, and assess the damages, by occasion of "the premises, to the sum of $405.00."

On the 26th of March the defendants moved for a new trial, and in arrest of judgment. The motion was sustained for a new trial, and leave given to the plaintiff to add a new count in trover, to his declaration.

The count was filed for two and seven-eighths stacks. The defendants plead "not guilty," on which issue was joined, and the case brought up for trial, June 18, 1857; when, after hearing the evidence, the plaintiff asked leave to withdraw a juror; which was allowed on condition of his paying all costs up to that time.

On the 1st of October, the case was tried by WILSON, Judge, and a jury, when the following verdict was given: "We, the jury, find for the plaintiff on the first count, "and the property replevied to be in the plaintiff; and further find said defendants "guilty under second count, and assess plaintiff's damages herein at two hundred "and eighty dollars."

The defendents then moved for a new trial and in arrest of judgment; which motion was overruled, and the defendants appealed.

The bond was filed and approved, and the following bill of exceptions taken by the defendants:

HORN,
vs.
DART *et. al.*

Replevin with count in Trover.

The plaintiff first offered in evidence a bill of sale from Charles and Martin Horn, sons of the plaintiff, to the plaintiff; but, the plaintiff's title being admitted

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for the purposes of this appeal, the said bill of sale can have no bearing upon the questions before the court.

Martin Horn, a son of the plaintiff, testified that he was not present when the hay was sold, nor when it was levied on; but the defendant, Dart, the deputy sheriff, told his brother in his presence, that he had sold it. He went to the defendant, Lord, and asked him if he had bought the hay, and Lord said he had nothing to do with it. He saw men come with horses and wagons, and carry away hay from this lot to the stable of Sutherland and Gould. He inquired for them at their stable; and a man who said his name was Sutherland or Gould, witness did not remember which, came forward, and witness told him that no more of that hay must be taken away, as it belonged to the plaintiff. He afterwards saw several loads taken and carried to the same place. He was paid one dollar a day by the plaintiff for watching the hay, and saw seven or eight loads in all, taken and carried to the stable of Sutherland & Gould. There were five stacks, containing seventy or eighty tons. When the writ was served, there were about thirty or forty remaining, the rest having been taken away since he first saw said teams. He cut the hay, and judged by his eye; had never weighed it. He made a demand on all the defendants as agent of the plaintiff.

On cross-examination he stated that he did not see the hay sold, nor did he hear Lord bid on it. The hay was taken away in large loads; he should think averaging over a ton each. Saw seven or eight loads taken. Hay was worth at that time about ten dollars a ton, on the ground.

Charles Horn, a son of the plaintiff, testified that he thought there were about sixty or seventy tons in the stacks, but was not a good judge.

Henry Lagerman testified that in his opinion the amount of hay taken was about forty or fifty tons. Judged by comparing the amount remaining after they had stopped hauling it away, with what was originally on the ground. Judged only by sight. Did not know the men who took it away, nor where they carried it.

The plaintiff here rested his case. The defendants then read the deposition of John L. Heustis, who testified that he had been book-keeper for Sutherland & Gould from November, 1856, to April, 1857. He knew about the hay said to belong to the plaintiff. It was bought about the 16th of December, of Reynolds, Ely & Co. Sutherland & Gould contracted with Reynolds, Ely & Co., through Lord, their agent, for fifty tons of hay. The amount received by Sutherland & Gould was thirteen tons and some hundreds, and no more. He could not state exactly without refering to the books; but he was certain it was less than fourteen tons. He knew by the weigh-bills, which were brought to him as book-keeper with each load, and he examined each load as it came in.

32 Cross-examination: He knew of his own knowledge the amount of hay so bought by Sutherland & Gould, and how many tons were brought into town by said Sutherland & Gould. He did not draw any of it himself, but it was all drawn under his direction and knowledge. It was his business to see to the getting of the hay; and no hay could have been brought from the place from which the hay was drawn, to Sutherland & Gould's, without his knowledge. The hay was weighed, and the weigh-bills of each load given him as the hay came in.

32 This was the whole evidence.

The court instructed the jury that, "if the jury believe, from the evidence, "that the hay in question was the property of the plaintiff, they will find on the "count in replevin that the property was the property of the plaintiff."

