No. 12448

Supreme Court of Illinois

Cody

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vs.

Hough

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140 — 157 —

Richard Cody
vs
David Hough

140

1/2448

1858

Prepared

State of Illinois---Supreme Court, 3d Division.

RICHARD CODY,
vs.
DAVID L. HOUGH.
} *Appeal from the LaSalle Co. Circuit Court.*

Record page 1. This was an action ~~of~~ Ejectment to recover Lot ~~5,~~ five on lenumbered as amended in Block ~~119,~~ in LaSalle—declaration and notice, in usual form, ~~filed Nov. 29th, 1856.~~

Record page 3. PLEA—General issue.

Record page 3. On the trial, plaintiff read to the Court the following affidavit: "State of Illinois, LaSalle County. David L. Hough being duly sworn according to law, on oath deposeth and saith, that he is plaintiff in the above entitled cause; that said cause is an action of ejectment, and the property in controversy is Lot 5, in Block 119, in the city of LaSalle, in said county, and states that affiant claims title to said property by virtue of a judgment in favor of the people of the State of Illinois, against one Isaac Cook, rendered by the aforesaid Circuit Court, and the sale of said property to affiant upon an execution legally issued upon said judgment, and a Sheriff's deed to affiant of the property thus sold. And affiant further says, that at the time of said judgment and of said sale, said Cook was the owner of said property, by virtue of a patent for the same, issued in his favor by the State of Illinois, which said patent is recorded in the office of the recorder of deeds, for the county aforesaid, in book of deeds No. 12, page 351; and affiant further says, that said Cody claims title to said property, by virtue of a deed from said Cook, bearing date August 29th, 1854, and recorded in the office of the recorder of deeds for said county, in book 41, pages 676 and 677; and affiant further says, that said Cook is the real defendant in said suit, and that the Attorneys of record for the defendant in said suit are employed by said Cook; and affiant further says; that said patent is not in his possession, nor under his control, nor within his power, nor has it ever been at any time in the possession of affiant, or under his control, or within his power."

Page 6. The defendant objected to the sufficiency of said affidavit, to enable plaintiff to introduce secondary evidence of the contents of the Patent described in said affidavit. The court overruled the objection and decided that said affidavit was sufficient to enable plaintiff to give secondary evidence of the contents of patent, to which the def't excepted.

It was conceded that ~~pl'ffs~~ plaintiffs counsel had served upon def't defendants counsel, on the evening of the day before the trial, a written notice to produce said patent; it was also conceded that Isaac Cook, the patentee named in said patent, resided in Chicago, ~~50~~ eighty miles distant from the place of trial, and

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was not present at the trial, and that this cause was set for trial on this day more than three days before the day of trial

The plaintiff then produced one of the record books of said LaSalle County, and offers what purports to be a record of a patent from the State of Illinois to Isaac Cook, for the lot described in plaintiff's declaration.

The def't objected to the evidence offered—the objection was overruled and an exception taken; said record was then read in evidence.

The plaintiff then offered in evidence the record of a judgment of the Circuit Court of LaSalle county, at the November term of said court, A. D., 1853, which record was as follows:

THE PEOPLE, &C.,
vs.
ISAAC COOK.

Friday, December 16th.

This day, come the People, by Wallace their attorney, and the def't, by Hollister, his attorney, who waives service of notice herein, and enters the appearance of the said defendant; and it appearing to the court that an execution was issued out of the LaSalle County Circuit Court, on the fourth day of June, A. D., 1850, on a judgment obtained therein by the People of the State of Illinois, against Matthias App, for the sum of $16 and 26½ cents, directed to the Sheriff of Cook county, to execute; and that said execution was received by Isaac Cook, the sheriff of said county of Cook, by John C. Miller his deputy, on the 6th day of June, A. D., 1850, at 9 o'clock, A. M. of that day; and it further appearing to the court that another execution for the sum of $14 47½-100 was issued out of said Court on the same day, on another judgment obtained by the same plaintiffs against the same defendant, and directed to the same sheriff to execute, and that the same was received by him, by his said deputy, John C. Miller, on the same 6th day of June, A. D, 1850, at 9 o'clock, A. M. And it also appearing to the Court, that on the 29th day of June, A. D., 1850, the said Isaac Cook, who was sheriff of said county of Cook, on that day, by the hand of said deputy, John C. Miller, received from the defendant therein, the sum of $10 on said executions, or one of them in part thereof. And it also appearing, that on the 19th day of August, A. D., 1850, the said Isaac Cook, who was sheriff, of said county of Cook, on that day, by the hand of his said deputy, John C. Miller, received from the defendant the further sum of ten dollars on said executions, or one of them in part thereof. And it further appearing, that said executions have been returned by the said sheriff, by his said deputy, to the office of the clerk of this Court, without any endorsement thereon of the receipt of said sums of money, and that neither the amount thereof, nor any part thereof has been paid over to the said People of the State of Illinois, the plaintiffs therein, and that the same has been returned by the said sheriff, Isaac Cook, in the hands of his said deputy, John C. Miller.

