No. 13649

Supreme Court of Illinois

Dodge et al

---

vs.

Snowhook, Impl.

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 64.

Dodge
vs
Swarthout

1332

1349

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third Monday, (being the Eighteenth day) of February in the year of our Lord one thousand eight hundred and Sixty one and of the Independence of the said United States the Eighty-fifth.

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

A. C. Hesing Sheriff of Cook County.

Attest, Wm L Church Clerk.

Be it Remembered, that, heretofore, to wit; on the 25th day of June A.D. 1860, William B. Snowhook defendant impleaded &c, files in the Court aforesaid a certain Transcript, Summons and Appeal Bond in the words and figures following, to wit;

Transcript.

Justice Court before N. D. Sturtevant

George Dodge and William Dodge vs Thos J Moriarty & Wm B. Snowhook

Debt. Demand $100 00

Summons issued June 7th 1860 returnable June 12th at 9 o'clock A.M. and given to R Carthew, Constable who returned the same served by reading to the within Wm B. Snowhook. Thos J. Moriarty not found. Suit called June 12th 1860. one witness sworn

Cost	.75
Judgt	.25
oath	.06

2	Carthew ,50	and testified and Pltffs demand being upon a Bond signed by the defendants
	R. Carthew	and which Bond has become due
	Rev. Snow ,75	the Court rendered Judgment for the Plff. and against the Defendant Wm

B. Snowhook impleaded with Thos J. Moriarity for Sixty five dollars and fifteen cents and costs in this suit—

I hereby certify the above to be a true and perfect transcript of the of the above entitled cause this 23d day of June A.D. 1860.

A. D. Sturtevant
Justice of the Peace

Summons.

State of Illinois }
Cook County } The People of the State of Illinois, to any Constable of said County, Greeting;

You are hereby commanded to Summon Thos J. Moriarity & Wm B. Snowhook to appear before me at my office in West Chicago, on the 12th day of June A.D. 1860 at 9 o'clock A.M. to answer the complaint of George Dodge & William Dodge for a failure to pay them a certain sum not exceeding one hundred dollars, and hereof make due return as the law directs.

Given under my hand and seal, this 7th day of June A.D. 1860.

A. D. Sturtevant (Seal)
Justice of the Peace

Endorsed.

3 Demand $100.00 - Costs .75" Served by reading to the within named Defendant W.B. Snowhook & Moreanity not found this 8 day of June 1860.
Service 50 R. Carthew, Constable"

Appeal Bond.

Know all men by these presents, that we William B. Snowhook & S.A. Irwin are held and firmly bound unto George Dodge & William Dodge in the penal sum of One hundred and forty Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, and administrators, jointly ~~and~~ severally and firmly by these presents. Witness our hands and seals, this 25th day of June A.D. 1860.

The condition of the above obligation is such, whereas, the said George Dodge & William Dodge did on the 12th day of June A.D. 1860. before A.D. Sturtevant Esq. a Justice of the Peace for the County of Cook recover a Judgment against the above bounden William B. Snowhook impleaded with Thos J. Moriarity for the sum of sixty five Dollars and fifteen cents, and costs of suit, from which said Judgment the said William B. Snowhook has taken an appeal to the Circuit Court of the County of Cook aforesaid, and State of Illinois. Now, ~~therefore~~ if the said

William B. Snowhook shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Taken and approved by me this 25th day of June A.D. 1860
Wm. L. Church, Clerk

Wm. B. Snowhook (Seal)
S. A. Irwin (Seal)

And afterwards, to wit: on the day and year last aforesaid, to wit: June 25th A.D. 1860, the said Defendant sued out of the office of the Clerk of the Court aforesaid the Writ of Summons directed to the Sheriff of said County to execute, and clothed in the words and figures following, to wit:

State of Illinois
County of Cook } ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you summon George Dodge and William Dodge if they shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof to be holden at the Court House in Chicago in said County, on the second Monday of July next, to answer unto William B. Snowhook impleaded with Thomas J. Mcnamby on an

5 appeal from the Judgment of A. D. Sturtevant a Justice of the Peace within said County.

And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness. William L Church, Clerk of our said Court and the seal thereof. at Chicago aforesaid. this 25. day of June A.D. 1860

(Seal)

Wm L. Church Clerk

And thereupon afterwards, to wit: on the 27th day of June in the year last aforesaid said writ was returned into the Court aforesaid by said Sheriff endorsed as follows. to wit:

Served by reading to the within named George Dodge & William Dodge on the 27th day of June 1860 – Fee:– Service $1.00 – Mileage .20 – Return .10 = $1.30

John Gray. Sheriff

By A. Steinhaus Deputy

And afterwards. to wit: at the January term of said Court. to wit: on the Sixteenth day of January A.D. 1861. the following proceedings, among others, were had and entered of record therein in said cause. to wit.

George Dodge & William Dodge
29.13. vs
William B. Snowhook Impld
with Thos J. Moriarity

} Appeal

This day come the said

6 Plaintiffs by Ward & Stanford their Attorneys, and the said Defendant impleaded as aforesaid, by S. A. Irwin his Attorney also comes, and by oral consent of said parties now here given in open Court said cause is submitted to the Court for trial upon the issues joined therein, and the intervention of a Jury waived, and the Court after hearing all the evidence adduced by the parties, the arguments of Counsel as well on the part of the Plaintiffs as of the Defendant and not being sufficiently advised in the premises takes said cause under advisement.

And afterwards, to wit, at the Februrary Term of said Court, to wit, on the second day of March in the year last aforesaid, the following proceedings, among others, were had and entered of record therein in said Cause, to wit:

George Dodge & William Dodge
vs
William B. Snowhook &
impl'd with Thos. J. Moriarity
} Appeal

This day again come the said parties by their attorneys, and the Court having had said cause under advisement, and being now fully advised of and concerning the premises, doth find the issues for the Plaintiffs, and and assesses their damages therein by reason of the premises to the sum of Sixty Five

Dollars and fifteen cents. Thereupon the said Defendant impleaded as aforesaid, moves the Court for a new trial of said cause, and Counsel having been heard as well in support of said motion as in opposition thereto, and the Court being now fully advised in the premises doth order that said motion be and the same hereby is overruled, to which ruling of the Court in overruling said motion for a new trial the Defendant by his counsel now here excepts.

