No. 14746

Supreme Court of Illinois

Taylor

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vs.

Riddle

71641 7

14746

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 104

J. W. Middleton & Co., Stationers, 196 Lake St.

made up

1864

Taylor

vs

Riddle

1864

SUPREME COURT.—THIRD GRAND DIVISION.

ABNER TAYLOR, Impleaded with ALVIN WOODWORTH, HIRAM BUTTERWORTH, *vs.* ADONIRAM RIDDLE.	Error to the Court of Common Pleas of the City of Aurora.

BRIEF FOR DEFENDANT IN ERROR.

This was an action of Replevin, commenced by Riddle against the defendants, Taylor, Butterworth, and Woodworth, for a span of horses which Woodworth bought of one Sands—for Taylor, Butterworth & Co., which were mortgaged by Sands to Riddle previous to the sale to Woodworth. Taylor only was served and defended.

It appears from the evidence in the case that Riddle sold the horses in question to Sands, and Sands executed a mortgage on the same horses and other personal property, to secure the payment to Riddle, in ninety days, of the sum of $275, and before

the mortgage matured, Sands sold the horses to Woodworth, and they were replevied by Riddle in a few days thereafter from the possession of Taylor.

The defence to the above action as interposed by the plaintiff in error is captious, without merits, and involves the sufficiency of the defendant in error's proof.

An examination into the papers filed by the plaintiff below in the case shows an amended affidavit, which, tested by Sec. 3d, of Revised Statutes, must be held in every particular, to be sufficient. The bond is not complained of.

The next paper in order was the writ, in the usual statutory form, containing for a plaint "that the defendants have taken and "do detain a span of bay horses, five years old, of the value of "$200," as stated in the affidavit, and amply sufficient, by Sec. 5, of the Replevin act. S. T. & B. Stat. Page 226, 4 Scam. 446.

The declaration is in the usual form, and is almost a literal copy of the precedents in Chitty and Saunders, which are the old common law forms for Replevin, and the declaration therefore is in the *cepit*.

The plaintiff, in his argument in the Court below, seemed to understand that the *affidavit* regulated the form of the action, as to whether in the *cepit* or *detinet*.

This cannot be so, for by Sec. 3d of the Replevin act one of two things only need exist to entitle a party to this writ. He must either be the "*owner of the property or entitled to its pos-*"*session*, and that the same have not been taken for any tax, &c." Now, does the fact of his swearing that he is "entitled to the possession" compel him to declare in the detinet? May he not have his election, or declare in both? And the proof alone must determine the fitness of his declaration.

While the statute has enlarged the Common Law remedy of Replevin, by embracing a *wrongful detention*, it has not changed the mode of pleading.

Having examined the papers filed by the plaintiff below, and shown that the action was for a *wrongful taking*, I propose to examine the defendant's pleas, and their materiality to the declaration, and see what kind of an issue, if any, there was to try.

The Plaintiff in error pleads, 1st, Non detinet; 2d, "The "property of one Taylor, Butterworth & Co."; 3d, "The property "of this Deff."; 4th, "The property of one Sands"; 5th, "The "property of Alvin Woodworth."

The first plea of *non Detinet* presented an immaterial issue and was disregarded. By it, and all the subsequent pleas, the wrongful taking was admitted.

4 *Scam.* 415.
4 *Blackf.* 309.
2 *Scam.* 227.
13 *Ills.* 315.
1 *Gill.* 371.
2 *Scam.* 762.

The only question to be determined by the jury was the issue under the Replication to the special pleas, to wit: The plaintiff's right to the property. To prove this issue, the plaintiff below introduced Newton Parkham, who swore that the plaintiff sold the horses in question to S. E. Sands, (the mortgagor) who lived in the town of Clinton, DeKalb county, Ills., and that he saw Sands sell them to defendant Woodworth. J. D. Andrus swore that he replevied the horses of the defendant Taylor, in the defendant Woodworth's barn, 8 or 9 o'clock in the morning; and that he went at the instance of Taylor, to Sandwich, to look for Sands, who had sold the horses. And that when he replevied them early in the morning, defendant, Taylor, had 5 or 6 horses tied together, which he supposed were about to be taken

to Chicago. Kirkpatick also testified that he was a Justice of the Peace of the town of Clinton aforesaid, and as such took the acknowledgment of Sands to the chattel mortgage, and also produced his docket showing the fact. The plaintiff then introduced his chattel mortgage on the horses, from Sands to himself, and the proofs were closed.

That the horses in question were the horses mortgaged by Sands to Riddle, and described in the mortgage, and sold by Sands to defendant Woodworth, and replevied by sheriff Andrus in Woodworth's barn of Taylor, there can be no question; and, indeed, it was not disputed on the trial. That the defendants took the horses in controversy is not only admitted by the pleadings, but proven by Parkham and the admissions of Taylor to Andrus, who employed him to search for Sands, who had cheated him out of a span of horses.

The only remaining question to establish the plaintiffs' claim to the horses, was the validity of the mortgage.

Two objections to it were urged: 1st. That it was not *bona fide*, because no note was shown in evidence. 2d. That there was no evidence that it had been recorded.

In reply to the first objection, I cite the Statute which makes all chattel mortgages valid if acknowledged before a justice of the peace in the district in which the mortgagor resides, and is recorded in the same county, and the instrument provides for the possession of the property to remain with the mortgagor. In that case the mortgage is presumed to be *bona fide* until the contrary appears. It is so plain a proposition of law, that fraud in fact is never to be presumed, but must be proven that I need no authorities to establish that fact. Because the statutes says: "If *bona fide*, shall be good and valid, &c," cannot be taken to change the rule of proof, and throw the onus of its *bona fides*

upon the party offering it in evidence. The statute can only mean that, not every mortgage shall be deemed valid, but only those which are free from fraud; and that question, the statute leaves to be settled by the rules of the common law. The mortgage recites an indebtedness which is presumed to be *bona fide*.

Chattel mortgages derive their validity from the statute, which does not make it necessary that a note should accompany them. How, then, can the fact that the note was not offered in evidence render the mortgage *mala fides per se?*

Mark the objection: '*The mortgage was void because no note "was offered in evidence.*" The meaning of that objection, as understood and meant by the defendant, is further illustrated by his fifth Instruction, which the court refused: That the absence of the note described in the mortgage, rendered it absolutely void. The effect and meaning of his objection is, that where a mortgage recites that it is given to secure a promissory note, and the note is not actually given, the mortgage is absolutely void. Now, that would be true if chattel mortgages were valid by the statutes to secure only promissory notes. But the validity of a chattel mortgages must, aside from these provisions, acknowledgments, &c., depend upon the *bona fides* of the *debt*, which it is given to secure. If the absence of the note is to affect the validity of the mortgage at all, it is simply a *circumstance* tending to impeach its *bona fides*. It has been decided by our Supreme Court in the case of *Prior* vs. *White*, 12 *Ills.*, 261, that a promissory note need not be executed at the time of the execution and delivery of the mortgage, although the mortgage recites that it was given to secure a note But that the note may be executed subsequently, to correspond with the note described in the mortgage. They also say that this may be a circumstance tending to prove fraud, but not such a fact as rendered the transaction fraudulent *per se*.

It is a question of fact, to be left to the Jury; and not one of law, to be decided by the Court.

And, again, if the court is to presume from the recitals in this mortgage, that a note was actually given, it had not matured at the trial of this cause. Hence, there were no presumptions that it had been paid, and no presumptions that it had been assigned. Then the presumptions of law are, that it was in Riddle's possession, and had not been paid; and these presumptions should have been overcome by proof on the part of the plaintiff in error. If this had been a direct proceeding to collect the mortgage debt, after the note had matured, then I conceed the propriety of introducing, or accounting, for the note. But when the object of the use of the mortgage is simply to show the *lien* of the mortgage upon the mortgaged property, and not the collection of a debt, and that, too, before the *mortgage debt has matured*, I fail to discover the necessity of the introduction of the note.

But, as the introduction of the note, or the omission to do so, only affects the *bona fides* of the transaction, and must be left for the Jury to pass upon; let us see if there is anything in the evidence from which the Jury could infer the *bona fides* of the debt, which this mortgage was given to secure.

Newton Parkham swears that Riddle, the plaintiff below, sold the horses in question to Sands, the mortgagor. There is no proof or pretence that Sands, at the time, paid for the horses; but he did execute his note and mortgage on the same horses to Riddle. This is the only transaction in proof between the parties. Is it not a very natural presumption, and would not the Jury be entirely warranted in finding that this mortgage was given to Riddle by Sands for the debt incurred for the purchase of the horses? Then we have shown that Riddle sold the horses to Sands—there is no proof or presumption that he paid for

them—and we claim that Sands executed this mortgage to secure the purchase money. Does not the proof warrant this claim?

