

Case No. 2,139.

BURCH v. DOWLING.

[5 Cranch, C. C. 646.]¹

Circuit Court, District of Columbia.

March Term, 1840.

REPLEVIN—ACTION ON BOND—PROOF.

Upon a replevin bond, the plaintiff may recover, although there has been no judgment for a return of the property; but the plaintiff must show that he has sustained damage by the plaintiff in replevin not prosecuting his writ with effect.

Debt on replevin bond, for not prosecuting the writ with effect, for not returning the property, and for not paying the costs. The plaintiff, [Fielder] Burch, was a constable, and had taken certain goods in execution to satisfy a debt due by——to——. They were replevied by one Isabella Martin, who, with the defendant [William Dowling] and another, executed the bond, in the penalty of \$75, for which this suit was brought Both parties appeared at the return of the writ of replevin, and, the defendant having laid a rule on the plaintiff to declare by the rule-day, the cause was continued until the next term, (namely, March term, 1838,) when the plaintiff was non-pross'd on the rule, and judgment was rendered against the plaintiff for costs, but no judgment was entered up for a return of the property, nor any avowry or suggestion for a return filed by the defendant. Whereupon, the present suit was brought, and the breaches assigned are, that the plaintiff in replevin did not prosecute her writ with effect, did not return the goods, and did not pay the costs.

Mr. Hoban, for defendant, contended that the plaintiff could not recover without showing a judgment for a return, and prayed the court so to instruct the jury; and cited 7 Wheeler [Cr. Cas.] 594; Moore v. Shield [Case No. 9,775].

Mr. Bradley, for plaintiff, cited Smith v. Hazel [Id. 13,055]; McDaniel v. Fish [Id. 8,744]; Dias v. Freeman, 5 Term R. 195; 7 Wheeler [Cr. Cas.] 569.

THE COURT (THRUSTON, Circuit Judge, absent) refused to instruct the jury as prayed by Mr. Hoban.

Mr. Bradley then contended that the plaintiff was entitled to recover the whole amount of the debt mentioned in the execution, whatever might be the value of the goods seized; or

that the presumption is that the officer took enough to satisfy the debt, and casts the burden of proof on the defendant to show the contrary. 11 Geo. II. c. 19.

But THE COURT said that the plaintiff must show that he sustained damages by the plaintiff's not prosecuting her replevin with effect; and must show the amount of his damages. Verdict for the plaintiff, \$43.13.

¹ [Reported by Hon. William Cranch, Chief Judge.]

This volume of American Law was transcribed for use on the Internet through a contribution from [Google](#). 