Therefore it is considered by the Court that the said Plaintiffs do have and recover of the said Defendant, impleaded as aforesaid, their damages of Sixty Five Dollars and fifteen cents in form aforesaid assessed, together with their costs and charges by them about their suit in this behalf expended and have execution therefor. Whereupon the said Defendant, impleaded as aforesaid, excepts, and prays an appeal to the Supreme Court of the State of Illinois, and on his motion it is Ordered that he have ten days to prepare and file his Bill of Exceptions in said Cause

And thereupon afterwards, and at the same term of said Court last aforesaid, to wit: on the 9th day of March in the year last aforesaid. the following further proceedings

8 in said cause were had and entered of record in said Court, to wit:

George Dodge & William Dodge
vs
William B. Snowhook
Impl'd with Thos J. Moriarity
} Appeal

On motion of D. A. Irwin of Counsel, no objection being made thereto, it is Ordered that the time to file Bill of Exceptions herein be further extended to Tuesday morning next, and the same is hereby extended accordingly.

And afterwards, and at the same term of said Court last aforesaid, to wit: on the 11th day of March in the year last aforesaid, the following further proceedings were had and entered of record in said cause in said Court, to wit:

George Dodge & William Dodge
vs
William B. Snowhook
Impleaded with Thos J Moriarity
} Appeal

This day again comes the said Defendant by his Counsel, and the Court being now fully advised in the premises doth grant the prayer of the said Defendant for an appeal from the orders and judgment

9 of this Court in said Cause to the Supreme Court of the State of Illinois upon condition that said Defendant, impleaded as aforesaid, shall, on or before tomorrow morning execute and file with the Clerk of this Court his appeal Bond herein in the penal sum of two hundred dollars, conditioned according to law with Samuel A. Irwin as security thereto,-

And afterwards, to wit: on the Eleventh day of March in the year last aforesaid the said Defendant by his said Attorney filed in the Court aforesaid, in said Cause, his certain Bill of Exceptions in the words and figures following, to wit:

10 George Dodge &
William Dodge
vs
William B Snowhook
Impleaded with
Thomas J Moriarty

In the Circuit Court
of Cook County.

Appeal.

Be it remembered that the above cause came on for trial at the January Term A D 1861. of said Circuit Court and by Consent of parties the same was submitted to the Court without the intervention of a Jury, and the said Plaintiff to maintain the issues on his part offered in Evidence the following Order or Judgment of said Circuit Court in the Case of Thomas J Moriarty vs George Dodge and William Dodge made at the April Term A D 1860. to wit:

Thomas J Moriarty
vs
George Dodge and
William Dodge

Appeal

This day Comes the said plaintiff by S A Irwin his Attorney and the said Defendant by Ward & Stamford their Attorneys also Come, and issue being joined herein it is Ordered that a Jury Come, Whereupon Come the Jurors of a Jury of good and lawful

11 men to wit: John A Clapp, Lewis Dodge, Luther Burley, A J Myers, S H Marcy, M S Foley, George Todd, E J Bellows, A F Bradley, J W Hawks John King and James Averill, who being duly Elected tried and sworn well and truly to try the issue joined aforesaid and a true Verdict render according to law and the Evidence, and after hearing a part of the Evidence for certain Causes moving ~~this~~ well the Court as the said Plaintiff and defendantz, Lewis Dodge one of the Jurors of the said Jury is now withdrawn by the Plaintiff from the panel thereof, and the residue of Jurors are altogether discharged from giving any Verdict of and upon the premises

Therefore it is Considered that said defendantz do have and recover of the said Plaintiff their Costs and Charges by them about their defense in this behalf Expended and have Execution therefor.

And the said Plaintiffs also offered in Evidence a Certified Copy of a Certain Appeal Bond purporting to be Executed by said Defendant and said Thomas J Moriarty in a Certain Case of the trial of the right of property, before one H H De Mary a Justice of the Peace in & for said Cook County on the appeal thereof to said Circuit Court, which is in the Words and figures following to Wit:

Know all men by these presentz

12 that we Thomas J Moriarty and of
the County of Cook and State of Illinois, are held
and firmly bound unto George Dodge and William
Dodge in the penal sum of One hundred and twenty
five dollars lawful Money of the United States
for the payment of which well and truly to be
made we bind ourselves our heirs Executors and
administrators jointly and severally and firmly
by these presents. Witness our hands and seals
this fifth day of February A D 1859.
The Condition of the above Obligation is such
that whereas the said George Dodge and William
Dodge did on the 2d day of December 1858 before H H
Demary a Justice of the Peace for said County of Cook
recover a judgment against one Edward Conly for
the sum of forty two 50/100 dollars besides Costs upon
which Judgment, Execution was issued against the
goods and Chattels of the said Edward Conly and
under the said Execution a levy was made by Richard
Carthew a Constable of said County upon a certain
dwelling house situated on Wells Street between Jackson
and Van Buren Streets in the City of Chicago and County
aforesaid, which dwelling house the above bounden
Thomas J Moriarty, Claimed to be the owner, and his
right thereto having been tried before the said Justice
and a Jury, and a Verdict rendered against him as
such Claimant, and he having thereupon prayed
an Appeal to the Circuit Court of the County of Cook

13 Now if the said Thomas J Moriarty shall prosecute such appeal without delay, and pay all costs that ~~may~~ have accrued or may accrue on such appeal in the said Circuit Court and shall deliver the said dwelling house to the said Constable if the Judgment of the said Circuit Court shall be against him the said Moriarty then these Obligation to be Void Otherwise to remain in full force and Virtue

Thos J Moriarty (Seal)
Wm B Snowhook (Seal)

Approved by me at my office this 5th day of February a D 1859
Wm L Church J P

And the said Plaintiff also offered in Evidence a certain Execution issued by said Justice Demary against the Goods and Chattels of Edward Conley and in favour of George Dodge & William Dodge and also the return thereon which Execution and return are in the words and figures following to wit:

State of Illinois
Cook County } ss

The people of the State of Illinois to any Constable of said County Greeting.

