

8493

No. _____

Supreme Court of Illinois

H. Clark

vs.

C. Cummings



700 5911 wms.
\$ 8.85

UNITED STATES OF AMERICA,
State of Illinois,
Crawford COUNTY.

ss. In Circuit Court, November Term, A. D. 1867

PLEAS, before the Honorable Hiram B. Nevins Judge of the
Fourth Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court
of Crawford County, in the State aforesaid, and at a term thereof begun and held at the Court
House in the Town of Robinson in said County, on the Second
Monday, (being the Eleventh day) of November in the year of our Lord
one thousand eight hundred and Sixty Seven and of the Independence of the said United
States the eighty

Present, Honorable Hiram B. Nevins Judge of the 4th Judicial
Circuit of the State of Illinois.

S. S. Whitehead States Attorney.

William Beville Sheriff.

Attest, Sam B. Allen Clerk.

John Cummings
vs
Israel James &
Henry Clark
vs
Israel James & Commission

On the 29th day of October A.D. 1866 the
following account was filed with Henry
Wulgar S.P. which is in the words and
figures following to-wit
State of Illinois
Jasper County
Israel James & Henry Clark vs
To John Cummings
in trover and conversion
of one Rifle less amount of damage

claimed Oct 29th 1866

\$ 15⁰⁰

John Cummins,

which said account is endorsed as follows
to wit; John Cummins account filed Oct
29th 1866; — filed in Crawford Cir Court
Nov 12th 1867; S B. Allen C.M.


And afterwards to wit on the
1st day of November 1866, the following Sum-
mons was issued,

State of Illinois }
Jasper County } 3

The People of the State of Illinois
to any Constable of said County Greeting

You are hereby commanded to summons
Israel Jared and Henry Clark to appear before
me at my office on the tenth day of November
1866 at one o'clock P.M to answer the complaint
of John Cummins in a suit of Trover and
Conversion for a failure to pay him a certain
demand not exceeding one hundred dollars
and hereof make return to me as the Law
directs.

Given under my hand and seal
this the first day of November 1866

Henry Dulger, J.P. 

on the back of said summons the following endorse-
ment appears. I have duly served the within
by reading to the within named defend ants

Israel Jared and Henry Clark this the 5 day
of November 1866 S. B. Matheny Const
Service 50 Damages \$15.00
Mchaf. 80 Justices fee 40
Return fee $\frac{10}{140}$

Filed Dec 2 1867

S. B. Matheny CLK

State of Illinois 3
Jasper County 3d

John Cummins
vs
Israel Jared
Henry Clark

Justice Court before the
undersigned. Account filed for Iron and
conversion of one Rifle Gun, amount of
damages claimed \$15.00, Summons
issued this Nov first 1866 handed to S. B.
Matheny Constable Returnable on the 10 Inst
at one o'clock P.M. The above summons return
served on defendants by reading on the
5th day of Nov 1866. S. B. Matheny Const.

Now this the 10th day of November 1866 the
Parties met at my office and consent of both
Parties the above cause was continued until
the 20th day of November 1866 at 3 o'clock
P.M.

Now this November the 20th 1866 Parties met
and proceeded to trial and the evidence

being fully heard also counsel heard in
the above cause. It is ordered by the Court
that the Plaintiff have Judgment against
Defendants for the sum of \$15.00 Damages also
for Cost in said suit.

Henry Dulgu J.P.S.

Judgment rendered November 20th 1866

Judgment \$15.00

Justice fees 2.75

Constable " 5.00

Justice fee for Transcript \$1.00

Witness for Plaintiff

A. Hamer. 2 days \$1.00

James Cummins 1.00

James W. Chapman 1.00

Dyloesto Monravy 50

John McCall 50

John Benson 50

State of Illinois
Casper County

I, Henry Dulgu Justice
of the Peace within and for said County
do certify the foregoing to be a true copy
and Transcript and papers of all of
proceedings before me Given under my hand
and seal this 24th day of December 1866.

Henry Dulgu J.P.S.

Endorsed as follows to wit

Transcript

John Cummins

vs

Israel Jared

Henry Clark

Filed in my office February
21st 1867 at 1/2 O'clock P.M

Wm W Jones - Clerk

By D B Brown Deputy

Filed Dec 2^d 1867

Lang B Allen Clerk

State of Illinois

Jasper County

Jasper Circuit Court

May Term AD 1867

John Cummins

vs

Israel Jared

Henry Clark

} appeal

Israel Jared and Henry

Clark the Defendants in the above entitled
cause respectfully represents to the Judge
of said Court that the inhabitants of
said Jasper County are prejudiced against
the Petitioners so that they fear they can not
have a fair and impartial trial in said

5

Court. said cause is now pending. That said petitioners were not fully convinced and satisfied of the existence of such prejudice until during the present term of this Court they learned and become satisfied and convinced of the existence of such prejudice from the conversations of divers citizens of said Jasper County assembled from all parts of said Jasper County. Your petitioners therefore pray for a change of Venue in said cause to some county where such prejudice does not exist pursuant to the Statute &c

Israel Jared

Henry Clark

Subscribed and sworn to before me this 15th day of May AD 1867.

William M Jones CLK

Endorsed

John Cummins

vs

Clark & Jared

Affidavit for Change
of Venue.

Filed May 15th 1867

William M Jones CLK

Filed Dec 2nd 1867

A Ballen CLK

At a Regular term of the Circuit Court within
and for the County of Jasper in the State of
Illinois in the 25th Judicial Circuit convened
in the Court House in said County of Jasper
on the 13th day of May AD 1867. Present
Honorable Aaron Shaw Judge Presiding

John L. Elden Sheriff

William M. Jones Clerk

Ed. S. Wilson Prosecuting Attorney

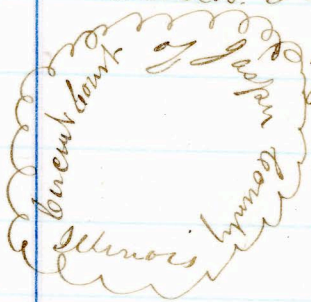
the following proceedings were had to wit
John Cummins }
vs }
Isaac Jared & } Appeal
Henry Clark }

And now at this
third day of this term of this Court comes
the said Plaintiff in person with Cooper
& Gibson his Attorneys as also said Defendants
in person and by Callahan their Attorney
and the said Defendants file their affidavit
and petition to the Court for a change of
venue herein and the Court having inspected
the affidavit of Defendants for a change
of venue herein. therefore it is ordered &
adjudged by the Court that the venue of this
cause be changed to the County of Crawford
in the State of Illinois and that the Clerk of
this Court certify and transmit the necessary

papers herein to the clerk of the circuit court
of said Crawford County.