"If the jury believe, from the evidence, that the plaintiff was the owner of the "hay in question at the time it was taken, as proved by the witnesses, the jury "will find a verdict for the plaintiff on the count in trover, for the hay so taken, at "the value of the hay as proved by the evidence."

33 To each of which instructions the defendants excepted.

The jury brought in a verdict for the plaintiff on both counts, and on the count in trover assessed the damages at $280.00.

The defendants then moved for a new trial, and in arrest of judgment,

1st. Because said verdict was against the law.

2d. Because it was contrary to the evidence.

Both motions were overruled, to which the defendants excepted, and prayed the court to sign and seal this bill of exceptions, which was done of the February term, for the September term, *nunc pro tunc*, by stipulation.

JOHN M. WILSON. [SEAL.]

BRIEF FOR APPELLANT.

First. Trover and replevin cannot be joined. The judgments are different, and the pleadings are different. 1 Ch. Pl. 200, *et. seq.*; Ill. St. Replevin, § 12.

Second. There is no proof in trover against either Lord or Dart.

A mere sale is all that is proved as to Dart; and a mere sale is no evidence of a conversion. 2 Gr. Ev. § 642; *Jackson* v. *Anderson*, 4 Taunt. 24.

The possession must be changed. The possession would be changed in law by a levy, but no levy is proved. Not one of the defendants is shown to have acted as sheriff. 1 Ch. Pl. 154.

There is even less evidence against Lord. Sutherland & Gould contracted with him as agent of Reynolds, Ely & Co., for fifty tons of hay. There is nothing to show that he ever delivered possession, that he ever received the price, that he ever had the hay under his control, that he ever saw it, or interfered in any way with the plaintiff's possession.

Merely "contracting" to sell another's goods is not enough to maintain trover. Neither Dart nor Lord is liable for the acts of Sutherland & Gould. There is no privity between them; no evidence that either Dart or Lord had any knowledge of the taking, or of the plaintiff's title at that time.

No demand and refusal is proved as to either. 2 Gr. Ev. § 644.

Third. There is no evidence to charge Lord in replevin.

The declaration charges an unlawful detention; but as we have already seen, no proof is offered.

If a taking is shown it must be an actual taking. 2 Gr. Ev. § 561.

And even if Lord is held liable for the acts of Sutherland & Gould, he is still not liable in replevin. *Philpot* v. *Kelly*, 4 N. and M. 611.

Fourth. No joint conversion is proved against all the defendants. 1 Ch. Pl. 102; 1 Arch. N. P. 607; *Nicol* v. *Glennie*, 1 M. and S. 588.

The judgment is a unit, and if erroneous as to one, must be reversed as to all. *Brockman* v. *McDonald*, 16 Ill. 112.

Fifth. The damages were excessive.

Sixth. The Judge in his instructions has decided questions which should have been left to the jury, and to the evident prejudice of the defendants.

GEORGE PAYSON, *Counsel for Appellants.*

[10551-22]

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John H. Dart Dec'd

vs

John Hoard

Filed April 22, 1838

S. Leland

Clerk

Plaintiff & Appellee

John Dam
adds
John A. Dart et al

Defendants & Appellants

} Supreme Court of Illinois April Term AD- 1858-

Appeal from Cook County Court of Common Pleas-

Argument of Appellants Counsel

First.

The instructions

The Court erred in giving the instructions for the plaintiff- Because;

1st No such verdict could properly be given under the pleadings, or under any pleadings-

1st

Trover and Replevin cannot be joined.

Trover and Replevin cannot be joined.

It is well settled that they cannot be joined under the old practice. The pleas are different- the judgments are different- and the rule in such cases is that no joinder be allowed-

The old law

1. Chitty Pleadings. 201.

If such joinder is to be admitted therefore, it must be by virtue of the statute- The only section of the statute relating to this point has these words; "In such action of replevin, in "case the property shall not be found or "replevied, and the defendant shall have

The Statute

[12561-A3]

The Instructions

"been summond as aforsaid the plain=
"tiff may file his declaration in Tower,
"and the cause shall be heard and de=
"termined as other actions of Tower"

Now is there any thing in the let=ter of this statute authorizing such joinder; is there any thing in its spirit? It is a remedial statute, and to be construed liberally; but is it not presuming too much on that liberality to say that the legislature, in suffering, in one class of cases, one form of action to merge in another, intended also, in another class of cases, to permit both these actions to be joined in one and the same suit?