The record does not show that there was any pretence or claim of fraud in fact in the mortgage, and no instructions were asked by the plaintiff in error upon that theory. And the Jury having found under the plaintiff's 2d Instruction, that the mortgage was bona fide, I do not suppose that this court will disturb that finding.

The second objection to the mortgage is, that "there was no evidence that it had been recorded."

This objection is a narrow one, and denies the existence of any evidence that the mortgage was recorded. This is a false assumption in fact. It has the filing of the Recorder of DeKalb county endorsed, which is made evidence by statute. The statute says: "It shall not be necessary for a certificate to be made "by the Recorder, of the recording of a deed, or other writing, "but an indorsement on the writing recorded, of the Book and "page in which the same is recorded, signed by the clerk, shall "be deemed sufficient evidence of recording." Scates, Treat & "Black, St. 511.

Title, fees of officers—bottom of page.

Then the narrow objection, that there was "no evidence" of the mortgage having been recorded, is sufficiently answered by the language of the statute, which makes the indorsement on the "mortgage sufficient evidence,"

2d Phillips on Evid., page 132, says: "That an endorsement by the proper officer on a deed of bargain and sale, enrolled ac- "cording to the statute, is evidence of the enrollment. So also, "that a memorandum of enrollment on a lease signed 'A. B.,'

"'Auditor,' was sufficient proof of the enrollment." This objection denies the existence of any evidence that the mortgage had been recorded. It cannot be carried by intendment to any other objection, which the party offering it, might have obviated by proof.

Sargeant vs. Kellogg. 5 Gill. 281.
Conway vs. Case 22 Ills 139.
20 Ills. 144.—27 Ills. 410,
29 Ills. 478.—16 Ills 269.—24 Ills 633.

Then we have a chattel mortgage of the horses in question, duly acknowledged and recorded, and conforming in every respect to the statute, and its bona fides, for the first time, questioned in the defendant's brief.

The only thing to be tried in this case was the plaintiff's right to the property, put in issue by his replication to the special pleas. 1 Gill. 371.

The Jury having found for the plaintiff on that issue, if the proofs were sufficient, that was an end to the case.

The court below, as shown from his instructions, seems to have misapprehended the issue, and forced the plaintiff to try the case as though it were in the detinet; and that a demand was necessary. He put it to the Jury, that a demand should have been made, or an excuse for not doing so, should be found in the fears of the plaintiff that the defendants would abscond with the horses, to avoid and prevent a demand.

This being an action for a wrongful taking, and which was admitted by the plea of non detinet, of course no demand was necessary.

4 Scam. 445.
2 do 227.
13 Ills. 315.
1 Gill. 317.
2 Scam. 762.

The defendant complains that his 2d, 4th, and 5th pleas were not answered. Instead of that being a ground of complaint, the plaintiff in error ought rather to thank us for noticing them at all. My replication alone, gives validity to any of his pleas. I quote from the 1st. of Gill. 371.

"If the defendant pleads property in himself, or a stranger, he "must in the same plea, traverse the plaintiff's allegation of "right. In such case the allegation of property in defendant, or "stranger, is only considered as inducement to the traverse of "the plaintiff's right, and the plaintiff must take issue on the "traverse, and not on the inducement. On such an issue the "substantial matter in dispute, is the right of the plaintiff to the "property."

And the right of the plaintiff to the property having been put in issue by the plaintiff's replication, the defendant's defective pleas were cured, and the issue made.

One more complaint of the plaintiff in error remains to be noticed. He says that under the ruling of the Supreme Court, in the case of Covill vs. Phy, 26 Ills., the summons should have been directed to be served within the limits of the City of Aurora.

This is the most unkind and foolish objection of all By the record we find that the first thing which this plaintiff in error did in the court below was to agree to set this cause for trial. On the 21st. of October the court made this order: "This cause "was set for trial on Wednesday afternoon next." That was the first order in the case, and the first time the defendant had appeared. He had not at that time plead. On the 23d of the same month, the defendant moves to dismiss "for want of sufficient avidavit.

We have on the 21st, the cause set for trial on the, the 23d, and on the last named day, the defendant makes a motion, and does not notice the writ.

Was not the defendant's appearance fully entered by his agreement to set the cause for trial, and his motion at the affidavit; and did he not wave, and was it possible for him to reach any defects there might have been in the writ? The court had jurisdiction of the defendant when he appeared, and the cause was set for trial, and he could not, by a subsequent motion at the writ, absolve himself from its jurisdiction.

But the fact is, the writ in this case is in nowise objectionable to the decision in the case of Covill vs Phy, 26 Ills. 432, because it does not direct the Sheriff to serve it within the county, as in that case. In the case of Covill vs Phy, this court say that the Court of Common pleas of the City of Aurora has no authority to send its original process beyond the limits of the city, and that a writ which authorizes the sheriff to serve out of the city limits is void. In the case at bar, the writ did not authorize the service out of the city limits. The question of jurisdiction in this case could not have been raised by motion. There was nothing appearing to the court but that the writ was served within the city, and by the writ the sheriff was not authorized to serve it elsewhere.

I repectfully submit, therefore, in view of the manifest errors of the court below, in forcing us to try our

cause as though we had declared for a wrongful detention—to impose upon us the necessity of proving a demand, or excusing its omission—of the entire misapprehension of the issue, and the great and illegal advantage which those errors and misapprehensions gave the plaintiff in error; if he has any reason to apprehend, after this court shall have passed upon this issue, any better success in an issue of fact before another Jury. If the doctrine of "offsett" could be applied to a question of "errors," I take it that this plaintiff would pray that the statute of limitations might speedily pass upon the errors in this case. It is, indeed, rare that we see a writ of error prosecuted on a Record by the party who has had the benefit of *all the errors* committed in the case.

L. R. WAGNER,
Att'y for Def't in Error.

104

Abner Sayler Complt
vs
Adonijah Riddle

Defts Bill

Filed May 2. 1864
J. Lewis Clk

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

To the Sheriff of Kane County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Court of Common Pleas ~~Court~~ of the City of Aurora ~~County~~, before the Judge thereof, between Adoniram Riddle

plaintiff, and Abner Taylor, Alvin Woodworth and Hiram Butterworth

defendants, it is said that manifest error hath intervened, to the injury of the said Abner Taylor

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

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

notice, together with this writ.

Pinckney H Walker

Witness, The Hon. ~~John D. Caton~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 31st day of March in the year of our Lord One Thousand Eight Hundred and Sixty-four

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Dep'y

Abner Taylor

No. 104 vs.

Adoniram Riddle

SCIRE FACIAS.

FILED.. April ..27.... A. D. 1864

L Lelande Clerk.

Sheriff the within Sy. summons to the within named Defendant Adoniram Riddle this 4th day of April 1864

Joseph Hopkins Sheriff
By Remus

Brief 50
Argue 50
Motions 50
Returns 100
$1.100

Rec'd the above $ 1.100
of Dayton & Reynolds
Attys

Pd Sheriff Hopkins

Taylor Impleaded
vs
Riddle

Replevin for a Span of Bay Horses
five years old

August 15-1861, S. E. Sands executed
to Riddle a Chattle Mortgage upon the
horses to secure the payment of $275.
in 90 days from date
Mortgage duly acknowledged & recorded.

Before expiration of 90 days Sands sold
horses to Taylor Butterworth & Co
from whom Riddle replevins the
same, and obtained a verdict and
judgment in his favor in the Court
below.

The Court below is charged with error
in not dismissing cause on account
of variance between the affidavit and
plaint

1 No proof that Mortgage recorded

19 Ill
Merrick vs Wallace, 486

2 Note not produced

~~No Demand~~
Pleas unsworn

2-3-4 & 5 pleas allege payment to
some one else - but do not traverse
the Plaintiffs allegation of right -
1 Gil 371

No Demand made
Mortgage dispenses with a demand

- if plea of non cepit - which admits
wrongful taking

104 - 157

19 Dec

per Bill

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

To the Clerk of the ~~_____~~ Court ~~for the County~~ of Common Pleas of the City of Aurora Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Court of Common Pleas of the ~~Court of~~ City of Aurora ~~County~~, before the Judge thereof, between

Adoniram Riddle

plaintiff, and

Abner Taylor impleaded &c.

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

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

Prudency H. Walker

Witness, The Hon. ~~JOHN D. CATON~~, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this Seventh day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty four.

L. Leland

Clerk of the Supreme Court.



104

Abner Taylor
wife & de

No. 104 *vs.*

Adonijam Riddle

WRIT OF ERROR.

FILED Mch. 7. A D. 1864,

L. Leland
Clerk.

Abner Taylor impl. &c
vs
Adoniram Riddle

Supreme Court, third
Grand division
April Term A.D. 1864.

Argument for Appellant.

I shall not discuss all the points raised in the printed brief, but shall confine myself to the leading points in the case.