State of Illinois }
Crawford County }

I, William M Jones clerk of
the circuit court of Jasper County in the state
of Illinois do hereby certify that the above is
a true copy of the proceedings had in this
case in the said circuit court as appears
of Record in my office and that the following
papers are all the papers in the case that is
in my office which are herewith enclosed
marked A. B. C. D. E. F. G. H. I. J. K. L.



Given under my hand and official
Seal at Newton Jasper County this
4th day of November 1867

William M Jones Clerk
By D. P. Brown Deputy

Filed in Crawford Circuit Court Dec^r 1867

State of Illinois }
Crawford County }

Crawford Circuit Court
November Term 1867

John Cummins }
vs }
Henry Clark }
Israel Jaud }

appeal

9
Your petitioners Henry Clark and Israel Jaud
defendants in the above entitled cause respectfully
represent to the Judge of said Court that they
entertain serious and well grounded fears
that they will not receive a fair and impartial
trial in this Court on account of the prejudice
which they believe to exist in the mind of
the Judge thereof against them, that this
suit was brought in Jasper County Ills
and that on the application of these defen-
dants the venue in this cause was at the
April term AD 1867 of said county of Jasper
changed to this County on account of the
prejudice of the Inhabitants of Jasper County
against these defts, that at the time said
venue was changed, his Honor Judge Shaw
was the presiding Judge of the 25th Judicial
Circuit which included the said counties
of Jasper and Crawford and that these
defts had no fears as to the prejudice of
Judge Shaw against them when they applied
for said Change of venue, and that they now
make this application for a change on
account of the prejudice of the Judge of this
Court at the earliest opportunity the Record
of this cause having only been filed and
said cause been pending in this Court since
the day of November AD 1867 and that

your petitioners had no notice that said record was filed in this Court until on yesterday when they immediately gave to the Counsel for the Plaintiff notice of their intention to make this application

Your petitioners therefore pray for a change of venue in this cause pursuant to the provisions of the Statute in such case made and provided

Henry Clark
Israel Jared

State of Illinois }
Crawford County }

Henry Clark and Israel Jared the above named petitioners being duly sworn according to Law on their oath say that the matters and things set forth in the foregoing petition are true in substance and in fact

Henry Clark
Israel Jared

Subscribed and sworn to before me this 12th day of November A.D. 1867

A. B. Allen clk

John Cummins }
vs } Appeal & Chg ven from Jasper Co
Jared & Clark }

And now on this day comes the Defendants and file their affidavit herein

for a change of venue and move the Court for a change of venue in this cause, which said motion is overruled by the Court to which decision in overruling said motion the defendants by their attorneys excepted

John Cummins	}	Appeal Chg. Venue
do		
Israel Jared &		
Henry Clark	}	

And now on this day comes the Plaintiff by James C. Robinson and James C. Allen his attorneys comes also the said defendants by Ethelbert Callahan and Frank R. Robb his attorneys and issue being joined therefor let a Jury come, whereupon came the following Jurors of the Jury To wit Robert M. Boyd & Henry Merrick & Reuben Bangguss & Thos. Sindley & Samuel Rich & J. A. Parker & Abraham Samerson & Stephen Gooch & Cornelius Stephenson & Wm. C. Steel & R. E. Waskins & Alfred Priors, who were duly tried impannelled and sworn to try said cause, and after hearing the evidence in the case, arguments of counsel and instructions of the Court, retired to consider of their verdict, and returned into open Court the following verdict to wit. We the Jury find the defendant

Henry Clark guilty and assess the damage at fifteen dollars and find defendant Israel Jared not guilty.

Whereupon it is considered by the Court that the Plaintiff have and recover of the said defendant Henry Clark the sum of fifteen dollars together with his costs by him laid out and expended and that he thereof have execution.

The defendant having moved the Court for a new trial and to arrest the verdict herein which said motions were overruled by the Court whereupon defendants by attorney excepted to the ruling of the Court and leave is granted said defendants to file bond in sixty days with Israel Jared as security in the sum of two hundred dollars.

State of Illinois }
Crawford County }

Crawford Circuit Court
November Term 1867

John Cummins }
vs } appeal
Israel Jaredant }
Henry Clark }

Be it remembered that on

the trial of this cause at the November term A.D. 1867 of the said Circuit Court the Plaintiff to maintain the issue on his part gave in evidence to the Jury the testimony following to wit

John Cummins the plaintiff being duly sworn on his oath testified, That the defts and others came to his house about ten or eleven o'clock at night and told me that they came to arrest me, I said they could not come in They gave me two minutes to surrender, they waited about an hour and then broke in the doors, I had the gun in my hand and thought I would use it but concluded not to. I laid the gun on the bed and put the pistol in the bed and gave up to go. Some one took the gun. The party was indicted and tried for stealing the gun, after that trial I told Clark we would prosecute him no further but he must return the gun I demanded it of him and he did not return it. It was my gun and was worth fifteen or sixteen dollars, Clark was Captain of the company that arrested me, Jared was there with him They claimed that I belonged to the army
 Crof Examined by deft
 I cocked the gun and intended to shoot but concluded not to do so. There was no violence

offered to me after I surrendered. They took me to the Provost Marshalls office in Terre Haute Indiana where our descriptive rolls were taken and were sent forward to Indianapolis. I was a deserter from the Army at the time they arrested me, When I demanded my gun from Clark he said it had been turned over to the proper authorities, that he would be glad to tell me how I could get my gun. He said he would see Wakefield and use his influence to have it returned. He said Wakefield was the Assistant Provost Marshal, The same evening Clark came and said if I wanted to see him he reckoned I would have to do so. Sylvester Monroy being sworn testified that he was present when Cummins was arrested. Clark asked my assistance to arrest deserters. I went with him and others to John Cummins house and waked him up. He refused admittance. They staid out for more than an hour and then broke in the doors, Cummins had the gun in his hand when the door was broken in. He threw it on the bed and when Clark went to get it, took it up again and he and Clark scuffled over it until it was taken from him. There was no officer of the Army along, a few private soldiers, Clark was the leading man in making the arrest.

