No. 13303

Supreme Court of Illinois

Brown

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vs.

Riley

SUPREME COURT.

SUPREME COURT.

JOHN BROWN, APPELLEE,
vs.
LAWRENCE RILEY, APPELLANT.

Points of Appellee.

T. G. FROST,
Attorney for Appellee.

The plaintiff, as a bona fide purchaser for a valuable consideration, acquired a title to the property in question on the 24th of February, 1858; the property being delivered and possession taken on that day. The defendant could acquire no title under the execution till it was issued, which was on the 27th of February, 1858, and the property was therefore not subject to the execution.

See Note A.

II. The defendant, though an officer, could not impeach the plaintiff's prior title on the ground of fraud, for the reason *that to do this* he was bound to prove a *judgment* as well as an *execution*, which he failed to do.

This was one of the facts essential to be proved by the defendant in order to make out his defence

4 Scam. 442, 445, and case cited.
5 Burr, 2681.
11 Ill. 610.
5 Hill, 194.
1 Hill, 118.
2 John, 46.
2 Pick. 418.

A. The date of the plaintiffs purchase was proved not only by the express testimony of the witnesses according to their best recollection, but also by the date of the note given at the time of the purchase, which was proved to be the 24th of Feby & which the law as much presumed (till the contrary was proved) to be the true date as it did that the defendants indorsement of the date of the receipt of the Execution was correct viz: the 27th of Feby. a mistake was possible as to either or both dates. all this was proper matter for the decision of the jury & shows no error.

This objection is available to the party seeking to *sustain* the judgment, although the bill of exceptions does not show (as it ought) the point taken at the trial, though it might not be available if the plaintiff sought a *reversal.*

1 Denio, 226.

III. If there was any room for question as to which party had priority of title, or as to the bona fides of the sale, if the jury were authorized to entertain that question upon the proof—the verdict of the jury upon this and all other disputed questions of fact, upon which there was evidence on both sides, was final and conclusive, and could properly only be subject to review before the appellate tribunal, where there was a *total* want of evidence to sustain the finding.

1 Gilman, 70.
20 Ill. 343.
19 Ill. 158, 166.
3 John. 271.
2 Hill, N. Y. R. 576, 578.
21 Wendell, 305.

IV. Upon the *assumption that the question of fraud* was *properly before the jury*, and that they were authorized to pass upon it, the instructions of the Court were substantially correct, and taken together, contained a sound exposition of the law applicable to the case.

V. The Court properly refused to give the defendant's first instruction, for the reasons:

1st. That though it contained a proposition abstractly correct, the doctrine of the necessity of a demand before suit brought had nothing to do with the case. A demand is only necessary when the defendant acquires possession by consent

of the owner, or without notice, of his rights. Here the defendant took the property with distinct notice of the adverse title, and in defiance of the plaintiff's rights. He could, under such circumstances, of necessity acquire no *lawful* possession *without title.* If he had the legal title, a demand was *unnecessary;* if not, a demand could not aid him. A demand was therefore immaterial. The question before the jury was exclusively a question of title.

2d. The Court did, *in effect*, instruct the jury by the sixth instruction, that the plaintiff could not recover at all, unless there *was a wrongful taking*, whether there was a demand or not; and this was *assumed* in all the instructions, and was a view of the law more favorable to the defendant than that called for by his first instruction.

20 Ill. R. 115, 443, 478, 557.
3 Scam. R. 365.
12 Ill. R. 261.

VI. Defendant's instructions Number Two and Three were properly refused.

1st. For the reasons already assigned for refusing the first instruction.

2d. They contained propositions that were not law, and assumed that the defendant could rightfully levy upon and take away the *plaintiff's* property to satisfy the execution against Gibney, if it only happened to be found in Gibney's hands, whereas the law was that if the title was in Gibney, then the property was subject to the execution; if in the plaintiff, then defendant was a trespasser for taking it.

1 Kernan N. Y. R. 61.

VII. The defendant was not entitled to the tenth instruction as asked, and as given it was more favorable to the defendant than the law would authorize. The Court held an absolute change of possession essential to the validity of the sale *in all cases.*

See note B.

