

No.

12167

Supreme Court of Illinois

Charlesworth

vs.

Williams

71641



7

148
R. Charlesworth
J. E. Williams

12167
1855

State of Illinois ss.
La Salle County }

Pleas before the
Honorables Edwin S. Seland Presiding
Judge of the Ninth Judicial Circuit
of the State of Illinois, at a term of the
Circuit Court in and for said La Salle
County commenced and held at the
Court House in Ottawa on Monday
the fourteenth day of November A.D.
1853 the same being the second
Monday in said month of November
of the twenty eighth year of American
Independence.

Present The Honorable Edwin S. Seland ^{Judge} Presiding
" Philo Lindley Clerk
" W. H. L. Wallace State's Attorney
" Richard Thorne Sheriff.

Thompson & Williams }
 vs. } Replevin -
 Richard Charlesworth }

Herefore, to wit: on June 16th A.D.
 1853, said plaintiff filed in the
 office of the Clerk of the Circuit
 Court in & for said La Salle County,
 his plaint in the words & figures following,
 to wit;

State of Illinois } Circuit Court thereof
 La Salle County } ss. to November term
 thereof A.D. 1853.

Thompson & Williams }
 vs. } In Replevin.
 Richard Charlesworth }

The plaintiff complains of the
 defendant for that the said plaintiff
 was on the first day of June A.D.
 1853, at the County aforesaid, the owner
 and entitled to the immediate possession
 of three certain canvass oil paintings
 of the value of twenty five dollars,
 each one of which paintings is about
 two feet square, the first of which is
 the representation of a miser grasping
 a bag of money; the second of which
 is the representation of Sportsman
 leaning on a pair of bars, and having
 a gun and two dogs; and the

Plaint

third of which is the representation
of a sea Captain with a cap on his head
and a mug of beer in his hand, together
with the frames of said pictures, and that
the said defendant refuses to
surrender possession of the same to
the plaintiff although requested so
to do. He therefore prays that the
same may be replevied out of the
possession of said defendant by the
Sheriff of said County & that the
defendant may be summoned to
answer the said complaint - &c.
James Strain
his attorney.

And on said June 16th 1853 said
plaintiff filed his affidavit in said
Office, which affidavit is as follows, viz:

State of Illinois
La Salle County } ss.

Thompson E. Williams
of lawful age being duly sworn according
to law deposes and says that he is
the owner of the following described
property, to wit: one canvass oil painting
representing a miser grasping a bag
of money - said painting being about
two feet square, one canvass oil
painting representing a sportsman

Original Affidavit

leaning on a pair of bars & having a
gun ~~and~~ two dogs; and one
Canvass painting, representing a
Sea Captain with a cap on his head
& a mug of beer in his hand, both
of the latter being about two feet
square; and deponent further
states that the said pictures 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 the said
deponent liable to execution or
attachment.

Subscribed & sworn to } Thompson E. Williams
before me the undersigned }
a Justice of the Peace }
in & for the County of }
State aforesaid - }

J. V. Swarthout J. P. Seal

And on said June 16th 1853, a paper
in the words & figures following, was
filed in said office, viz;

State of Illinois } Circuit Court
La Salle County } Term of November
1853

Thompson E. Williams }
vs. Richard Charlesworth } On appeal

painting representing a sportsman
leaning on a pair of bars and having
a gun and two dogs, and one
cannass painting representing a
sea captain with a cap on his head
& a mug of beer in his hand, both
of the latter being about two feet square
of the value of Seventy five dollars.
We therefore command you that
if the said plaintiff shall give
you bond with good & sufficient
security in double the value of
said goods & chattels to prosecute his
suit in this behalf to affect and
without delay & 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 same to be replevied
and delivered to said plaintiff
without delay, and that you also
summon said defendant to be
and appear before the Circuit
Court of said County on the first
day of the next Term thereof to be
held at the Court House in Ottawa
on the 14th day of November next,
to answer said plaintiff in the
premises, and have you then and

Writ of Replevin

There this writ-with an endorsement
Thereon as to the manner in which
you may execute the same together
with the bond which you shall have
taken from said plaintiff as before
commanded before executing
this writ.

E. S.

Witness Philo Lindly Clerk
of our said Circuit Court
& the Seal thereof this
16th day of June A.D. 1853.
P. Lindly Clerk

The following endorsements are upon
the back of said writ-viz:

"Executed this writ-by taking the within
described paintings and delivering
them to the within named J. E. Williams
& reading this writ-to the within named
defendant.

R Thorne Sheriff
W. H. Valentine J. J. S.
June 17/53 "

and "Filed July 26 - 1853.

P Lindly Clerk."

And on the 26th day of July A.D. 1853,
a paper in the words & figures
following was filed in said office,
viz;

Know all men by these presents,
that we Thompson E. Williams and
~~Edwin R. Moffatt~~ are
Herman Baldwin

Bond
held and firmly bound unto Richard
Thorne Sheriff of La Salle County,
Illinois, in the sum of one hundred
and fifty dollars lawful money,
for the payment of which well
and truly to be made we bind
ourselves, ^{our} heirs, executors and adminis-
trators firmly.

Witness our hands and seals, this
16th day of June A.D. 1853.

The condition of this obligation is
such, that whereas the said
Thompson E. Williams has this day
sued out a writ of replevin against
Richard Charlesworth.

Now, if the said Thompson E.
Williams shall prosecute his said
writ to effect and without delay,
and make return of said property if
return thereof shall be awarded,
and save and keep harmless
the said Sheriff in replevying said

property, then this bond to be void.

Thompson E. Williams ESB

E R Moffatt ESB

Herman Baldwin ESB

And afterwards, to wit, at said November term of said Court, the following proceedings were had, viz; Saturday November 19th 1853.

Thompson E. Williams }
vs. } Replevin.
Richard Charlesworth }

This day the plaintiff by strain his attorney enters a motion for leave to file an amended affidavit herein, and also to substitute other security in the replevin bond for Edwin R. Moffatt.

(And on the 12th day of December A.D. 1853, the following affidavit was filed in said Court, viz; -

State of Illinois } Circuit Court thereof
La Salle County } November Term A.D. 1853

Thompson E. Williams }
vs. } Replevin.
Richard Charlesworth }

Mary C. Moffatt as the agent of said Thompson E. Williams after being duly sworn according to law, deposes and says that at the time

Motion to change
Security, & file Amended affidavit

Amended or New Affidavit

I bring out the writ of replevin in
the above entitled cause, and at the
time of the making of the affidavit
for said writ, the said Thompson
E. Williams was entitled to the
immediate possession of the
goods and chattels described in
the affidavit of the said Thompson
E. Williams made and filed, by said
Williams for the purpose of
procuring a writ of replevin in
the above entitled cause.

Subscribed & sworn } Mary O. Moffatt
to before me the under-
signed a Justice of the
Peace in and for said
County & State this
tenth day of December }

A.D. 1853-

Daniel Cosgrove J.P. (Seal)

November Term 1853.

