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Goodrich vs. Fritz.

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4/525. Distgd. in Hogan v. Deuel, 24/218.

**GOODRICH vs. FRITZ.**

After the defendant introduces evidence to support a plea in replevin, he cannot move the court to instruct the jury to find as in case of a nonsuit. But still, if the final judgment is right upon the whole, it will not be reversed. Replevin cannot be maintained against an officer, who has the custody and possession of property, under a valid execution.

THIS was an action of replevin, tried in the Johnson Circuit Court, in September, 1841, before the Hon. RICHARD C. S. BROWN, one of the circuit judges. Goodrich sued for a wagon, which was replevied, and delivered over. Fritz pleaded *non cepit*, and *non detinet*, to each of which issue was joined, and gave notice that he would give special matter in justification. After the plaintiff's evidence, the defendant read, in evidence, an execution from a justice of the peace, against a third person, by virtue of which he, as constable, had levied on the wagon. The execution was admitted to be a regular and legal one, and to be legal evidence. The defendant then moved the court to instruct the jury to find as in the case of a nonsuit, which was done. Damages were then assessed, by writ of inquiry, and judgment for Fritz, for damages and costs. Goodrich brought error.

The case was argued here, by *Blackburn*, for the plaintiff in error.

*By the Court*, DICKINSON, J. In instructing the jury to find as in case of nonsuit, there is error; but we do not regard it of such character as authorizes us to reverse the judgment, if the record shows, as it does in this instance, that the final judgment is right.

That replevin cannot be maintained against an officer, who has the custody and possession of property, under a valid execution, is clear. In such case, the property is already in custody of the law, and cannot be replevied out of it. If the party desired to try the right, the statute prescribes the mode. If the officer was a trespasser, he could be sued, or the party could follow the property into the hands of a purchaser. Replevin was certainly not the proper remedy to obtain possession of the property, or damages for its loss or detention. We can discover no error in the proceedings of the court.

Judgment affirmed.

*Blackburn*, for the plaintiff in error, presented a petition for reconsideration, which was overruled.

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