B. There was no error in the refusal of the Court to give the tenth instruction without modification. The doctrine that an absolute & continued change of possession is essential to make a sale valid, as against creditors as a general rule is undoubtedly correct but it is not an invariable absolute & unqualified rule but it is laid down in the books with various qualifications & Exceptions. If the defendant desired an instruction on this point he should have taken pains to have it couched in unExceptionable language & not asked for an instruction that this was the absolute, unqualified & ~~unExceptionable~~ enforceable rule "in all cases". In fact in the 11 Sec 386. 391. the very case cited by the defendants counsel in his brief The vendor remained in possession long after the sale as

It is not true that a sale of personal property is not valid in *any case* against an execution, unless the sale is followed up by an absolute and *continued* change of possession.

Possession may, in some cases, be re-delivered for a special or temporary purpose, as on lease or hire, and the sale still be valid against creditors.

14 Ill. 386, 390,
14 Ill. 474.

The evidence in the case shows without conflict that there was a legal, actual and absolute change of possession, and Gibney's being engaged in drawing a load of wood, at the time of the levy, for the plaintiff, did not invalidate the title acquired by the plaintiff under the sale, and the Court could not properly so instruct the jury. In truth, the law and the facts were with the plaintiff, and a verdict against the plaintiff would have been set aside as against evidence.

VIII. It is not enough that the instruction asked is partly true. The Court is not bound to separate or correct it. The defendant's instruction must in all respects be unexceptionable, and each and every portion of the instruction asked must state the law precisely as it is, and not be coupled with illegal propositions, before error can be predicated upon the Court's refusal to instruct as requested.

12 Wen. R. 504.
8 Wen. R. 109.
1 Selden, N. Y. R. 422.
1 Kernan R. 61.

IX. The sale could not be impeached as fraudulent on account of the fraudulent intent of Gibney, if such existed, unless the plaintiff was *privy* to it; such is the statute, and such the uniform construction of the Court thereon.

20 Ill. R. 448.
11 Ill. 322, 509.

the vendees agent & the sale was notwithstanding Sheds good. The various Exceptions & qualifications to the rule also there referred to and commented on. The Court therefore for this reason were not bound to give the instruction. It was also calculated & designed to mislead the jury & induce them to believe that Gibney's using the team on one occasion to draw a load of wood for the plaintiff, vitiated the plaintiffs title & so impaired & subverted his possession as to render his purchase void for want of the absolute & continued change of possession deemed in law essential to the validity of his title & for this reason also the instruction was properly refused. There was no error in the instruction as modified. Except that it stated the case more favorably for the defts & more unfavorably for the plaintiff than the legal rule strictly required which is an error of which the defts has no right to complain with does them no legal injury.

The point raised by the defendant that the demurrer in the record was not disposed of before trial, can be of no avail to him.

1st It is the Plaintiffs & not the defendants demurrer & it is not for the defendant to complain because the plaintiffs ~~demurrer is not decided~~ when the plaintiff waived it by joining issue on the facts stated in the plea by ~~imparlance~~ a replication

2d The filing of a replication was itself a waiver of the demurrer & cured the error if any. 2 Scam 223 Nye & Wright 3 Scam 223 Nye & Wright

3d The defendant by his similiter to the replication to the plea demurred to, & saying without objection the issue of fact by him thus joined, waived any decision upon the demurrer or any other incident thereto & cured the error if any.

2 Scam 223 Nye & Wright. 1 Scam 34 Rowe & Reddick 2 Scam 61.

4. Though the record does not show expressly it furnishes strong presumptive evidence of the fact which is the real truth in the case that the plea was originally defective and the point in

respect to which the demurrer was taken and amended by consent by inserting the amendment in the original plea by the deft who confessed the error without a decision of the Court by which the demurrer is apparently left undisposed of by the record, when the informality in question occurred.

178-75

Brown vs Riley
Points of Appellee
with additional
suggestions

1303

JOHN BROWN,
vs.
LAWRENCE RILEY,

STATE OF ILLINOIS,
IN THE SUPREME COURT,
APRIL TERM, A. D., 1859.

APPEAL FROM KNOX.

ABSTRACT.