The 1st point is that the Court erred in not allowing defendants motion to dismiss the suit.

The writ of replevin was directed to the Sheriff of Kane County directing him to seize the goods and chattels therein mentioned, without confining the Officer to the limits of the City of Aurora in executing the writ, nor does the return of the Officer show, that the writ was executed within the limits of the City of Aurora.

The Court in the case of Cook vs Ply 26th Ills Rep. 432 says "by no rule of con-
" struction can the power conferred for be deri-
" ved from this section nor had the legislature
" constitutional power to extend the jurisdic-
" tion beyond the City limits"

Again in the same case the Court says
" We have therefore of the opinion, that the Con-

" has no authority to send its original process
" beyond the limits of the City, and that the
" Summons in this case as well as the service
" was unauthorized and void.

The next point is the Court erred in permitting the chattel mortgage to be read as evidence for because there is no proof that the mortgage was recorded & 2d that the mortgage is void as against us, without producing the note or accounting for its absence.

The mortgage was executed in de Kalb County it was introduced in evidence in a case pending in the County of Pike. No proof is made of the official character of the person who signed Engrossed as Recorder or Clerk of the Circuit Court nor is there any proof of the handwriting of the Recorded or Clerk of the Circuit Court of de Kalb County ~~of the~~ that the certificate of record of the signature thereto is in

In the case of Fail & et al vs Goodtitle Breese Rep. 201 the Court say "the signature
" of registers of Land Offices can not be known
" officially to the Court, they have no public
" seal to authenticate their signature, proof
" ought therefore to have been given of the
" handwriting of the register

In a case in the 4th Scam. Rep. P. the Court

recognises the rule above laid down. The bill of exceptions did not it seems contain a statement that it contained all the evidence
" in the case and the Court says, "in the ab-
" sence of a contrary statement in the bill of
" exceptions, we are to presume that proof
" of the handwriting and official character
" of the register were proved before the admis-
" sion of the certificate in evidence.

Our statute provides "and it shall not be
" necessary for a certificate to be made by the
" recorder, of the recording of a deed or other
" writing, but a indorsement on the writing
" recorded of the book and page in which the
" same is recorded and the date of recording
" the same, signed by the Clerk, shall be dee-
" med sufficient evidence of the recording thereof
" of." Blackwells St. P. 513. at the bottom of the Page under the head of "Fees"

This Statute does not away with the necessi-
ty of proving the official character and sig-
nature of the recorder if the deed or instru-
ment is to be used in a foreign county,
as in this case. The Court could not take
judicial notice, of this officer, nor of his
handwriting, nor was the certificate of
record under the seal of the recorder to

authenticate his official character.

The plaintiff in the court below, in order to show title to the property, introduced this mortgage given by Sands, (from whom we derived title to the property) to himself; which mortgage discribed a note for $275. due ninety days after its date, to secure which, said mortgage purported to have been given. This note was not produced on the trial, nor its absence accounted for.

We claim that the note must be produced, or its absence accounted for before they can claim title under such mortgage.

In the case reported in 9th Wisc. Rep. 28. the court says, it was held in Bailey vs Gould Walkers Ch. 478. that unless the note accompanying a mortgage is produced or accounted for, it must be presumed paid as against the party setting up the mortgage. This is in accordance with well settled principals. In the case before us the notes were not produced, and we are entirely without evidence either of their existance or ownership at the present time.

The above book is not in the library

In a case in the 18th Ills Rep. 81. the court says "the promissory note should also have been produced and proved as evidence of the mortgage debt, and without which the mort-gage deed, the incident, would be of no force

In a case in the 20th Ills Rep. P. 170. the court say "it is all important that the note should be produced or a good account given for its non production. It would be absurd to deal with an "accident" as Lord Hardwicke calls a mortgage, without accounting for the main fact or principal thing. It may be that the note has been paid and that is a rea-sonable presumption, or it may be in the hands of another party, who holding it would have a right to control its security

Our statute makes it a felony for any mort-gagor to sell any property upon which he has executed a chattel mortgage. Is it likely a man would make himself liable to be sent to the penitentiary, by selling this property, if this note had not been paid? We think not.

But if the plain-tiff has not assigned if he has not altered the note since its execution, or if it has not been paid, why not produce it.

it is in their possession, unless paid, or as-
signed, and is not invalidated by any alter-
ation after its execution, there can be no
harm in producing the note.

We are strang-
ers to this mortgage transaction, we know
nothing of the bona fides of this transac-
tion between Sands and Riddle, but it looks
very much as if Sands and Riddle were
acting in concert on one plan, 1st for Sands
to sell us the horses get some $200.00 in
money, then Riddle to replevy them under
his pretended mortgage, and then if we
should pursue Sands in a criminal prose-
cution for selling property which has mort-
gaged, we would fail, because the mortgage
is a nullity, there being in reality no debt.

The plaintiffs hold the affirmative on the is-
sue of the right of property, and must
sustain his right, or fail in the action,
1st Caldwell, 371.

The horses described in the plaintiffs declara-
tion, also in the chattel mortgage are de-
scribed as bay horses, the evidence shows
that one of the horses they took from
us was a cornell horse. Now these horses
are either different horses, or one of them

is misdescribed in the chattel mortgage. Now who should bear the loss of the one horse, the one who is guilty of a misdescription of the horse in the chattel mortgage, or an innocent purchaser - certainly not the latter - We look to the records, find a chattel mortgage on personal, describing a span of bay horses, the mortgagor comes and offers us a span of horses for sale, one is a bay, the other a sorrel horse - they are not the horses described in the mortgage, for they were described as bay horses - we buy them, pay for them, - and a few days after the mortgagee comes and claims the property by virtue of his mortgage - Now shall the innocent purchaser suffer by reason of this mortgagees carelessness, in taking a mortgage which contains a misdescription of the property, and which is no notice to the world of any other property except such as it describes, or the mortgagee who is a party to the mortgage. It seems to me, that justice demands that he should be the loser who is in fault.

The exceptions to giving plaintiffs, and re-issuing defendants instructions, also the refusal of the Court to grant a new trial and that the verdict is contrary to law

and evidence in the case, involve the points heretofore discussed, and no further argument is necessary. We claim therefore that this judgment should be reversed as being clearly erroneous and unjust,

Charles D Mayer
Attorney for Appellant

1044-157

Abner Taylor appt
vs
Admiral Riddle

Argument for
Appellant.

Salem April 28. 1864
C Lecount Atty

Page of Record.

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

ABNER TAYLOR, impleaded, &c., ~~Appellant~~,
vs.
ADONIRAN RIDDLE, ~~Appellee~~. } *Replevin.*

2 Adoniran Riddle, being first duly sworn, doth depose and say, that he is the plaintiff in the above entitled cause, and that he is at this time lawfully entitled to the possession of a span of bay horses, five years old, worth two hundred dollars, and now in possession of said defendants, or one of them, and that the same have not been taken for any tax assessment or fine levied by virtue of any law of this State, or seized under any execution or attachment against the goods and chattels of this affiant liable to execution or attachment.

3 Affidavit duly sworn to and filed October 7th, 1861.

Replevin bond, in the usual form, filed October 7th, 1861.

4 October 7th, 1861, replevin writ issued.

State of Illinois, Kane County, City of Aurora.—The people
5 of the State of Illinois to the Sheriff of said county, greeting: Whereas Adorinan Riddle, plaintiff, complains that Alvin Woodworth, Abner Taylor and Hiram Butterworth, defendants, unlawfully and wrongfully have taken and do detain the following described goods and chattels, to wit: a span of bay horses, five years old, of the value of two hundred dollars, therefore we command you, &c.

6 Writ returned duly served on defendant Abner Taylor—defendants Woodworth and Butterworth not found.

7 October 11th, 1861, plaintiff's declaration for wrongfully detaining a span of bay horses was filed in the office of the Clerk of said Court.

12 October 23d, 1861, amended affidavit filed:

Adoniran Riddle vs. Alvin Woodworth, Abner Taylor and Hiram Butterworth. Adoniran Riddle being first duly sworn doth depose and say, for an amended affidavit in the above entitled cause, that he was, at the time of the commencement of this suit, to wit: the 7th of October, A. D. 1861, and now is lawfully entitled to the possession of a span of bay horses, five years old, worth two hundred dollars, which were, at the time of the commencement of this suit, in the possession of said defendants, and that the same have not been taken for any tax assessment or fine

Page of Record.

levied by virtue of any law of this State, nor seized under any execution or attachment against the goods and chattels of this affiant, liable to execution or attachment.

10 & 23 October 23d, 1861, motion by defendant Taylor to dismiss said suit, for the following reasons: 1st, there is a variance between the writ, the plaint and affidavit filed in this cause, and 2d, because said writ was issued without authority of law. Motion

13 overruled and defendant excepts. Defendant files the following pleas: 1st, non-detinet; 2d, property in Taylor, Butterworth & Co.; 3d, property in defendant, Abner Taylor; 4th, property in one Sands; 5th, property in defendant, Woodworth.

