No. 11838

Supreme Court of Illinois

Hamilton

vs.

Lowe

71641 7

James Hamilton
vs 44
Henry Lowe

44

11838

1858

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

TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF Lake GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Lake County, before the Judge thereof, between James Hamilton

plaintiff, and Harry Lowe

defendant it is said manifest error hath intervened, to the injury of the aforesaid James Hamilton 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 Third Tuesday in April A.D. 1857 ~~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.

WITNESS, The Hon. WALTER B. SCATES, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 18th day of April in the Year of Our Lord One Thousand Eight Hundred and Fifty-seven

L. Leland
Clerk of the Supreme Court.
By J. B. Rice Deputy

[11838-1]

James Hamilton
vs
Henry Lowe

Writ of Error

1

"United States of America
State of Illinois, Lake County } ss.

Pleas before the Honorable George Manierre Judge of the Seventh judicial Circuit of the State of Illinois,

At a term of the Circuit Court for the County of Lake in said Circuit, began and held at Waukegan, in said County, on the fourteenth day of January, in the year of our Lord one thousand eight hundred and fifty six and of the independence of the United States the eighteenth

Present, the Honorable George Manierre Judge,
John F. Guyles, Sheriff of Lake County
Attest, N. B. Cotes, Clerk,"

Be it remembered that on the second day of April said day being a day in Vacation between the January term and April Special terms of the Lake County Circuit Court for the State of Illinois in the year of our lord one thousand eight hundred and fifty six an affidavit was filed in the Office of the Clerk of said Court which said affidavit is in the words and figures following to Wit,

"State of Illinois
Lake County } ss."

James Hamilton being sworn says that fifty Cords of wood of the value of One hundred dollars the property of this deponent, was wrongfully taken by Henry Lowe, and that the same is now wrongfully detained by said Lowe, near the track of the Chicago & Milwaukee Rail Road ~~Company~~ in the Township of Deerfield in said County of Lake and that said wood was not taken for any tax, assessment or fine levied by virtue of any law of this State nor

[1838-2]

seized under any execution or attachment issued against this defendant, This defendant therefore prays that a Writ of replevin issue agreeable to law

Sworn and Subscribed before me this 2 day of April AD. 1856 } James Hamilton

A. B. Cotes Clerk "

And that afterwards to wit on the said second day of April AD. 1856, the same being a day in the Vacation last aforesaid a Writ of replevin, was issued out of said Circuit Court, which said Writ is in the words and figures following to wit

"State of Illinois } ss.
County of Lake }

The People of the State of Illinois
To the Sheriff of said County, Greeting

Whereas James Hamilton plaintiff complains that Henry Love defendant has wrongfully taken and does now wrongfully detain the following described goods and chattels to wit, fifty Cords of wood near the track of the Chicago and Milwaukee Rail Road, in the town of Deerfield in said County of Lake, of the value of One hundred dollars, from the possession of the said plaintiff

Therefore We Command you, That if the said plaintiff shall give bond with good and sufficient security in double the value of the said goods and chattels as required by law to prosecute his suit in this behalf to effect and without delay, and to make return of the said goods and chattels if return thereof shall be awarded, and to save and keep you harmless in replevying said goods and chattels, you cause the said goods and chattels to be replevied and delivered to said plaintiff without delay and also that you summon the said defendant to be and appear before the Circuit Court for said County, on the first day of the next term thereof, to be holden at Waukegan in said County, on the third Monday of April instant to

answer said plaintiff in the premises. And if the said goods and Chattels cannot be found by, or shall not be delivered to, you, then you are hereby Commanded to summon the said defendant, to appear at the time and place aforesaid before the said Circuit Court and answer to the said plaintiffs action for the recovery of the Value of the said Goods and chattels, and have you then and there this Writ, with an endorsement thereon of the manner in which you shall have executed the same, together with the bond (if any) which you shall have taken from the said plaintiff as before Commanded, before executing this Writ

Witness Augustus B. Cotes, clerk of said Court
And the Seal thereof at Waukegan in said County
this Second day of April A.D. 1856

Seal of Court

A. B. Cotes Clerk"

Which said Writ

was afterwards on the 19th day of April A.D. 1856 being a day in Vacation aforesaid returned into the office of the Clerk of the said Court with the endorsement of the Sheriff thereon which said ~~Which said Writ is~~ endorsement on the back is in the words and figures following to Wit,

"Executed this Writ by taking the property therein described & delivering the same to the within named James Hamilton he having with John Dunlap as surety previously executed to John F Guyles Sheriff of Lake County a bond in the penal sum of two hundred dollars according to the Statute in such Cases made ~~and~~ & provided and also by reading the same to and in the presence & hearing of the within named Henry Lowe this 8th day of April A.D. 1856.

