No. 13226

Supreme Court of Illinois

Dooley

---

vs.

Crist

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

1903

No. 175.

Dealy
vs
Cusack

1861

Replied

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

WILLIAM DOOLEY, Appellant,
—vs.—
DAVID L. CRIST, Appellee.
} APPEAL FROM McLEAN.

ABSTRACT.

PAGE.

1 Præcipe for writ.

2 Summons and return.

3 4 5 Declaration in trover, for a house.

5 6 Plea not guilty.

6 7 Trial and verdict.

7 8 Motion for new trial.

8 Final judgment for plaintiff below.

8 Appeal prayed and granted.

9 Bill of exceptions commences.

Plaintiff's evidence: S. B. BROWN was a justice of the peace; proves his docket, and shows two judgments, both in favor of plaintiff below—one against Phillips, the other against Whitelock; and introduces executions, which are given in evidence.

9 10 11 Execution against Phillips with return showing a levy and sale on the house in controversy.

11 12 Execution against Whitelock for $50.50 debt, and $2.66¼ costs, with return showing levy and sale on the house as above. Sale was for $60, and amount was divided between the two executions, leaving a part of both unsatisfied.

12 13 Testimony of PERCY: Was the constable that had above executions; went with them to, or near, the house in controversy; inquired for Whitelock; he was not at home; in sight of the house, indorsed the levy; don't recollect that he said anything to Whitelock's family, who were living in the house, about the levy; either same day, or a day or two afterwards, saw Whitelock at a school house, and told him of the levy; advertised the house in the usual manner; on day of sale went with plaintiff and one or two others to within a rod of the house; then sold it to plaintiff as per his return above; Whitelock's family were living in the house at time of sale; did not see Whitelock; did not recollect that he, witness, was in the house on day of sale; gave plaintiff a writing showing that he had bought

the house; this was all witness had to do with the house; the family of Whitelock had been living in the house for some time before the levy, and continued to live there until some time after the sale.

14 Testimony of STITT: Was the carpenter that built the house; it was a good frame house of the kind; 20 feet long, 16 feet wide, one story high, good lumber, well built; stood on 8 to 12 blocks, partly in the ground, partly above ground; cost $225; could be moved by raising it off the blocks, but not any more easily than if it had a brick or stone foundation.

15 Testimony of MITCHELL: About 12 months after date of constable's sale, at the request of defendant, removed the house from where it stood to the opposite corner of the 40 acre tract of land on which it stood, and attached it to another house there as an ell; placed it on the same blocks on which it originally stood.

15 Testimony of HAWKS: A few days before the commencement of the suit heard plaintiff demand of defendant the house, and defendant refused to deliver it.

15 Whitelock called, objected to and sustained.

15 16 Plaintiff's release to Whitelock, releasing Whitelock from judgment on which the execution against him issued.

16 17 Whitelock again offered, and again objected to, because he was still interested; objection overruled and exception taken.

17 18 19 Testimony of WHITELOCK.

17 18 Direct.

Built the house in controversy on a 40 acre tract in possession of and claimed to be owned by Phillips; had Phillips's permission to build it there; when he built it expected if he was able to pay for his land adjoining it to keep it, if not that he would sell it or remove it; heard of the constable's sale a few days after it was made; said that an opinion prevailed that a constable could sell a man's house, and that he supposed the sale was good; about a week after the sale, met plaintiff in Bloomington; told plaintiff he had used witness badly; plaintiff said all he wanted was his debt; plaintiff told witness if he could sell the house for more than enough to pay plaintiff he might do so and keep the surplus; that witness agreed with plaintiff that the house should be plaintiff's, and witness would try to sell it and pay plaintiff's debt; if he could not sell it would pay plaintiff a reasonable rent; made several attempts to sell it, but did not succeed, and after living in the house 12 or 15 months after the constable's sale, abandoned the house and his land, and went to Missouri, without notifying plaintiff.

18 19 Cross-examination.