15 Replication filed by plaintiff; and the said plaintiff, by L. R. Wagner, his attorney, for replification to said defendant's pleas, says *precludi non*, because he says that the said horses, in the plaintiff's declaration mentioned, were not the property of said defendants, but were the property of said plaintiff, and of this he puts himself upon the country, &c. Similitar by defendant Taylor.

16 October 25th, 1861, trial by jury. Verdict, we, the jury, find defendant guilty, as charged, and assess plaintiff's damages at one cent.

Defendant moves for a new trial; motion overruled; defend-

17 ant Taylor excepts; judgment on the verdict.

18 October 28th, motion by defendant in arrest of judgment; motion overruled; defendant excepts, and prays an appeal; appeal allowed, upon entering into bond with Thomas Snell as security; appeal bond and bill of exceptions to be filed in sixty

19 days. December 9th, 1861, appeal bond filed in the office of clerk, as required by rule. December 26th, 1861, bill of exception filed by defendant.

23 Plaintiff introduced Newton Parkham as a witness, who testified: I know Riddle; know S. E. Sands; he lives in Clinton, De Kalb county; I came there in August; Riddle sold Sands a span of horses, one sorrel and the other a bay horse; I was at Sandwich when they were sold; Woodworth bought the horses; they were the horses Riddle let Sands have; it was some three or four weeks ago; the horses are now in the stable across the river; Woodworth stated he was buying them for a firm in Chicago at the time of purchase; (defendant objects as to what Wood-

23 worth said, because the defendant is not connected nor responsible for what Woodworth said, which objection the Court overruled; to which decision of the Court the defendant then and there excepted;) he, Woodworth, did not state for whom he was buying.

J. D. Andrus, who, being duly sworn, testified as follows: I am Deputy Sheriff of Kane county; I executed this writ; I

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24 found the horses in Woodworth's barn ; I saw Taylor, and asked him if there was such a span there ; he said likely there was in the barn ; I told him I was going up there after them, and asked him to go along ; he said he would not, he had no time ; I then went up to the barn with Riddle and he pointed the horses out to me and I took them ; came back to see Taylor ; he wanted me to go to Sandwich and see who and where the fellow was that sold them to Woodworth; he swore a little ; he said he had been cheated out of a span of horses ; I know the firm of Taylor, Butterworth & Co. ; don't recollect hearing him say what they were going to do with the horses; Taylor, Butterworth & Co. are doing a large business here ; when I went to the barn, five or six horses were tied together ; he supposed they were going to take them to Chicago.

Kirkpatrick sworn, who testified as follows : I am a Justice of the Peace ; was on the 19th day of August last ; I acknowledged this instrument ; have my docket with me ; I live in the town of Clinton, De Kalb county, State of Illinois. Plaintiff then and there introduced memorandum of acknowledgment of chattel mortgage. The plaintiff then and there offered to introduce a chattel mortgage as follows, to wit :

This Indenture, made this fifteenth day of August, 1861, be-
25 tween S. E. Sands, party of the first part, of the town of Clinton, county of De Kalb, and State of Illinois, and Adoniran Riddle, of the town of Victor, same county and State aforesaid, party of the second part, witnesseth : That the said party of the first part, for and in consideration of the sum of two hundred and seventy-five dollars, in hand paid by the said party of the second part, do grant, bargain and sell unto the said party of the second part, his heirs and assigns, the following goods and chattels, to wit : One span of five year old bay horses, one set double harness, one neck-yoke, one double-tree and two whiffle-trees, being the horses and harness owned formerly by said Riddle and this day sold to S. E. Sands ; to have and to hold all and singular the goods and chattles hereinbefore granted, bargained and sold, unto the said party of the second part forever. *Provided always*, and these presents are upon the express condition, that if the party of the first part shall and do well and truly pay, or cause to be paid to the said party of the second part the sum of two hundred and seventy-five dollars, according to the tenor of a promissory note bearing even date with this instrument, and due in ninety days from date, then these presents and every matter herein contained shall cease and be null and void. But in case
26 default shall be made in the said sum of money above mentioned at the time above limited for the payment of the same, or any part thereof, or if the said party of the second part shall at any

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time deem the security unsafe and insufficient, it shall and may be lawful for the said party of the second part, his agent or attorney, to take possession of the said goods and chattels wherever the same shall be, and to sell and dispose of the same for the best which can be obtained therefor, at public vendue, after giving ten days' notice of the time and place of such sale, as required by law in the act concerning constables, and out of the money to arise from such sale thereof, to retain the said sum of money above mentioned, and all charges for keeping said property, and of such sale (if so much there shall be) rendering the surplus (if any there shall be) to the said party of the first part; and it is hereby agreed by and between the said parties, that in case the said party of the first part shall sell, assign or dispose of, or attempt to sell, assign or dispose of any of said goods and chattels, or remove or attempt to remove from said county any of said goods and chattels, or if the same shall be levied upon or seized by virtue of any execution, writ of attachment or other process against said party of the first part, it shall and may be lawful for the said party of the second part, his agent or attorney, to take possession
27 of said goods and chattels, and sell the same in the payment of said sum of money above mentioned, and all costs for taking and keeping the same in the manner aforesaid; and provided, also, that the said party of the first part is to have the use and possession of the said property [except to remove it from the county] and at his own expense to keep the same. In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

S. E. SANDS. [SEAL.]

STATE OF ILLINOIS, } ss.
DE KALB COUNTY. }

This mortgage was acknowledged before me by S. E. Sands, the mortgagor, this nineteenth day of August, A. D. 1861.

SMILEY KIRKPATRICK, J. P. [L. S.]

Endorsed on the back as follows, to wit: Chattel Mortgage.

28 STATE OF ILLINOIS, } ss. No. 1376.
DE KALB COUNTY, }

This instrument was filed for record on the 22d day of August, A. D. 1861, at one o'clock P. M., and duly recorded in book G, of Chattel Mortgages, on page 136. C. M. BROWN, Recorder.

Fees, 90c., paid.

To introduction of which, said defendant then and there objected, for the following reasons: 1st, because said chattel mortgage is illegal and void, as against said defendant; 2d, there is

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no evidence that the mortgage has been recorded; all of which objections the Court then and there overruled, and permitted said mortgage to be read in evidence to the jury, to which ruling of the Court the said defendant then and there excepted; and this being all the evidence introduced in said cause, either on the part of the plaintiff or on the part of the defendant, the Court instructed the jury on behalf of the plaintiff as follows, to wit:

The jury are instructed that if they believe from the evidence that the defendants were about taking the horses away, or re-
29 moving the same, so that a demand could not safely be made, then no demand was necessary for the horses; but in order to obviate such demand, the jury must believe from the evidence that the defendants were hurrying the property away expressly to avoid a demand and to deprive the plaintiff of property, or the possession of it, as the case may be. 2d, The jury are instructed that if they believe from the evidence that the plaintiff, Riddle, had a chattel mortgage on the horses in question, which was acknowledged before a justice of the peace in the town
30 where the mortgagor, Sands, resided, and was recorded in the county where he also resided, and contains a provision that the property may remain in the possession of the mortgagor, Sands, and that the same was made in good faith and to secure an honest debt, which is unpaid and still due the plaintiff, then the mortgage is good and valid against purchasers and creditors, and the plaintiff may maintain his action of replevin for a wrongful detention of the same, [11 Ill., 618,] providing a demand was
31 made. To the giving of which said instructions, and each of them, the said defendants then and there excepted.

And the said defendants then and there requested said Court to instruct the jury as follows, to wit:

1st. Unless the jury believe from the evidence that the chattel mortgage has been duly recorded in the Recorder's office of De Kalb county, they must find for the defendant.

2d. This is an action for wrongful detention of property, and before the plaintiff is entitled to recover, he must show that prior to the commencement of this suit he made a demand upon the defendants for the property, and that the defendants refused to deliver the same to him.

And further requested the Court to give the jury the following instructions:

32 3d. And in order to prove the certificate of record, it is necessary for the plaintiff to prove the hand-writing of the recorder to the certificate of record, and also that said Brown is the Clerk of the Circuit Court of said De Kalb county.

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4th. The certificate of record on the back of said chattel mortgage is not in evidence before the jury, and the jury must disregard the same.

5th. Unless the plaintiff has produced in evidence the note for which the mortgage was given, or accounted satisfactorily for its absence, they must find for the defendant.

Which said instructions the Court refused to give the jury, to which refusal of the Court to give said instructions, and each of them, the defendant then and there excepted. The Court then and there, on its own behalf, instructed the jury as follows, to wit:

The first question before the jury is, whether there was an unlawful detention of the property. In order to sustain that aver-
33 ment in the declaration, the plaintiff must show affirmatively that a demand was made for the same before the commencement of this suit, and in the absence of such proof to find the first issue for the defendant.