We command You, That of the Goods and Chattels of Edward Conley in your County, you make the Sum of Thirty Six dollars and Eighty Cents, debt

14 and One dollar and Eighty Seven Cents Costs, and interest, which George Dodge & William Dodge lately recovered before me in a certain plea against the said Edward Conly, and thereof make return to me within Seventy days from this date.

Given under my hand and seal this 6th day of December AD 1858.

H H De Mary (Seal)
Justice of the Peace.

Endorsements on Execution,

Received December 6 1858 at 10 o'clock AM. Executed by levying on the following described property, to wit: One two story frame building on Wells St between Jackson & Van Buren Sts, December 26 1858.

Fees ——— 50.

R Carthew Const

Execution returned right of property tried and Defts Appealed to the Upper Court Jany 29 1859

R Carthew
Constable.

The said Plaintiffs also offered in Evidence a certain instrument of Writing from Thomas J Moriarty to Charles Wacker which is in the Words and figures following to wit:

This Indenture, Made this twenty Eight day of September, in the year of our Lord One thousand

15 Eight Hundred and fifty nine, between Thomas O Moriarty of Chicago party of the first part and Charles Wacker of Chicago Cook County Ills party of the second part, Witnesseth That the said party of the first part, for and in Consideration of the Sum of Three Hundred and twenty ($320.) dollars in hand paid by the said party of the second part the receipt Whereof is hereby acknowledged and (the said party of the second part forever released therefrom) ha- granted, bargained, sold remised, released Conveyed, aliened and Confirmed, and by these presents do grant bargain sell remise release Convey alien and Confirm unto the said party of the second part and to Hers and assigns forever, all the following described Lot piece or parcel of land situate in the County of Cook and State of Illinois, and known and described as follows to Wit: One two story frame house, situated on Wells Street on Lots Eight & Nine (8 & 9) Block Ninety one (91) School section addition Chicago Illinois, Together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion or reversions remainder and remainders rents, issues and profits thereof, and all the Estate right title interest, Claim or demand whatsoever of the said party of the first part, Either in Law or Equity of, in and to the above bargained premises with the hereditaments and appurtenances To have

16 and to hold, the said premises above bargained and described, with the appurtenances, unto the said party of the second part his heirs and assigns Forever. And the said Thomas J Moriarty party of the first part for his heirs Executors and administrators do Covenant, grant bargain and agree to and with the said party of the second part his heirs and assigns, that at the time of the Ensealing and delivery of these presents, he is well seized of the premises above Conveyed, as of a good sure perfect absolute and indefeasible Estate of inheritance in law, in fee simple and ha good right full power and lawful Authority to grant bargain sell and Convey the same in manner and form aforesaid, and that the same are free and Clear from all former and other grants, bargains Sales, liens, taxes, assessments and incumbrances of What Kind or nature soever, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and Every person or persons lawfully Claiming or to Claim the whole or any part thereof, the said party of the first part shall and will Warrant and forever Defend. In Witness whereof the said party of the first part hereunto set his hand and seal the day and year first above written

Signed Sealed and delivered } Thomas J Moriarty (Seal)
in presence of
A D Hicks

17 It is admitted property described in this Conveyance is the same as that described in Bond sued on.

And the said Plaintiffs also called as a Witness, Richard Carthew who being duly sworn testified as follows. Know the parties to this suit. I had the Execution introduced in Evidence in this Case, am an acting Constable of Cook County. Made the levy Endorsed on Execution Property was never returned to me.

On the Cross Examination of said Witness he testified as follows to Wit:

I had the Execution when I made the levy, but returned it when the right of property was tried, and defendants appealed. I did not move the House Conley was living in it at the time of the levy. I did not put a Custodian or Keeper in the House when I levied on it, the Occupants remained in the House as usual. I took no other possession of it than to tell Conley or his wife, I had the Execution and was going to make the levy, and did then and there make the levy, and then when I made the levy I advertized it for sale.

To which testimony in relation to how levy was made, was then and there Objected to by Counsel for Plffs. because defendant is estoped from denying regularity of levy by their notice to try right of property, and by Bond, which objection was overruled

18 by Court, to which ruling Plffs atty then & there Excepted.

I met Snowhook on the Corner near Sherman House, he came across Clark Strut to me and said Carthew I want you to go up and take possession of that House. I said Snowhook I have no Authority to take the House, I said Snowhook my Execution was returned I have no Execution, it was returned. I could not hold it more than 70 days, he then said Come over to my Office & I'll send a boy with you. I told him it was of no use. the boy could not put me in possession as I know the property belongs to another person. The property was sold by Moriarty to Charles Walker, and I went to Charles Walker to see if it was a fact. He told me that it was so & he had shown me a bill of sale, and the people in the House told me they had leased it of him. a few days later I met him (Snowhook) again with a young man and he said I now want you to go & take possession of the House & I will send this young man with you. I told him it was no use. I had no Execution and no power to take the House, he never offered to go with me himself.

This closed the Evidence on the part of Plaintiffs and they here rested their Case.

19 And Defendants announced that he had no Evidence to offer, and no other or further Evidence being Offered by either of said parties, and the said Court after hearing the Arguments of Counsel took the same under advizment.

And afterwards to Wit: at the January Term AD 1861. of said Circuit Court, the said Court found in favor of said Plaintiffs and against said Defendants for the sum of sixty five dollars and fifteen Cents. and Costs of Suit.