John F Guyles
Sheriff
By H. N. Hinkley Deputy"

Fees, levy	50
service	50
Milg	1,00
Rptn	10
	$2,10"

Recd my fees of James Hamilton

[11638-3]

And that on the 7th day of April A.D. 1856 the same being a day in the Vacation aforesaid, James Hamilton by his Attorneys, Parks and Haines filed in the Office of the Clerk of the Said Circuit Court his declaration which said declaration is in the words following to Wit,

"State of Illinois }
Lake County Circuit Court, } ss. Of the April Special Term in the year of Our Lord One thousand eight hundred and fifty Six

Lake County p. Henry Lowe the defendant in this Suit was summoned to answer James Hamilton plaintiff in this Suit of a plea whereof he took the wood of the Said plaintiff, and unjustly detained the same against sureties and pledges until &c, and therefore the said plaintiff by Parks & Haines his Attorneys complains for that the said defendant on the tenth day of March in the year of Our Lord One thousand eight hundred and fifty Six near the track of the Chicago and Milwaukee Rail Road in the township of Deerfield in said County of Lake took the goods and chattels to Wit fifty Cords of Wood of him the said plaintiff of great Value to Wit, of the Value of One hundred dollars, and unjustly detained the same against sureties & pledges until &c Wherefore the said plaintiff saith that he is injured and hath sustained damage to the Amount of One hundred & fifty dollars, and therefore he brings suit &c

Parks & Haines
Pltff. Attys."

5 "United States of America }
State of Illinois Lake County } ss.

Pleas before the Honorable George Manierre, Judge of the seventh judicial Circuit of the State of Illinois, at a Special term of a Circuit Court for the County of Lake in said Circuit, began and held at Waukegan in said County on the twenty first day of April in the year of our Lord One thousand eight hundred and fifty six and of the independence of the United States the eightieth, said term of Court being held pursuant to an order of the said Honorable George Manierre judge as aforesaid and presiding Judge of the Circuit Court of Lake County aforesaid which was made and entered at the last January term of the said Circuit Court, the said term being a regular term thereof. and which appointed the said twenty first day of April in the year of our Lord one thousand Eight hundred and fifty six as a time for holding a Special term of the said Circuit Court for hearing and deciding Chancery Causes and also for the trial of civil and criminal causes

Present the Honorable, George Manierre, Judge,
John F. Guyles, Sheriff of Lake County
Attest, A. B. Cotes, Clerk,"

And be it also remembered that afterwards to wit, on the twenty second day of April A.D. 1856 the same being one of the days of the April Special term of said Court for the year last aforesaid proceedings were had in said Court which are entered of record in the words and figures following to Wit

"James Hamilton }
vs, } Replevin
Henry Lowe } Now comes said parties, the said

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[41838-4]

plaintiff by Parks, his Attorney, and the said defendant by Ferry, his Attorney, and by their Agreement it is Ordered that the said defendant have until the Opening of Court to morrow morning in which to file his plea herein."

And that afterwards to wit on the twenty third day of April A.D. 1856 it being as yet of the April Special term of said Court for the year aforesaid Henry Love by Ferry & Clarke his attorneys filed his pleas with the clerk of said Court which said pleas are in the words and figures following to Wit:

"Lake Co Cir Court.
Apr Speci. Term 56

"James Hamilton
vs.
Henry Love } Plea.

And the said Deft by Ferry & Clarke his Attorneys, Comes & says that he did not take and detain the said goods ~~and~~ & Chattels in said declaration mentioned or any part thereof in manner & form as the plaintiff hath above alleged, and of this the defendant puts himself upon the Contrary &c

Ferry & Clarke
Attys."

"And the said deft, for a further plea in this behalf says actio non because he says that the said goods and chattels mentioned in said declaration when &c were not the property of the said plaintiff, but were then & there the property of this deft, to Wit at Lake Co aforesaid and this he is ready to verify

Ferry & Clarke
Atty for deft."