But if the jury believe that the right of property, as stated in the declaration, was in the plaintiff, then, on the issues made by the special pleas, they should find for the plaintiff.

The form of your verdict will be guilty or not guilty. *If you desire to find not guilty on the first plea, and guilty on the balance* of the pleas, you will say:

We, the jury, find not guilty on the first pleas, and guilty on the special pleas. We find the issues joined for plaintiff.

On the 25th day of October the jury returned the following verdict:

We, the jury, find the defendant guilty, and damages one cent.

L. BALDWIN, Foreman.

34 And the said defendant then and there moved said Court for a new trial, for the following reasons: 1st, The Court permitted improper evidence to be introduced. 2d, Because the Court erred in giving plaintiffs' instructions. 3d, The Court erred in refusing defendants' instructions. 4th, The verdict is against the law and evidence. Which said motion the said Court then and there overruled; to which ruling of the Court, the defendant then and there excepted. And the said defendant then and there moved said Court in arrest of judgment in said cause, for the following reasons: 1st, Because the defendants' 2d, 4th and 5th pleas remained unanswered. 2d, Because the declaration contains no cause of action; which said motion the Court then and there overruled, to which ruling of the Court the defendant then and there excepted, and prays that this, his bill of exceptions, may be signed, sealed, &c.

B. F. PARKS, [SEAL.]
Judge of the Court of Common Pleas
of the City of Aurora.

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The errors assigned are: 1st, The Court erred in not allowing defentants' motion to dismiss said cause.

2d, The Court allowed improper evidence.

3d, The Court erred in giving plaintiffs' instructions.

4th, The Court erred in refusing defendant's instructions.

5th, The Court erred in rendering judgment on the verdict.

6th, The Court erred in overruling defendants' motion for a new trial.

7th, The Court erred in overruling defendants' motion in arrest of judgment.

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A. Taylor

vs

A. Riddle

abstract

Julius A/c 21.1864

S Sclanedon

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864

ABNER TAYLOR, impleaded, &c., ~~Apellant~~,
vs.
ADONIRAN RIDDLE, ~~Appellee~~.

BRIEF AND POINTS FOR APPELLANT.

The Court erred in not dismissing the suit, there being a clear varience between the affidavit and plaint. The affidavit stated that plaintiff is entitled to the span of horses, and were at the time of the commencement of the suit in possession of Defendants; the plaint alleges that the defendants wrongfully and unlawfully have taken and do detain, &c.

The plaint must contain the substance of the affidavit.

4th Scammon, p. 449.

The plaint does not contain the substance of the affidavit. It is essential that the affidavit should aver *that the property has not been taken for any tax assessment &c.*, which ought to be stated in the plaint; it is a part of the substance of the affidavit.

The writ was issued without authority of law; it is directed to the Sheriff of Kane county, to be executed without the limits of the county of Kane, when it should have directed him to serve it without the limits of the city of Aurora.

Davis vs. Phy,—26th Ill. Rep.

The Court erred in permitting witness Newton Parkham testifying as to what Woodworth said, at the time of the sale of the horses by Riddle to Woodworth, because Taylor was in no way connected with the conversation, or the transaction.

The Court erred in permitting the Chattel Mortgage from Sands to Riddle to be read as evidence:

1st. Because there is no proof that the Mortgage was recorded.

2d. Because the Mortgage is void as against us, without showing that the Mortgage was given to secure a debt, *bona fide due*, which must be done by producing the note described in the Mortgage, or to account for its absence.

9th Mich Rep. 28 Mathers Chanc. Rep. 478 18 Ills 77. 20 Ills. 165.

On the first point I will cite the case of Fail & Nalb vs. Goodlittle, and *al. et.*

Breese's Rep., p. 156;
4th Scam., p. 7.

On the 2d point, Blackwell's Statute, p. 813.

The Court erred in giving plaintiff's instructions, because the 2d, 4th and 5th plea of defendant remain unanswered, and therefore nothing was to be tried by the jury. Plaintiff's replication is to defendant's pleas. Taylor, Butterworth & Co., Sands and Alvin Woodworth are not defendants.

The plaintiff's first instruction is not based on evidence.

The plaintiff's second instruction is not based on evidence:

1st, Because there is no evidence that the mortgage was duly recorded.

2d, Because there is no evidence showing that the note described in the mortgage remains unpaid, or that the appellee is still the owner of it, but on the contrary his failure to produce the note, or account for its absence, raises the implication that it is paid, cancelled or assigned; in the latter case it would carry the mortgage with it, and appellee cannot maintain this action.

The Court erred in refusing defendant's 3d, 4th and 5th instruction.

The 3d and 4th instructions are based on the principle of law contained in Bruce's Rep., p. 156, and 4th Scam., p. 7.

The 5th instruction is based on the principle of law, that the mortgagee must show an existing debt to secure which the mortgage was given.

On the motion for a new trial the principles of law already discussed are involved, and the additional point that the verdict is not supported by evidence, because: 1st, There is no evidence of a demand for the property before commencement of suit.

4th Scam., p. 449.
14th Ill., p. 467.
13th Ill., p. 317.

And hence no refusal on the part of Taylor to deliver the property up.

13th Ill., p. 317.

Nor is there any evidence that Taylor was actually absconding with the property, so as to obviate the necessity of a demand for the property.

2d Gill. Rep., p. 344.

2d. The horses described in plaintiff's declaration and Chattel Mortgage are *bay horses*, while their evidence showed that one of the horses bought by Taylor was a sorrel horse.

CHARLES J. METZNER,
Attorney for Appellant.

1011

Taylor

v

Riddle

Appellants briefs

Filed Apl. 21. 1864

L. Leland

Clk.

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

Pleas begun the Honorable
Benjamin F. Parks
The Judge of the Court of Common Pleas of
the City of Aurora at a regular Term of
said The Court of Common Pleas of the
City of Aurora begun and held at the Court
room in the City of Aurora in said County
and State on the Third Monday (the 17th day)
of March in the year of Our Lord One Thou
=sand Eight Hundred and Sixty Two and of
the Independance of said United States the
Eighty Six

Present the Honorable Benjamin F. Parks
The Judge of said Court
" Demmens Clark Sheriff of Kane County

Attest
Charles P. Johnston
Clerk

The Court opened by proclamation

Be it remembered that heretofore to wit on the 7th day of October the following affidavit was filed in the clerks office of said Court to Wit

State of Illinois
Kane County
City of Aurora
} ss

The Court of Common Pleas of the City of Aurora October Term A.D. 1861

A. Addison Riddle
vs
Alvin. Woodworth
Abner. Taylor and
Hiram. Butterworth

A. Addison Riddle being first duly sworn doth depose and say that he is plaintiff in the above entitled cause and that he is at this time lawfully entitled to the possession of a Span of bay horses five years old worth Two Hundred dollars and now in the possession of the said defendants or one of them and that the same have 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 this affiant liable to execution or attachment

Subscribed and Sworn to before me this 7th day of October A.D. 1861

A. Addison Riddle

Chas. P. Johnston Clerk

with an endorsement on the back as follows to wit

Adamiam. Riddle
vs
Alvin Woodworth
Writ
Affdt

Filed October 7th 1861
C. P. Johnston
Clerk

And also on the same day to wit the 7th day of October A. D. 1861 the following bond was filed in the clerks office of said Court To Wit

Know all men by these presents that we Adamiam. Ridde as principal and Colmmbus Pinney 2nd and Charles. L. Cook and S B. Wagner as Surety are held and firmly bound unto D. Clark Sheriff of Kane County in the penal sum of Two Hundred Dollars lawful money of the United States for the payment of which sum we bind ourselves our heirs executors administrators and assigns each and every of them firmly by these presents Witness our hands and Seals this Seventh day of October A. D 1861

The Condition of the above oblig

-ation is such that whereas the above bounden Adoniram Riddle is about to sue out of the Clerks Office of the Court of Common Pleas of the City of Anna a Writ of Replevin for a Span of Bay Horses five years old against Alvin. Woodworth Abner Sayler and Hiram Butterworth Now therefor if the said Riddle shall prosecute his suit with effect and without delay and make return of the property if return thereof shall be awarded and save and keep harmless the said Clerk Sheriff as aforesaid in replevying said property then this obligation to be null and void otherwise to be in force and effect

Adoniram Riddle (Seal)
Columbus Pinny Jr (Seal)
Charles L. Cook (Seal)
L. B. Magnes (Seal)

Endorsed on the back as follows to wit

Adoniram Riddle
vs
Alvin. Woodworth
Sayler & Butterworth

Bond
filed October 7th 1861
C. P. Johnston Clerk

5 And also on the same day to wit the 7th day of October A. D. 1861 the following replevin writ was issued out of said office to wit