~~Thursday~~ Friday, December 8th 1853

Thompson E. Williams }
vs. } Replevin.
Richard Charlisworth }

On motion of
defendant by Jenkins his attorney, the
plaintiff is ruled to file his declaration
herein by to-morrow morning; and the
plaintiff comes by Strain his attorney
& enters a motion for leave to substitute
Herman Baldwin as security for costs
herein, in place of E. R. Moffatt, which
motion is granted by the Court.

Change security for costs

November Term 1853.

Monday December 12th 1853.

Thompson E. Williams }
vs. } Replevin
Richard Charlesworth }

This day the defendant - Jenkins
his attorney enters a motion to dismiss
this suit.

Motion to Dismiss suit

And on the 9th day of December A.D.
1853, said Plaintiff filed his
declaration in said Court in the
words & figures following, viz;

State of Illinois } Circuit-Court thereof
La Salle County } Nov. Term A.D. 1853.

Thompson E. Williams }
vs, } Replevin.
Richard Charlesworth }

Thompson E. Williams Plaintiff
complains of Richard Charlesworth
defendant in a plea of replevin, for
that the said Richard Charlesworth
on the sixteenth day of June A.D. 1853,
at the County aforesaid was possessed
of certain goods and chattels of the
said Thompson E. Williams, to wit;
one canvass oil painting representing
a miser grasping a bag of money
said painting being about two
feet square - one certain other canvas
oil painting representing a sportsman
leaning on a pair of bars, and having
a gun and two dogs - and one certain
other canvass oil painting representing
a sea captain with a mug of beer
in his hand and a cap on his head,

Declaration

both of which last described paintings
are about two feet square together
with the frames belonging to said
pictures, to be delivered to the said
Thompson & Williams when he the
said Richard Charlesworth should be
thereto afterwards requested; Yet the
said Richard Charlesworth though
requested so to do, has not delivered
the said goods and chattels nor
any part thereof to the said Thompson
& Williams, and so the said
Richard Charlesworth wrongfully
detains the same from the said
Thompson & Williams to his
damage of twenty five dollars,
and therefore he sues se.

By J. Strain his atty.

And on the 14th day of December A.D.
1853 said defendant filed his pleas
in said Court in the words & figures
following, viz.

Richard Charlesworth }
vs. } In reply.
Thompson & Williams }

And the said Richard

Plea in answer

Charlesworth comes and defends &c. and says that he does not wrongfully detain the goods and chattels in Plaintiff's declaration mentioned or any part thereof in manner and form as therein alleged - and of this he puts himself upon the country

By D. P. Jenkins his atty.
And the said Thompson & Williams
doth the like by his atty.

And for a further plea in his behalf the said defendant comes and says the said Plaintiff ought not to have his aforesaid action against him, because he says that the said paintings and the frames belonging to the same in the said declaration mentioned at the said time when &c. were the property of the defendant and not of the plaintiff, and this he is ready to verify, wherefore he prays judgment if the said Thompson & Williams ought to have his aforesaid action thereof against him &c.

D. P. Jenkins
Atty. for deft.

Plea Property in Deft

And on said December 14th 1853,
said plaintiff filed his replication
in said Court in the words & figures
following, viz;

Thompson E. Williams } LaSalle County
vs, } Cir. Court No.
Richard Charlesworth } Term A.D. 1853.

Replication
And the said Thompson E.
Williams as to the plea of the said
Richard Charlesworth secondly above
pleaded in bar, says, that he ought
not to be barred of his action aforesaid,
because he says, that the said goods
and chattels in the said declaration
mentioned, at the said time when
were the property of him the said
Thompson E. Williams and not of
the said Richard Charlesworth as the
said Richard Charlesworth in his said
plea hath alleged - and of this he puts
himself upon the country &c.

And the said Richard Charlesworth
doth the like

by J. Strain his atty.

November Term 1853.

Wednesday December 14th 1853.

Thompson E. Williams }
vs. } Replevin.
Richard Charlesworth }

This day again comes the Plaintiff
by Strain his attorney, and the defendant by
Enkins his attorney & thereupon came
the following Jurors of a Jury to wit; B. J.
Woodbury, Miles Rouse, O. P. Perdue, Platt
Thorn, J. E. Shaw, Amos Thorn, John E. Waterman,
A. B. Smith, Uri Carter, J. Lewis, J. H. Frudenburg
& J. J. Howland, who are duly elected, tried
and sworn to well and truly try the issues
herein according to the evidence, and after
hearing the evidence, the jury retire to
consider of their verdict, and after due
deliberation thereon had, return into
Court the following verdict to wit.
We the jury find the issues therein for the
Plaintiff and assess his damages at
one cent. Thereupon defendant's attorney
enters a motion for a new trial.

Trial & verdict

November Term 1853.

Monday December 19th 1853.

Thompson E. Williams }
vs. } Replevin.
Richard Charlesworth }

This day again came the parties hereto by their attorneys, and after hearing the arguments of Counsel, it is ordered that the motion for a new trial be overruled & that no writ of Habeas Corpus issue herein.

It is therefore considered that the plaintiff have and recover of the defendant the said sum of one cent for his damages assessed by the Jury aforesaid, together with his costs and charges by him herein expended and that he have execution therefor. Thereupon the defendant entered a motion in arrest of judgment, which is overruled by the Court.

No further trial overruled

Judgment

(Bill of Exceptions)

Richard Charlesworth

vs.

Thompson E. Williams

Replevin.

Be it remembered that on this twelfth day of December A.D. 1853 and at the November term of the Circuit Court, came the defendant in this cause by his attorney and moved the Court to dismiss this suit for the reasons following to wit: That the original affidavit on file in this cause is insufficient in this to wit: -

That it does not state that the plaintiff is entitled to the possession of the property about to be replevied -

That it does not charge the defendant with wrongfully withholding it, or refusing to give it up.

That it does not state that the property is of any value.

That it is without date, and nothing to show when it was made.

That the new affidavit filed as an amended affidavit in this cause during this term is unauthorized, informal and insufficient.

That it does not appear to be sworn to by any one authorized by the plaintiff to make the oath -

That it does not appear to be sworn to by any one authorized to administer oaths

Moved by Dr. to dismiss suit

in the County of La Salle and State of Illinois =
The said paper purporting upon the face of
it to have been executed within said County
"State of Illinois }
La Salle County } ss

Thompson C. Williams
of lawful age being duly sworn according
to law deposes and says that he is the
owner of the following described property =
to wit - one canvas oil painting repre-
senting a miser grasping a bag
of money - said painting being about
two feet square; One Canvas oil
painting representing a sportsman
leaning on a pair of bars and having
a gun & two dogs; and one canvas
painting, representing a sea captain
with a cap on his head and a
ring of keys in his hand, both of
the latter being about two feet
square; And deponent further
states that the said pictures have
not been taken for any tax - assess-
ment 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 deponent
Subscribed and Thompson C. Williams
sworn to before me the
undersigned a justice of
the peace in & for the County
& State aforesaid } J. V. Swarthout J.P.
Filed June 16. 1853. Plaidly C.P.

