

~~Opinion of the Court, delivered by~~
delivered the opinion of the Court:

Mr. Justice Reese, ~~delivered~~ This was an action of replevin for a Canal boat, to which the defendant pleaded 1. non detinet, 2. That the boat was the property of the defendant and the following plea:

—And for a further plea in this behalf, defendant says *actio non*, &c., because he says that heretofore, to wit, at the September Term of the LaSalle County Court, A. D. 1858, to wit, on the 9th day of September A. D. 1858, one Alfred Deane, and one Marvin Blanchard, recovered a judgment against the said plaintiff, for the sum of two hundred and six dollars and thirty-eight cents, besides costs, which judgment remained in full force on the 13th day of October, A. D. 1858, on which day an execution was issued out of the office of the Clerk of said Court, under the seal of said Court, which execution was in due form of law, and issued upon the judgment aforesaid, which execution was then and there delivered to Eri L. Waterman, who was then and there Sheriff of LaSalle County, duly qualified and commissioned; and said Waterman afterward, to wit: on the 18th day of December, A. D. 1858; he being then and there acting sheriff of said County, levied upon said canal boat, which was then and there the property of said plaintiff, by virtue of said execution which was then and there in his hands wholly unsatisfied; and said Waterman, by virtue of said execution, afterwards, to wit: on the 19th day of January, sold said property at public auction to the defendant, he being the highest and best bidder therefor, and then and there delivered said boat to said defendant, and that said Waterman duly advertised said property for sale according to law, at the time aforesaid; all of which he is ready to verify, wherefore he prays judgment.

There were four applications to this plea, the first, that Waterman was not acting as Sheriff; Second, That he did not make sale of the boat by virtue of the execution but of his own wrong; Third, That Waterman did not, by virtue of said execution levy upon said boat, but of his own wrong; and fourth, That on the eighteenth day of December Francis Warner was Sheriff of LaSalle County, and alone authorized to make a levy.

That Sheriff Waterman himself and his deputies Groom and Chapman through and by whom the sale and delivery of the boat

were
 made been examined as witnesses on the trial
 of these issues, and had we been sitting as the jury,
 we should have found that the date of the levy of this
 commission had been altered from the Dec. 1
 to Dec. 18 by adding the figure 8, and by
 the addition of the word "late" to the
 return of Watson. The proof certainly
 preponderates greatly in favor of such
 a finding. But we say that by, read
 all the issues upon this plea were found for
 the plaintiffs.

The following instructions were asked by
 the plaintiffs:

If the jury believe, from the evidence, that the canal boat in contro-
 versy, down to the time of the sale thereof on the execution in evidence,
 was the property of the Union Line Transportation Company, and defend-
 ant, O'Connor, has shown no title to said boat, or right to the possession
 thereof except by virtue of the sale on the execution in evidence, then
 said O'Connor must recover, if at all, upon evidence to the satisfaction of
 the jury, of the truth of his averment in his 3d plea; and said O'Connor
 having averred in his said plea that the levy endorsed upon said execution
 was made on the 18th of December, 1858, he is estopped from now deny-
 ing that said levy was made on the said 18th day of December, 1858.

To this instruction, the defendant desired the
 following qualification: "Under the plea
 of property, the defendant is at liberty
 to move any Cape Rule to him of
 the Canal boat before the beginning of
 this suit without reference to the date
 mentioned in the 3d plea". This qualification
 was refused and an exception taken.
 The defendant then asked this instruction

Under the plea of property in the defendant, it is not necessary to prove that the boat was levied on or sold on any particular day; it is sufficient to sustain this plea if it appears that, before this suit was commenced, the boat was sold to defendant under a valid judgment against the plaintiff, by virtue of a valid execution, by a proper officer.

This motion was also ^{and exception taken} refused, and there are the principal errors assigned on the record.

We are satisfied the qualification to plaintiff's plea instruction should have been given, for although he had pleaded and specially in the 3^d plea, the caution and the proceedings under it, it was his privilege to show under the second plea, any legal title to the property he claimed now denied. The whole field was open to him under the plea of property in himself, and therefore the Court should have qualified the instruction as the defendant desired. By refusing to do so, the jury was precluded from entering into the ~~the~~ defendant's title, which he had a right to assert upon.

~~Explains and settles the facts of the case.~~ If this fact had been legally proved on and sold by a valid execution issued and valid process, ~~before~~ before the commencement of this suit, and the defendant ^{had} become the purchaser, it was all sufficient to sustain

the plea of proximity in himself. The Court
therefore, ended in reversing the instruction.

~~The judge is wrong and the~~
~~cause remanded.~~ A valid judgment
and a decision, and a valid sale
were all that was necessary to make
a title for the respondent. ~~But there~~
~~over the whole was made on the date~~
~~of the registration.~~

The judgment is wrong and
the cause remanded.

~~Chief Justice~~
In this opinion the whole Court concurred.

Judgment reversed.

143-35

O'Connor

as

The Union Trust
Publication Co.

Opinion by

Meese J.

Recorded 12 B. 176

Complete