State of Illinois
Kane County } ss
City of Aurora

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

Whereas Adoniram Biddle plaintiff complains that Alvin Woodworth Abner Taylor and Hiram Butterworth defendants unlawfully and wrongfully have taken and does detain the following described goods and Chattels to wit a Span of Bay Horses five years old of the value of Two Hundred Dollars

Therefore We Command You that if the said plaintiff shall give you bond with good and sufficient security in double the value of the said goods and chattels as required by law to prosecute this suit in this behalf to effect and without delay and to make return of said goods and chattels if return thereof shall be awarded and to save and keep you harmless in replevying said goods and chattels you cause the said goods and chattels to be replevied and delivered to the said plaintiff without delay and also that you summon the said defendants to be and appear before the

Court of Common Pleas of the City of Aurora for said County on the first day of the next term thereof to be holden at the Court Room in Aurora in said County on third Monday of October A D 1861 to answer said plaintiff in the premises

And you have 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 Charles P. Johnston clerk of our said Court and the Seal thereof at Aurora in said County the 7th day of October 1861

Seal

Chas. P. Johnston clerk

Endorsed on the back as follows to wit

Alonzo Riddle

vs

Alvin Woodworth et al

Writ of Replevin

Fee 1 Sev 50

Bond 50

Ret 10

3 mile 15

$1,25

Filed Oct 21st 1861

C. P. Johnston clerk

7

By virtue of the within writ of Replevin I did on the Seventh day of October 1861 Replevy the within discribed property and at the same time the plaintiff delivered to me a bond according to law and I delivered the property to plaintiff and on the Seventh day of October 1861 I served this Summons on Abner Taylor by reading the same to him Alvin Woodworth and Hiram Butterworth not found

D. Clark Sheriff
By J. D. Adams
Deputy

And afterwards to wit on the 11th day of October 1861 the following declaration was filed in the clerks office of said court to wit

The Court of Common Pleas
of the City of Aurora
October Term thereof A.D. 1861

Adoniram, Riddle
vs
Alvin, Woodworth
Abner, Taylor &
Hiram, Butterworth

State of Illinois
Kane County } ss
City of Aurora

Alvin Woodworth Abner
Taylor and Hiram Butterworth defend-
-ants in this suit were summoned to answer
A. Adamiam. Riddle plaintiff in this suit of
a plea wherefore he took the horse of the
said plaintiff and thereupon the said plaintiff
by L. R. Wagner his attorney complains for
that the said defendants on the seventh day
of October A D. 1861 in the County of Pike and
City of Aurora in a certain barn therein situate
took the horse to wit a span of bay horses
of the said plaintiff of great value to wit
of the value of Two Hundred Dollars and
unjustly detained the same against sureties
and pledge until &c Whereupon the said
plaintiff saith he is injured and hath sust-
-ained damage to the amount of one hundred
dollars and therefor he brings suit &c

L. R. Wagner Plff atty

Endorsed on the back as follows to wit

Court of Common Pleas
October Term A D. 1861
A Adamiam, Riddle
vs
Alvin. Woodworth
Hiram. Butterworth &
Abner. Taylor

9

Nan

Filed October 11th 1861

C. P. Johnston Clerk

L. B Magnes. Plffs. atty.

And afterwards to wit on the 21st day of October A D. 1861 it being one the days of the regular October Term A D 1861 of said Court the following among other proceedings were had in this cause in said Court and entred of record to. wit

Adamiam Riddle
vs
Albin. Woodworth. et. als } Replevin

This day this cause is set for trial on Wednesday afternoon next

And afterwards to wit on the 23d day of October A D. 1861 it being one of the days of the regular October Term A D 1861 of said Court the following among other proceedings were had in this cause in said Court and entred of Record to Wit

Adamiam. Riddle
vs
Albin Woodworth Abner Taylor & Hiram. Butterworth } Replevin

This day come the

defendant, Abner Taylor by O. J. Mattyson his attorney and enters this motion to dismiss this cause on account of want of sufficient affidavit

And afterwards to wit on the 23 day of October A.D. 1861 it being one of the days of the regular October Term A.D. 1861 of said Court the following among other proceedings were had in this cause in said Court and entered of record to wit

Adoniram Riddle
vs
Alvin Woodworth
Abner Taylor &
Hiram Butterworth
} Replevin

This day come the plaintiff by L. B. Wagner and enters his corp motion to amend the affidavit herein It is ordered that the corp motion be granted and that the motion of defendant, Abner Taylor heretofore entered to dismiss this cause be overruled Thereupon come the defendant, Abner Taylor and enter his motion to dismiss this cause for a variance between the writ and affidavit & plaint herein and the Court being fully advised overrules said motion Thereupon the defendant, Abner Taylor and asked to plead herein within one hour and afterwards on defendant, Abner Taylor motion leave is given

11 them to amend his plea herein

And again come the parties to this cause by their attorneys and issue being joined herein on plaintiffs motion It is ordered that a Jury come whereupon come a Jury of good and lawful men to Wit

N. Otis C. B. Whitford John Fleming
Hiram. Barta A. J. Hatty J. L. Hamshett
Lyman. Baldwin E. A. Bradly O. Lathrop
John Harrison B. Monk David. Aiken

who being severally called tried elected and sworn also come and after having heard the evidence adduced the hour of adjournment for the day having arrived it is ordered that the Jury may Seperate and meet the court on Friday morning next

And also on the same day to wit the 23 day of October A.D. 1861 the following amended affidavit was filed in the clerks office of said court in this cause to Wit

State of Illinois }
Rane County } The Court of Common
City of Aurora } Pleas of the City of Aurora
October Term A.D. 1861

Abraham Riddle
vs
Alvin. Woodworth

Abner. Taylor &
Hiram. Buttenworth

Adoniram Riddle being first duly sworn doth depose and say for an amended affidavit in the above entitled cause that he was at the time of the commencement of this suit to wit on the 4th day of October A. D. 1861 and now is lawfully entitled to the possession of a span of bay horses five years old worth Two Hundred Dollars which were at the time of the commencement of this suit in the possession of the said defendants and that the same have not been taken for any tax assessment or fine levied by virtue of any law of this State nor levied under any execution or attachment against the goods and chattels of this affiant liable to execution or attachment

Subscribed and Sworn to before me this 28th day of October 1861

Adoniram Riddle

Chas. P. Johnston
Clerk

Endorsed on the back as follows to wit

Adoniram Riddle
vs
Abner Woodworth et als
Amd Affd

13 Filed Oct 28th 1861
C. P. Johnston Clerk

And also on the same day to wit the 28th day of October A. D. 1861 the following Pleas were filed in the office of the Clerk of said Court in this cause to Wit

Adonijam. Riddle
vs
Abner. Taylor
impleaded &c

Court of Common Pleas of the City of Anna
October Term A. D. 1861

And now comes the said defendant Abner. Taylor by. C. J. Mcbyrne his attorney and says that he does not wrongfully detain said house in said declaration mentioned from said plaintiff as is in said declaration alleged and of this he puts himself upon the Country &c

C. J. Mcbyrne atty for Deft

And for a further plea in this behalf the said defendant says actio non for he says that said house at the time when &c were the property of One Taylor Butterworth & Co. and this he is ready to verify wherefore he prays Judgment and return of said house &c

C. J. Mcbyrne Deft atty

And for a ~~further~~ further plea in this behalf the said defendant says actio non for he says that said horses in said declaration mentioned at the time when &c was the property of this defendant and this he is ready to verify wherefore he prays Judgment & return of said horses &c

C. J. Metzner atty for Defft

And for a further plea in this behalf the said defendant says actio non ~~for he says~~ ~~actio non~~ for he says that at the time when &c said horses in said declaration mentioned were the property of one Sands and this he is ready to verify wherefore he prays Judgment and a return of the horses &c

C. J. Metzner atty for Defft

And for a further plea in this behalf the said defendant says actio non for he says that at the time when &c said horses in said declaration mentioned were the property of one Albin, Woodworth and this he is ready to verify wherefore he prays Judgment and return of the property &c

C. J. Metzner Defft atty

Endorsed on the back as follows to wit
Filed Oct 23d 1861
C. P. Johnston, clerk

And also on the same day to wit on the 28th day of October A D 1861 the following Replication to the said Defendants pleas was filed in the office of the clerk of said Court in this cause to wit

Adoniram. Riddle
vs
Alvin. Woodworth
Abner. Taylor &
Hiram. Butterworth

The Court of Common Pleas of the City of Aurora October Term A.D. 1862

And the said plaintiff by L. B. Magner his attorney for Replication to the said Defendants pleas says precludi non because he says that the said horses whose is the plaintiffs declaration mentioned were not the property of the said Defendants but were the property of said plaintiff and of this he puts himself upon the Country &c and the defendant A Taylor doth the like C. J. McIntyre Atty for Defts

L. B. Magner

And endorsed on the back as follows to wit

Adoniam. Riddle
vs
Abner Taylor et als

Filed Oct 28th 1861
C. P. Johnston Clerk

And afterwards to wit on the 25th day of October A. D. 1861 it being one of the days of the regular October term A. D. 1861 of said Court the following among other proceedings were had in this cause and entered of record in said Court to wit

Adoniram Riddle
vs
Abner Woodworth
Abner Taylor &
Hiram Butterworth
} Replevin

This day again come the parties to this cause by their attorneys and the jury heretofore empannelled in this cause also come and having heard the arguments of Counsel and instructions of the Court retire in charge of an officer to consider of their verdict and afterwards come into court and for a verdict upon their oaths say, we the jury find the defendant guilty as charged and assess the plaintiffs damages at one cent Wherefore the said plaintiff ought to have and recover of said defendants Abner Woodworth & Abner Taylor the possession of the property replevied in this cause and also his damages sustained by reason of the detention thereof to one cent

Thereupon come the defendants Abner Taylor and enter his motion for a new trial herein

17.