Copy of Original Affidavit

"State of Illinois } Circuit Court thereof
La Salle County } November term A.D. 1853

Thompson E. Williams }
Richard Charlesworth } Replevin

Mary O. Moffatt, as the agent of said
Thompson E. Williams, after being duly
sworn according to law deposes and
says that at the time of suing out the
writ of Replevin in the above entitled
cause, and at the time of the making
of the affidavit for said writ the said
Thompson E. Williams was entitled to
the immediate possession of the goods
and chattels described in the affidavit
of the said Thompson E. Williams made
and filed by said Williams for the
purpose of procuring a writ of
replevin in the above entitled cause

Subscribed & sworn Mary O. Moffatt
to before me the undersig=
ned a justice of the peace
in and for said County
and State this tenth day
of December A.D. 1853

Daniel Cosgrove J. & Seal
Filed Dec 12th 1853

Plindley CR "

Copy of new Affidavit

of (Bill of Exceptions)
The Court upon consideration of the facts
overruled the Defendants motion to
dismiss the suit and granted leave
to the attorney of the plaintiff to withdraw
said new or amended affidavit for
the purpose of getting the signature to
the same of one Daniel Congrove a Justice
of the peace of ~~said~~ La Salle County -
who it was alleged by Counsel for
the Plaintiff had administered the
oath - and who had attempted it
was alleged to sign his name in full
but had written only a part of it so
that it did not sound or look like
his name - To which decision of the
Court in overruling Defendants
motion and granting the leave
aforesaid The defendant by his attorney
excepts

Be it further remembered that on
this fourteen day of December A.D. 1853
this cause came on for trial - and
a jury being empanelled to try the
cause under the direction of the Court
the plaintiff to maintain the issue
on his part - Called as a witness one
E. R. Moffatt - To the competency of which
witness to testify in the cause the defend-
ant objected on the ground that said
witness had been the original and
only security in the bond given to the
Sheriff in this cause to serve and

Overruling Mo to Dismiss Suit & granting
leave to get Congrove signature to affidavit

and keep harmless the said sheriff &c
= and that his name had been
erased from said bond under an
order of the Court permitting the plaintiff
to substitute the name of Herman Baldur
as security in lieu of the said Moffatt
with the consent of the Sheriff (the said
Sheriff assenting thereto) which objection
the Court overruled and permitted
the said witness to testify and give
evidence in the cause generally. So which
decision of the Court, overruling said
objection. The defendant by his attorney
excepts - The testimony of said witnesses
was as follows, to wit - Ques - Do you
know of the Plaintiff's demanding of
the defendant certain paintings, \$500
when? Ans I do - I think it was the
day before this suit was brought I heard
the plaintiff demand of the defendant -
certain paintings which plaintiff said
belonged to him & which were the same
as described in the declaration - So
which the defendant replied - that if he had
any paintings then he must get them - I did
not see any paintings at that time - but
have seen in defendant's possession since
seven or eight years since paintings which
answered very nearly to those described
in the plaintiff's declaration - and
I rather think I saw them about
eight months since but am not certain

Certain - The witness on his examination
in chief also stated that defendant refused
to give up the paintings demanded but
on cross examination stated that he
inferred the refusal from Defendants reply
which has already been given and
from the manner in which said
reply was made

The plaintiffs attorney then offered in
evidence the Depositions of Mary D Moffatt
to wit:

Thompson C. Williams

vs. Richard Charleworth

} In Replevin
In La Salle County
Circuit Court Do
Nov Term A.D. 1853

It is agreed between the parties to the
above suit that the defendant waives
the want of notice, in taking the
depositions of Mary D. Moffatt to be
used in evidence on trial of said cause
- And it is further agreed that in case
the said Mary D. Moffatt shall become
a perfectly competent witness before the trial
of this cause, then the said Defendant
waives any incompetency on the part
of said witness that may exist, at
the time of the taking said deposition
- And nothing is to be considered waived
by said defendant relative to the legality
of said deposition except what is

herein specifically named
James Strain } W. P. Jenkins
Atty for Plff } Atty for Def
November 18th 1853 }

Deposition of a witness taken before me
James U. Swarthout a Justice of the Peace
in and for the County of La Salle, and
State of Illinois, on the 18th day of November
A.D. 1853, at the office of James Strain in
La Salle by consent of parties to be read in
evidence on behalf of the plaintiff in a
certain Action of Replevin now pending
in the Circuit Court of the County of
La Salle in the State of Illinois, wherein
Thompson William is plaintiff and
Richard Charlesworth is defendant.

Mary O. Moffatt of lawful age
being first duly sworn as hereinafter
certified, deposes & says -

1st Interrogatory, What is your name - age and
place of Residence?

Answer - Mary O. Moffatt my residence is
La Salle La Salle County, & State of Illinois
my age is 32 years

2nd Are you acquainted with the parties
plaintiff and defendant in the suit above
described in the caption to this deposition,
if so how long have you known them,
or either of them?

Answer

I am acquainted with the plaintiff and defendant. have been acquainted with the plaintiff twenty eight years and have been acquainted with the defendant about twenty two years. as near as I can recollect.

38th Interrogatory State what you ^{may} know of any thing about certain oil paintings that once belonged to your father now deceased. Describe the pictures - & state if you know where they are now?

I know that my father had three oil paintings and that my Brother has them now in his possession. One is a representation of a miser with white hair a red turban on his head & has a purse of money in his hand the next is represents a sea captain with the same head dress has a mug of beer on a stand and a pipe in his mouth & smoking the next is one as a sportsman has a gun in his hand and is in the act of climbing over the fence has a dog set at his feet and a dog on the other side of the fence looking through at the other.

4th Interrogatory - Where were these pictures at the time of your fathers death?

Answer. They were in my fathers possession up to the time of his death.

3th Interrogatory, Who had them in possession for some time, & how long, after the death of your father?

Answer, My Mother had them in her possession until she married Mr Charlesworth

6th Interrogatory - Did your father, at the time of his death have any other oil paintings of so, what were they?

Ans - he had two others one was the representation of himself and the other was a fruit piece

7th Interrogatory - What became of these last named paintings at the time of his your fathers death -

Ans - My Mother had them with the others (objected to by the Counsel Deft)

8th Interrogatory - When and where was your Mother married to the defendant Charlesworth?

Answer She was married to Mr Charlesworth about the year 1828 or 29 in St Clairsville Ohio,

9th Interrogatory - State what you may know of any distribution or disposition of the paintings above spoken of, by your father or mother before the death of either or both of them?

Ans, I do not know that my father made disposition of any of them

my Mother gave the three first named to my Brother and the two last named to myself (Objected to by the Def)

10th Interrogatory -

Did said paintings have frames on them at the time of your mothers marriage to the defendant or not?

Ans. they did not, one of them my fathers portrait had a frame

11th Sub. How long had said paintings been in your Fathers family before his death?

Ans. I do not know my father had them at the time that they were married I have frequently heard my mother say So (Objected to a part of the above by Def)

12th Sub.

How were these paintings regarded in the family?

Answer they were regarded as family paintings belonging to my brother and myself (Objected to by Def)

13th Sub.

During the time the marriage relation existed between your mother & the defendant - how were said paintings regarded by your mother & the defendant?

Ans. they were regarded as property belonging to my Brother and myself that is by my mother and the defendant

14th Interrogatory -

Who put the frames on said paintings & when -?