7 United States of America
State of Illinois Lake County } ss.

Pleas before the Honorable George Manierre Judge of the seventh judicial Circuit of the State of Illinois. At a Circuit Court for the County of Lake in said Circuit, began and held at Waukegan in said County, on the second day of June in the year of our Lord, one thousand eight hundred and fifty six, and of the independence of the United States the eighteeth

Present the Honorable George Manierre Judge Aforesaid, John F. Guyles, Sheriff of Lake County Attest, A.B. Cotes, Clerk,

And be it also remembered that afterwards to Wit on the eleventh day of June A.D. 1856, the same being one of the days of the June term of said Court for the year last aforesaid proceedings were had in said Court which are entered of record in the words and figures following to Wit;

110 James Hamilton vs. Henry Lowe } Replevin

Now come said parties the said plaintiff by Haines his attorney, and the said defendant by Ferry his attorney, and the said defendant waiving the making and filing of an affidavit, it is ordered that this cause be and the same is hereby continued at the costs of the said plaintiff, and that the said defendant have and recover of the said plaintiff his costs and charges of this term expended herein and that he have execution therefor

[L1838-5]

"United States of America } ss
State of Illinois Lake County }

Pleas before the Honorable George Manierre Judge of the seventh judicial circuit of the State of Illinois

At a circuit Court for the County of Lake in said Circuit, began and held at Waukegan, in said County on the thirteenth day of October, in the year of our Lord one thousand eight hundred and fifty six, and of the independence of the United States, the eighty first, Present, the Honorable George Manierre Judge aforesaid, John F Cuyler Sheriff of Lake County Attest, A. B. Coles, Clerk,"

And be it also remembered that afterwards to wit on the thirteenth day of October A.D 1856 the same being one of the days of the October term of said Court for the year last aforesaid proceedings were had in said Court and entered of record in the words and figures following to wit

"James Hamilton } Replevin,
vs,
Henry Lowe }

Now come said parties, said plaintiff by Parks his Attorney, and said defendant by Perry his Attorney, and by their agreement, it is ordered that this cause be and the same is hereby Continued"

"United States of America } ss
State of Illinois Lake County }

Pleas before the Honorable George Manierre Judge of the Seventh judicial Circuit of the State of Illinois

9 At a term of a Circuit Court for the County of Lake, in said Circuit began and held at Waukegan in said County, on the second day of February in the year of our Lord one thousand eight hundred and fifty Seven, and of the independence of the United States the eighty first

Present the Honorable George Manierre Judge, Carlos Haven States Attorney, Parnell Murray Sheriff of Lake County

Attest. A.B. Coles Clerk,"

And be it also remembered that on the Sixth day of February A.D. 1857 the same being one of the days of the February Term of said Court for the year last aforesaid proceedings were had in said court, which are entered of record in the words and figures following to Wit,

"51. James Hamilton vs. Henry Lane } Replevin

Now came said parties, the said plaintiff by Parks his Attorney, and the said defendant by Kelley his Attorney, and thereupon the said defendant enters his motion to Strike from the files of this Court the depositions of T.H. Benson and H. Brecht filed by the said plaintiff in this cause, and after arguments of Counsel, the Court being fully advised in the premises, it is ordered that the said depositions be, and they are hereby Stricken from the files of this Court,"

"United States of America } ss
State of Illinois Lake County }

Pleas before the Honorable

[1038-E]

18 George Manierre Judge of the Seventh judicial Circuit of the State of Illinois

At a Special term of a circuit Court began and held at Waukegan in said County on the Seventeenth day of February in the year of our Lord one thousand eight hundred and fifty seven, and of the independence of the United States the eighty first, which said Special term of Court being held pursuant to a Special order of the Honorable George Manierre Judge of the Seventh judicial Circuit of said State and presiding Judge of the circuit Court of Lake County bearing date the sixth day of February A.D. 1857, and entered of record on the said sixth day of February the same being one of the days, of the said term of said Court for the year A.D. 1857, calling said Special term to commence on the third Tuesday of February instant being the seventeenth day of the present month for the transaction of Civil and criminal business,

Present the Honorable George Manierre Judge,
Pamell Munn Sheriff of Lake County
Attest, A.B. Cotes, Clerk,

And be it also remembered, that on the twenty first day of February A.D. 1857 the same being one of the days of the February Special Term of said Court for the year last aforesaid, proceedings were had in said Court which are entered of record in the words and figures following to wit

41 James Hamilton vs. Henry Lowe } Replevin

Now come said parties, the said plaintiff by Parks his Attorney, and the said defendant by Clarke his Attorney, and thereupon the said plaintiff enters his motion, to Strike from the files the deposition

11 11 of Enos G. Miller, taken on the part of the said defendant herein, and the Court being fully advised in the premises, it is ordered that the said deposition be, and the same is hereby stricken from the files at the costs of the said defendant.