Stated that he had contracted by a written contract with defendant to purchase 40 acres of land; that Phillips had also contracted with defendant for another 40 acre tract adjoining; witness was son-in-law of Phillips; witness commenced improving his land, where

the house in controversy was built; there was not as good a building spot on witness's 40, as there was across the line on Phillips's 40; that witness and Phillips had made a verbal contract for the exchange of an acre; witness got an acre of Phillips, on which the house was built, and gave Phillips one acre in another part of witness's 40; that they each mutually took possession of their said acres, and occupied them for about 3 years and up to the time witness left the country; that he occupied the house in connection with his 40 acre tract of land; occupied it about three years; never paid defendant anything on the land; a long time after the constable's sale had offered to sell the land, house and all, to William H. Dooley, son of defendant; asked $300 for his interest; was willing defendant should have $200 of it; did not disclose to W. H. Dooley that plaintiff had any interest in the house, but said his intention was, if he made the sale, to pay plaintiff's debt.

19 Plaintiff closes his case.

19 It is here agreed that the house stood on a certain 40, describing it, and that the legal title to same was in defendant.

20 Defendant here introduces a written contract between him and Phillips for the sale of the 40 upon which the house stood.

21 Defendant calls WILLIAM H. DOOLEY: Testified that the above contract had, by mutual agreement between Phillips and defendant, been cancelled; that shortly after Whitelock left the country, defendant went into possession of both the 40 acres of Phillips and Whitelock, and moved the house from where it stood to another house on the Phillips' 40, and made of it an ell to the other, and moved into it in the spring; that the house was placed upon the same blocks that it had originally stood upon; that they were good size blocks, of sound white and burr-oak; the house stands on the same blocks yet, except there has been a cellar dug under part of it, and some of them have been removed for the cellar walls. Witness testified that nearly a year after the date of the constable's sale, Whitelock had tried to sell to witness his 40 acres of land, or his interest in the land, and held out as the principal inducement to the purchase, the value of the house. Here the evidence closed.

22 23 Plaintiff's first instruction:

The court instructs the jury that if they believe from the evidence that the house in controversy was sold by Whitelock to Crist, or on an execution *vs.* Whitelock, and bought by Crist, and that the house was personal estate, and that after the sale was made, Dooley took the same and converted it to his own use, then the jury will find for plaintiff the value of the property at the time of the conversion.

23 Second instruction:

That if Whitelock assented to the levy and sale of the house, and surrendered possession of the house to Crist, made under said levy

and sale, then such levy and sale is valid against any person having no right to the house, as creditor or purchaser of Whitelock, unless they find that the house was a part of the real estate.

23 Plaintiff's third instruction:

That if they believe from the evidence that Whitelock held possession of the house as tenant of Crist, or under any agreement with Crist to hold the same and pay him for the use of the same, then in contemplation of law Crist was in possession of the house, and the possession of Whitelock was the possession of Crist.

23 24 Plaintiff's fourth instruction:

That the possession of the property in controversy (if personal property) by Whitelock as tenant of Crist, if the jury so find the facts from the evidence, is sufficient in the absence of other proof to support title in Crist.

24 Plaintiff's fifth instruction:

That the law presumes the person in possession of personal property to be the owner thereof, and if the jury believe from the evidence, that the property in controversy is personal property, and at the time of the taking of the same, was held by Whitelock as tenant, or under an agreement with Crist, then such possession is sufficient prima facie title in Crist, in the absence of all other proof, to entitle him to maintain the action.

24 Plaintiff's sixth instruction:

That if the jury believe from the evidence, that Whitelock built the house in controversy on the premises occupied and claimed by Phillips, by the leave and consent of Phillips, with the privilege of moving or doing as he pleased with the same, and Whitelock did so build his said house, and put the same on blocks, without in any manner fastening the same to the blocks or the soil, so that the same could be easily removed, then such house is personal property.