Argument on the Statute

To answer this question it is neces=sary first to inquire into the reasons which must have governed the legislature in introducing this innovation; and if those reasons are found to apply only to the case ex=pressly mentioned, and to have no refer=ence to the case of a joinder, it would seem that this fact alone should settle the question.

The first and most obvious reason in fa=vor of allowing replevin to change into

Trover is, that, thereby, the plaintiff, having commenced his action, will not be turned out of court and have the costs thrown upon himself, simply because he cannot find the property sought to be replevied. The ordinary action of replevin being an action in rem cannot of course be sustained without process against the thing itself, and the plaintiff's remedy may thus be often lost or defeated by this technical difficulty. It was this difficulty undoubtedly that the legislature sought to remove.

Argument on the Statute

But no such reason exists why the two actions should be joined. If a part only of the property is found, that is enough to sustain the action of replevin; and the plaintiff may bring another action of trover for the remainder. It is true, this may subject him to a slight additional inconvenience, but this is nothing to the inconvenience arising from the union of two actions so dissimilar, when the variety of pleadings and diversity of issues must unavoidably confuse the jury, and render the decision of difficult questions still more difficult and uncertain.

And when, as in the present case,

The Instructions

suit is brought against several, it may happen, as also in the present case, that there is no evidence against one or more of the defendants, either in one action or the other; and consequently, if the actions had been separate, this co-defendants would have had the benefit of this testimony, which they are now deprived of, and which is often the only testimony that could be obtained.

Argument on the Statute

(To show that this is not simply a conjecture, I would add that in this very case the only witness on behalf of the defendants was Lord; and that, by making him also a defendant, the plaintiff at once cut off every defence that might, and in fact, would have been made on his evidence. In truth there was evidence against him, which, though slight as testimony will could be, might have been held sufficient to exclude him, while in reality his innocence is at once apparent.)

Again if the legislature had really intended to favor the plaintiff so far, why, I would ask, did they not revive at once the old action of replevin in the detinet? They would

thus have attained the same end, & in a much simpler way. The plaintiff could then have recovered not only nominal damages for the detention, but actual damages also for the value of the property not found. That action had all the good, and none of the evil, of the mongrel mischief of form of action which the plaintiff seeks to father upon this court. Yet that action, and doubtless for good reasons, has become obsolete.

Argument on the Statute

"Shall be heard and determined as other actions of Trover." Ga Statute.

By this clause the legislature seems inclined to remove any doubt before existing on this subject. The action is to be heard and determined as other actions of Trover, not as actions of replevin and Trover. Was the present action tried or determined as other actions of Trover? Clearly not.

The Instructions

2°. Hart and Lord not guilty in Trover

again the court erred in giving the instructions for the plaintiff: Because 2°. There is no evidence to charge either Hart or Lord on the count in trover Hart told a brother of one of the witnesses "that he had sold the hay;" and this is all the evidence against him. Is a mere sale, without any thing further, a conversion?

No instance exactly in point has presented itself; but there are several authorities sufficiently near to enable us, with the aid of a few general and well settled principles, to answer the question.

In Smith's Evidence V. 2. § 642, it is said, "A wrongful sale is a conversion, "and though the custody of the goods "remain undisturbed, yet the delivery of "the documentary evidence of title and "the receipt of the price completes the act "of conversion"

The most natural conclusion, to be drawn from this language, is that the sale alone is not a conversion; that, in order to render it a conversion, a delivery, or some act equivalent to a delivery, is required - such as the receipt of the price, the giving up of the doc-

mentary evidence of title. or any other act showing that the transfer is complete.

This is the only conclusion, I say, to be drawn from the above words, and it is the only conclusion agreable to justice and common sense. To say that the mere selling of another goods, while those goods all the time remain in the owners possession, in his warehouse or in his field, where no payment is made, no possession delivered, either absolutely or constructively, is ground enough to support Trover or any other form of action, is the same as saying that there is no reason in the law, and no law in reason.