This was an action of Replevin commenced in the Knox Circuit Court to recover two horses, one double wagon, and one double harness, claimed by the Plaintiff, and was tried in that Court before a Jury at the April Term, A. D., 1858. Verdict and Judgment for Plaintiff. Motion for a new trial by the Defendant overruled.

IV. Declaration that Defendant unlawfully took 2 horses, one wagon, and one harness, and unjustly detained the same.

Five Pleas were filed as follows:

V. 1. Did not take and detain the property.

2. Did not unlawfully take or detain.

3. The property was not the property of the Plaintiff, but was the property of one Patrick Gibney.

4. That as one of the Constables of Knox county, Illinois, he took the said property justly, because heretofore, to wit: on the 26th day of February, A. D., 1858, one L. C. Conger, then Police Magistrate in Galesburg, Knox county, Illinois, issued under his hand, in due form, an Execution in favor of James C. McMurtry, Plaintiff, against Patrick Gibney and Thomas Stokes; that on 27th Feb'y, 1858, the Execution came to his hands to execute; that he was then acting Constable in said county, and that by the Execution he was commanded to make $212 90-100 which James C. McMurtry had recovered on the 26th day of Feb'y, 1858, before said Magistrate, against Patrick Gibney and Thomas Stokes, and that as Constable, on the 8th of March, 1858, he levied said Execution upon and took the property, and detained the same as the property of Patrick Gibney, whose property it then was, which was the same and only taking and detention, and prays damages and return of the property.

VII. 5. Did not unlawfully detain.

Replication to third plea: That the property was the property of the Plaintiff, and not the property of Gibney.

VIII. Similiter to replication to 3d plea.

Similiter to Defendant's first, second, and fifth pleas.

Demurrer by Plaintiff to Defendant's 4th plea.

IX. Beplications to Defendant's 4th plea:

1. Property was not the property of Patrick Gibney, but was the property of the Plaintiff.

X. 2. L. C. Conger did not issue said Execution against Patrick Gibney and Thomas Stokes; Defendant was not Constable, and Execution was not delivered to him to execute, and Defendant did not levy said Execution on the property as the property of Gibney.

IX. Similiter to Plaintiff's 1st replication to 4th plea.

X. Similiter to Plaintiff's 2d replication to 4th plea.

The Plaintiff, to maintain the issue on his part, introduced the following:

Patrick Gibney testified that he made a mortgage on the property in controversy to Thomas Moony, and that on the 24th of February, A. D., 1858, he sold the said property to the Plaintiff; Fitzgerald and Moony were present when the property was sold; Plaintiff was to pay me twenty-five dollars and pay the debt to Moony; the Plaintiff saw Moony and gave him a note for $275, and Moony gave up his claim to the property, and the same day I went and gave the Plaintiff the property, and Plaintiff took them home, and Plaintiff kept them after that; three or four days afterwards the Plaintiff asked me to get him a load of wood with the team, and I went for the wood with the team, and then the Defendant took the team and property, and I told him the property was Brown's, and he said he would take the property, and he was good for it; Defendant threw off the wood; James C. McMurtry said, in the presence of the Defendant, that if the Plaintiff would come and satisfy them that he owned the property, it would be given up; same property described in mortgage.

Cross examined, said: The Defendant took the property upon an Execution, and I suppose he was a Constable, he claimed to act as such; he claimed to levy on the property; the levy was three or four days after the sale to Brown; at the time of the levy Raferty, Philip and Thomas Stokes were there; the note was given to Moony the same day of the sale to Brown; the sale was at Moony's place; the horses were then in Drake's stable, where I kept them for three months previous; I have never had the mortgage since I made it; the note that accompanied the mortgage was given to me; I don't know that the date of the sale was on the 24th of February, only what others said; I don t keep the day of the month.

XII. Thomas Moony testified: At the date of the mortgage Gibney owed me the note shown of three hundred and sixty-five dollars; I sold the note and mortgage to Plaintiff in February, it might have been on the 24th day; he gave me his note for $275, dated 24 February, for the note and mortgage; Gibney and Brown come to my place, and Plaintiff said he was about buying the horses and other property, if he could arrange with me, and asked if I would take his note, and I said yes; the Plaintiff and Gibney went to the stable and came back, and Plaintiff had the property, and gave me his note, then I gave him Gibney's note endorsed by me without recourse, and delivered to him the mortgage, and he took them away; I never had the property in my possession.