Crop. examined by defts

15

I think Albert Hammers knocked out some of the chinking in the house, Clark and his company spent an hour or more persuading at Cummins to surrender and go back to the service, He said he would not do it, Clark told him he was authorized to arrest deserters, this was in December AD 1863.

The defendant Henry Clark was then introduced and sworn for the purpose of proving that Charles Wakefield was an acting assistant Provost Marshall of a District including Jasper County Illinois and that as such he authorized the defts to arrest John Cummins as a deserter from the Army, of the United States, which was objected to by the Plaintiff and the objection overruled by the Court and defts ^{pleas} excepted, and the Witness testified that Charles Wakefield was an acting assistant Provost Marshall in the 11th district of Illinois including Jasper County and that he was openly and notoriously recognized as such by the People and also in the Office of the Provost Marshall at Olney, He gave me authority to arrest deserters and gave me a list of names including that of John Cummins. I got help and went to his house, I told him who I was and that I come to take him back to the service, He said

hold on a minute. He then got his gun and revolver, an axe and a corn cutter and got behind the table. I told him we did not want to hurt him, that he should be treated like a man, I told him if he tried to shoot I would shoot him. When the doors were broken in he said "I surrender," I told him if he surrendered to give up his arms. He was in the act of laying the gun on the bed, as I went to take it he said it might be of some use to his family and asked me to leave it. I told him if it had been in the rack where it ought to have been I would not take it but as it was I felt it to be my duty to take it. I took it and turned it over to the Provost Marshall. I never used the gun. It was left in my hands awhile by the Provost Marshall, but was not under my control. Mr. Cummins statement as to his demand is fair only I think he has it mixed. He said all he wanted was his gun. I told him I did not think I ought to pay for it, when I took it under orders and had turned it over, a day or two after this I went to Olney and tried to find his gun but could not. It had been misplaced. The gun is an ordinary old rifle worth from its appearance five or six dollars. The tube blew off with the load that was in it when taken. Corp Examined

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There were seventeen of us went to arrest Cummins about ten days before this the Assistant Provost Marshall gave me the authority to arrest him this authority was verbal. I took the gun because he used in resisting an arrest. He made no resistance after he surrendered. The Provost Marshall paid me for arresting deserters, I did not belong to the Army I had been to Olney after the gun was demanded before this suit was commenced but had not informed Cummins of the result of my trip. I think when Cummins demanded this gun I told him I would use my influence to get it and if he would not wait a reasonable time to allow me to do so he might crack his whip.

Israel David being sworn testified as follows to wit, I know Charles Wakefield. He was acting assistant Provost Marshall or Deputy in Gasper Crawford and Richland counties and had been for more than two years before the arrest of John Cummins. Col. O'Kear was Provost Marshall of the District when Wakefield was appointed. The office was at Olney in Richland County. I have often seen Wakefield in the office and know that he was recognized as a Deputy or assistant.

Loop Escamond

I am not sure whether Scott or Condit was
 Provost Marshall when Cummins was arrested
 I was at the arrest at the instance of Mr. Clark

The Plaintiff then introduced as a witness Joseph
 Cummins who being sworn testified as follows
 to wit I know the Pltffs gun. It is a heavy
 barrel common stock, was in good order
 and had traded in the neighborhood for
 from twelve to sixteen dollars. I heard the
 Plaintiff demand his gun of Clark. Clark
 said he would be glad if he had his gun
 that he would see Wakefield and try to get
 the gun. In the evening afterwards he said
 John would have to sue, I heard no qualification

Cross Examination

I think Clark said he had turned the gun
 over to the proper authorities,
 Which was all the evidence offered by either
 of the parties. The said defendants then
 moved the Court upon the evidence to instruct
 the Jury that desertion from the Army of the
 United States is a crime and that when any
 crime has been committed any person may
 lawfully arrest the person who committed the
 crime without waiting to obtain legal process
 and in so doing has a right to use all the
 force necessary to arrest the criminal

19 and to take from him any weapons that may be found in his hands in such a way as to justify a reasonable apprehension that such weapons were intended to be used by him for purposes of resistance.

2 When it becomes necessary in arresting a person charged with a criminal offense to take from such person any arms or weapons either of offense ~~or~~ or defense the person taking such weapons incurs no liability for the value of such weapons.

3 A person making an arrest must judge for himself at the time what measures are necessary to make the arrest and take the alleged criminal before the proper authorities in safety and only becomes liable civilly or criminally if his action turns out to have been unreasonable and of this the Jury must judge.

4 When a private person takes it upon himself to arrest a person charged with the commission of a crime he undertakes to say that a crime has been committed and that the person whom he arrests is the person who committed the crime. Whereupon the Court qualified said instructions as follows.