And afterwards to wit on the said twenty first day of February A.D. 1857 the same being as yet of the Said Special February term of said Court, proceedings were had in said Court which are entered of record in the words and figures following to wit;

41. James Hamilton vs. Henry Lowe } Replevin

Now comes said plaintiff by Parks his Attorney, and on his motion it appearing to the Court that Charles Kaster has been duly subpoenaed on the part of the said plaintiff to attend the present term of this Court, to testify in this Cause, and the said Charles Kaster, being three times solemnly called, and coming not it is ordered that a writ of Attachment issue against the said Charles Kaster for his Contempt in having failed to attend this Court to testify herein, at this term although lawfully subpoenaed,

And afterwards to Wit on the said twenty first day of February A.D. 1857, the same being as yet of the said Special February Term of said Court for the year last aforesaid, proceedings were had in said Court, which are entered of record in the words and figures following to Wit,

41. James Hamilton vs. Henry Lowe } Replevin

Now Come said parties the said plaintiff by Parks his Attorney, and the said defendant by Clark his attorney, and thereupon the said plaintiff enters his motion founded upon affidavits filed, for a continuance herein, and after arguments of Counsel the Court being fully advised in the premises, it is ordered that the said motion be and the same is hereby overruled at the Costs of the said plaintiff, to which decision of the Court overruling said motion the said plaintiff excepts, And afterwards issue being joined herein, it is ordered that a jury Come to try the same, whereupon the said plaintiff enters his Challenge to the array of Jurors, and the Court being fully advised in the premises, it is Ordered that the said Challenge be and the same is hereby denied at the Costs of the said plaintiff to which he excepts

And afterwards come a jury to Wit. J. M. Brown, Rufus Sayles, J. C. Peck, John E. Clarkson, E. Plimpton Thomas Cropp, Eli Wilder, J. C. Stevens, Benjamin Porter, F. H. Porter, Philip Blanchard and Edmund Baker, who being duly empanneled and sworn to well and truly try the issue, and a true Verdict give according to the evidence, and having heard the evidence, delivered the following Verdict. We the jury find the issue for the defendant, and thereupon the said plaintiff enters his motion for a new trial which motion the Court being fully advised overrules and adjudges that said plaintiff take nothing by his writ and that said defendant have return of the property and one cent damages for the Caption thereof and that he recover his Costs and damages in this action and that he have execution therefor, And afterwards on

13 motion of the said plaintiff, it is ordered that he have two weeks from this date, in which to file his bill of exceptions herein, and thereupon said plaintiff prays an appeal, which is granted on condition that said plaintiff within two weeks from this date hereof file with the Clerk of this Court his bond with good and sufficient surety to be approved by said Clerk in the penal sum of two hundred and fifty dollars,

And be it also remembered that on the twenty fifth day of February A.D. 1857, said day being a day in Vacation between the Special February Term and the June Term of said Circuit Court for the ensuing year, James Hamilton by Parks and Haines his attorneys filed in the Office of the Clerk of said Court his bill of exceptions which said bill of exceptions are in the words and figures following to wit

15

State of Illinois
Lake County Circuit Court

James Hamilton } Febuary Special
vs } Term for 1857
Henry Lowe } Replevin

Be it remembered that on the 3d day of Febuary AD 1857 the same being one of the days of the Febuary Term of said Court for said year this cause being set for the Third day of said Term was called for Trial; upon Motion of Plaintiff and by concent of parties the same was set down for trial for Monday of the second week of said term The term was terminated by an adjournment without day on Saturday of the first week of said Febuary Term. Previous to said adjournment the following order was entered upon the journal of said Court

" It is hereby ordered and appointed by the Court
" that a special term of this court for the transaction of civil
" and criminal business be held on the Third Tuesday of Feb
" uary instant it being the Seventeenth day of the pres-
" ent month"

At the time of entering said order it was stated by the Judge of said Court that the the first business in order at said special term would be the disposal of some criminal business on the docket among which was an inditment for murder to be tried the court also by the concurrence of the parties & without any objection named several civil suits that would be for trial after the disposal of the crml bunes and among them this suit

And be it further remembered that on the 18th day of Febuary it being the second day of the special Febuary term of this court this cause was called in the absence of C. C. Parks the counsil who had special charge

of the case but his partner Mr E. Haines being present (the said Parks being confined to his house by sickness) & Friday the 20 day of February was named by counsel for the defendant as a day of trial, neither the said Parks nor the said plaintiff being at the time in court, but his partner the said Haines being present and there being no agreement or understanding that said cause was to be tried on that day; though it was understood to be for trial during the term as before stated. And be it further remembered that on friday the 20th day of February this cause was called for trial and the same was continued by the court until the next day (Feb 21) to give parties time to procure their witnesses.