Hart not guilty in Trover

It does not appear that the hay ever came into Hart's possession, — that he ever saw it, or meddled with it in any way, or did any thing to interfere with the owners dominion.

A levy indeed would have been in law a change of possession & consequently, a conversion — but no levy is proved. There is nothing to show that Hart, or any of the defendants, acted as Sheriff.

[12556-26]

The Instructions

Nor is there anything to implicate Hart in the hauling away of the hay, or to show that it had any connection with the sale. On the contrary the evidence favors the presumption that there was no such connection. Sutherland & Gould did not buy of Hart, but of Reynolds Ely & Co. There is no privity between Sutherland & Gould and Hart, nor between Hart and Reynolds Ely & Co.

Hart not guilty in Error

Hart sold the hay, and of course there must have been a purchaser; but we have no means of knowing who that purchaser was.

Sutherland & Gould hauled away a portion of the hay, and this is all we know about the matter. There is nothing to show whether they hauled it away before or after the sale by Hart; whether in consequence of that sale, or in entire independence of it. If there was any connection, we are left to our imagination to find it out.

The Justice's return might have supplied the link that is now wanting, but the plaintiff did not see fit to

lay that before the jury. If there had been any evidence, however slight, in the absence of any objection on the part of the defendants, it would perhaps have been considered sufficient; but, as the matter stands, it must be conclusively presumed that there was no connection between Hart and Sutherland & Gould, & consequently that whatever their acts might be, he is in no way to be held accountable.

Lord not guilty in Power

The evidence against Lord in Power is that Sutherland & Gould contracted with him, as agent of Reynolds & Co, for fifty tons of hay

But again is no proof that he delivered possession, or that he ever had possession, or that he received the price, or transferred any documentary title.

But he stands in a nearer relation to Sutherland & Gould than Hart. The contract was made with him, and the presumption would perhaps be that he was privy to the stealing away. But there is no proof of such privity; and, as the plaintiff could easily have established

The Instructions

this fact, if it is one, by a few questions put to Austis the defendants witness, it does not seem right that he should now be permitted to take advantage of his own neglect.

Hart and Lord then, one or both of them, should have been found "not guilty" on the count in trover.

3°
Lord not guilty in Replevin

But once more supposing Lord to be guilty in trover, he is certainly not liable in replevin. That part of the hay replevied was all the time in the possession of the plaintiff. It had never been removed from the place where it was originally stacked. There had been no change, not even a constructive change, of possession. Lord contracted to sell fifty tons of hay, and no more; and we have no reason to believe that Lord & Gould intended to haul away any more than that. Their taking away a part would not make either them or Lord liable for what remained.

Philpot vs Kelly. 4. N. & M. 611.

In this case it was held that the

mere taking away and destroying a part of the property in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to enable the owner to maintain trover for the whole.

Finally no demand & refusal is proved against Lord - nor any taking - nor is there any evidence that the hay, if obtained at all, could not have been recovered without recourse to law.

4°
No joint Conversion

No joint conversion is proved against all the defendants. This is a fatal error. See Nicol vs Glennie 1 M. & Selwyn, 588 cited with approval 1 Ch Pleading 202. 1 Arch. Ni. Pri. 607

In this case trover was brought against A & B. bankrupts, and C & D their assignees. Proof was that A & B before their bankruptcy received the goods and afterwards pledged them without authority - that after the bankruptcy - C & D. took possession and refused to deliver on demand. The jury were directed only, and the jury found all the defendants guilty - Held, on appeal, that no joint conversion being proved, no verdict

L(2554-58)

The Instructions

could properly be bound against all the defendants.

Now the evidence of a joint conversion here was much stronger than in the present case. There was a privity between the bankrupts and their assignees; but there is none between Hart & Sutherland & Budd. It might have been maintained in the case cited that it was a continuing conversion - that the assignees did in fact adopt and ratify the act of the bankrupts, and thus make it their own, but there is no conversion shown between the parties to the suit now before the court.