Ans. I do not know who had it done
the frames were put on in the year of 1832
to the best of my recollection

15th Q^y -

Do you know who furnished the funds
to have them framed?

Ans. I do not

16th Q^y -

How often have you heard the defendant
speak of said paintings as being family
paintings and as being the property of yourself
and brother - the plaintiff?

Ans. I have frequently heard the defend^t
say that they paintings were my brother
and my own I do not know how often,

17th Q^y -

When did you get possession of the
paintings given to you - and who gave them
to you?

Answer I came into possession of one of them
a year ago last October Alon Charlesworth the
defend^t came to my house and said he had
brought me the painting I was sick at the
time I came in possession of the portrait
of my father some time before I think
Bechard Charlesworth brot it to my house

18th Q^y - Did you ever know of the defendant previous
to your mother's death claiming said
pictures as his property?

Ans. I never did hear him the defend^t
claim the pictures as his own

19th Interrogatory.

How long did the defendant
your mother and family remain in Ohio
after the marriage of the defendant and
your mother?

Ans. As near as I can recollect they removed
to Virginia and lived there between two and
three years and then they moved back to
Ohio again after they were married about
three they moved to Virginia after they
came back to Ohio they stayed about ten
years

20th Int-

According to the family arrangement
in regard to said paintings spoken of by you
when were you and your brother - the plaint-
iff to have possession of said paintings?

Ans - We were to get them at my Mother's
death (objected to by Defth)

21st Is your mother dead, if so, when did
she die?

She is dead she died on the 27th day of last
November

Cross Examined by Defth

1st Sub. Please state whether the paintings you have
been testifying in relation to - came into the
possession of Defth on the marriage of your Mother
with Defth. If yea state whether they have always
since remained with him until this year
Answer they never was in his possession as his
property they were in the house but not
his

Sub 2 Did Deft remove said paintings from place to place with his personal property as he removed his family - when he changed his places of residence at his own expense

Answer they were removed with the rest of the things

Sub 3 Do you recollect the Deft's having said pictures framed in Wheeling Va in or about the year 1832 if you state whether said pictures frames remained on said pictures the last time you saw them

Answer they were framed there in the year of 1832 and the frames were on the pictures the last time I saw them

Sub 4 Have you seen them since the commencement of this suit

Answer I have

Sub 5th You say in answer to the 16th Sub on direct examination that you have frequently heard defendant say that the paintings were your Brothers and your own = } Please state now whether you recollect distinctly of his ever saying so = & if so when & where

Answer.

I recollect very well when the pictures were mentioned in any way they mentioned as belonging to my brother and myself I do not recollect any distinct conversation at any particular time

Sub 6th Please state how the paintings referred to was kept in the house of the defendant during the 23 years they were in his house - were they generally hung up on the walls

of the parlor or sitting room or were they
packed away in the particular custody of
yourself & brother or either of you
Answer

They were hung up on the wall in
the house in the Parlor or sitting Room
State of Illinois } Mary O. Moffatt
La Vall County }

I James V. Swarthout
a Justice of the peace in and for said
County do hereby certify that Mary O. Moffatt
was by me sworn to testify the truth the
whole truth and nothing but the truth and
that Deposition by her subscribed as above
set forth was reduced to writing the
undersigned a Justice of the peace and
was taken by agreement of parties at
Dated this 18th Day of November 1853

James V. Swarthout
Justice of the peace

Filed Nov 23^d 1853

P. Lindley, Clerk

To the admission of which the defendant objected
- 1st because she is admitted to be the wife
of the witness E. R. Moffatt who was security on
the replevin bond filed in this cause

2^{dly} because no sufficient certificate
appears to said deposition, and because
it is otherwise informal and illegal - which
objections were overruled by the Court and
the said Deposition read to the jury -
to which decision of the Court the defendant

by his attorney excepts - Here it was admitted
as a fact without proof that the division made
of the five paintings referred to by Mary O. Moff-
att in her deposition - by the Mother of the plaintiff
took place about seven or eight years since
- And here the plaintiff rested his case -
And the defendant producing no evidence
rested his side of the case also - Whereupon
the court adjourned for dinner - And
now upon the calling of the court the
plaintiff recalled the Witness E. R. Moffatt
and asked him this question - To wit Do you
know where the Father of the plaintiff died, to
which witness answered - I have heard them say in the family that he died
in Ohio and I have seen a record of it in
the family Bible that he died there I do not
know from my own knowledge when he
died Witness also testified that the only
children of said deceased were his witness
wife & the plaintiff and that the widow
of said deceased had had no other
children there were no children of a
deceased child To which question and
answer the defendant by his attorney objected -
1st because the cause the case had been closed
on both sides and submitted to the jury, 2^d
because the question introduced entirely
new subject matter - totally disconnected
with the subject of his previous examination
in chief And 3^{dly} because the evidence
was hearsay and secondary in its character
& not the best in the power of the plaintiff

to produce - Which objection the court overruled and permitted the evidence to go to the jury. To which decision of the court in overruling said objection the defendant by his attorney excepts. The attorney for the plaintiff then offered to prove what the laws of Ohio were by offering as evidence a book purporting to be the statutes of Ohio - which book was bound - To the introduction of the contents of which book as proof the defendant by his attorney objected. The plaintiff's attorney then proposed to examine the attorney for the defendant for the purpose of proving that said book was a bound volume of the statutes of Ohio, To which proof the defendant by his attorney objected. The court overruled the objection and ordered him sworn, To which decision of the court the Deft by his attorney excepts.

The said attorney for the defendant (D. P. Jenkins) testified in substance as follows to wit - do not know whether said book contains the statutes of Ohio or not - never examined it to my present knowledge - never read a line in it. The plaintiff's attorney then called as a witness to prove the same thing one O. C. Gray - to the introduction of whom the defendant renewed his objection which objection the court overruled & left excepts. The court received his evidence - which was as follows to wit in substance (He thought the book was

the statutes of Ohio on crop examination stated
- He did not know - had never before seen that
book that he knew of - Had not read a line in
it Thereupon the court directed the witness to
look through the book - which the witness did
by opening and closing the book hastily
in several places not occupying more
time in the examination of said book
than from one to two minutes - when
said witness stated he thought there was no
doubt but it was the statutes of Ohio, he
was an attorney & had practised law in Ohio
- Thereupon the court overruled the objections
of defendant and permitted the attorney for
the plaintiff to read from said book to the
jury & to the court the following which
purported to be to wit "An Act to provide
for the settlements of Estates of deceased
Persons - Passed ^{over the spot} March 23rd 1840 - Sections
43 and 44 of said act - Also what
purported to be an act regulating
descents and the distribution of Personal
Estates, Passed February 24th 1831, took
effect June 1st 1831 Sections 2nd 3rd 4th 5th
and 6th

To all of which the defendant by his attorney
objected. The court overruled the objection
To which decision the defendant by his
attorney excepts

Here the plaintiff submitted his case
to the jury - and the defendant without
introducing any evidence did the same
It also appeared in evidence that the
demand made by the plaintiff was after
the death of his mother & before the bringing
this suit And the above and foregoing
was all the testimony introduced on the trial
of said cause - The plaintiff by his attorney
then asked the court to give to the jury the
following instructions, to wit:

"Given by the court"

"Of the jury believe from the evidence that
the father of the plaintiff being the owner of the
paintings in the declaration mentioned
died in Ohio leaving a widow and the
plaintiff and the witness Mary O'Neiff
his only children, and also that the said
widow died before the bringing of this
suit & that after the death of said widow
& before the bringing of this suit the plaintiff
demanded of the defendant the pictures
aforesaid & the plaintiff refused to
deliver them on such demand and that
there were five paintings so owned
by said father at the time of his decease
and the plaintiff and his sister divided
said five paintings the plaintiff to
have the three in the declaration mentioned

Pliffs Instruction

and the sister to have the other two, and by agreement between the widow & said two children the widow was to have possession of said paintings till her death, and if by the law of this the personal estate of a deceased person descends to his children, and no other person except his widow & children are entitled to said personal property and the widow has no more than a life estate the jury should find for the plaintiff and if under the above state of facts the defendant being the husband of said widow framed said pictures the plaintiff can recover the frames also"

To the giving of which instructions the defendant by his attorney objected. The court overruled the objection & read the same to the jury - To the giving of which by the court the defendant by his attorney excepts. The defendant by his attorney then asked the court to give to the jury the following instructions to wit:

Richard Charlesworth }
attys } Replevin
Thompson E. Williams }

That the five several paintings referred to in the depositions of Mrs Moffatt as having been left by plaintiffs father at the time of his death & were personal property, and in the absence of any proof tending

1st
Refused

to show that some disposition had been made of them by plaintiff's father before his death. The jury are instructed that said paintings become on his death as assets of his estate.

2^d That if the jury believe from the evidence said paintings become assets of the estate of plaintiff's father - Then they must find in favor of the defendant as plaintiff would not be entitled by law to maintain this action in his personal capacity.

3^d That if the jury believe from the evidence - That said five paintings remained in the possession of Plaintiff's Mother after the death of his father up to the time of her intermarriage with the Defendant - And then came to the possession of the Defendant without any previous disposition having been made of them and they believe also, from the evidence before them that said five paintings referred to by Mrs. Moffatt in her deposition - become the property of Plaintiff's Mother, his sister Mrs. Moffatt, and himself upon the death of Plaintiff's father subject to the rights of creditors - and no creditors interfered - and they believe further that said paintings come into the possession of ^{the} Defendant under such circumstances. Then they are instructed that by operation of law the Defendant became the legal owner of the interest whatever that might be of the Mother of

Refused

Refused

4th the plaintiff in said paintings"

They are further instructed by the Court that if they believe from the evidence before them - that there was an understanding existing in the family of the defendant, that the plaintiff and his sister Mrs Moffatt should have said paintings upon the death of their mother and they should believe the defendant assented to such an arrangement - and further that the death of plaintiff's mother occurred before the commencement of this suit - still the plaintiff cannot recover in this action unless it is proved that said understanding or arrangement in relation to the disposal of said paintings amounted to an agreement between the parties and was based upon a good and valuable consideration or the defendant voluntarily parted with the possession of said paintings in carrying it out - they are instructed, that if they believe from the evidence that it was a mere understanding existing in the family of the defendant and there is no proof of any valuable consideration for it they will find for the defendant unless as before stated he also parted with the possession of said paintings for the purpose of carrying out the arrangement - and which must be proved before the jury are warranted

Refused

5th in finding it to be so

Refused
they believe
and they

Further if the jury believe from the evidence that the defendant acquired a legal or equitable ~~right~~ interest in said paintings by his marriage with the Mother of the plaintiff = and ~~they~~ ^{believe} he had the actual possession of said paintings and they also believe he acquiesced in an arrangement made by the mother of the plaintiff to dispose of said paintings to the plaintiff and his sister Mrs Moffatt - yet if he received no good and valuable consideration for his assent and did not voluntarily part with the possession of said paintings in carrying it out = such assent would not bind him & the plaintiff could not maintain this action against him to recover the possession

6th

Given

The jury are further instructed that if they should believe that defendant did part with the possession voluntarily of two of the five of said paintings without a good and valuable consideration it does not prejudice him in law in retaining possession of the other three

Refused

7th

The jury are further instructed that if they believe the property in said paintings to be in the plaintiff Mrs Moffatt and the defendant or in the plaintiff and defendant they will find in favor

2147-12

of the defendant unless the ~~defendant~~ ^{plaintiff}
has proved aside from his title a right
to immediate possession at the time of the
commencement of this suit

9th

Given

The jury are further instructed, that
in this case the law requires the
plaintiff to recover if at all on the
strength and perfection of his own
title and not upon the weakness
and insufficiency of the defendant's
And the question is has the plaintiff proved
a good title or a good legal right to the
immediate possession of said paintings
and the frames belonging to the same
at the time this suit was commenced

9th

Refused

10th

The jury are further instructed That
if they believe the defendant had possession
of said paintings at the time the frames
were attached to them - and no proof to
show who had it done the presumption
of law is the defendant had it done and
that they belong to the defendant

Given

The court is asked to instruct the
jury That in order for the plaintiff
to recover in this action, he must
prove substantially, that he made a
demand of the defendant and that
the defendant refused to give up
possession of said paintings

unless they should believe from the evidence
in said cause that the defendant was
wrongfully in possession of said paintings.

11th

They are further instructed that in considering
the proof of demand and refusal they will
consider the language used between the
parties and construe it in its natural
sense - and not take the inferences, or what
the witness understood to be the meaning,
as evidence.

They are further instructed that before
they can find in favor of the plaintiff, there
12th must be proof show that the defendant
was in possession of said paintings at the
time the demand was made for them
(if any such demand was made).

The Court thereupon gave to the jury
as desired the sixth, eighth, tenth, eleventh
and twelfth instructions asked for by Deft.
but refused to give the first, second, third,
fourth, fifth, seventh and ninth instructions
asked for. To which decision of the Court
in refusing to give the aforesaid instructions,
the defendant by his attorney excepted. The
jury then retired and in a short time
returned into Court with a verdict finding
for the plaintiff and assessing his
damage at one cent - and thereupon came
the defendant by his attorney, and entered

a motion for a new trial in this cause for the reasons following, to wit,

1st That the Court erred in permitting E. R. Moffatt to testify as a witness, he having been security in the Replevin bond filed in this cause, and otherwise interested.

2^d. In admitting the deposition of Mary O. Moffatt, it being admitted that she was the wife of the witness E. R. Moffatt and because she was otherwise interested, and because said deposition was informal and illegal.

3^d The Court erred in permitting the witness E. R. Moffatt to be re-examined in chief after the evidence in the case had been closed.

4th The Court erred in admitting as evidence the book which purported to be the Statutes of Ohio - without proof that they were what they purported to be.

Also in receiving the evidence of the witnesses Jenkins and Gray for the purpose of proving that said book was what it purported to be -

Also in permitting the Plaintiff's atty. to read to the jury what purported to be the laws of Ohio and applicable to this case - The 43 and 44 Sections of what purported to be an Act passed by the Legislature of Ohio entitled an "Act to provide for the settlement of estates of deceased persons, passed March 23rd 1840.