And it appearing to the court, that the interest on the aforesaid sums from the time the same were collected unto this date, at the rate of 20 per cent per annum, amounts to the sum of $13 41-100, which said sums of principal and interest, being computed together, amount to the sum of $33 41-100. It is therefore considered by the court that the People of the State of Illinois have and recover of said Isaac Cook the said sum of thirty-three dollars and 41 cents, and their costs and charges by them herein expended, and that they have execution therefor.

5 and first order should have been to return execution & if rule not complied with on service of a copy - Statute penal & should be strict.

Judgment Dec 16/53

11 Ills - 636 -

Chap. 99 - R S

Sec 16 - 517 -

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The def't objected to the introduction of said record. The court overruled the objection and permitted said record to be read in evidence—to which the def't excepted. Plaintiff then offered in evidence a fee book kept by the clerk of said court, containing the record of a fee bill and bill of costs, as follows:

P'ge 10

THE PEOPLE,
vs.
ISAAC COOK. } Rule to pay over Moneys.

PEOPLE'S COST.

Clerk's fees—Appear 15, judgment for damages 20, for costs 20,	$0,55
Ord. for ex. 20, bill of costs 30, copy 20, copy of Judg't 50,	1,00
Cert. and seal 35, satisf. 15,	,50
Am't,	$2,05
Clerk,s fee—issuing ex. 40, fil'd d'k 15, sheriff's return 10,	,65
Am't	$2,70

To the introduction of which record of the fee bill the def't objected. The court overruled the objection and the deft excepted.

P'ge 11 The pl'ff then offered in evidence, an execution issued on said judgment, bearing date Feb. 27th, 1854, for $33 41-100, damages, and $2 70-100

P'ge 12 costs, and also, a return on said execution, showing a levy on the lot in question, by the sheriff, and the sale of said lot to David L. Hough on the 18th day of May, 1854—to which execution and return the deft objected; the court overruled the objection, and permitted the same to be read in evidence, to which the deft excepted.

P'ge 13 The pl'ff then offered in evidence a deed from Francis Warner, as sheriff of LaSalle county, to the pl'ff, for said lot, and in connection therewith

P'ge 14 called upon John F. Nash as a witness, and offered to prove by him, that Francis Warner was the successor in office, as sheriff of LaSalle county, of Richard Thorne. Deft objected to the competency of the proof—the court overruled the objection and the def't excepted.

The witness, Nash, then testified, that said Warner was the successor in office of said Richard Thorne, as sheriff of said county, and was acting sheriff on the day of the date of said deed. The pl'ff then offered said deed in evidence. The deft objected to the same—the court overruled the objection and permitted the deed to be read in evidence, to which the deft excepted.

P'ge 14 E. F. Bull was called by pl'ff and testified, that since Nov., 1856, Lots 5 and 6, in block 119, in the city of LaSalle, have been enclosed in one fence; defendants house in which he lives, stands on said lot 6; he did not know who put up the fence around the lots; never saw deft exercise any acts of ownership of the lots in controversy.

This was all the evidence in the case.

P'ge 15 The court, at the request of the pl'ff, instructed the Jury: That the patent from the State to Cook, the judgment, execution, fee book, and sheriff's fees, which have been given in evidence make a prima facie title in the pl'ff, and he is entitled to your verdict, to the giving of which instruction the deft's excepted.

P'ge 15 The deft asked the court to instruct the Jury as follows: Before the Jury can find a verdict for the pl'ff in this cause, they must believe from the evidence that the def't was in possession of the lot named in the

Objects to this—

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plff's declaration at the time of the commencement of this suit. Which instruction the court refused to give, and the def't excepted.

The Jury found a verdict for the Plaintiff.

P'ge 15 The def't moved for a new trial—which motion the court overruled, and the def't excepted.

P'ge 18 The errors assigned are :

1st—The court erred in admitting in evidence the record of the patent from the State to Isaac Cook for the lot in controversy.

2nd—The court erred in admitting in evidence the record of the judgment against Isaac Cook in the La Salle County Circuit Court as aforesaid.