Whereupon the Counsel for the said defendant, moved the said Court for a new trial, which Motion for a new trial is in the words and figures following towit:

Jesse Dodge
William Dodge
vs
William B Snowhook
Impleaded with
Thomas J Moriarty

In the Circuit Court of Cook County.

Feby T. 1861.

Motion for New Trial.

And now Comes the Defendant Wm B Snowhook by his Atty S A Irvin and moves the Court for a New trial herein, for the reasons following

1st The Judgment or findings of the Court is against law.

2d. The finding of the Court is against Evidence

20 3. The finding of the Court is against law & Evidence,

4. That the Bond on which said suit is brought is null & Void

5 That said Bond is illegal & Void not being given in a case authorized by the Constitution & laws of the State of Illinois

6th That the trial of the rights of property by a Constable together with a Justice of the Peace is not recognized by the Existing Constitution of the State.

7 That Defendant Snowhook is not bound by said Bond.

8 That the Justice before whom said suit was tried had no jurisdiction, because the penalty of Bond sued on Exceeded One Hundred dollars

9 That the Deft by the Conditions of Bond was only required to pay Costs & deliver dwelling House & that having offered to do so in same Condition as levied upon, the Judgments should have been for Costs.

10 That Dwelling House being property levied upon. said levy was *prima facie* Void by a Constable. unless it affirmatively appears that it was personal property.

11. That the Constable who is alleged to have made the levy on House. never took or had possession of the Same.

S. A Irvin
Atty for Snowhook

24 And the said Court immediately overruled said Motion and Entered Judgment on the said finding in favour of Plff. and against Deft for the sum of Sixty five Dollars and fifteen cents.

Whereupon the Counsel for said Defendant Excepted to the overruling of said Motion for a new trial & to the Entry of Judgment as aforesaid. And inasmuch as the Matters aforesaid do not appear upon the record, prayed that the Judge of said Circuit Court would set his hand and seal to this Bill of Exceptions according to the form of the Statutes in such Case made and provided. and thereupon the Judge of said Court at the request of said Counsel for said Defendant did sign and seal this Bill of Exceptions pursuant to the Statute &c

George Manierre Seal
Judge of 7 Judicial
Circuit Ills.

And afterward to wit: On the 11th day of March in the year last aforesaid the said Defendant filed in the Court aforesaid in said Cause his certain Appeal Bond in the words and figures following to wit:

Know all men by these presents That we Williams B Snowhook and S A Irwin of Cook County and State of Illinois are held and

22 and firmly bound unto George Dodge and William Dodge in the penal Sum of Two Hundred dollars for the payment of which well and truly to be made we bind ourselves our heirs ~~and~~ Executors and Administrators jointly severally and firmly by these presents

Witness our hands and seals this 9th day of March A D 1861

The Condition of the above obligation is such, that whereas the said George Dodge and William Dodge did at the February Term A D 1861. of the Circuit Court of Cook County & State of Illinois recover a Judgment against the above bounden William B Snowhook impladed with one Thomas J Moriarty for the Sum of Sixty five dollars & fifteen Cents and Costs of Suits from which Judgment of the said Circuit Court the said William B Snowhook has taken an appeal to the Supreme Court of the State of Illinois,

Now if the said William B Snowhook shall well and truly pay the said Judgment, Costs interest, and all damages in case the said Judgment shall be affirmed, and shall prosecute said Appeal with Effect, then the above Obligation shall be Void otherwise to remain in full force and Effect.

Wm B Snowhook (Seal)
S A Irwin (Seal)

Approved by me this 9th day of March 1861.

George Dodge et al
vs
William B Snowhook

} In Supreme Court Illinois — Appeal from Cook Circuit Court

And the said appellants say there is manifest error in the judgment and proceedings of said Circuit Court in this

1st The judgment of said Circuit Court should have been rendered for this appellant instead of having been rendered against him.

2 said Circuit Court erred in not rendering judgment for this appellant.

S. A. Irwin
appellants Attorney —

Additional Errors assigned by the Plaintiff in Error on the 24th April 1862 by leave of the Court first had & obtained,

1. The judgment or finding of the Court is against law.
2. The finding of the Court is against evidence
3. The bond on which the suit is brought is null & void.
5. The bond is illegal & void, not being given in a case authorized by the Constitution and laws of the State of Illinois
6. That the levy of the writ of property by Constable, together with a J.P. is not recognised by the existing laws & constitution.
7. That defendant Snowhook is not bound by said bond.
8. Justice had no jurisdiction, penalty of bond exceeding $1000.
9. Condition of bond only required deft to pay costs & deliver horse and having offered to do so, judgment should only have been for costs.
10. Dwelling house being prima facia realty constable could not levy on it unless evidence affirmatively showed it realty.
11. Constable never took or had possession of horse.

S. A. Irwin
Atty for Appellants

And the said appellee by Ward & Stamford their atty come and say that there are no errors in the finding of said court and think the same are correct

Ward & Stamford
Atty for appellee

~~144~~ ~~19~~ 81

Cir. Court Cook Co.

Wm Dodge
64
81

W. B. Snowhook Impr

Complete Record

Filed April 16. 1861
L. Leland
Clerk

1.5.75 S. A. Irvin
Defts atty

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Original writ, Papers, proceedings of record Bill of Exception & Appeal Bond in a certain cause lately pending in said Court on the Common Law side thereof, wherein George Dodge & William Dodge were Plaintiffs and William B Snowhook impleaded &c were Defendant.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Chicago, this Fifth day of April A. D. 1861

Wm L Church Clerk.

Fees for Record $5,75/100

In the Supreme Court

OF THE STATE OF ILLINOIS.

April Term, A. D. 1862.

GEORGE DODGE et al., Appellees.
vs.
WILLIAM B. SNOWHOOK,
Impleaded with
THOMAS J. MORIARTY, Appellant.

