

No. 13971

Supreme Court of Illinois

Bryan

vs.

Smith

Bryans
&
Smith

Two points are assigned for error in this case which appear in the Bill of Exceptions. The first relates to the exclusion of parole evidence to show the admission by defendants Smiths of the Bryans being tenants in common in the lands, for which they ask them to account for the rents & profits. On this point we have no doubt the Circuit Court decided correctly. It was inadmissible for the plaintiffs to show title to the lands, by parole admissions, while paper title existed; upon the acknowledged principle that there was higher, better, and more certain testimony, to be had in record evidence of their title, which was within their power to produce, the ~~and~~ ^{of which} production could subject them, to no possible inconvenience, if they were tenants in common, of the lands stated in the declaration.

On the second point of the rejection of the ~~same~~ ^{alias} fieri facias, under which the plaintiffs demand their title by purchase, at the Sheriff's sale, it is admitted, that if the strict regular rules of English, and many American authorities, in some of the State Courts are to prevail with us, there would in the rejection of the Executions offered in evidence be no departure from those rules, as adopted by them; and that ~~the~~ ^{alias} Executions, not corresponding in the amount of the debt, with the first, or original writ

of Fieri Facias should be rejected on
the ground of variance. In Courts where
a regular Judgment Roll is made up
containing the amount of the whole
Judgment with the costs, there is much
reason that this correspondence should
be observed; and the more so, as our
Execution can embrace any subsequent
costs made, beyond the amount for which
Judgment is given in mesne. But
our practice has uniformly in all
our Courts been different. In the first
place, the Clerk enters the Judgment
on his records, when rendered, and
costs are awarded, without any specific
mention of the amount, - ~~then~~ he subsequently
makes up his costs, without any caption
and inserts them in the writ of Fieri
Facias. whenever a second or alias
writ issues the costs attendant on
the first writ, are included in the
second, and those of the alias in an
alias if it issues; hence the alias
copies, cannot correspond with
the original writ of Fieri facias, and
therefore it would be unjust to ~~ask~~
~~examine~~ the exact correspondence
in these writs, which is exacted in
Courts which do not allow the subsequent
costs, and require the adherence to the
Judgment Roll. in respect to costs is considered
as essential to the regularity of the proceedings,
on the Execution of the Judgment.

We presume that it was the discrepancy
between the Executions & the amount
of writs which induced the Circuit Court
to reject the bills writ of fieri facias
and which on more mature reflection
we presume it would not have considered
as a serious objection to its reception
in evidence. If the rigid rules to which
we have alluded, were adopted. ~~the~~
~~titles~~ ~~to~~ ~~the~~ in our Courts it would
be not manifest, that the titles to
Real Estate purchased under Execution
at Sheriff's Sales might be most
seriously affected. In numerous ^{cases}
is not entirely destroyed; hence it
of ~~the~~ ~~most~~ becomes a question of
grave ~~and~~ import whether the present
practice altho' it may not be entirely
~~free~~ free from objection, from its being
had not better be sanctioned, than
to innovate on it, by which such
serious consequences might ensue
we think so, and therefore reverse
the Judgment of the Circuit Court ^{with costs}
and ~~sent~~ remanded the Cause with
directions to the Circuit Court to award
a venue de novo.

Bryan's
vs } Opinion
Smith }

Just reversed
Smith

Filed Feb. 1. 1840.
J. M. Duncan
per J. M. Mathew

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