5 The Court instructs the Jury on the part

1st instruction as qualified

of the defendants, that desertion from the army of the United States is a crime by the laws of the United States and that when any crime has been committed any person may lawfully arrest the person who committed the crime without waiting to obtain legal process, and in so doing has a right to use all the force necessary to arrest the criminal and to take from him any weapons that may be found in his hands in such a way as to justify a reasonable apprehension that such weapons were intended to be used by him for purposes of resistance

2^d as qualified

When it becomes necessary in arresting a person charged with a criminal offense to take from such person any arms or weapons either of offense or defense the person taking such weapons, incurs no liability for the value of such weapons (by the fact of taking the same, provided such arms or weapons, are returned to the person from whom they are taken or his authorized agent on demand after danger therefrom has entirely ceased or the person legally discharged from such arrest)

To which qualifications the defendants by their counsel then and then excepted
And the Court at the instance of

the Pltff instructed the Jury that if they believe from the evidence that these defendants took the gun of the Plaintiff without legal authority and against the Plaintiffs consent then they should find for the Plaintiff

2. That although the Plaintiff might have been a deserter, yet the Provo Marshal nor any one acting under him had a right to take his private property away for that reason. And if the Jury believe from the evidence that the defendants did take the property of the Plaintiff without his consent, then they should find for the Plaintiff, unless the evidence further shows that it was necessary to take it for the purpose of preventing the Plaintiff or some one else from using it to prevent the Plaintiffs arrest, or to protect themselves from danger after making such arrest.

3. That before the defendants can justify themselves for taking the gun of Plaintiff away they must show that the Provo Marshalls had legal authority to take the private property of Commons.

4. That under the laws of this state no Officer has a right to confiscate private property although that property might belong to a deserter and no Provo Marshall could confer upon private citizens a right

to confiscate private property that he the
 Provo Marshal himself did not possess
 And if the Jury ^{believe} from the evidence that
 the defendants did take the gun of Plaintiff
 without authority they should find for
 the Plaintiff.

If the evidence shows to the satisfaction
 of the Jury that defendants took the property
 of pl^tff by force and against the consent of
 defendant and has since refused to return it
 the plaintiff is entitled to recover the value
 of the property in this action, unless defendants
 have shown by the testimony that they had
 a legal right to take said property and keep
 it.

In this case if the Jury believe that defend
 ants took the gun of Plaintiff without his consent
 and have not returned it, the defendants are
 liable in this action for the value thereof
 unless the Plaintiff have shown that they had
 a lawful right to take the gun and still
 had the right to detain it at the time the
 same was demanded by Pl^tff and at the
 time this suit was commenced.

To the giving of which instructions of
 the Plaintiff the said defendants by their Counsel
 then and there excepted, and thereupon the
 Jury gave their verdict against the said

defts. whereupon the Counsel filed the following motion for a new trial

State of Illinois }
Crawford County } ss
Crawford Circuit Court
September
October Term 1858

John Commis }
vs } appeal
Henry Clark and }
Israel Jones } }

The said Plaintiff Henry Clark moves the Court to set aside the verdict of the jury in this cause and grant a new trial and assigns for cause the following:

- 1st The error of the Court in refusing instructions asked by the depts. and giving improper and erroneous instructions for the Plaintiff
- 2nd The verdict is contrary to the law and the evidence

E Cullahan
Atty for depts

Endorsed as follows

Motion for new trial.
John Commis vs Jones & Clark

but the Court overruled the said motion and gave judgment upon the said verdict of said jury against said Hefts to which the said Defendants then assented, and in as much as the matters aforesaid do not appear of record the Counsel for the Defendants present this Bill of exceptions, and pray that the same may be assigned and sealed by the Court and made part of the record in this case and it is done accordingly.

William B. Humes ⁽²⁰⁰⁾
 Judge 4th Jud. Cir. Court.

Which said Bill of exceptions is endorsed as follows,
 Crawford Cir. Court November Term
 1867, John L. Larrison vs
 Samuel James & Henry Clark,
 Bill of exceptions,
 Filed Dec 8 1867

Eriny B. Allen
 Clk

and afterwards to wit on the 21st day of
December AD 1867 the said defendants filed
their bond as follows.

Know all men by these presents that we
Henry Clark as principal and Israel Jared
security are held and firmly bound unto
John Cummins in the penal sum of two
hundred dollars for the payment of
which well and truly to be made we bind
ourselves our heirs executors and admin
istrators jointly severally and firmly

The condition of the above
obligation is such that whereas at the
November term of the Circuit Court in
and for the County of Crawford and
state of Illinois for the year AD 1867
the above named John Cummins recovered
a Judgment against the above bounden
Henry Clark for fifteen dollars and
costs of suit from which the said Henry
Clark has prayed an appeal to the
Supreme Court of the state of Illinois
Now if he shall prosecute his said
appeal with effect and shall pay
and satisfy whatever shall be adjudged
against him by said Supreme Court
on trial or dismissal of said appeal
then the above obligation to be void

24/2

Assignment of Errors

The Court erred in refusing the change of venue asked by the depts on a count of the prejudice of the presiding judge

2^a The Court erred in qualifying the depts
Second instruction

3^a The Court erred in giving the instructions on the part of the plaintiff

4^a The Court erred in overruling the depts motion for a new trial

J. Callahan

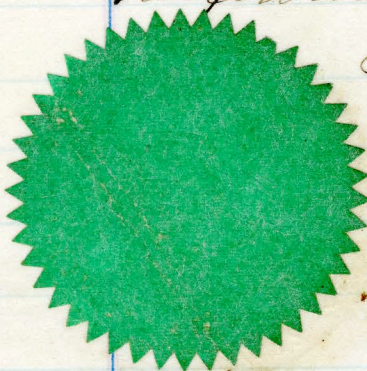
Atty for appellant

but otherwise to be in full force and effect
Witness our hands and seals this 10th
day of December AD 1867

Henry Clark ES
Israel Jarrard ES

State of Illinois }
County of Crawford } 30

I, Erving B. Allen
Clerk of the Circuit Court of Crawford
County in the State aforesaid do hereby
certify the above and foregoing to be
a true perfect and complete copy of
the Papers and orders in a certain
cause pending in said Court on
the Common Law side thereof when
John Cummins is Plaintiff and
Israel Jarrard and Henry Clark
Defendants.



In Witness Whereof I have hereunto
set my hand and official
the seal of said Court at
Robinson this Tenth day of
May AD 1868

Erving B. Allen CLK

And the said Appelles by J. B. Allen
his Atty. joins in error and says
there is no error in the record and
proceedings in said cause

J. B. Allen atty
for appellee

23
Supreme Court - 7th Div.

A. Leuk }
 ⁰⁷ }
Crawford } Appell from Court
J. Cummings }

Record

Filed 14th May 1908
R. B. Richards
Clerk

8493

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

JUNE TERM, A. D. 1868.