Points and Authorities of the Appellees.

The bond upon which this suit was originally brought was executed under the following circumstances:

The Dodges, by virtue of an execution in their favor, caused certain property to be levied upon, which property was claimed by said Moriarty.

The right of property on notice by Moriarty was tried before a justice of the peace and a jury, pursuant to the statute, and decided adversely to the claimant, Moriarty.

The said Moriarty appealed from the judgment in said right of property trial, and to perfect the said appeal this bond was executed by Moriarty and Snowhook, as obligors.

On the trial of said appeal, the decision was again adverse to the claimant Moriarty; whereupon the Dodges brought suit upon said bond before a justice of the peace, recovered a judgment, from which judgment said Snowhook, impleaded with Moriarty, appealed to the Circuit Court of Cook County, and from that court to this.

1st. The proceedings in which the bond was given are valid.

The justice acts as in other cases—issues the papers, dockets the case, swears the witnesses and jurors, and on the *verdict* of the *jury* enters the judgment in *his docket.*

The constable forms no part of the court in the sense urged by Snowhook.

See Scates' Statutes, page 1115, Sec. 9 and 10.

Justices' Courts are recognized by the Constitution of this State.

Sec. 1, Art. 5, of present Constitution.

The bond is good as a voluntary undertaking.

Van Deusen *v.* Hayward, 17 Wend. 67.
Ring *v.* Gibbs, 26 Wend. 502.

The obligors procured the property levied upon to be relieved, have had the benefits of the bond, and should not be permitted to dispute its validity.

26 Wend. 502.

2nd. It is urged that the penalty of the bond exceeded $100, and could not be sued on before a justice of the peace. This does not follow, for;—

I. The test of the jurisdiction of a justice of the peace is the amount demanded and proved to be due.

Nichols *v.* Ruckells, 3 Scam. 299.
Clark *v.* Witbeck, 14th Ill. 393.

II. In all actions of debt on bonds, &c., justices have jurisdiction where the *amount claimed to be due* does not exceed $100.

Scates' Statutes, page 686, Sec. 17.

III. The amount claimed to be due was limited by the endorsement on the back of the summons issued by the justice.

Scates' Statutes, page 698, Sec. 29.
11th Ill. 619.
4 Gil. 65.

And the proofs in this case showed less than $100 due.

IV. The rule in courts of record prescribing the form of judgments on penal bonds does not apply to justices' courts; for, "no particular form is necessary to make the finding of a justice of the peace a judgment."

Kimball *v.* Riter, 25th Ill. 276.

In the case of Washburn *v.* Payne, 4 Blackford Ind. Rep., page 216, it was held that—

In an action of debt on a bond, before a justice of the peace, conditioned for the delivery of property, that if the plaintiff in his statement claimed less than $100, the justice had jurisdiction though the bond was in the penal sum of $175, the test of the jurisdiction being the *amount demanded.*

The case of Beard *v.* Kinney, 6 Blackford, ~~also cited above~~, recognizes the same doctrine.

3rd. Both Snowhook and Moriarty are estopped from denying the regularity or sufficiency of the levy by their acts in giving notice to try the right of property under the levy, and in signing the appeal bond.

2 Scam. 21. Harrison *v.* Singleton.

4th. Snowhook pretends, that after the decisions of the appeal in the Circuit Court, he offered to deliver the property to the constable. The proof shows that the property in question was sold, delivered to and in possession of one Walker.

Pages 15, 16 and 17 of Record.

The Dodges were not bound to follow it there. The bond was substituted in place of property, and Snowhook was bound to deliver the property *to* the constable, —an *offer* to deliver, while the property was in possession of third parties, was not enough.

5th. The proof is sufficient to sustain the judgment;—for a portion of the testimony was the record of a cause between Moriarty and the Dodges, being the trial of the appeal in the right of property case, in which the said Dodges recovered against Moriarty their costs in that suit.

Pages 11 and 12 of Record.

The costs in that suit were properly admitted and assessed by the court as additional damages in this suit on the bond.

WARD & STANFORD,
Attorneys for Appellees.

64 81

Supreme Court
State of Illinois

Wm B. Snowhook
appellant
vs
Geo Dodge et al
appellees

Points & Authorities of
Appellees

Filed Apl 28th 1862
L. Leland
Clk.

Ward & Stanford
Attys for appellees

In the Supreme Court
of the State of Illinois

April Term A.D. 1862

Geo. Dodge &
William Dodge
vs Appellees
William B Snowhook
Impl. &c
Thomas J. Moriarty
Appellants

And now come the said Geo. Dodge & William Dodge appellees in the above entitled cause by Ward & Stanford their attorneys and waive the issue and service of Process, and enter their appearance in said cause

April 5th 1862

Ward & Stanford
Attys for Appellees
Geo. & Wm. Dodge

64

Supreme Ct. of
State of Illinois

Geo. Dodge &
Wm Dodge
Appellants
vs
Wm B. Snowhook
Appellant

Appearance for Appellants

Filed Apl. 10. 1862
L. Leland
Clk.

Ward & Stanford
Atts for Appellants

In the Supreme Court
State of Illinois

April Term 1862

William B. Snowhook
Impleaded &c Appellant
vs
Geo. Dodge &
William Dodge
Appellees

It is hereby Stipulated and agreed by and between the parties to this above entitled suit that the same shall be submitted to the Court upon the printed arguments, points and authorities of the respective parties & be filed without oral argument — the same to be disposed of by the Court when the same shall be reached in its regular order for hearing

Chicago April 22. 1862

Ward & Stanford
Atty for Appellees
S. A. Irvin
Atty for Appellants

64 81

Sup. Court
State of Iowa

William B Shinnhorst
impleaded &c
vs
Gov. Dodge et al

Stipulation to submit
cause on printed Arguments

Filed Apl. 23. 1862
L. Leland
Clk.

