

## MURPHY v. TINDALL.

[Hempst. 10.]<sup>1</sup>

Circuit Court, Territory of Arkansas. April, 1822.

## REPLEVIN—UNLAWFUL TAKING—AGAINST WHOM LIES.

It is not essential to the maintenance of the action of replevin that the defendant should unlawfully take the property out of the possession of the plaintiff; but the action lies against all persons in whose possession personal property unlawfully taken may be found, except officers of the law who have possession by virtue of legal process.

At law. Appeal determined before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. This was an action of replevin brought by [Benjamin] Murphy against [Thomas H.] Tindall, and upon the trial of the cause a verdict was rendered in favor of the defendant, from which the plaintiff appealed to this court. The only question presented for consideration is, whether the court below erred in the instruction given to the jury, on motion of the defendant, which was that, "unless it was proved that the defendant took the property out of the possession of the plaintiff unlawfully, and against the plaintiff's consent, the jury must find for the defendant." We are clearly of opinion that this instruction was erroneous. It is true, that it was necessary to establish an unlawful taking from the plaintiff in order to support the action; but it was not necessary to prove the unlawful taking by the defendant. It was sufficient to prove it by any other person. This, we apprehend, is the doctrine of the common law, (1 Chit. Pl. 185,) and by reference to the statute of this territory, (Geyer's Dig. 333,) it is clear that the action of replevin is maintainable against any person in whose hands or possession the

property may be found. We are of opinion, then, that the action of replevin lies against all persons in whose possession personal property unlawfully taken may be found, except officers of the law, who may have possession by virtue of legal process. In the opinion we have given we are supported by the authorities referred to in 1 Chit. Pl. 185, 186. Reversed.

<sup>1</sup> [Reported by Samuel H. Hempstead, Esq.]

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