HENRY CLARK, Appellant,)

vs.)

JOHN CUMINS, Appellee.)

Appeal from Crawford.

ABSTRACT OF RECORD.

- 1 On the 29th of October, 1866, the Appellee filed, before H. Dulgar, a
Justice of the Peace in Jasper county, an account in trover against Appel-
lant and Israel Jared, for the conversion of one rifle gun, of the value of
fifteen dollars.
- 2 Summons was duly served on Def'ts Jared Clark, and the Justice, the
3 parties appearing for trial, rendered a judgment for fifteen dollars against
both Defendants, from which Defendants appealed to Circuit Court of Jas-
per county.
- 4 Def'ts filed an affidavit for change of venue, on account of the prejudice
of the inhabitants of Jasper county.
- 6 The court changed the venue to Crawford county.
- 9 At the November Term, 1867, of the Crawford Circuit Court, the
Def'ts in that Court petitioned the Court for a change of venue from the
Circuit, on account of the prejudice of the Judge, showing that at the time
the change of venue was taken from Jasper county, Hon. Aaron Shaw was
the Presiding Judge of the 25th Judicial Circuit, which included the coun-
ties of Jasper and Crawford, and that they had no fears as to the prejudice
of Judge Shaw, and that this application is made at the earliest possible
opportunity, the record having only been filed in the office of the Clerk on
10 the — day of November, 1867. That notice was given to counsel for
Pl'ff on the same day they received notice that the record was filed. The
petition is sworn to.
- 11 The motion for a change of venue was overruled, and the Def'ts
excepted. The cause then came on for trial before the Court and a Jury,
and the Jury having heard the cause, returned into Court the following ver-
12 dict: "We, the Jury, find the Defendant, Hay Clark, guilty, and assess the
damage at fifteen dollars, and find the Defendant, Israel Jared, not guilty."
The Def't Clark moved the Court for a new trial, which the Court
overruled, and gave judgment upon the verdict. The Def't excepted, and
prayed an appeal, which was allowed, and sixty days given to file an appeal
bond, with Israel Jared security, in the sum of two hundred dollars.
- The evidence is preserved in the bill of exceptions.
- 13 The Appellee (the Pl'ff below) testified that Def'ts and others came to
his house at ten or eleven o'clock at night, and said they had come to arrest

him. He told them they could not come in. They gave him two minutes to surrender, but waited about an hour before they broke in. That he had the gun in his hands, and thought he would use it, but concluded not to. That he laid the gun on the bed, and put the pistol in the bed, and gave up to go. Some one took the gun. That he demanded the gun of Clark, and he did not return it. It was his gun, and was worth fifteen or sixteen dollars. Clark was Captain of the company that arrested him, and claimed that he belonged to the army.

14 *Cross Examined.*—That he cocked the gun, and intended to shoot, but concluded not to. There was no violence offered to him after he surrendered. That they delivered him at the Provost Marshal's office at Terre Haute, Ind. That he was a deserter from the army when he was arrested. That when he demanded his gun of Clark, Clark said it had been turned over to the proper authorities: That he would be glad to tell him how he could get his gun, and would see Wakefield, the Deputy Provost Marshal, and use his influence to have the gun returned.

Sylvester Monroney was present at the arrest, and testified substantially the same as Cumins, except that he says after Cumins threw the gun on the bed Clark went to get it, Cumins took it up again, and he and Clark scuffled over it until it was taken from him. That there was no army officer along, and only a few private soldiers. Clark was leader in making the arrest.
15 Clark and his company spent more than an hour persuading Cumins to surrender and go back to the service. He said he would not do it. Clark told him he was authorized to arrest deserters. This was in December, 1863.

The Def't, Clark, was then sworn, and introduced to prove "That Charles Wakefield was an acting Assistant Provost Marshal of a District including Jasper county, Illinois, and that as such he authorized the Def'ts to arrest John Cumins as a deserter from the army of the United States;" which was objected to by the Pl'ff, and the objection overruled by the Court, and the Pl'ff excepted. The witness then testified that Wakefield was acting Ass't Provost Marshal of the 11th Dist. of Illinois, including Jasper county, and was openly and notoriously recognized as such by the people and in the office of the Provost Marshal at Olney. That he gave witness authority to arrest deserters, and gave a list of names, including that of John Cumins. That he got help and went to Cumins' house, told him who he was, and that
16 he must go back to the service. He got his gun, revolver, an axe and a corn cutter, and got behind table. I told him he should be treated like a man, but if he shot I would shoot him. When the door was broken, he said, "I surrender." I took the gun and turned it over to the Provost Marshal. After Cumins demanded his gun, I went to Olney and tried to find his gun, but it had been misplaced.

17 *On Cross Examination.*—That there were seventeen engaged in making the arrest. The authority given me to arrest was verbal, and was given two weeks before. I took the gun because he used it to resist. The Provost Marshal paid me for arresting deserters. I did not belong to the

army. I had been to Olney after the gun was demanded, before this suit was commenced, but had not informed Cumins of the result. I think when Cumins demanded the gun I told him I would use my influence to get it, and if he would not wait a reasonable time for me to do so, he might crack his whip.

17 Israel Jared proves that Wakefield had been acting Assistant Provost Marshal for more than two years before the arrest of Cumins.

18 The Plaintiff then introduced Joseph Cumins, who testified that the gun was worth from twelve to sixteen dollars. That when Pl'ff demanded his gun, Clark said he would be glad if he had his gun, that he would see Wakefield and try to get the gun. In the evening afterwards he said John would have to sue—heard no qualification. I think Clark said he had turned the gun over to the Provost Marshal; and this was all the evidence.