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS,

APRIL TERM, A. D. 1861.

GEORGE DODGE AND WILLIAM DODGE

vs.

WILLIAM B. SNOWHOOK

IMPL'D WITH

THOMAS J. MORIARITY.

Defendants' POINTS AND BRIEF.

This is an action on an appeal bond, sued before a Justice of the Peace, the penalty whereof exceeds $100. The bond was filed in a case wherein the right to property, which was levied on by a constable, was tried before a JUSTICE and a Jury, and decided adversely to the claimant; whereupon he appealed to the Circuit Court.

Numerous objections were made to the right of recovery by plaintiffs on said bond, both before the Justice and Circuit Court, the chief of which were the following: to which the attention of the Court is particularly directed, to wit:

1st. That said bond is illegal and void, not having been given in a case authorized by the Constitution and laws of the State.

Sects. 9 and 10, of chap. 90 of Rev. Stat., 1845, provide for the trial of the right of property, levied on by a constable, when a claim is made to it by a third party, before the *constable serving* such execution, *together* with the justice who issued the same, &c., &c. That law was approved, March 3rd, 1845, and it was valid until the adoption of the new Constitution in force April 1st, 1848.

By the New Constitution, however, the Judicial power of the State, was vested in the Supreme Court, Circuit Courts, County Courts and Justices of the Peace. *See Sec.* 1 *of Art.* 5 *of New Const.* The tribunal, to wit: "*the Constable, together with the Justice*, &c.," in which the authority was vested by the aforesaid Secs., to try the right of property in the case given, is not recognized by said Constitution.

Hence, the proceedings before the Justice, &c., were *Coram non Judice.*

Indeed, the transcript of the trial of right of property, shows that said trial was had before the Justice *only*, and a Jury : A tribunal not even provided by the Statue to try the same. "The Constable, *together* with the Justice" being the tribunal provided by Secs., 9 and 10 aforsaid.

The appeal bond therefore executed by the defendant, &c., and which was filed in said case, and upon which this suit is brought, was given in proceedings not recognized by law; and is consequently null and void.

2nd. The next objection taken, to the right to maintain this action, is that the penalty of the bond sued on, exceeds $100.

The form of a summons in a Justice's Court, is given in the Statute in relation to Justices and Constables. By the form of Summons, the form of action cannot be determined, for this Court has already held, that a Justice has jurisdiction under said form of summons in any action, wherein the same is conferred by Statute. In other words, the form of summons is immaterial; if the justice has Jurisdiction of the subject matter, then the party will be presumed to have chosen the form of action suited to his case.

Hence, although the summons, in the Justice's Court in this case, does not show the form of action, yet, for the reasons aforesaid, the Court will presume it an action of debt.

Being an action of debt, the judgment must necessarily be for the penalty; (to wit, $120) which exceeds the Justice's jurisdiction, to be discharged, however, by the payment of the damages found. *See Frazier et al., vs. Laughlin et al.* 1 *Gilm.* 347—2 *Gilm.* 266—14 *Ill.* 248.

It was not contended in the Court below, and will not be here, that *this* defect in the jurisdiction was cured by the appeal; but we presume it will be contended here, as there, that these decisions of this Court, refer *exclusively* to Courts of Record, and not to Justices' Courts.

The cases relied on to maintain this view of the question, are the following: *King et al. vs. Pres. and Trust of Jack.*, 2 *Gilm.* 305—*Clark et al, vs. Whitbeck*, 14 *Ill.* 393—*Pendergast vs. the City of Peru*, 20 *Ill.* 51—*C. R. I. R. R. Co. vs. Whipple*, 22 *Ill.* 337.

The first case is an action to recover penalty for breach of a town ordinance. The ordinance and act of incorporation of the town, conferred jurisdiction on the Justice, who fined the party $5—this amount was, of course, within the Justice's Jurisdiction; but no question arose in regard to the amount of penalty, or fine exceeding $100. The case therefore is not analagous.

The second case was an action of assumpsit on a promisory note and an account. The amount claimed by plaintiff was $100; this would appear to have been a balance, as the Judgment rendered by the Justice was only $80;—and in the Circuit Court the Judgment was but $25; the maximum amount of indebtedness was less than $100, being an action of assumpsit, the Justice, of course, had jurisdiction. If the action had been debt for a penalty of a bond exceeding $100, then it would seem clear, even, from the case, that the Justice would have had no jurisdiction.

The third case is an action to recover a penalty for violation of a city ordinance. In that case, the penalty did not exceed $100. The judgment, though in damages, and not in debt, was for the full amount of penalty: the judgment was, therefore, substantially correct; though erroneous in form, yet it was simply a *clerical* error in putting the judgment into form.

Had the judgment, in the case at bar, been formally in damages for the full amount of the penalty of the bond, then it would have been substantially correct; and would have been analagous to the case last cited; but it would, at the some time, have shown, of course, that it exceeded the Justice's jurisdiction.

The fourth case is an action on the transcript of a Justice of the Peace. The judgment was for the gross amount of the debt and damages, which together amounted to a sum less than $100—the gross amount, of the transcript, debt, interest and costs, was less than that sum. The judgment, therefore. if rendered formally in debt, would have been less than $100: it was, indeed, erroneously entered, but was substantially correct. In other words, there was simply a clerical error in making up the judgment.

The Court will perceive that none of these cases, was an action on a penal bond wherein the penalty exceeded $100.

It is believed that there is a clear distinction between an action to recover a penalty for violation of a town ordinance, where it is less than $100, and an action upon a penal bond, where the amount exceeds $100; and the error merely one of form.

The penalty of the bond, in the present case is $120; the condition is that suit described in the bond, be prosecuted without delay; that all costs which have or may accrue on appeal, be paid; and the property be delivered to constable, if appellant fail in his suit; on failure to perform these conditions or any of them, of the bond, the penalty becomes forfeited, and the obligee entitled to recover the penalty, to be discharged, however, on payment of damages; but it is no less certain that the recovery, or judgment must be for the full amount of the penalty, and THAT whether it be rendered formally in debt, or otherwise.