No joint Conversion

The conversion by Hart, admitting, for arguments sake, such conversion to be proved, consisted in the sale - that by Sutherland & Budd in the hauling away. It does not appear that the parties ever met, that there was any concert between them, or that they even knew of each others existence and in fact there was no such concert. The torts were separate and distinct, as much so as torts

affecting the same property could be, and, in order to bind all the defendants, there should have been separate counts against each party.

The judgment then is clearly erroneous on this ground. And as the judgment is a unit, if erroneous as to one, it must be reversed as to all.

See Brockman vs Mc Donald. 16. Ill. 112.

Second Refusal of New Trial &c

The court erred in refusing a new trial and arrest of judgment for the reasons already given, and also because the damages were manifestly excessive.

The Verdict

The jury brought in a verdict for forty tons of hay at seven dollars a ton, which is modified on the record so as to read for two hundred and eighty dollars.

The only certain testimony on this point is that of Curtis, Bookkeeper of Sutherland & Gould. He testifies that the total amount of hay hauled into Sutherland & Goulds stable did not exceed thirteen tons and some pounds, or less than one third the quantity found by the jury. His testimony on this point, both on the direct and cross =

13552-29

Refusal of New Trial

amination is remarkably clear and convincing, and is certainly sufficient, so far as it goes, to settle the question.

But, it may be said, his testimony does not go far enough: it proves only that no more hay was hauled into the defendants stable; it does not prove that none was hauled to other places.

The verdict and evidence

We admit that it does not prove this, though it furnishes strong presumptive evidence that such was the fact; but we maintain that, taken in connection with the plaintiffs own evidence, it does furnish conclusive proof that no more than thirteen tons and some hundreds was ever taken by the defendants, either to Sutherland & Gould's stable, or any where else.

Now the evidence on the part of the plaintiff is in the first place given by interested witness, the sons of the plaintiff. It is mere guess-work, or, at best, a doubtful calculation of unknown quantities, when their natural, and we may add, unavoidable, inclination to tell as good a story as pos-

ble for their father, could be most easily indulged, and with little danger of conviction even by their own consciences.

And, after all, what do they testify? Martin Horn says that he never weighed the hay, but judged by his eye; that there were seventy or eighty tons at first, and about thirty or forty remaining. This would show a diminution of only thirty tons, taking the evidence, as we should do, most strongly against the party producing it. But this is not all. Martin Horn was employed by the plaintiff to watch the hay, and paid, for so doing, a dollar a day. We have a right to presume that he did watch carefully. If he was absent much of the time, that fact should have appeared in evidence. Yet, if so, how did it happen that he saw only seven or eight loads hauled away? When was he all the time, and what was he doing while the others twenty tons were ~~hauled away~~ abstracted? And is it not a singular coincidence, to say no more, that the amount he actually saw taken agreed so nearly with the amount

The verdict and evidence

present

[125[6-30]

Refusal of New Trial &c

as testified by Curtis? And, finally, how are we to know that, the other twenty tons, if taken at all, were not taken by other parties, or even by the plaintiff himself?

The verdict and evidence

The only mode by which the jury could have arrived at their verdict was by presuming that, because the defendants were shown to have taken some of the hay, and because the plaintiffs witnesses thought that more was missing than the defendants would allow, that, therefore, the defendants must have taken it all. This, in effect, was the same thing as compelling the defendants to prove what, from the nature of the case, it was impossible for them to prove, ie, that they did not take more than fourteen tons. It is very plain that, no matter how innocent they might be, such a rule of evidence would render their conviction certain.

It is not enough then to say that the ~~verdict was~~ damages were excessive. They were given in the very teeth of the evidence. They show that the jury threw aside

entirely the testimony of Curtis, and received, without one jot of abatement, that of Charles and Martin Horn, the sons of the plaintiff.

Third. The Judge acts as jury man

But if we now turn to the last point on which the appellants rely, we shall find that the jury had really no choice in the matter. The decision of every question of fact in the whole case, ~~was taken~~ ~~as to every thing~~ ~~from the~~ except the single one of property, was taken from them by the judge. He instructed them that, if they found the hay to be the property of the plaintiff, they should find a verdict for the plaintiff for the hay so taken. He thus assumed that all the hay taken was taken by the defendants — that it was taken by all the defendants — that it was a wrongful taking — and, in short, that the defendants were conclusively shown to be guilty, the moment it appeared that the hay belonged to the plaintiff.