And be it further remembered that on the 21st day of February being the fifth & last day of said special term in the afternoon of the day this cause being No 41 on the docket was called for trial; all the causes standing before this on the same having been disposed of, some in the regular February term, and some in the Special February term, the docket not being called in its order at this special term, the plaintiff objected to proceeding to trial in said cause out of its order which objection was overruled by the court and the plaintiff then and there excepted

The plaintiff then made a motion for continuance founded upon affidavits of which the following are copies

"State of Illinois Lake County Circuit court

"James Hamilton
vs. } Replevin
"Henry Lowe

"Lake county ss. James Hamilton the "above named plaintiff being sworn says that Charles "Caster is a material witness in this cause, without whose "testimony he this deponant cannot safely proceed to

17 "trial. This deponant further says that he expects to prove
"by said witness that defendant took and carried away
"from the land of this plaintiff the wood replevined in this
"case in the night time. This deponant further says that
"he is informed and believes that every effort has been
"used by his counsil that could be used to procure
"his attendance, and that he said witness has been
"subpoenaed and an attachment issued for him
"which is still unreturned"

"Sworn and Subscribed before me } (signed) James Hamilton
this 21st day of Febuary A.D. 1857 }
(Signed) J. K. Trindser Deputy Clerk"

"State of Illinois
"Lake County Circuit court
"James Hamilton
vs } Replevin
"Henry Lowe

"Lake County ss. Calvin C. Parks
"one of the attorneys for the plaintiff in the above entitled
"cause being sworn says that yesterday morning was
"the first intemation that he had from any quarter
"that this cause would be called for trial during the
"present week, in fact from information received
"at his house, while in a sick bed, that the jury were
"discharged the first day of the present term. This
"deponant supposed that this cause would not be
"called for trial during the present term — This deponant
"further says that on being informed by the court that
"the plaintiff must prepare for trial, this deponant
"caused subpoenas to be immediately issued and for
"plaintiffs witnesses and among them was a witness
"by the name of Charles Easter whose testimony this
"deponent was informed and verily believes was

"very material. This deponant further says that the
"first subpoena issued was immediately placed in the
"hands of an officer who took the morning train of
"cars for Port Clinton the residence of said Kastor.
"This deponant further says that fearing said Kastor
"might not be served with the first subpoena he caused
"another to be issued and placed in the hands of an
"other officer and paid him money to bear his expen
"ses and has used every exertion to procure the atten
"dance of said Kastor since said trial was pro
"posed.

"Sworn and Subscribed before } (signed) C. C. Parks
"me this 21st Febuary 1837 }

"J. N. Windsor Deputy Clerk" It appearing to
this court that this cause has been continued at the June
and November terms of 1836 at the instance of the
defendent & also by the return of the Sheriff that
said Charles Kastor had been served with sub-
poena in this cause on the 20th day of Febuary
instant in said County of Lake, and that on
the morning of the 21st day of Febuary instant
an attachment was issued for said witness, after
the argument of Counsel, and the Court being
fully advised in the premised overruled said motion
for continuance and the defendant then and there
excepted. On the first day of the term a petit jury
which was summoned by order of Court, (no regular
panel having been drawn for this term) gave their
attendance, but owing to a change of venue granted
in said murder case the said jury was discharg-
ed on that day, no other business at that time be-
ing ready the Judge at the time stating that a
jury could be summoned in the latter part of the
week when required. On this the 21st There being

no petit jury in attendance to try said cause the following order was entered on the journal by direction of the judge

„ The Petit jury having heretofore been discharged „ from further attendance as such jurors for this „ term of court it is ordered that the Sheriff of the county „ summons a special petit jury of twelve good and lawful men to be in attendance forthwith and thereupon „ the said Sheriff comes and returns into court the „ following named persons summoned by him to attend as such jurors to wit J. M. Brown" and others to the number of twelve and said jurors being called to try this cause the plaintiff by his counsel interposed a challenge to the array of jurors ✝ which challenge was overruled by the court and the defendant then and there excepted ×

The said plaintiff now here in open court tenders this his bill of exceptions and prays that the same may be signed and sealed by the court and it is done accordingly

George Manierre (Seal)
Judge of Judicial Circuit
Illinois

× On two grounds viz: 1st that the jury was summoned by the sheriff without the direction of a judge upon whom the said order only; and 2nd that the petit jury having been discharged the court had no power to cause another jury to be summoned during the term or at least during the rest of the term.