Also in permitting the Plaintiff's attorney to read to the jury as law and as applicable to this case the 2^d 3^d 4th 5th and 6th Sections of what purported to be an Act passed by the Legislature of Ohio, entitled an "Act regulating descents and the distribution of personal estates," passed February 24th 1831 - took effect June 1st 1831.

5th Because the Court erred in giving the instructions asked for by the Plaintiff to the jury -

6th Because the Court erred in refusing to give to the jury 1st 2^d 3^d 4th 5th 7th and 9th instructions asked for by the atty. for the defendant.

7th Because the verdict was against the law and the evidence.

8th Because there was no evidence before the jury tending to show that said paintings were in the defendant's possession at the time of demand made by the plaintiff.

The court overruled said motion for a new trial - to which decision of the Court in overruling said motion the defendant by his attorney excepts.

The defendant by his attorney then entered a motion in arrest of the judgment for the reasons following, to wit:

That the original affidavit filed in this case is insufficient in not stating that the plaintiff is entitled to the immediate possession of said paintings.

In not stating that the defendant wrongfully detains said property -

In not stating that said paintings are of some value -

And in not being dated.

That the new or amended affidavit is in fact a new affidavit & unauthorized by law -

That there is no evidence of the authority of Mary O. Clossatt to make said affidavit. It does not set forth that she is the agent of the plaintiff.

That it does not supply the defects existing
in the original affidavit.

The replication, or what purports to be
one, filed in this cause by plaintiff is
insufficient, in not being signed by
plaintiff or atty. and for various other
defects apparent upon the face of it.

Which motion in arrest
of judgment the Court overruled, and
ordered judgment to be entered in
accordance with the finding of the
jury - to which decision of the Court
in overruling said motion to arrest
the judgment herein, the defendant
by his ^{attorney} ~~testimony~~ excepts - And prays
the Court to sign and seal
this bill of exceptions and make the
same a part of the record in this
cause - which is done in open Court
at the term aforesaid by

E. J. Deland *Seal*

{ Judge of the 9th Judicial Circuit
of the State of Illinois,

State of Illinois } ss.
La Salle County }

I, Philo Lindley Clerk
of the Circuit Court in and for said
County, do hereby certify that the foregoing
is a true, full and complete copy of the
papers, proceedings and judgment in the
foregoing entitled cause, as the same
appear of record and on file in my
office.

In witness whereof, I have
hereunto set my hand and
the seal of said Court at
Ottawa in said County
this 31st day of May A.D. 1854.
P. Lindley Clerk

Richard Charlesworth
Plaintiff in Error

vs
Thompson & Williams
Defendant in Error

Supreme Court
At Ottawa
Indy Term
A D 1885

And now Comes the
said Richard Charlesworth and
says there ^{various and manifest} are errors in the within
Record ~~in this~~ to wit

- 1st That the Cir Court Erred in over ruling
Defendants Motion to dismiss the suit
And in allowing the New Affidavit to
be withdrawn from the files for the
purpose of procuring the signature
of Daniel Cosgrove - a Justice of the
Peace of La Salle County
- 2^d The Court Erred in admitting the
Evidence of the Witnesses E. R. Moffatt
& Mary O. Moffatt his wife
- 3^d The Court Erred in admitting the Testi
mony of D. P. Jenkins & A. C. Gory - their
not being the best evidence in the power of the party to produce
- 4th The Court Erred in permitting the
Attorney for the Plaintiff to read to
the Jury the sections named from
the Book purporting to be the Stat
utes of Ohio - without Proof that
they were such

5 The Court Erred in giving the instruction asked for by Plaintiff. And in refusing to give the 1st, 2^d, 3^d, 4th, 5th, 7th & 10th instructions asked for by Defendant

6th The Court Erred in Refusing to grant a new trial, = And in Refusing to arrest the Judgement.

D.P. Jenkins
Atty for Plff in Error

And Comes now the said Defendant in Error Thompson & Williams by his Attorney and says there is no error in the foregoing Records

By James Stearns
his atty

It is mutually agreed between the Parties Plaintiff & Defendant that this Cause may be filed in the Supreme Court at any time and be proceeded with as though it had been filed in proper time & service made on the defendant

James Stearns, for Defendant
D.P. Jenkins atty for Plff
in Error

140
Thompson & Williams
attys
Richard Chastanorth
Recor

Filed July 24, 1855
W. Deland CLK.

Payd by W. P. Linton
CLKs fee 8.12 1/2

Richard Leacockworth } In Supreme Court
vs } Error } At Ottawa
Thompson & Williams } Jan Term AD 1855

In commenting upon this case I shall not attempt to follow the case through pointing out all the errors that may seem to exist in the Record as the case progressed - But shall confine myself to a few points which I wish more particularly to call the attention of the Court - And
1st The original affidavit was admitted to be insufficient - And at the next term of the Court instead of amending the old affidavit, there is an other Person Comes forward & makes a new and distinct affidavit - and not claiming or pretending to be amendatory of the first & which when considered by its self is quite as deficient as the first

A 2^d affidavit sets forth the value of the property or that we wrongfully detained it - The new affidavit was not sworn to before any one authorized to administer oaths - as appears from the record And the Court permitted the same to be taken from the files - & the signature of Daniel Cosgrove a Justice of the Peace to be attached to it -

I have this remark to make in reference to these affidavits - That, If this Court will sanction such a course of practice - That it becomes a matter of little importance whether

we have a *prima facie* Case made out
on paper when we come into Court or
not - as we will be permitted to
make a Case after ~~Bar~~ *Bar* advisers
make their objections - I think such
a course of practice would be opposed
to law and the interest of the Court
Bar & Clients; and would result in
disastrous uncertainty, and Confusion
2^d Now as to the change of security in the
Bond for Costs - This Court has decided
that such a change may be made
and not one word said as to its being
necessary to have the Consent of the Sheriff
which would leave the inference that
such Consent was not necessary - Yet
who is there that doubts but what it
is necessary (In this Case such assent
was had) and I only refer to the Case for
the purpose of showing that it was not
made as clear as it might have
been - But we will admit that the
Security may be changed in a proper
manner and the old security become
a Competent witness - Will it not
have to be done if at all, by a new
bond or so amending the old one
that the new security expressly takes
upon himself the obligation to be res-
ponsible for the payment of all costs
from the time of the Commencement
of the suit

Otherwise does he render himself liable
for the payment of any amount ac-
cruing before he become the obligor

In this case the only alteration made was the striking out one name and the signing of an other after the case had been progressing some time - and considerable cost already accumulated. At the time of being sworn as a witness was not E. R. Moffatt bound for the payment of those costs that had accrued before his name was erased from the bond - If so did it not render both himself & wife Mary Moffatt incompetent to testify.