Cross examined, said: At the time I gave the mortgage to the Plaintiff, I did not make any assignment of the mortgage; I delivered the note and mortgage to Plaintiff the same day; the Plaintiff bought the property and took Plaintiff's note same day; afterwards in the same week I signed the assignment on the back of this mortgage; I signed it the same time it was acknowledged before M. D. Cook, Esq.;

I sold plaintiff the note and mortgage, and took his note for $275, and what I owed him; I owed him eight or ten dollars; at the time I took the note and mortgage from Gibney, he owed me for a wagon eighty-five dollars, loaned money five dollars, blacksmithing bill thirty or forty dollars, and that was all he owed me. Here the witness fell down in a fit and was carried down from the stand, so that neither party could use him any farther.

XIII Mr. Fitzgerald testified: I was present when the sale was made of property to Brown last February at Moony's; plaintiff asked if I knew the horses, and said I am buying them and want you to go to Moony's with me, he has a claim on them; bargain was made and Moony agreed to take plaintiff's note for $275, and plaintiff went away with the team.

Cross examined, said: I saw plaintiff drive the team the day of sale, and I saw him drive them two or three times; plaintiff and Gibney lived one-half mile apart; plaintiff gave Gibney $25; I heard when the Constable took the team and it was four or five days after the sale; the day of the sale the plaintiff took the horses home, and come back and hired the stable of Drake where Gibney had formerly kept them, and put the horses in there; the stable was half a mile from plaintiff's; after the sale I saw Gibney feed the team; after day of sale roads too muddy to use team.

XIV L. E. Conger testified that he replevied the property when and at the place where it was advertised for sale by the defendant; L. C. Conger is my brother, and is Police Magistrate in Galesburg, and I am acquainted with his signature; the signature to the Execution shown to him is his signature.

Plaintiff offered note and read the same as follows:

CITY OF GALESBURG, Sept. 26th, 1857.

One day after date I promise to pay to Thomas Moony the sum of Three Hundred and Sixty Dollars, it being for value received.

PATRICK GIBNEY.

I assign the within without recourse.

THOMAS MOONY.

The plaintiff offered and read in evidence a chattle mortgage dated September 26, 1857, and made by Patrick Gibney to Thomas Moony, and thereby conveyed in consideration of $360, to said Moony, one span of horses, dark sorrels, one seven and the other eight years old; one two-horse wagon; one double harness; conditioned for the payment of three hundred and sixty dollars, with interest; no day of payment fixed; if the money paid mortgage to be void; conditioned that the mortagor should retain possession of the property until 26th day of September, 1857; containing also the usual provisions for sale of the property in case of forfeiture; mortgage signed and sealed by Patrick Gibney, and by him duly acknowledged on the 26th day of September, A. D., 1857, before Z. Pond, J. P.

Mortgage was duly filed for record and recorded in the office of the Clerk of the Circuit Court of Knox county, on the 30th day of September, A. D., 1857.

XVII. And on said mortgage is the following assignment:

$295. For and in consideration of two hundred and seventy-five dollars to

me paid by John Brown, of Galesburg, the receipt whereof is hereby acknowledged, I hereby sell, assign, and transfer, and set over unto said Brown the within mortgage, and property described therein, including horses, wagon, and harness, and all my right, title, and interest therein, to him, his heirs, executors, administrators, and assigns forever. Witness my hand and seal the 24th of February, A. D., 1858.

THOMAS MOONEY, {SEAL.}

Acknowledged before me this 12th day of March, A. D., 1858.

M. D. COOK, J. P.

Plaintiff here rested his case.