18 The Def'ts asked the Court to instruct the Jury :

1st. That desertion from the army of the United States is a crime, and that when any crime has been committed, any person may lawfully arrest the person who committed the crime, without waiting to obtain legal process, and in so doing has a right to use all the force necessary to arrest the criminal, and to take from him any weapons that may be found in his hands, in such a way as to justify a reasonable apprehension that such weapons were intended to be used by him for purposes of resistance.

2d. When it becomes necessary in arresting a person charged with a criminal offence, to take from such person any arms or weapons, either of offence or defense, the person taking such weapons incurs no liability for their value.

19 3d. A person making an arrest must judge for himself at the time what measures are necessary to make the arrest, and take the alleged criminal before the proper authorities in safety, and only becomes liable civilly or criminally if his action turns out to be unreasonable, and of this the Jury must judge.

20 The Court qualified the second instruction by adding to it : "By the taking of the same, provided such weapons are returned to the person from whom they are taken, or his authorized agent, on demand, after danger therefrom has entirely ceased, or the person legally discharged from such arrest."

To which qualification the Def'ts excepted.

PLAINTIFF'S INSTRUCTIONS.

21 The Court, on the part of the Plaintiff, instructed the Jury :

1st. That if they believe from the evidence that the Defendants took the gun of the Plaintiff, without legal authority and against the Plaintiff's consent, then they should find for the Plaintiff.

21 2d. That although the Plaintiff might have been a deserter, yet the Provost Marshal, nor any one acting under him, had a right to take his private property away for that reason; and if the Jury believe from the

evidence that the Defendants did take the property of the Plaintiff, without his consent, then they should find for the Plaintiff, unless the evidence further shows that it was necessary to take it for the purpose of preventing the Plaintiff, or some one else, from using it to prevent the Plaintiff's arrest, or to protect themselves from danger after making the arrest.

3d. That before the Def'ts can justify themselves for taking the gun of Pl'ff, they must show that the Provost Marshal had a legal authority to take the private property of Cumins.

22 4th. That under the laws of this State, no officer has a right to confiscate private property, although that property might belong to a deserter, and no Provost Marshal could confer upon private citizens a right to confiscate private property, that he, the Provost Marshal himself, did not possess; and if the Jury believe from the evidence that the Def'ts did take the gun of the Pl'ff, without authority, they should find for the Pl'ff.

5th. If the evidence shows to the satisfaction of the jury, that the Def'ts took the property of the Pl'ff by force and against the consent of the Def't—(Plaintiff) and has since refused to return it, the Pl'ff is entitled to recover the value of the property in this action, unless the Def'ts have shown by the testimony that they had a legal right to take said property and keep it.

6th. In this case, if the jury believe that the Def'ts took the gun of Pl'ff without his consent, and have not returned it, the Def'ts are liable in this action for the value thereof, unless the Pl'ffs (Def't) have shown that they have a legal right to take the gun, and still had the right to detain it at the time the same was demanded by Pl'ff, and at the time this suit was commenced.

22 The Def'ts excepted to all of the foregoing instructions.

The jury gave their verdict against the Def't Clark, who filed the following motion for a new trial:

23 The said Def't, Henry Clark, moves the Court to set aside the verdict of the jury in this cause, and grant a new trial, and assigns for cause the following reasons to-wit:

1st. The error of the Court in refusing instructions asked by the Def't, and giving improper and erroneous instructions for Plaintiff.

2d. Because the verdict is contrary to the law and the evidence.

E. CALLAHAN,

Att'y for Def'ts.

23½ But the Court overruled the motion, and gave Judgment on the verdict, to which the Def't excepted, and amended his Bill of exceptions which is signed and sealed by the Court.

24 The Def'ts appeal bond.

23½ Assignment of errors.

25 Certificate of the Clerk.

E. CALLAHAN,

Att'y for appellant.

ERRORS ASSIGNED.

1st. The Court erred in refusing the change of venue asked by the Def'ts on account of the prejudice of the presiding Judge.

2d. The Court erred in qualifying the Def't's 2d instruction.

3d. The Court erred in overruling the Def'ts motion for a new trial.

E. CALLAHAN,

Att'y for Appellants.

APPELLANT'S BRIEF.

The first error assigned is the action of the Court in refusing a change of venue on account of the prejudice of the Judge. The application was for a cause that had arisen since the change was taken from the people of Jasper county. It was for a cause that was unforeseen and could not have been provided against. A new Judge had succeeded to the Bench and it was unfair to compel the defendants to be tried before him, regardless of his prejudices against them. If he had been of counsel against the defendants, must they still be tried before him?

The second error assigned, is the qualification to the defendant's second instruction, which assumes that when an officer or a private person necessarily takes a weapon from a criminal in making an arrest, he must follow it up, and after the party is acquitted, must return the weapon to the criminal, even though it has passed from his control, and it is out of his power to return it.

The third error assigned, questions the correctness of the instructions given for plaintiff.

The first instruction tells the jury that if the defendants took the gun without legal authority, and against the consent of plaintiff, the defendants are liable. The third instruction tells the jury that before defendants can justify, they must show "that the Provost Marshal had legal authority to take the private property of Cumins," and the fourth that the Provost Marshal did not possess the right.

The fifth instruction tells the jury that the plaintiff must recover, "unless the defendants have shown that they had a legal right to take the gun and keep it. The sixth instruction is to the same effect.

The instructions together, take the whole case from the jury, and leave them no option but to find for the plaintiff. All that part of the instructions which refers to confiscation and taking private property, was outside of the record, and calculated to mislead the jury. The defendants never claimed any right to confiscate the property of appellee. They claim that in the discharge of their duties as citizens, they took the gun, which appellee swears he cocked, intending to shoot, and turned it over to the Provost Marshal, who took the man and the gun, both of which passed beyond their control, and that in so doing, they incurred no responsibility.

The questions involved are new, and it is believed that no authorities bearing directly on them can be cited.

E. CALLAHAN,

Att'y for appellant.