3^d In relation to the evidence in the cases I shall say but little as it is set forth fully in the records - That part in relation to the laws of Ohio - I wish to refer the Court to - The Book offered in evidence was what purported to be a Bound volume of the Statute Laws of Ohio - In Gales Statutes Page 287 sec 2^d will be found "The printed Statute books of the several States and Territories of the United States purporting to be printed under the authority of those States and Territories shall be evidence &c" Now compare this with the 1st sec chp 40 Rev Statutes of 1845 Page 232 - The phraseology is slightly changed leaving the substance as near as I can decide the same with the single and I might & would say singular exception (If I was going to contend that it had no meaning) of leaving out that very important word "purport." Does this change in the law by the Legislature shew that they intended to make it obligatory upon the Party producing such evidence.

to prove that it was what it purported to be - This seems to me a plain proposition and it argues nothing against the soundness of the Construction. To say it would be or might be inconvenient - Well suppose I am Correct - then what kind of proof must they furnish - I reply if the law makes no exception favouring them in this class of cases - they would have to furnish the same kind of proof required in other cases - to wit - the best in their power or that ought by their exertions to be in their power to produce. Well what would that be - Ans. It would be a copy of the acts they wished to use Certified to by the Secretary of State of the State of Ohio - or his Certificate. The book was what it purported to be and contained a correct copy of the original laws on file in his office - This I think is not only the law - but the law as practiced & followed by the Bar in preparing their cases for trial. And to give any other Construction would render useless & fruitless the distinction clearly made by the Legislature. And the courts generally in construing laws endeavour to harmonize rather than render them inoperative.

Now it will be perceived by the Court also that the Atty for the Plaintiff in the Court below - was rather unfortunate in his selection of what purported to be the law - which he read

at all in the Record to enlighten or having a tendency to show us what the laws of Ohio were at the time referred to - But supposing the law read by the Pltffs atty, was genuine - and properly admitted it simply tends to prove that the passages read was not the law at the time they wish to apply it - The simple fact of the Legislature passing these acts is prima facie evidence to show that such was not the law before - Now by referring to the instruction given by the Court in favour of the Plaintiff to the Jury It will be seen that the Court refers to the laws of Ohio as read (there being nothing else introduced on the time as such) to the Jury as being applicable in this case as showing to whom the title in the property in dispute passed.

This is not perhaps "the Court stating the law incorrectly" - But it was quite as bad or worse for the defendant - The Court below in this case admitted evidence that we contended was totally irrelevant & calculated to mislead the Jury - & then instructed the Jury that if they believed it they should find for the Pltff Now I contend that if this Court should think with me that the ^{the} sections of purported Ohio law read to the Court & Jury was improperly admitted - then there was nothing in evidence relative to what the law was in Ohio at the time of the Death of Pltff ^{3rd} Estate.

to the Court & Jury - The Court will see
by referring to the 8th Int, ^{& the answer thereto} on direct Ex-
amination of Mrs Moffatt - That Pltffs
Mother was Married to the Defendant
Charlesworth in the year AD 1828 or 29
Now I suppose we are to infer from the
testimony that Pltffs Father died before
his Mother Married Drft -

Pltffs Atty for the purpose of proving title
to the property in dispute to be in the Pltff
Williams in this case reads to the Court
and Jury what purports to be Certain
Sections of Certain Statutes passed
by the Legislature of the State of Ohio
& when we look to see when they purp
out to have been so passed we find
the first as follows "An act to provide
for the settlement of ^{estates of} deceased Persons
Passed March 23^d 1840 To take effect
Nov 1st 1840 - (At least 11 or 12 years
after the Death of Pltffs Father -

The second read was as follows
"An act regulating decents and the
distribution of Personal Estates,"
Passed February 24th 1831 Took effect
June 1st 1831 (At least 2 or 3 years
after the death of Pltffs Father,

Now these purported acts or rather
the sections designated in the Record
were read to the Court & Jury as being
the existing law of Ohio at the time
of the death of Pltffs Father and
under which the plaintiff claimed
property in the Paintings in dispute

Now the fact is we have nothing

Then the instruction referred to was unauthorized & wrong there being no evidence (legal) in the case to base it upon - See 2 Scam Pay 68
about ex Mrs Adams

And if the sections read was not improperly but properly received - Then they had a tendency to prove that such was not the law at the time of the death of Pltffs Father - a few years previous thereto. - There is just as much evidence in the case to show that the Widow upon the death of Pltffs Father became by the laws of Ohio at that time the exclusive Inheritor of the Property in dispute as there is to show that it (the title) descended in any other way.

But I do not wish to extend the argument - It will be perceived by the Court that by the instruction given for Pltff - The Jury are informed that they may give the Frames to the Paintings to the Pltff - upon what principle I am at some loss to determine as it was not pretended to be shown but that the paintings could very readily and easily be taken from the Frames without injury to either. And for any thing the proof shows to the contrary the Frames may have been worth much more than the Paintings - The Common sense of every man will tell him that the two may very easily be separated without injury to either - This is not the case of one man putting his wheat in with an others - In this case the property in severally is very easily distinguished and separated -

"Where the Court has given improper instructions to the jury or withheld such as are legal and appropriate when asked for. The proper course to adopt to enable the Court to correct the error and do justice to the Parties, is for Counsel to apply for a new trial," ~~the~~ ^{2d} ~~Seam~~, Page 814
Evans vs Lohr see 2^d do Page 850

Has the merits of this case been fully and fairly tried - I answer no! for to say we have had a fair trial ~~would~~ would be in effect saying that we have had the benefit of the law for our Protection - This case has been tried much upon the same principle that would be involved in a Criminal Case by reading the indictment and letting ^{the Prisoner} ~~the~~ put in his Plea of "Not guilty" - & then calling on him to prove it - If the Plaintiff was to recover the property in ~~this~~ dispute in this case - In order for him to do so legally, or fairly It was for him to prove his title to it and this he perfectly well understood & attempted so to do by his purported Ohio laws - but he was unfortunate in selecting - He produced something that did not, nor could not, be applied to his case; = This being so ~~and the~~ the proof seignally failing to show any title in him = we should have had the benefit of it - but we did not get it, but an erroneous instruction in place of it which not only took away ~~what~~ that which they failed

to prove title to and gave to them
but also that which the proof sh
owed affirmatively belonged to us
See also Sowing as on 1st June 70

Perhaps it may be ~~replied~~ ^{said by my opponent} that
in this case justice has been done?

I approve of the principle laid down
by the Court as I understand it, when
they say "If justice has been done
they will not disturb the verdict
or reverse the decision" (in subst
ance) I do not quote the exact langu
age = By this I understand the Court
below may have instructed the jury &
the jury may have decided against
the weight of evidence & the instructions
yet if it is apparent that justice has
been done the case will not be re
versed in this Court. But it cannot be
said that justice has been done when
an instruction has been given direct
ly calculated to mislead the jury
& they have accordingly gone astray
and rendered a verdict not warranted
by the evidence — By this word justice
I do not understand the jury or the Court
to be authorized to make law, or in
other words to decide a case according
to their abstract notions of justice —
independent of the law as made by
our Legislatures = The last point that
I wish to call the attention of the
Court is the fact that the Replication
is not signed by the Plaintiff, his
attorney or any one else — Is this

not error - Perhaps the Plaintiffs
Counsel might have asked leave
in the Court below to sign it, after
the objection was made on arrest
but he done neither - Therefore
the issue was not made -

In this case the Replication is not signed
but there is a Similitar added
by Plffs Atty & signed by him in his
own name as Atty for Drft

The want of a Similitar it seems
see 1st Vol Chit's Pleading Page 600 -
would be ground of error & setting
aside the verdict - Is an unautho-
rized Similitar any better than no
Similitar - The record shows said
replication to have been filed on the
day of trial & there is nothing in the
record showing or having a tendency
to show that Drfts Atty had any
notice of its being on file or belong-
ing to the Case -

I submit to the Court then that
there are various manifest errors
apparent in the record of this Cause
and that said Record does show
most conclusively that the Drft
has not had the benefit of a fair
trial & that he should have had
a new one awarded him

D. P. Jenkins
Atty for Appellant

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Charlesworth
appellant
vs

Williams
appellee

Error

Brief of Ref.