24 25 Plaintiff's seventh instruction:

The court instructs the jury, that in this case the question whether the house is real or personal estate is a mixed question of law and fact: that if the jury believe from the evidence, that Whitelock built the house on Phillips's land, with Phillips's consent, with the intention of removing the same if he saw fit, then the house is personal property, and subject to levy by execution.

25 Plaintiff's eighth instruction:

That in judging of the intention of Whitelock, it is proper for them to take into consideration all that Whitelock said or done about the property while he occupied it, and before the contest arose.

25 Defendant excepts to the giving of all the above instructions.

25 26 First instruction given for defendant.

If the jury believe from the evidence that Whitelock claimed the

40 acres of land as a purchase of the same under Dooley, and that he contracted with Phillips for the one acre on which to build the house, for the purpose of getting a better site on which to build the house than was on his own land, and gave Phillips one acre of his (Whitelock's) land in exchange; and that Whitelock and Phillips each mutually took possession of and occupied their several acres of land; and if they further believe from the evidence that Whitelock built the house with the intention of occupying it as a permanent residence in connection with the land, then the house become a part of the land and was not liable to the levy and sale, and they should find for the defendants.

26 Second instruction given for defendant:

In order to make a valid levy on personal property, the officer making the same must take such possession of the property as the nature of the property will admit of, and in order to make a valid sale of personal property by an officer on execution, it must be in the power of the officer at the time of the sale to put the purchaser into possession of the property, that is, such possession as the nature of the property admits of.

26 Third instruction given for defendant.

"If the house was real estate at the time it was built, no subsequent change of intention on the part of Whitelock would convert it into personal property."

27 Fourth instruction given for defendant.

"In trover the plaintiff must show title in himself, and it is not material whether the defendant is the owner or not; the plaintiff cannot recover without showing title in himself."

27 Fifth instruction given for defendant.

That if the jury believe from the evidence that Whitelock built the house on his own land, or land that he contracted for with the intention of not removing the same, then the house is real estate, and passed with the land.

27 Sixth instruction given for defendant:

In substance, that if Dooley owned the land, and the house was real estate, then Dooley owned the house.

28 Defendant submits to the court in writing the following three instructions, and asked that they be given to the jury.

28 First instruction refused.

"If the jury believe from the evidence that Whitelock built the house as the owner, or as claiming to be the owner of the soil, the house, as soon as it was built, became a part of the real estate, and no subsequent change of intention on the part of Whitelock, will change the character of the property from real estate to personal property."

28 Second instruction refused:

"If the jury believe from the evidence that the constable never had possession of the house, and if they further believe from the evidence that at the time of the sale the constable did not have it in his power to deliver possession of the house to the purchaser, then the levy and sale are void, and they should find for the defendant."

28 Third instruction refused:

"If the jury believe from the evidence that during the whole time, from the levy until the sale, and for some time after the sale, the house was in the actual possession of Whitelock, who claimed the same as his own adversely to the officer making the levy, then the levy and sale were void."

28 The court refused to give the last three instructions, which refusal was excepted to.

29 30 Motion for new trial, on the ground that the court erred in permitting Whitelock to testify; that the court admitted improper evidence for plaintiff, and excluded proper evidence offered by defendant; that the court erred in giving plaintiff's instructions, and in refusing defendant's instructions; and that the verdict was against law and evidence.

30 Motion for new trial overruled, and ruling excepted to.

30 31 32 Appeal bond.

32 Clerk's certificate.

ASSIGNMENT OF ERRORS.

1. The court erred in permitting the witness Whitelock to testify.

2. The court erred in excluding evidence offered by defendant below.

3. The court erred in giving plaintiff's instructions.

4. The court erred in refusing defendant's instructions.

5 The court erred in overruling a motion for a new trial.

R. E. Williams

for Appellant

175

Deeds

Print

Abstract

Filed April 15, 1861

A. Leland

Clerk

R. E. Williams

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

WILLIAM DOOLEY, *Appellant*,
vs.
DAVID L. CRIST, *Appellee*.
} APPEAL FROM McLEAN.