This is sustantially correct
Ferry & Clarke

[11838-11]

And that afterwards to wit, on the seventh day of March A.D. 1857 the same being a day in vacation between the said Special February Term and the June term of said Court for the year last aforesaid, an Appealed bond was filed in the Office of the Clerk of said Court, which is in the words and figures following to wit,

Know all men by there presents that We James Hamilton as principal and Richard Lappin as security are held and firmly bound unto Henry Lowe in the penal sum of two hundred and fifty dollars for the faithful payment of which we bind ourselves our heirs executors and administrators jointly and severally firmly by these presents, In testimony whereof we have hereunto set our hands and seals this 23d day of February A.D. 1857

The Condition of the above bond is such that Whereas a judgment was rendered at the Special February Term of the Lake County Circuit Court for 1857, in favor of the said Henry Lowe and against the said James Hamilton in replevin that the said Henry Lowe have a return of the wood replevied and that he the said Henry Lowe recover his Costs, from which said judgment the said

2/ James Hamilton prayed an appeal to the Supreme Court, Now if the said James Hamilton shall pay or cause to be paid all damages and costs in said cause in case said judgment shall be affirmed in said supreme court and also if the said James Hamilton shall prosecute his said appeal to final judgement and abide the order and determination of the Supreme Court therein then this bond to be void otherwise of force

Approved March 7, 1857 } James Hamilton Seal
Sev. Manierre Judge &c. } Richard Lappin Seal

Richard Lappin being sworn says, he is a resident of the City of Chicago & further says that he is worth twelve thousand thousand dollars over and above all indebtedness & liabilities

Wm L Church clk

State of Illinois }
Lake County } ss.

I, Augustus B. Cotes, Clerk of the Circuit Court in and for Lake County in the State of Illinois, do hereby certify the foregoing to be a true transcript from the records and files of my office of the pleadings on file therein in a suit lately pending in said Court wherein James Hamilton was plaintiff and Henry Lowe was defendant and also of the appeal bond and bill of exceptions on file in said cause, and also of the record of all the proceedings had and entered of record in said Court in said cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Waukegan ~~and~~ in said County this 21st day of April A.D. 1857

A. B. Cotes Clerk
by J. H. Wendner Deputy

5/18-38-12

107
Supreme Court State of
44 Illinois

James Hamilton
plaintiff in Error
vs.
Henry Lowe
Defendant

Return Writ of Error

Filed May 11. 1857
L. Leland
Clerk

Fees for transcript $5.85
Paid by James Hamilton

In Supreme Court - Illinois

3rd Grand Division

James Hamilton
vs
Henry Lowe

It is stipulated in this case that the same be heard before the Supreme Court of this State on Tuesday the 14th day of May next or as soon thereafter as learned can be heard. April 22d 1857

Parks & Harris
attys for Plff

Geo. Klerk & Williams
Attys for Deft

~~107~~ 47

Supreme Court Ill
1st Division

James Hamilton
vs
Harry Lowe

Stipulation

Filed April 2 1857
L. Leland
Clerk

State of Illinois

In Supreme Court

James Hamilton
Deft in Error
vs
Henry Lowe
Deft in Error

Error to the Lake County Circuit Court

Sir – please issue and send to us a writ of error in the above entitled cause returnable at the next term of Supreme Court

Yr
& Obly
Clerk of Supreme Court
Ottawa
April 7th 1857

Parks & Hains
Pltff atty

Please send amount of fees required by law & we will remit by return mail

Yours &c
Parks & Hains

[1838-14]

Hamilton
vs
Lowe

Precipe

Filed Apr. 18. 1857
S. Leland
Clerk

44

State of Illinois
Supreme Court } ss.
3rd Grand Division

April Term 1857

James Hamilton
Plaintiff in Error
vs.
Henry Lowe
Defendant

Now comes the said Plaintiff in error by Parks & Haines his attorneys and says that in the record and proceedings aforesaid, and also in giving Judgment aforesaid there is manifest error in this, to wit:

1st Th Lake County Circuit Court erred in overruling Plaintiffs objections to taking up the Cause for trial out of its order on the Docket.