And afterwards to wit on 28th day of October A.D. 1861 it being one of the days of the regular October Term A.D. 1861 of said Court the following among other proceedings were had in this cause and entered of record in said Court to wit

Adamiam. Riddle
vs
Alvin. Woodworth
Abner. Taylor
Hiram. Butterworth
} Replevin

This day again come the parties to this cause by their attorneys and this cause coming on to be heard upon the defendant Abner Taylor's motion heretofore entered for a new trial herein and the Court now being fully advised of and in said motion

Thereupon it is considered by the Court that said plaintiff do have and retain the property replevied in this cause and also recover of said defendant Abner Taylor his damages by one cent in form as by the Jury heretofore empannelled in this cause assessed and also his costs by him about his suit in this behalf expended and have execution therefor

To which decision of the

Court in overruling the motion for a new trial and rendering Judgment herein the Defendant Abner Taylor by his Counsel at the time excepted

Thereupon came the defendant Abner Taylor and entered his motion in arrest of Judgment and the Court being fully advised overrules said motion

To which decision of the Court in overruling said motion in arrest of Judgment the defendant by his Counsel at the time excepted

Thereupon came the defendant Abner Taylor and prays an appeal to the Supreme Court of the State of Illinois in this cause

It is ordered by the Court that the appeal be allowed upon defendant Abner Taylor entering into bond in the Sum of One Hundred dollars with Thomas Snell as surety and that they have Sixty days to file their appeal bond and Sixty days to file their bill of exceptions herein

And afterwards to wit on the 9th day of December A.D. 1861 the following Appeal Bond was filed in the office of the Clerk of said Court in said cause to wit

Know all men by these presents that we Abner Taylor and Thomas Snell of Kane County Illinois are held and firmly bound unto Adoniram Riddle of the same place in the penal sum of One Hundred Dollars to the payment of which well and truly to be made we do by these presents jointly and severally bind ourselves our heirs executors and administrators sealed with our seals and dated this 1st day of December A.D. 1861

The condition of the above obliga=tion is such that whereas Adoniram Riddle did at the October Term A.D. 1861 of the Court of Common Pleas of the City of Aurora holden in and for said City of Aurora County of Kane and State of Illinois obtain a Judgment in a certain plea of Replevin then and there pending in said Court for the sum of one cent dam=ages and costs of suit against the said Abner Taylor now if the said Abner Taylor shall pay the Judgment costs and interest and damages in case the Judgment of the said Court of Common Pleas shall be affirmed

by the Supreme Court in whole or in
part and shall duly prosecute this appeal
then the above obligation shall be void
otherwise to remain in full force in law

In testimony whereof we have
hereto set our hands and seals the day
and year first above written

A. Taylor (Seal)
Thomas. Snell (Seal)
(Seal)
(Seal)

Endorsed on the back as follows to wit

Appeal Bond
Adamson Riddle
vs
Abner Taylor
impleaded &c

Filed December 9th 1861
C. P. Johnston
Clerk

21 And afterwards to wit on the 18th day of March A. D. 1862 it being one of the days of the regular March Term A D 1862 of said Court the following among other proceedings were had in this cause and entered of record in said Court to wit

Admiand Riddle
vs
Abner Taylor et als } Replevin

This day it is ordered by the Court that the Bill of Exceptions in said cause be filed Nunc Pro tunc as of 26th day of December A D. 1861

And afterwards the following bill of Exceptions was filed in the office of the clerk of said Court in said cause as follows to wit

A. Dominus. Riddle vs Abner Taylor impleaded &c } Court of Common Pleas of the City Aurora October Term A. D. 1861

Bill of Exceptions

Be it remembered that on the 22d day of October A. D. 1861 it being one of the days of the said October term of said Court and the said defendant Abner Taylor by. C. J. Metzner his attorney moved said Court to dismiss said suit for want of a sufficient affidavit and the said plaintiff then and there entered his crop motion to amend his affidavit which said crop motion said Court then and there sustained and overruled said defendants motion to the ruling of which said Court said defendant then and there excepted And on the 23 day of October it still being one the days of said term of said Court Said defendant moved said Court to dismiss said suit for the following reasons 1st because there was a variance between the writ and the affidavit and plaint filed in said cause and 2 because said writ issued without authority of law which said motion the Court then and there overruled to which

ruling of the Court the said defendants then and there excepted And be it further remembered that on the day last aforesaid it being still one of the days of said October term of said Court and said cause having come on for trial the said plaintiff introduced the following witnesses to wit Newton Parkhams who being duly sworn testified as follows. J. Know Riddle Know. S. E. Sands he lives in Clinton De Kalb County. J. came there in August Riddle sold Sands a span of Horses one Sorrell and the other a bay horse I was at Sandwich when they were sold. Woodworth buying the horses they were the horses Riddle let Sands have it was some time or four weeks ago the horses are now in the Stable across the river Woodworth stated he was buying it for a firm in Chicago at the time of purchase (defendant objects as to what Woodworth said because the defendant is not connected now responsible for what Woodworth said which objection the Court overruled to which decision of the Court the said defendant then and there excepted) he Woodworth did not state for whom he was buying

J. D. Adams who being duly sworn testified as follows I am Deputy Sheriff of Kane County I executed this writ I found the horses in Woodworths barn I saw Taylor and ask him if there was such a span there

he said likely there was in the barn I told him I was going up there after them and ask him to go along he said he would not he had no time I then went up to the barn with Riddle and he pointed the horses out to me and I took them came back to see Taylor he wanted me to go to Sandwich and see who and where the fellow was that sold them to Woodworth he swore a little he said he had been cheated out of a span of horses I. know the firm of Taylor Buttenworth & Co. saw Taylor about 8 or 9 in the morning dont recollect hearing him say what they were going to do with the horses Taylor Buttenworth & Co. are doing a large business here, when I went to the barn five or six horses were tied together he supposed they were going to take to Chicago

Kirkpatrick sworn who testified as follows I am a Justice of the Peace was on the 19th day of August last I acknowledged this instrument have my docket with me I live in town of Clinton DeKalb County State of Illinois plaintiff then and there introduced memorandum of acknowledgment of Chattel mortgage

the plaintiff then and there offered to introduce a chattel mortgage as follows to wit

This Indenture made this Fifteenth day of August 1861 between B. E. Sands party of the first part

of the Town of Clinton County of De Witt and State of Illinois and Adonirum Biddle of the Town of Victor Scott County and State aforesaid party of the second part. Witnesseth that the said party of the first part for and in consideration of the Sum of Two Hundred and Seventy five Dollars in hand paid by the said party of the second part do grant bargain and sell unto the said party of the second his heirs and assigns the following goods and chattels to wit

One Span of five year old Bay Horses
One Set double Harness and Head Stall
One double Tree and Two whiffle trees being the Horse and harness owned formerly by said Biddle and this day sold to S. E. Sands

To have and to hold all and singular the goods and chattels hereinbefore granted bargained and sold unto the said party of the second part forever Provided always and these presents are upon the express condition that if the party of the first part shall and do well and truly pay or cause to be paid to the said party of the second part the Sum of Two Hundred and Seventy five Dollars according to the tenor of a promissory note bearing even date with this instrument and due in ninety days from ^ date then these presents and every matter herein contained shall cease and be null and void But in case default shall be made in the

said sum of money above mentioned at the time above limited for the payment of the same or any part thereof or if the said party of the second part shall at any time deem the security unsafe and insufficient it shall and may be lawful for the said party of the second part his agent or attorney to take possession of the said goods and chattels wherever the same shall be and to sell and dispose of the same for the best which can be obtained therefor at public vendue after giving ten days notice of the time and place of such sale as required by law in the act concerning constable and out of the money to arise by such sale thereof to return the said sum of money above mentioned and all charges for keeping said property and such sale (if so much there shall be) rendering the surplus money (if any there shall be) to the said party of the first part And it is hereby agreed by and between the said parties that in case the said party of the first part shall sell assign or dispose of or attempt to sell assign or dispose of any of said goods and chattels or remove or attempt to remove from said County any of said goods and chattels or if the same shall be levied upon or seized by virtue of any execution writ of attachment or other process against said party of the first part it shall and may be lawful for the said party of the second

part his agent or attorney to take possess
=ion of said goods and Chattels and sell
the same in the payment of said sum of mon
=ey above mentioned and all costs for taking
and keeping the same in the manner aforesaid
and provided also that the said party of
the first part is to have the use and possess
=ion of said property (except to remove it from
the County) and at his own expense to keep
the same

In Witness Whereof the said party of the
first part has hereunto set his hand and seal
the day and year first above written

S. E. Sands (Seal)

State of Illinois } ss
DeKalb County }

This mortgage was acknow
=ledged before me by S. E. Sands (the mortgagor)
this Nineteenth day of August A D 1861

Smiley Kirkpatrick J.P. (L.S.)