Brief on the part of Appellee.

This case was an action of trover by Crist *vs.* Dooley, to recover the value of a frame building. Verdict and judgment for Crist. I shall first examine consecutively the points and argument presented by appellant's counsel.

The 1st point is the refusal of the court to reject the testimony of Whitelock. Why did appellant insist on excluding him? *Because*, as appellant's counsel in his brief says, *Whitelock was interested in sustaining the constable's sale?* The facts are he had no interest in sustaining the sale, for he was entirely released and discharged from the judgment on which the execution issued. The verdict and judgment in favor of Crist could give Whitelock no advantage in any controversy he might have with the constable about a surplus; and he (W.) was therefore entirely void of interest in the suit. He made nothing either way. It was immaterial to him who obtained the verdict in the case, because Crist's judgment against him was entirely and wholly discharged. And if the verdict were for Dooley, there was no responsibility on the part of Whitelock to Crist, because the judgment against him (W.) was satisfied by the release from Crist. (See the record, pp. 15, 16.)

And I insist it is immaterial how many claims Whitelock had against the constable who made the sale, or Phillips, or anybody else a stranger to this suit, growing out of the sale of this house, because the verdict and judgment in this cause could not be used by Whitelock against anybody except the parties to this suit, and would preclude no one except them.

The whole thing in a few words is: That the constable made the sale, and Whitelock affirmed it, and thus passed the title of the house to Crist. Crist released Whitelock from, and wholly discharged and satisfied, the judgment under which the sale was made, and used Whitelock as a witness. The judgment being released, Whitelock had no interest whatever in favor of Crist, or in the result of the suit: not in favor of Crist, because it was immaterial

whether Crist won or lost the suit; if he lost it, he had no remedy over against Whitelock, the judgment being satisfied, not in the result of the suit, because he (W.) could not use the judgment for himself, nor could it be used against him by any one; and he neither gained nor lost by the result.

As to the 2d point:

The abstract shows no such evidence excluded as is complained of—the record does. But the evidence offered was improper and irrelevant, because it was entirely immaterial about the custom of the country in reference to buildings—the question, and the only question, being about the house in controversy. And the counsel is mistaken in his reading of the plaintiff's 6th instruction, for it is expressly stated that "*if the house was built with the privilege of moving,*" *&c.*

There can be no general custom of the country here controlling the law upon these questions. Every man builds his house after his own notion. And all the customs in the world would not help to elucidate the question whether the Whitelock house was personal property, and so built, held, and disposed of by Whitelock.

The 3d point made is, error in plaintiff's instructions.

The 1st instruction is the law I think, as I shall show by authority hereafter.

The 2d is not liable to the objection urged against it. See the record, (pp. 18, 19) where Whitelock expressly agreed to abide by the sale, and that the house should be Crist's.

The 3d instruction is supported by the evidence. (See record, pp. 18, 19.) This instruction embodies the law that the possession of the tenant is the possession of the landlord; and Whitelock swears that heheld the house as tenant of, and paying rent to, Crist.

The 4th instruction merely asserts a common principle, that *possession of personal property* is sufficient (in absence of other proof) evidence of title. And this is all the instruction covers.

The 5th instruction cannot be liable to the objections urged. What constitutes personal property is a question of law; but whether a specific piece of property is personal or real, is a fact to be ascertained under the law.

The 6th and 7th instructions are supported by Whitelock's evidence, (pp. 17, 18, of record,) where he says he had Phillips' permission to build the house where he did; and he built it with a view to its removal. That these instructions embody the law, I will hereafter show.

The 8th instruction is explanatory of all the others in referring to Whitelock' intentions. Can any one mistake its meaning in connection with the other instructions? It seems clearly not. That it embodies the law, the authority referred to will hereafter show.