2nd In overruling Plaintiffs motion for Continuance.

3d In overruling Plaintiffs Chalenge to the array.

4th In trying the cause and rendering Judgment without issue being joined.

5th In rendering Judgment and awarding a writ of Retorno Habendo when there was no issue upon Defendants plea of property in himself.

6th In rendering Judgment in favor of Defendant and against Plaintiff.

And the said Plaintiff in error prays that the Judgment aforesaid for the

[1858-15]

Errors aforesaid, and the other errors in the records and proceedings aforesaid, may be reversed and annulled, and altogether held for naught, and that he may be restored to all things which he has lost by reason of said Judgment &c —

Parks & Haines
Attys for Plff in Error

107
Hamilton
vs
Lowe

Copy of Errors

Filed May 11, 1844
J. Leland
Clerk

In Supreme Court,

THIRD GRAND DIVISION,

APRIL TERM, 1857.

JAMES HAMILTON, PLAINTIFF IN ERROR, *vs.* HENRY LOWE, DEFENDANT IN ERROR.	ERROR TO LAKE COUNTY CIRCUIT COURT.

Page 4 April 7th, 1856, plaintiff in error filed his declaration in replevin for the taking and detention of 50 cords of wood.

6 April 23rd, A. D. 1856, defendant filed his pleas: First—*Non Cepit.* Second—Property in himself.

(No replication to the second plea was filed.)

February 21st, 1857, trial by jury; verdict: "We, the jury, find the issue for the
12 "defendant." Judgment thereon that plaintiff take nothing by his writ, and that defendant have return of the property and one cent damages for the caption thereof, and that he recover his costs and damages in this action, and that he have execution therefor.

Appeal prayed and bond filed. The plaintiff, doubting his right to an appeal, caused a writ of error to issue.

The bill of exceptions (being entitled in the case) is in the words and figures following, that is to say:

15 *Be it remembered,* That on the 3rd day of February, A. D. 1857, the same being one of the days of the February term of said Court for said year, this cause being set for the third day of said term, was called for trial; upon motion of plaintiff, and by consent of parties, the same was set down for trial for Wednesday of the second week of said term. The term was terminated by an adjournment, without day, on Saturday of the first week of said February term. Previous to said adjournment the following order was entered upon the journal of said Court:

"It is hereby ordered and appointed by the Court that a special term of this Court, "for the transaction of civil and criminal business, be held on the third Tuesday of "February, instant, it being the seventeenth day of the present month."

At the time of entering said order, it was stated by the Judge of said Court, that the first business in order at said special term would be the disposal of some criminal

business on the docket, among which was an indictment for murder to be tried. The Court also, by the concurrence of the parties and without any objections, named several civil suits that would be for trial, and among them this suit.

And be it further remembered, That on the 18th day of February, it being the second day of the special February term of this Court, this cause was called in the absence of C. C. Parks, the counsel who has special charge of the case, *but his partner, Mr. E. M. Haines, being present*, (the said Parks being confined to his house by sickness,) and Friday, the 20th day of February, was named by counsel for the defendant as a day of trial, neither the said Parks or the said plaintiff being at the time in court, *but his partner, the said Haines, being present*, and there being no agreement or understanding that said cause was to be tried on that day, though it was understood to be for trial during the term, as before stated.

And be it further remembered, That on Friday the 20th day of February, this cause was called for trial, and the same was continued by the Court until the next day, (February 21st,) to give parties time to procure their witnesses.

And be it further remembered, That on the 21st day of February, being the fifth and last day of said special term, in the afternoon of the day, this cause, being No. 41 on the docket, was called for trial, all the causes standing before this on the same
16 having been disposed of, some in the regular February term and some in the special February term, the docket not being called in its order at this special term. The plaintiff objected to proceeding to trial in said cause out of its order, which objection was overruled by the Court, and the plaintiff then and there excepted.

The plaintiff then made a motion for continuance, founded upon affidavits, of which the following are copies:

" STATE OF ILLINOIS,
" *Lake County Circuit Court.*

" James Hamilton
vs. } *Replevin.*
" Henry Lowe.