3. The next objection to recover in this action, is that the Constable never, in fact, levied on the property From the testimony of Constable Carthew, (*see abstract page* 17), it will be seen that what he calls the levy, was simply an endorsement on the back of the execution, informing the occupants of the property of the fact, and advertising. He took no receipt for the property from any person; put no custodean in possession of it; nor did no act which could, by any possibility, be construed as notice to the public.

"In order to make a valid levy on personal property the Sheriff" (or other officer) "must have it within his power and control, or at least within his view, and if having it so, he makes a levy upon it, it will be good *if followed up afterwards within a reasonable time, by his taking possession in such a manner as to apprize everybody of the fact of its having been taken in execution.* 2 *Bouvier's Dic.*, 47—*Wood vs Handsdale*, 3, *Rawle* 405, —*Barns et al vs Bellington et al*, 1 *Wash. C. C. R.* 29.

But it is contended by plaintiffs that the defendant, Snowhook, the surety in the appeal bond, is estopped from denying the regularity of the levy, because Moriarity the claimant gave notice to try the right of property, and because the defendant executed the bond.

The answer to this, is, that it is not the regularity of the levy which is denied, but the fact that no legal levy was made. The objection, made by plaintiffs, is not tenable as to this defendant, who is simply a surety on the bond; whatever may be its force as between the parties themselves.

Another answer to the plaintiffs' objection is that the so-called levy being a nullity the entire subsequent proceedings are null and void.

Hence, the bond was made in a case, not authorized by law, and, is consequently of no force.

4th. Again, even should the Court be against us in our preceding positions, the judgment of the Circuit Court, is erroneous on the merits of the case.

It is true, the plaintiffs contend that the bill of sale, offered in evidence, vested the title in the house in controversy in Walker. The instrument is dated Sept. 28, 1859. The so-called levy was made Dec. 26, 1858, almost one year before; if that levy was legal and valid, the lien created thereby upon the house could not, and did not cease and determine until the final determination of the suit for the trial of right of property; and if determined against claimant, not then until the property was disposed of—so that, if even Moriarity had any interest in the house, as Walker purchased after the levy, and while the lien subsisted, then he took it subject to that lien.

But the determination of the suit for the trial of the right of property in the Circuit Court against Moriarity, the claimant raises the conclusive presumption, in the absence of any other testimony, as to his title to the house, that he had no interest whatever in it; and that the house was Conley's, the defendant in execution.

Hence, the sale to Walker, was simply a nullity, it not appearing the vendor had any title thereto. Such having been the case, the objection made by Constable Carthew, when Snowhook desired him to take posession of the house after the determination of the suit on appeal: that he had uo authority; that he had returned the execution; that he knew defendant could not put him in possession; that the property had been sold by Moriarty to Walker; that Walker had shown him the bill of sale of it; was mere *bagatelle*, for if true, still it did not release him from taking possession of the house, when such possession was tendered him by the defendant.

But the second interview, he, Carthew, had with Snowhook, leaves little room to doubt that the objections made in his first interview were simply excuses, without reality, intended by him to get rid of taking possession of the house, which was offered to be given him; for it will be observed by testimony, that in said second interview he puts his refusal, to take possession of the house, upon a somewhat different ground, viz: "That he had no execution and no power to take the house," notwithstanding, he admits that the defendant had a young man with him whom he proposed to send with him (Carthew,) to deliver the house. See Abstract Pgs. 17 and 18.

Carthew's evidence shows beyond any doubt, that within a few days after the right of property to the house was determined, upon appeal in the Circuit Court against the claimant, that the defendant offered to deliver him (Constable Carthew,) the house; and that on mere pretexts, he refused to receive it. For be it remembered, there is an entire absence of evidence, even tending to show that the defendant was unable to make the delivery, as he proposed.

The judgment therefore of the Circuit Court, is clearly erroneous on this ground, and, should have been simply for costs, under the evidence in the case.

5th. Then, again, the only evidence appearing in the whole Record from which damages could be assessed is the Execution against Conley, amounting to $36.80 debt and $1.87 costs, notwithstanding the judgment of the Court below is for $65.15. How can such a judgment be arrived at from the evidence?

S. A. IRVIN,
ATT'Y FOR DEF'T.

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Snowhook
vs
Dodge—

~~Affidavit and~~ Points & Brief—

Filed Apr. 25-1861-
L. Leland
Clerk

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS,

APRIL TERM, A. D. 1861.

GEORGE DODGE AND WILLIAM DODGE

vs.

WILLIAM B. SNOWHOOK

IMPL'D WITH

THOMAS J. MORIARITY.

ABSTRACT OF THE RECORD.

Page of Rec.

1 & 2 Transcript of Justice filed by deft. in Circuit Court, June 25th, 1860.

2 & 3 Justice's Summons to deft. and return thereon, filed June 25th, 1860.

3 & 4 Appeal Bond of deft. filed June 25, 1860.

4 & 5 Summons to appellees, issued June 25, 1860.

5 Date of Sheriff's return thereon, June 27, 1860.

5 & 6 And afterwards, to wit, at the January Term, 1861, said cause came on to be heard before the Judge of said Circuit Court, a jury having been waived by consent of parties, when, after hearing the evidence, &c., took the same under advisement.

6 & 7 And afterwards, to wit, at the February Term, 1861, on the 2nd day of March, the Judge of said Circuit Court found for the Plffs., and assessed their damages at $65.15, whereupon said deft. moved the Court for a new trial, and the Court then and there overruled the same, to which ruling the said deft., by his Counsel, then and there excepted.

And, thereupon, judgment was rendered by the Court in favor of plffs.,
7 for $65.15, with costs of suit.

