BOLEY *v.* GRISWOLD.

In an action in the courts of the Territory of Montana for the recovery of the possession of personal property—the code of civil procedure in which Territory provides that the judgment in such an action may be for the possession of the property, or the value thereof in case a delivery cannot be had, and damages for the detention—while it is true that there can be no judgment for the value if there can be a delivery of the property, yet it is not true that a judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding that a delivery cannot be made is not necessary. An absolute judgment for the money is equivalent to such a finding.

ERROR to the Supreme Court of the Territory of Montana.

The Civil Practice Act of the Territory of Montana thus enacts:

"In an action to recover possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention of them."

This act being in force, Griswold sued Boley in one of the District Courts of Montana for the recovery of the possession of certain cattle. The jury found as follows:

"For the return of the cattle to the plaintiff, and in case a return of the same could not be had, $3000, the value thereof; and $800 damages for the detention."

On this verdict the court entered a judgment that plaintiff recover from defendant the sum of $3800, with interest, &c.

No alternative judgment, as provided by the Practice Act, for the possession or return of the property, was rendered upon the verdict by the District Court.

The defendant took the case to the Supreme Court, which affirmed the judgment of the District Court. Thereupon he brought the case here.

Opinion of the court.

Messrs. J. Hubley Ashton and N. Wilson, for the plaintiff in error:

The section of the Civil Practice Act of Montana, on which this case depends, appears to be identical with section 277, of the New York Code, which prescribes the form of judgment to be taken in actions to recover the possession of personal property. Upon that code the Court of Appeals of New York has decided* that neither a plaintiff nor a defendant, in an action to recover the possession of such property, can take judgment for the *value* of property, except as an *alternative;* and that if a judgment is taken for the value alone, and no alternative judgment is entered for the *return* of the property, it will be erroneous, and that for such error the judgment for the value will be reversed by an appellate court.

This seems a rational view of the case, and comes before this court with the support of a tribunal particularly conversant with the general principles of the Civil Practice Act under consideration.

Mr. Robert Leech, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is true that under the Civil Practice Act of Montana there can be no judgment for the value if there can be a delivery of the property, but it is not true that a judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding to that effect is not necessary. An absolute judgment for the money is equivalent to such a finding.

In one part of this record it appears that the verdict was for the return of the property, or, in case that could not be made, for $3000, the value, and $800 damages for the detention. The judgment was for the money, and the pre-

* Dwight *v.* Enos, 5 Selden, 472, 476; Fitzhugh *v.* Wiman, Ib. 563.

sumption is, in the absence of anything in the record to the contrary, that before it was rendered the court had become judicially satisfied that the property could not be returned. In a court of error every presumption is in favor of the validity of the judgment brought under consideration. Error must appear affirmatively before there can be a reversal.

JUDGMENT AFFIRMED.

HEARNE v. MARINE INSURANCE COMPANY.

1. Where, by the terms of a policy, a vessel is insured "to *a port in Cuba*, and at and thence to port of advice and discharge in Europe," and the vessel is lost in going from the port of discharge in Cuba, to another port in the same island for reloading, held on a suit on the policy for a loss that evidence by the assured was inadmissible to show a usage that vessels going to Cuba might visit at two ports, one for discharge and another for loading. [In the present case the court held that the evidence offered did not show such a usage.]
2. Where there has been a deviation in a voyage insured, no decree will be made for a return of any part of the premium. The deviation annuls the contract as to subsequent parts of the voyage and causes a forfeiture of the premium.

APPEAL in equity from the decree of the Circuit Court for the District of Massachusetts. Hearne filed a bill in the court below against the New England Mutual Marine Insurance Company to reform a contract of insurance, he alleging that the policy as made out did not conform to the agreement of the parties, taking that agreement with the usage or custom which he insisted entered into and formed a part of it.

The case was thus:

On the 7th of May, 1866, Hearne made his application by letter to the company for insurance. He said:

"The bark Maria Henry is chartered to go from Liverpool to Cuba and load for Europe, *via* Falmouth for orders where to discharge. Please insure $5000 on this charter valued at $16,000, provided you will not charge over 4 per cent. premium."