" *Lake County, ss.* James Hamilton, the above named plaintiff, being sworn, says " that Charles Kastor is a material witness in this cause, without whose testimony he, " this deponent, cannot safely proceed to trial. This deponent further says, that he " expects to prove by said witness that defendant took and carried away from the " land of this plaintiff the wood replevied, in this case, in the night time. This " deponent further says that he is informed, and believes, that every effort has been " used by his counsel that could be used to procure his attendance, and that he, said " witness, has been subpœnaed and an attachment issued for him which is still " unreturned.

" Sworn and subscribed before me, } (Signed) " JAMES HAMILTON."
" this 21st day of Feb., A.D. 1857. }
(Signed) " J. H. WINDSOR, *Deputy Clerk.*"

17 " STATE OF ILLINOIS.
" *Lake County Circuit Court.*

" James Hamilton
vs. } *Replevin.*
" Henry Lowe.

" *Lake County, ss.* Calvin C. Parks, one of the attorneys for the plaintiff in the " above entitled cause, being sworn, says: That yesterday morning was the first " intimation that he had from any quarter, that this cause would be called for trial " during the present week. In fact, from information received at his house, while on

" a sick bed, that the jury were discharged the first day of the present term, this " deponent supposed that this cause would not be called during the present term. " This deponent further says, that on being informed by the Court that the plaintiff " must prepare for trial, this deponent caused subpœnas to be immediately issued for " plaintiff's witnesses, and among them was a witness by the name of Charles Kastor, " whose testimony this deponent was informed and verily believes was very material. " This deponent further says, that the first subpœna issued was immediately placed " in the hands of an officer, who took the morning train of cars for Port Clinton, the " residence of said Kastor. This deponent further says, that fearing said Kastor " might not be served with the first subpœna, he caused another to be issued and " placed in the hands of another officer, and paid him money to bear his expenses, " and has used every exertion to procure the attendance of said Kastor since said " trial was proposed.

" Sworn and subscribed before me, " this 21st February, 1857. } (Signed) " C. C. PARKS."

18 (Signed) " J. H. WINDSOR, *Deputy Clerk.*"

That this cause had been continued at the June and also November term of 1856, *at the request of the defendant.* It appearing to the Court, by the Return of the Sheriff, that said Charles Kastor had been served with subpœna in this cause, on the 20th day of February, instant, in said County of Lake, and on the morning of the 21st day of February, instant, an attachment was issued for said witness. After the argument of counsel, aud the Court, being fully advised in the premises, overruled said motion for continuance, and plaintiff then and there excepted.

On the first day of the term, a petit jury, which was summoned by order of Court, (no regular panel having been drawn for the term,) gave their attendance, but owing to a change of venue in said murder cause the said jury was discharged on that day, no other business at that time being ready, the Judge at the time stating that a jury could be summoned in the latter part of the week, when required. On this day, the 21*st, there being no petit jury in attendance to try said cause*, the following order was entered on the journal, by direction of the Judge:

19 " The petit jury having heretofore been discharged from further attendance as such " jurors for this term of Court, it is ordered that the Sheriff of the county summons " a special petit jury of twelve good and lawful men, to be in attendance forthwith; " and thereupon the said Sheriff comes and returns the following named persons sum- " moned by him to attend as such jurors, to wit: J. M. Brown," and others to the number of twelve; and said jury being called to try said cause, the plaintiff, by his counsel, interposed a challenge to the array, which challenge was overruled by the Court, and the plaintiff then and there excepted *on two grounds, viz.: that the jury was summoned by the Sheriff without the issuing of a venire, but upon the said order only; and, second, that the petit jury having been discharged the Court had no power to cause another jury to be summoned during the term, or at least during this week of the term.*

And this plaintiff, now here in open Court, tenders this his bill of exceptions, and prays that the same may be signed and sealed by the Court, and it is done accordingly.

GEORGE MANIERRE, [L. S.]
Judge Seventh Judicial Circuit, Illinois.

ERRORS ASSIGNED.

1st. In overruling plaintiff's objection to taking up the cause for trial out of its order on the docket.

2nd. In overruling plaintiff's motion for continuance.

3rd. In overruling plaintiff's challenge to the array.

4th. In trying the cause and rendering judgment without issue being joined.

5th. In rendering judgment and awarding a writ of *Retorno Habendo* when there was no issue upon defendant's plea of property in himself.

6th. General assignment.

PARKS & HAINES,
Attorneys for Plaintiff in Error.

Printers fee $8.00

No. 44

Hamilton
vs
Lowe

Abstract

Filed May 11, 1857
L. Leland
Clerk