Clark
vs
Cummings

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Appeal from Crawford

Abstract & Brief

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Clark
vs
Cummins

Mr. Justice Lawrence ~~J.~~ delivered the opinion of the Court. In this case it appears that Clark, not being in the military service of the government, but acting under the authority of the Provost Marshal, arrested Cummins as a deserter, and at the same time took and carried away, from the house of Cummins, a gun which was the private property of the latter. Cummins has demanded the return of the gun, but it has not been restored, Clark swearing he turned it over to the Provost Marshal. The plaintiff below obtained judgment for the value of the gun.

The judgment was clearly right. Whatever may have been the authority of the defendant to arrest the plaintiff as a deserter, he clearly had no right or authority to seize and carry away his private property. He does not claim to have been directed

by the Post Marshal to seize
that, and no facts appear upon
the record showing a state
of affairs which would justify
the Post Marshal in ~~undertaking~~
assuming such authority, even
if he had undertaken to
assume it.

The judgment must be
affirmed.

Judge affirmed.

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In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

JUNE TERM, A. D. 1868.

HENRY CLARK, Appellant, }
 vs. } Appeal from Crawford.
JOHN CUMINS, Appellee. }

ABSTRACT OF RECORD.

- 1 On the 29th of October, 1866, the Appellee filed, before H. Dulgar, a Justice of the Peace in Jasper county, an account in trover against Appellant and Israel Jared, for the conversion of one rifle gun, of the value of fifteen dollars.
- 2 Summons was duly served on Def'ts Jared Clark, and the Justice, the parties appearing for trial, rendered a judgment for fifteen dollars against both Defendants, from which Defendants appealed to Circuit Court of Jasper county.
- 3
- 4 Def'ts filed an affidavit for change of venue, on account of the prejudice of the inhabitants of Jasper county.
- 6 The court changed the venue to Crawford county.
- 9 At the November Term, 1867, of the Crawford Circuit Court, the Def'ts in that Court petitioned the Court for a change of venue from the Circuit, on account of the prejudice of the Judge, showing that at the time the change of venue was taken from Jasper county, Hon. Aaron Shaw was the Presiding Judge of the 25th Judicial Circuit, which included the counties of Jasper and Crawford, and that they had no fears as to the prejudice of Judge Shaw, and that this application is made at the earliest possible opportunity, the record having only been filed in the office of the Clerk on the — day of November, 1867. That notice was given to counsel for Pl'ff on the same day they received notice that the record was filed. The petition is sworn to.
- 10
- 11 The motion for a change of venue was overruled, and the Def'ts excepted. The cause then came on for trial before the Court and a Jury, and the Jury having heard the cause, returned into Court the following verdict: "We, the Jury, find the Defendant, Hay Clark, guilty, and assess the damage at fifteen dollars, and find the Defendant, Israel Jared, not guilty."
- 12 The Def't Clark moved the Court for a new trial, which the Court overruled, and gave judgment upon the verdict. The Def't excepted, and prayed an appeal, which was allowed, and sixty days given to file an appeal bond, with Israel Jared security, in the sum of two hundred dollars.
- The evidence is preserved in the bill of exceptions.
- 13 The Appellee (the Pl'ff below) testified that Def'ts and others came to his house at ten or eleven o'clock at night, and said they had come to arrest

him. He told them they could not come in. They gave him two minutes to surrender, but waited about an hour before they broke in. That he had the gun in his hands, and thought he would use it, but concluded not to. That he laid the gun on the bed, and put the pistol in the bed, and gave up to go. Some one took the gun. That he demanded the gun of Clark, and he did not return it. It was his gun, and was worth fifteen or sixteen dollars. Clark was Captain of the company that arrested him, and claimed that he belonged to the army.

14 *Cross Examined.*—That he cocked the gun, and intended to shoot, but concluded not to. There was no violence offered to him after he surrendered. That they delivered him at the Provost Marshal's office at Terre Haute, Ind. That he was a deserter from the army when he was arrested. That when he demanded his gun of Clark, Clark said it had been turned over to the proper authorities. That he would be glad to tell him how he could get his gun, and would see Wakefield, the Deputy Provost Marshal, and use his influence to have the gun returned.

15 Sylvester Monroney was present at the arrest, and testified substantially the same as Cumins, except that he says after Cumins threw the gun on the bed Clark went to get it, Cumins took it up again, and he and Clark scuffled over it until it was taken from him. That there was no army officer along, and only a few private soldiers. Clark was leader in making the arrest. Clark and his company spent more than an hour persuading Cumins to surrender and go back to the service. He said he would not do it. Clark told him he was authorized to arrest deserters. This was in December, 1863.

16 The Def't, Clark, was then sworn, and introduced to prove "That Charles Wakefield was an acting Assistant Provost Marshal of a District including Jasper county, Illinois, and that as such he authorized the Def'ts to arrest John Cumins as a deserter from the army of the United States;" which was objected to by the Pl'ff, and the objection overruled by the Court, and the Pl'ff excepted. The witness then testified that Wakefield was acting Ass't Provost Marshal of the 11th Dist. of Illinois, including Jasper county, and was openly and notoriously recognized as such by the people and in the office of the Provost Marshal at Olney. That he gave witness authority to arrest deserters, and gave a list of names, including that of John Cumins. That he got help and went to Cumins' house, told him who he was, and that he must go back to the service. He got his gun, revolver, an axe and a corn cutter, and got behind table. I told him he should be treated like a man, but if he shot I would shoot him. When the door was broken, he said, "I surrender." I took the gun and turned it over to the Provost Marshal. After Cumins demanded his gun, I went to Olney and tried to find his gun, but it had been misplaced.

17 *On Cross Examination.*—That there were seventeen engaged in making the arrest. The authority given me to arrest was verbal, and was given two weeks before. I took the gun because he used it to resist. The Provost Marshal paid me for arresting deserters. I did not belong to the

army. I had been to Olney after the gun was demanded, before this suit was commenced, but had not informed Cumins of the result. I think when Cumins demanded the gun I told him I would use my influence to get it, and if he would not wait a reasonable time for me to do so, he might crack his whip.

17 Israel Jared proves that Wakefield had been acting Assistant Provost Marshal for more than two years before the arrest of Cumins.