The defendant offered evidence as follows:

XVIII. Henry Evans testified that defendant acted as Constable in Knox county in February and March last.

Defendant offered and read in evidence an Execution and endorsement thereon issued by L. C. Conger, Police Magistrate, dated 26 February, A. D., 1858, purporting to be issued for the collection of a judgment, $212 90-100 and costs, recovered before him 26th day of February, 1858, in favor of James C. McMurtry, plaintiff, and against Patrick Gibney and Thomas Stokes, which execution had the following endorsement thereon:

This Execution hereto attached came to my hands on the 27th day of February, A. D., 1858, at 2 o'clock, P. M., and on the 8th day of March, 1858, I levied the same Execution upon one span of horses, harness and wagon, and on the undivided half of a lot of wood of about two hundred cords, and on a lot of logs; all of said horses, wagon and harness was levied upon as the property of Patrick Gibney, and the said logs and wood as the property of Thomas Stokes; and I further certify that I advertised said wood and logs on the 9th of March according to law, and on the 20th of March, 1858, sold the wood for $80, and the logs for $1 60-100; and I certify that the horses, harness and wagon were replevied from me by L. E. Conger, Deputy Sheriff, at the suit of John Brown against me as defendant, on the 20th day of March, 1858.

W. L. RILEY,

Constable in and for Knox Co., Ill.

XIX Raferty testified: I saw defendant take the team; Patrick Gibney brought the team there.

Philip Stokes testified: I was in the house when defendant took the team; Patrick Gibney took the team there; I rode up with him; I saw Gibney drive the team before, but can't tell how long; he was after wood, I think for the plaintiff.

This was all the evidence in the case.

At the request of the plaintiff the Court gave to the Jury the following instructions, Nos. 1, 2, 3, 4, 5, 6, and 7, and defendant excepted to the giving the same:

XX. 1. If the Jury find from the evidence, that Brown bought the property in good faith on the 24th day of February and took possession, the fact that Gibney was drawing wood for the plaintiff when the property was taken does not effect a legal change of possession, or effect the validity of plaintiff's title, and if it was levied on and taken by defendant while thus in Gibney's use, the levy and taking was wrongful, and no demand is necessary to be proved.

2. If the Jury believe from the evidence, that the plaintiff bought the property on 24th February in good faith, and took possession of it on that day, he had a right to loan or hire the same to the defendant in the Execution on the day spoken of to draw wood with, and such loan does not render or make the plaintiff's title void, or subject the property to the Execution against Gibney.

3. Unless it is proved that Brown knew that there was fraud in the mortgage, or that the purchase by him was made with a view to defraud, delay, or hinder creditors of Gibney, his title is not rendered invalid even though the Jury should believe that the mortgage was fraudulent, and void as such for want of sufficient consideration.

4. If the Jury believe from the evidence, that the plaintiff was a bona fide purchaser of the property in controversy, and received the possession of it on the 24th day of February, and the Execution upon which the defendant took said property did not come to his hands until the 27th day of February, they are instructed to find for the plaintiff.

5. If the Jury believe from the evidence, that the mortgage from Gibney to Moony was not made in good faith, still, if they believe from the evidence, that Brown, the plaintiff, was not a party to said mortgage, and was not a party to any fraudulent sale, and had no knowledge of it, but made his purchase in good faith, and before the Execution become a lien, they will find for the plaintiff.

6. The Jury are instructed that they are not to infer fraud on the part of Brown, the plaintiff, because he paid a part of the purchase money to Moony, the mortagee, by the request of Gibney, of whom Brown purchased the property, and that fraud is never to be presumed but must always be proved.

7. If the sale was actually made and possession of the property taken on the 24th of February, it is wholly immaterial that a written assignment of the mortgage was not made till afterwards.

The defendant asked the Court to give the following instructions, Nos. 1. 2, and 3, and the Court refused to give them, and defendent excepted:

XXI 1. The Jury are instructed that if they believe from the evidence, that the defendant came lawfully in possession of the property in controversy, then they will find for defendant, unless they further believe from the evidence, that the plaintiff, prior to the commencement of this suit, made a demand of the property.

2. The Jury is instructed that if they believe from the evidence, that the defendant was an acting Constable in and for the County of Knox, and that as such Constable the Execution shown in evidence come to the hands of the defendent to execute, and that while the property in dispute was in the hands, possession, or control of one or both of the defendants in said Execution, this defendant levied said Execution upon the property in controversy and took it away, that such taking and levy would not be wrongful, and that this action cannot be maintained by the plaintiff without proving a demand of the property before bringing the suit, or a taking that was wrongful.