Endorsed on the back as follows to wit

Chattel Mortgage

S. E. Sands

to

Adonirum Ridall

28

State of Illinois }
DeKalb County } No. 1376

This instrument was filed for record on the
22d day of August A. D. 1861 at One Oclock
P. M. and duly recorded in book N. of Chattel
Mortgages on page 136

C. M. Brown
Recorder

Fee 90 ¢ Paid

to introduction of which said
defendant then and there objected for the
following reasons 1st because said Chattel
mortgage is illegal and void as against the
defendant 2d there is no evidence that the
mortgage has been recorded all of which objections the Court then and there overruled
and permitted said mortgage to be read
in evidence to the Jury to which ruling of
the Court the said defendant then and there
excepted And this being all the evidence
introduced in said cause either on the part
of the plaintiff or on part of the defendant
the Court instructed the Jury on behalf of the
Plaintiff as follows to wit

The Jury are
1st
instructed that if the believe from the evidence
that the defendants were about taking the
horse away or removing the same so that

29

Given as Qualified

a demand could not safely be made then no demand was necessary for the horses but in order to obviate such demand the Jury must believe from the evidence that the defendants were hurrying the property away expressly to avoid a demand and to deprive the plaintiff of property or the possession of it as the case may be

Refused

Given & should have been left out

2 d

If the Jury believe from the evidence that the plaintiff had a valid bona fide mortgage upon the property in question duly acknowledged and recorded and before default in the payment of the note secured to be paid by said mortgage the said defendants by themselves or their agent purchased the horses in question of the mortgagor & and took them away then such purchase and taking would not divest the plaintiff & his right to the possession of such property and the same would be in plaintiff

2

The Jury are instructed that if they believe from the evidence that the plaintiff Riddle had a Chattel Mortgage on the horses in question which was acknowledged before a Justice of the Peace in the town where

30

Given as Qualifica

the mortgage Bonds resided and was recorded in the County where he also resided and contains a provision that the property may remain in the possession of the mortga = gor Bonds and that the same was made in good faith and to secure an honest debt which is unpaid and still due the Plaintiff then the mortgage is good and valid against purchasers and Creditors and the plaintiff may maintain his action of Replevin for a wrongfull detention of the same 11 Jlls. 618.
providing a demand was made

Refused

4th

The Jury are instructed that the taking of the horses is admitted by the pleadings and no proof is necessary on that Question

5th

Refused

The Jury are instructed that if they believe from the evidence that the defendants wrongfully or illegally took the horses of the said Plaintiff then no demand is necessary to entitle the Plaintiff to recover

21

to the giving of which said instruction and each of them the said defendants then and there excepted

And the said defendants then and there requested said Court to instruct the Jury as follows to wit

1st

Unless the Jury believe from the evidence that the Chattel mortgage has been duly recorded in the Recorders Office of DeKalb County they must find for the defendant

Given

2d

This is an action for wrongfull detention of property and before the plaintiff is entitled to recover he must show that prior to the commencement of this suit he made a demand upon the defendants for the property and that the defendant refused to deliver the same to him

Given

And further requested the Court to give the Jury the following instructions

3d

And in order to prove the certi

Refused 32

=cate of Deed is necessary for the plain
=tiff to prove the handwriting of the
Recorder to the Certificate of Deed and
also that said Brown is the Clerk of the
Circuit Court of said DeKalb County

4th

The Certificate of Deed on the
back of said Chattel mortgage is not
in evidence before the Jury and the Jury
must disregard the same

Refused

5th

Unless the plaintiff has produced
in evidence the note for which the mortg
=age was given or accounted satisfactorily
for its absence they must find for the
Defendant

Refused

which said instructions
the Court refused to give the Jury to
which refusal of the Court to give said
instructions and each of them the defend
=ant then and there excepted the Court
then and there on its own behalf insta
=cted the Jury as follows to wit

The first question before the Jury
is whether there was an unlawful detain
=tion of the property in order to sustain

that averment in the declaration the plaintiffs must show affirmatively that a demand was made for the same before the commencement of this suit and in the absence of such proof to find the first issue for the defendant

But if the Jury believe that the rights of property as stated in the declaration were in the plaintiff then on the issues made by the special pleas they should find for the Plff

The form of your verdict will be guilty or not guilty If you desire to find not guilty on the first plea and guilty on the balance of the pleas your will say

We the Jury find not Guilty on the first plea and guilty on the special pleas We find the issues joined for Plff

And on the 25th day of October it still being one of the days of said October Term the Jury returned the following verdict to wit

We the Jury find the defendant Guilty and damages one cent

L. Baldwin
vs
Forman

And the said defendant then and there moved said Court for a new trial for the following reasons 1st the Court permitted improper evidence to be introduced 2d because the Court erred in giving plaintiffs instructions 3d the Court erred in refusing defendants instructions 4th the verdict is against the law and evidence which said motion the said Court then and there overruled to which ruling of the Court the defendant then and there excepted And the said defendant then and there moved said Court in arrest of Judgment in said cause for the following reasons 1st because the defendant 2d 4th & 5th plea remained unanswered 2d because the Declaration contains no cause of action which said motion the Court then and there overruled to which ruling of the Court the defendant then and there excepted and pray that this his bill of exception may be signed sealed &c

B. F. Potts (Seal)
Judge of the Court of Common Pleas of the City of Aurora

Endorsed on the back as follows to wit

Adonirom Riddle
vs
Abner. Taylor
impleaded &c

Bill of Exceptions

This bill of exceptions was filed within the time of filing the same mentioned in order and the clerk will so file it

B. F. Parks Judge

Filed Nov 8th
time of December
26th 1861

C. P. Johnston
Clerk

State of Illinois
County of Kane } ss
City of Aurora

J. Charles P. Johnston Clerk of the Court of Common Pleas of the City of Aurora in County and State aforesaid do hereby certify that the above and foregoing is a true correct and complete copy of the files and records in a certain cause lately pending in said Court of Common Pleas of the City of Aurora wherein Adonijah Riddle is plaintiff and Asa Taylor Alvin Woodworth and Hiram Butterworth are defendants as appears to me of record.

Witness my name and Seal of said Court at the City of Aurora in County and State aforesaid this 7th day of April A D 1862

Charles P. Johnston
Clerk

Supreme Court of the State of Illinois 3d Grand
Division April term A.D. 1864.

Abner Taylor impleaded &c. Appellant
vs
Adoniram Judd Appellee.

And now comes the said
Abner Taylor Appellant by
Charles J. Mentzer his attorney
and says there is error in the
said record in this to wit
1st the Court erred in not dis-
missing said cause at defendants mo-
tion. 2d the Court erred in not sustaining
appellants objections to the introduction of
said chattel mortgage in evidence. 3d The Court erred
in not sustaining appellants objections
to the introduction of the certificate of
record in evidence. 4th the Court erred
in giving plaintiffs instructions. and each
of them. 5th the Court erred in refusing
defendants 3d 4th & 5th instructions 6th
the Court erred in rendering judgment
on the verdict 7th the Court erred in ~~not~~
~~granting~~ overruling defendants motion for a new
trial & 8th the Court erred in ~~not granting~~ overruling
~~this~~ defendants motion in arrest of
judgment. All of which he is ready to

verify wherefore he prays Judgment
& &c

Charles [illegible]
Atty for Appt

And now comes the said Solomon
Riddle & says that in the record
said record as above alleged & &
this he is ready to verify & &c.

Leland & Blanchard
Attys

104
Com. Pleas. Cumb.

104.

Adminrs. Biddle

vs

Admrs. Taylor et. als

Copy of Record

Filed March 7. 1864

S. Leland
Clerk

Fees	
79 folio	$7.90
Cert & Seal	35
	$8.25