18 The Plaintiff then introduced Joseph Cumins, who testified that the gun was worth from twelve to sixteen dollars. That when Pl'ff demanded his gun, Clark said he would be glad if he had his gun, that he would see Wakefield and try to get the gun. In the evening afterwards he said John would have to sue—heard no qualification. I think Clark said he had turned the gun over to the Provost Marshal; and this was all the evidence.

18 The Def'ts asked the Court to instruct the Jury :

1st. That desertion from the army of the United States is a crime, and that when any crime has been committed, any person may lawfully arrest the person who committed the crime, without waiting to obtain legal process, and in so doing has a right to use all the force necessary to arrest the criminal, and to take from him any weapons that may be found in his hands, in such a way as to justify a reasonable apprehension that such weapons were intended to be used by him for purposes of resistance.

2d. When it becomes necessary in arresting a person charged with a criminal offence, to take from such person any arms or weapons, either of offence or defense, the person taking such weapons incurs no liability for their value.

19 3d. A person making an arrest must judge for himself at the time what measures are necessary to make the arrest, and take the alleged criminal before the proper authorities in safety, and only becomes liable civilly or criminally if his action turns out to be unreasonable, and of this the Jury must judge.

20 The Court qualified the second instruction by adding to it: "By the taking of the same, provided such weapons are returned to the person from whom they are taken, or his authorized agent, on demand, after danger therefrom has entirely ceased, or the person legally discharged from such arrest."

To which qualification the Def'ts excepted.

PLAINTIFF'S INSTRUCTIONS.

21 The Court, on the part of the Plaintiff, instructed the Jury :

1st. That if they believe from the evidence that the Defendants took the gun of the Plaintiff, without legal authority and against the Plaintiff's consent, then they should find for the Plaintiff.

21 2d. That although the Plaintiff might have been a deserter, yet the Provost Marshal, nor any one acting under him, had a right to take his private property away for that reason; and if the Jury believe from the

evidence that the Defendants did take the property of the Plaintiff, without his consent, then they should find for the Plaintiff, unless the evidence further shows that it was necessary to take it for the purpose of preventing the Plaintiff, or some one else, from using it to prevent the Plaintiff's arrest, or to protect themselves from danger after making the arrest.

3d. That before the Def'ts can justify themselves for taking the gun of Pl'ff, they must show that the Provost Marshal had a legal authority to take the private property of Cumins.

22 4th. That under the laws of this State, no officer has a right to confiscate private property, although that property might belong to a deserter, and no Provost Marshal could confer upon private citizens a right to confiscate private property, that he, the Provost Marshal himself, did not possess; and if the Jury believe from the evidence that the Def'ts did take the gun of the Pl'ff, without authority, they should find for the Pl'ff.

5th. If the evidence shows to the satisfaction of the jury, that the Def't took the property of the Pl'ff by force and against the consent of the Def't—(Plaintiff) and has since refused to return it, the Pl'ff is entitled to recover the value of the property in this action, unless the Def'ts have shown by the testimony that they had a legal right to take said property and keep it.

6th. In this case, if the jury believe that the Def'ts took the gun of Pl'ff without his consent, and have not returned it, the Def'ts are liable in this action for the value thereof, unless the Pl'ffs (Def't) have shown that they have a legal right to take the gun, and still had the right to detain it at the time the same was demanded by Pl'ff, and at the time this suit was commenced.

22 The Def'ts excepted to all of the foregoing instructions.

The jury gave their verdict against the Def't Clark, who filed the following motion for a new trial:

23 The said Def't, Henry Clark, moves the Court to set aside the verdict of the jury in this cause, and grant a new trial, and assigns for cause the following reasons to-wit:

1st. The error of the Court in refusing instructions asked by the Def't, and giving improper and erroneous instructions for Plaintiff.

2d. Because the verdict is contrary to the law and the evidence.

E. CALLAHAN,

Att'y for Def'ts.

23½ But the Court overruled the motion, and gave Judgment on the verdict, to which the Def't excepted, and amended his Bill of exceptions which is signed and sealed by the Court.

24 The Def'ts appeal bond.

23½ Assignment of errors.

25 Certificate of the Clerk.

E. CALLAHAN,

Att'y for appellant.

ERRORS ASSIGNED.

1st. The Court erred in refusing the change of venue asked by the Def'ts on account of the prejudice of the presiding Judge.

2d. The Court erred in qualifying the Def't's 2d instruction.

3d. The Court erred in overruling the Def'ts motion for a new trial.

E. CALLAHAN,

Att'y for Appellants.

APPELLANT'S BRIEF.

The first error assigned is the action of the Court in refusing a change of venue on account of the prejudice of the Judge. The application was for a cause that had arisen since the change was taken from the people of Jasper county. It was for a cause that was unforeseen and could not have been provided against. A new Judge had succeeded to the Bench and it was unfair to compel the defendants to be tried before him, regardless of his prejudices against them. If he had been of counsel against the defendants, must they still be tried before him?

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The third error assigned, questions the correctness of the instructions given for plaintiff.

The first instruction tells the jury that if the defendants took the gun without legal authority, and against the consent of plaintiff, the defendants are liable. The third instruction tells the jury that before defendants can justify, they must show "that the Provost Marshal had legal authority to take the private property of Cumins," and the fourth that the Provost Marshal did not possess the right.

The fifth instruction tells the jury that the plaintiff must recover, "unless the defendants have shown that they had a legal right to take the gun and keep it. The sixth instruction is to the same effect.

The instructions together, take the whole case from the jury, and leave them no option but to find for the plaintiff. All that part of the instructions which refers to confiscation and taking private property, was outside of the record, and calculated to mislead the jury. The defendants never claimed any right to confiscate the property of appellee. They claim that in the discharge of their duties as citizens, they took the gun, which appellee swears he cocked, intending to shoot, and turned it over to the Provost Marshal, who took the man and the gun, both of which passed beyond their control, and that in so doing, they incurred no responsibility.

The questions involved are new, and it is believed that no authorities bearing directly on them can be cited.

E. CALLAHAN,
Att'y for appellant.

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R. CALLEMAN,

Att'y for Appellant.