Filed July 24, 1858.
J. A. Kline Clerk.

D. P. Jenkins
Att'y

Richard Charlesworth Plaintiff in
Error vs Thompson & Williams
defendants in Error.

Argument on behalf of Def't, in Error

In reply to the first point made by
Counsel for Plff in Error it is suffi-
cient to say that the original affidavit
of the Plff below was a literal compli-
ance with the statute. and of course,
good. It states that the Plff below was
the owner of the property. The other
affidavit referred to by Counsel as having
been filed at the next Term of the
Court below was, as appears from the
record filed made an official
an amendment to the ^{original} affidavit.
and was made by Mary C. Moffatt, who
swears that she ~~is~~ makes the affida-
vit as the agent of Plff. This amend-
ment sets forth the additional fact
that the Plff was at the time of the
commencement of the suit entitled
to the immediate possession of the property.
The Court by reference to Chap. 88. Sec 3
R. S. p 434. will perceive at a glance
that if the original affidavit states
that Plff was the owner of the property

it is not necessary to state that he is then lawfully entitled to the possession, for the latter clause is in the alternative, "or"; This disposes of the first objection, and also of the second which is, "that the second affidavit was not sworn to before any person authorized to administer oaths," although the record shows that it was.

In reply to the 3^d objection, that "neither affidavit states the value of the property, or that it was wrongfully detained it" it is sufficient to say that the statute does not require such statements in the affidavit.

It is also objected that it may be possible the new security on the attachment bond for costs, and response bond may not be liable for the costs that had already accrued before the change of securities. It has been decided by this Court, and by other courts, that in such a case the undertaking of the new bondsmen has relation back to the time of the making of the bond-

In reply to the objection that the Statutes
of Ohio were improperly admitted in
evidence. it is sufficient to reply
that the record shows not only that
the volume introduced is supported to
be the laws of Ohio. but they were
proven in such positively by the
testimony of the witness Mr. Gray
who testified also that he had practiced
law in Ohio.

In relation to the question
of the sufficiency or the relevancy
of these laws to sustain the issue on
the part of the plaintiff. I reply
that the record shows that the volume
its self was introduced in evidence,
and whether the passages read from
it to the jury were sufficient to
sustain the plaintiff's case or not,
the jury had a right to (and in fact did)
carry said volume to their room as a part
of the evidence. Now I submit that
this Court cannot decide that there
is error in this part of the record, unless
the whole record shows that some necessary
part of the plaintiff's case depended
on a supposed law of Ohio which,
on an examination of said volume cannot

be found. For if the record shows that
the plaintiff claims to the property
rests upon such supposed law, and
that the jury had said volume in
evidence, the court could find no
such error unless upon inspection
it should be found that no such law
was to be found in said volume. For
the court will not, I think, presume
that the jury did not base their ver-
dict on such law, if such there be.
Now by reference to said volume
of Ohio laws, p. 42. Sec. 2nd of "an
ordinance for the government of the
territory of the United States northwest
of the river Ohio. it will be seen that
"the estates of resident and non resident
proprietors in said territory dying inter-
state, shall descend to, and be distributed
amongst their children &c, in equal
parts amongst them & by the 4th Sec.
of the Schedule to the Constitution
p. 40. said law was to continue in
force until repealed" &c. I ask the
~~gentle~~ counsel for the plaintiff in
error to point out the repealing
clause if he can,

In reply to the objection that the Statutes of Ohio were improperly admitted in evidence. it is sufficient to reply that the record shows not only that the volume introduced is supposed to be the laws of Ohio. but they were proved be such positively by the testimony of the witness Mr. Gray who testified also that he had practiced law in Ohio.

In relation to the question of the sufficiency or the relevancy of those laws to sustain the issue on the part of the plaintiff. I reply that the record shows that the volume itself was introduced in evidence, and whether the passages read from it to the jury were sufficient to sustain the plaintiff's case or not, the jury had a right to (and in fact did) carry said volume to their room as a part of the evidence. Now I submit that this Court cannot decide that there is error in this part of the record, unless the whole record shows that some necessary part of the plaintiff's case depended on a supposed law of Ohio which, on an examination of said volume cannot

It is said by Counsel for Plaintiff in Error that the Court erred in instructing the jury, if they found the property in the pictures to be in the plaintiff they should also give him the picture frames, because it is said, that the property is divisible, and that the case is not like that of a mingling of property.

I think it cannot be determined by the testimony, that the frames could be taken from the pictures without injury to them, even if it is admitted that the frames were put on the pictures by the defendant below. This however is ^{not} admitted, and I think the proof shows conclusively that the frames go with the pictures, and the presumption is that they were framed by the owners of the pictures. The proof shows that the defendant below never made any claim of property in the pictures, but on the contrary recognized them as belonging to the plaintiff below, his sister, and if while so recognizing property in them the defendant below should take the responsibility to place the frames on the pictures, he of course, could by so doing acquire no property in them.

But as the proof shows that the pictures were really in the possession of the mother (although in the house of the plaintiff in error) to be kept by her during her life, and then to be handed over to the defendant in error & to his sister, Mrs. Moffatt, the presumption is that they were framed

by the owners, who alone had a right to do so: and the plaintiff in error could not possibly acquire any property in the frames if he should officiously intermeddle and frame them. But even if the proof showed (which it does not) that the plff. in error had framed the pictures, the presumption in the absence of any other proof would be, that he was employed by the owners & paid for so doing.

The last point made by counsel for Plff in error is that the replication is not signed by the attorney for the plaintiff below. This last point will doubtless strike the Court as the last grasp at a straw of a drowning man. The record shows that J. Stain was attorney for the Plaintiff below; it shows that on the 14th of December 1833rd he filed his replication &c; and it shows the harmless clerical mistake that the plff's attorney added the similitur for the defendant below, and signed his name below the similitur as his "Atty" in stead of "J. Stain atty for plff." The whole record so clearly shows this to have been a mere clerical mistake, by which no one could be deceived, misled, or injured, that it certainly can not be a sufficient error, for which to disturb the proceeding.

1 Gil R 423 Too late to except on trial to depa-
sition for any cause that could
be eliminated by retreating it

[Faint handwritten notes, possibly bleed-through from the reverse side of the page]

Richard Charles -
vs. Wm. Hambridge in
Error. vs.
Thompson & Williams
vs. H in Error

Argument by Stair
for rect. in Error

Filed July 25, 1855

L. Deland Clerk.

J. Stair Counsel
for rect. in Error