All these questions should have been left to the jury; and were decided by the judge, and were all de-

all

cided adversely to the law, adverse=ly to the evidence, and adversely to the ~~the~~ rights of the defendants.

No authorities will probably be required to establish this point; I will cite however The United States vs Tillotson. 12 Wheat. 180. Tufts vs Seabury. 11. Pick. 140. Allen vs Kopman 2 Dana 221

All which is respectfully submitted.

Geo. Payson
Counsel for Appellants

Answer to Argument of Appellee

First

As to the evidence against Hart.

The counsel for the appellees cavils at the Bill of Exceptions. It need only be said in answer that the bill was submitted to him - that alterations were made in it to please him, though contrary to the recollection of the defendants' counsel and of the judge - that he declared himself satisfied with the bill as so altered - and it is now too late to raise objections, or to seek, as the counsel does, to go outside of the record -

The counsel for the appellant in making up the bill sought only to present the evidence fairly and succinctly.

Not a particle of evidence was offered at the trial to show that Hart acted as sheriff - The fact, of his being sheriff was not even alluded to except incidentally.

If the plaintiff below had produced any testimony on this point, however slight, it might have been sufficient; but there was absolutely none.

The counsel indeed "infers" that Hart did act as sheriff - he "infers" that Hart did

[1855-82]

all the hay to Lord – that Lord did sell the whole of the hay to Sutherland Gould. in fact, wherever the evidence is want= ing, or is diametrically opposed to his theory, the counsel "infers" that the fact was as he would have it – and thus by stuffing it full with inferences makes out a very pretty case

Second As to the joint conversion, the coun= sel misapprehends the ground taken by the appellants. It is not that the several conversions of Hart and Sutherland Gould were not contempo= raneous, but because of the total want of any connection or privity between the parties that the appellants object to the verdict.

Third The Damages. The counsel claims that at the first trial the plaintiff below obtained a judgment of $405. he forgets however, innocently no doubt, to add that this verdict was procured in the absence of the defendants coun= sel.

Fourth As to the instructions. The punctua= tion is not such as the counsel would

have suffered. The applicants can only say in reply that he is welcome to any advantage the change may give him. They had not noted the exact position of the comma in question so carefully as they would have done if its importance had been sooner shown to them

They must insist however that the instruction of the judge was calculated to mislead the jury, and could not have failed to do so. Admitting that no question was raised as to the taking of a part of the hay, by part of the defendants, they denied at the trial, & do still deny, that the taking was wrongful, or that all the defendants had part in it. And these questions should have been left to the jury, free from any bias given by the judge.

The cases then, cited by the counsel have no bearing upon that now before the court. The facts assumed by the judge were not "facts about which the parties were agreed"

Nor can it be said for a moment that "substantial justice has been done" in this case. Unless indeed it be "substantial justice" that one receiving thirteen tons of

Lay should pay for thirty - or that questions of chief importance to one of the parties, and in regard to which that party had a right to the opinion of the jury, should be decided by the judge, decided, too, not designedly, or with any thought of so doing, but simply from not perceiving the full force of the instructions.

The defendants below have, to be sure, had three trials before a jury - one in the absence of counsel - one when the plaintiff withdrew a juror, and one when both parties were in court. Whether they would be beaten in twenty trials they cannot say, nor do they consider that a question before the court.

In justice to himself however the counsel for the appellants would add, in conclusion, that it is not with a view of obtaining a few weeks delay, nor of obstructing the course of justice that he has sought this appeal; but to settle certain questions of importance to the profession and to the public, and chiefly because he most devoutly believes that the merits

of this case have not yet been fairly tried. That the plaintiffs claim is entirely without foundation except in fraud, and that he shall be able to establish these facts in another trial.

George Payson
Counsel for Appellants

[125 SL 3H]

166-156

Supreme Court

April Term 1858

Sart et al

vs

Hom

Argument

for

Appellants

Filed May 27, 1858

S Leland

Clk

George Payson

Counsel for

Appellants