Whereupon said deft., by his counsel, excepts, and prays an appeal to the Supreme Court of Illinois, and ten days were allowed him to file his bill of exceptions.

7 & 8 And, thereupon, afterwards, on the 9th day of March, in the year aforesaid, on motion time was extended to file bill of exceptions.

9 And, on the 11th day of March, 1861, the prayer of said deft. for an appeal from the rulings and judgment of said Court in said cause, to the Supreme Court of the State of Illinois, was granted upon condition that bond in the penal sum of $200 be filed on or before to-morrow morning. And, afterwards, on the 11th day of March, 1861, deft., by his Attorney, filed his bill of exceptions.

10 The above cause came on for trial at the Jan. Term, 1861, and, by consent of parties, the same was submitted to the Court without intervention of jury.

10 & 11 And, the pltff., to maintain his issue, introduced the transcript of a Record of a cause wherein Thomas J. Moriarity was pltff., and George Dodge and William Dodge were defts. The pltff. in said case withdrew from the panel thereof a juror, and the residue having been discharged, it was considered that said defts. recover of said pltff. their costs, &c.

11 And, pltffs. also offered in evidence a certified copy of a certain Appeal Bond, executed by said deft. and Thomas J. Moriarity, in a certain case in trial of right of property before one H. H. DeMary, a Justice of the Peace in and for Cook Co., Ill.

12 & 13 Said Bond is in the penalty of $120, and dated February 5th, 1859.

Condition recites, the pltffs. did on the 2nd of December, 1858, before Justice DeMary, recover a Judgment vs. one Ed. Conley for $42.50 and costs. That execution was issued thereon, and that Const. Carthew thereunder levied on the dwelling house, situated on Wells Street, &c., as the property of said Conley, that same was claimed by Moriarity as his, and his right thereto tried before Justice DeMary and a Jury, and decided against him; that, thereupon, he prayed an appeal to the Circuit Court of Cook Co. The consideration of the Bond is, that said Moriarity shall prosecute his appeal without delay, and pay all costs, that have, or may accrue on said appeal in said Court, and deliver said dwelling house to said Constable Carthew, if the judgment of said Court be against him.

13 The pltffs. also offered in evidence the execution in favor of Pltffs. vs. said Conley.

13 & 14 The execution is in the usual form, and dated Dec. 6, 1858, with an endorsement thereon by Constable Carthew, that he had levied on the 2 story frame building described in said Bond, dated Dec. 26, 1858, and with the further endorsement of the return of said execution on account of the appeal of the trial of right of property, which is dated Jan'y 29, 1859.

15 & 16 Pltffs. also offered in evidence an instrument in writing from Moriarity to Cha's Walker, dated Sept. 28, 1859; said instrument is in form and substance a Warranty Deed; consideration $320, acknowledged to be paid by Walker to Moriarity, purports to convey the building in the bond described to Walker.

17 Property in deed admitted to be the same as that described in bond.

Plaintiffs call as witness Richard Carthew, who was sworn, testified, that he knew the parties; that he is an acting Const. of Cook Co.; made the levy endorsed on the execution; stated, the property was never returned to him.

On cross-exam. stated, had Ex. when levy made; return'd it when appeal was taken; did not move house; Conley lived in it at time of levy; did not put custodian in it; occupants remained in house as usual; took no other possession of it than to tell Conley or his wife that I had Ex. and levied on it; when I
17 & 18 made the levy, advertised it. Evidence in relation to how levy was made, objected to by counsel for pltffs., because deft. estoped from denying regularity of levy by trial of right of property and execution of bond.

Objection overruled by Court and excepted to by pltffs.

Witness also stated that he met Snowhook near Sherman House, who told him to go up and take possession of the house; witness said I have no authority; I have returned my Ex.; could not hold it more than 70 days; defdt. said I will send a boy with you to take possession of it; witness replied Charles Walker had shown him a bill of sale of it, and the people in the house had told him they leased it of Walker.

18 A few days after, witness met deft. again with a young man; deft. said: now I want you to go and take possession of the house; I will send this young man with you to take possession. I told him it was no use; I have no execution, and no power to take the house; he never offered to go with me himself. The pltffs. here rested their case.

19 Deft. offered no evidence; and this being all the evidence, said Court took the same under advisement, and afterwards, to wit, at the Jan'y Term 1861, the said Court found in favor of pltffs. for the sum of $65.15, and costs.

19 & 20 Whereupon counsel for deft. moved the said Court for a new trial, for the reasons following:

1st. The judgment or finding of the Court is against law.

2nd. The finding of the Court is against evidence.

3rd. The finding of the Court is againt law and evidence.

4th. That the Bond, on which suit is brought, is null and void.

5th. That said bond is illegal and void, not being given in a case authorized by the Constitution and laws of the State of Illinois.

6th. That the trial of the right of property by a constable, together with a Justice of the Peace, is not recognized by the existing Constitution of the State.

7th. That Deft. Snowhook is not bound by said Bond.

8th. Justice had no jurisdiction, penalty of Bond exceeding $100.

9th. Condition of Bond only required Deft. to pay costs, and deliver house, and having offered to do so, judgment should only have been for costs.

10th. Dwelling house being prima facia realty, Constable could not levy on it, unless evidence affirmatively showed it personalty.

11th. Constable never took, or had possession of house.

21 Court over-ruled deft's motion for new trial, and entered judgement for Pltff's. vs. Deft. for $65.15.

Whereupon deft's counsel excepted, inasmuch as the matters aforesaid do not appear of Record, and prayed a bill of exceptions, which was signed and sealed by the Judge of said Court.

And, afterwards, on March 11th, 1861, deft., by order of the Court, filed his Bond with S. A. Irvin as surety, in the penalty of $200, which was duly approved by the Court.

S. A. Irvin
atty for defts

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Geo. Dodge et al

vs

W. B. Snowhook et al

Abstract

Filed Apr 16. 1861

V. Edmund

Clerk