3. The Jury is instructed that if the defendant in good faith as Constable levied on the property while the same was in Gibney's hands, by virtue of said Execution shown in evidence, and took the same away, such levy and taking would not be wrongful, and that a demand must be proven before the plaintiff can recover.

At request of defendant the Court gave the following instructions, Nos. 4, 5, 11, 6, and 8:

4. The Jury is instructed that the endorsement of the Constable and the return of the defendant attached to the Execution shown in evidence, is prima facia evidence of the time when the Execution came into his hands, upon what property the same was levied and the time of the levy, and what become of the property.

5. The Jury is instructed that the mortgage shown in evidence is void as against the Execution shown in evidence, unless possession was taken by plaintiff before the Execution come to the officer's hands.

11. The Jury is instructed that the Execution shown in evidence was a lien upon all the personal property of Patrick Gibney from and after the time when said Execution come to the hands of the defendant, and that no sale or transfer of such property by said Gibney, after the Execution come to the hands of the defendant, could destroy or effect such lien.

6. The Jury is instructed that in this case a wrongful taking is not presumed but must be proven.

8. The Jury is instructed that the burthen of proof as to the ownership of the property is upon the plaintiff, and that if the proof is equally balanced as to the ownership, they will find for the defendant.

Defendant asked the Court to give the following instruction, No. 10, and the Court refused to give the same as asked, and defendant excepted:

XXIV 10. The Jury is instructed that a sale of personal property is not valid in any case against an execution, unless the sale is followed up by an absolute and continued change of possession, and that the possession must be delivered by the execution debtor before the execution comes into the hands of the officer to execute.

And the Court modified the said instruction 10, by striking out the words "*and continued*," and gave the same so modified, and defendant excepted.

The defendant asked the Court to give instructions Nos. 9 and 7; the Court refused to give them and defendant excepted. The Court modified them and gave them modified as follows, and defendant excepted:

9. If the Jury believe from the evidence, that the property in controversy was sold by Patrick Gibney to the plaintiff, still, if the Jury believe that such sale was made to delay or hinder the collection of said execution debt, that such sale was void as against said execution.

Modification to instruction 9: "Provided the Jury further believe from the evidence that the plaintiff knew of the purpose of such sale and was party to it."

7. The Jury is instructed that if the defendant was an acting Constable of Knox county, and that as such Constable he received said execution, that from the time he received the execution it was a lien upon all the personal property of Patrick Gibney in said county, and that the defendant had the right, and it was his duty as such Constable, to levy the same on any personal property then owned by said Gibney in said county and take the same away, and such levy and taking would not make a wrongful taking.

Modification to instruction 7: "If the sale from Gibney to plaintiff was a fair and

honest transaction, and possession was delivered to plaintiff before the execution came into defendant's hands, then the property belonged to plaintiff and was not subject to execution to pay Gibney's debts."

XXVI Verdict for plaintiff. Damages 1 cent.

The defendant then moved the Court for a new trial, as follows:

JOHN BROWN, } KNOX CIRCUIT COURT,
vs.
W. L. RILEY, } APRIL TERM, A. D., 1858.

And now comes the defendant and moves for a new trial herein, for the following reasons:

1. The verdict is against the law and evidence.
2. The verdict is against the instructions of the Court.
3. The instructions are calculated to mislead the Jury.
4. The Court erred in giving the instructions asked by the plaintiff.
5. The Court erred in refusing to give the instructions asked by the defendant.
6. The Court erred in modifying the instructions asked by the defendant and giving the same so modified.
7. The Court erred in refusing to give the instructions asked by defendant as asked.
8. The evidence was not sufficient to authorize a recovery.

DOUGLASS & CRAIG, *Atty's for Defendant.*

The Court refused to give a new trial. The defendant then and there excepted to the decision of the Court.

Judgment on the verdict..

DOUGLASS & CRAIG, *Att'ys for Appellant.*

Assignment of errors the same as on motion for a new trial

1788

W. L. Ruby
Appellant

John Brown
Appellee

Abstract

Filed April. 18. 1859
L. Leland
Clerk

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