3rd—The court erred in admitting the said fee book in evidence.

4th—The court erred in admitting the execution as aforesaid and the return thereon in evidence.

5th—The court erred in admitting parole proof to show that Francis Warner was successor in office to Richard Thorne as sheriff of La Salle county.

6th—The court erred in admitting in evidence the deed from Francis Warner to the plaintiff.

7th—The court erred in giving the instruction asked for by the plaintiff.

8th—The court erred in refusing the instruction asked for by the defendant.

9th—The court erred in overruling motion for new trial.

10th—The court erred in rendering the judgment aforesaid in the manner and form aforesaid.

GLOVER & COOK,
W. H. L. WALLACE, } *For Appellant.*

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Richard Cody
vs
David L. Hough

Filed Apr 19/58
L Leland
Clerk

May 21 1858

Richard Cody

v

David L. Hough

Appeal from LaSalle

1st The money specified in the Judgment belongs to the County ~~xxxx~~ and should have been collected under section 16. Chap 99. Rev Stat

2 That this is a summary proceeding. The Jurisdiction of the court will not be presumed unless it affirmatively appears, Where the proceeding is not according to the course of the common law but a special jurisdiction conferred by the Statute and although in a court of general common law and Chancery Jurisdiction but an extraordinary Jurisdiction which is not in conformity with either, it must appear on the face of the record itself that the contingency existed or at least was alleged which authorizes it to proceed under the Statute and make the order

Young v Forrain 11 Ill 636 & 7

Miami Exporting company

6 Halstead 535

Hamilton v Buren 3 Yerger 355

Barry v Patterson 3 Humphreis 313

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3d This Judgment is sought to be sustained under one of two sections of the Statute and the appellee does not know which. the sections are Sec 424 chap 83 Purples Stat or the Statutes 263. and Sec 16 chap 99. Rev Stat It can not be sustained under either Statute because no certain notice under either Statute, it is true that some notice was waived but how can it be said that it was a notice under either section of the statute above cited we say that the notice he waived was a notice that a motion would be made for a rule upon him to pay over the money I dont see how it can be said that the waiver a service of a notice that application would be made for a Judgt against him for the money and 20 per cent damages

4th The Court below treated it as a proceeding under the 424th Sec chap 83. as appears from the fact that it rendered a Judgment for the amount with 20 per ct damages which is only authorized by that Statute. The Judgment can not be sustained under this section of the Statute because

1st By this Statute the court is authorized upon proof that the sheriff has had ten

days notice in writing to grant an order requiring the Sheriff to pay over the money with 20 per cent damages thereon and on failure of the Sheriff to comply with such order on demand, and being served with a copy of such order he shall be adjudged to be in contempt or the plaintiff may have Judgt for the money with twenty per cent damages

To give the Court Jurisdiction to render the Judgment, under this Statute it must appear or at least have been alledged so that the Judgment of the court will be presumed to have been taken upon the question

1 That a demand was made for the money by the person authorized to receive it

2 That an order was made requiring the Sheriff to pay over the money with 20 per cent damages

3 That a copy of such order was served upon the Sheriff.

Neither of things appear

4th This Judgment can not be sustained under the 15th Sec Chap 99 because

over

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1 The Judgment is for 20 per cent damages this Section only authorizes 10 per cent damages

2 No demand was ever made upon the Sheriff to pay over the money. this is a condition precedent. unless this was done the Jurisdiction of the Court under this section never attached. unless this was alledged no ground was ever made by which this speedy Summary jurisdiction could be set in motion Young v Sourain 11 Ill 637
(See note at end of brief)

3 The proceeding must be in the name of the person entitled to receive the money. it was not in this case. The People of the State of Illinois were not entitled to receive the money
I think this proceeding can not be instituted in the name of the People

6th This Statute is a highly penal one and must be strictly construed, The Jurisdiction is Summary & special and the right to exercise such Jurisdiction must affirmatively appear

4th The Small amount for which a very valuable property was sold. It not being for the amount of one Years taxes upon the same. show the reason of this whole proceeding.
We believe the law is against this kind of dealing, and as we are sure that Equity ~~and~~ is.

B. C. Cook
of counsel for appellant

Note

In the case cited Justice Eaton says "The authorities all agree that enough must appear either in the application or the order to at least show upon the face of the proceeding to call upon the Court to proceed to act;
a demand of the money was necessary in this case and it does not appear.

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Cody vs Stough

Brief of appellants

Filed May 22. 1858
S. Leland
Clk

B. C. Cook