As to the 4th point:

The 1st *refused* instruction of defendants cannot be the law. Is it true that a man has no power over his own property? Cannot the owner sever what was a part of the realty, and make it personal estate?

Cannot a man build a house on his own land, which he intends for movable property, as personal estate? And will not a sale and delivery of such house pass its title as personal property? These questions clearly show the error in the instruction, and it was properly refused.

But the court gave for defendant two instructions, which embody the same principles of law asked for in the refused instructions. (See the 3d and 5th instructions *given* for defendant in the abstract, and in the record, pp. 26, 27.

The 2d *refused* instruction is wrong, for this reason; that it instructs the jury that the levy and sale are void, and on that conclusion of law alone *they should find for the defendant.*

What becomes of Whitelock's assent to the sale? This instruction entirely ignores that. Then again, the instruction gives the defendant—a mere wrong-doer—the right of objection to what is binding between the parties to the act. The defendant was not not connected with Whitelock in any manner, but was a mere stranger to him and his acts; and as long as Whitelock does not complain of the levy and sale, it is not for defendant to do so.

The 3d instruction refused is objectionable for the same reasons as the 2d. It ignores the facts of the case, and as a mere proposition does not apply to the evidence.

Again, the law asked for in these 2d and 3d *refused* instructions was substantially fully given in defendant's 2d *given* instruction. (See abstract, and record, p. 26.) Where an instruction given is substantially the same as one refused, judgment will not be reversed. (23d Ill., 552, 502.)

Having thus briefly examined appellant's instructions, let me now state the law of this case, as I believe it to be.

If the house was personal property, there can be no doubt that it was subject to execution; and if it was taken in execution, and sold by the constable, nobody can complain of the constable's acts except Whitelock, or those connected with him by purchase, or as creditors. And if Whitelock affirmed the constable's sale, however defective the levy and proceedings under it may haye been, no stranger can step in to raise objections.

That the house was personal property, (laying out of view the fact that it was a dwelling,) there can be no doubt from the evidence. (See the description of it in Stitt and Mitchell's testimony, on pp.

14, 15, of the record, the abstract not being full on that point.) And that the house was erected for removal, there can be no question, for Whitelock so swears, and the manner of its construction so indicates.

The law is, that the intention, understanding, and agreement of parties, controls the character of the property. It was so decided expressly in Smith *vs.* Benson, (1st Hill, [N. Y.,] page 178.) And the counsel for appellant says that it was decided in 2d Scam., 284, that the intention controls.

In the case at bar, Whitelock and Crist by their agreement treated the house as personal property, and passed the title to Crist—Whitelock holding as tenant.

In the absence of Whitelock, Dooley took the house and moved it off, and held the same as his own. There was no cancellation of the contract on the part of Dooley and Whitelock, or Whitelock and Phillips; and Whitelock was entitled to notice of a forfeiture if Dooley desired to declare one.

In the contract between Dooley, and Phillips and wife, the consideration was executed—that is to say, each took possession of the property they had purchased from each other, but deeds were not passed. (See the record, page 20.)

Phillips and his wife owned the land on which they gave Whitelock permission to build—Whitelock built his house and lived on the land about three years—while Dooley lived on and enjoyed the property he got of Phillips. There was, then, no right in Phillips and Dooley, without notice to Whitelock, so to act as to give Dooley Whitelock's property. There was no clause of forfeiture in the contract between Dooley and Phillips, or in the building arrangement between Whitelock and Phillips; and Whitelock was surely entitled to notice of the cancellation of the Dooley contract, before his property could be forfeited. If, then, Whitelock had those rights, Crist had them, as holding under him.

Again: Phillips could not have claimed Whitelock's house, because it was on his (P.'s) land, without giving Whitelock notice to take it away. Dooley took the land back from Phillips, and virtually held under him; and Dooley therefore could not claim the house as his own, by virtue of its being on his land, without notice to Whitelock. And if Whitelock was entitled to this notice, so was Crist.

The point raised about the levy and sale I shall not notice, further than to say that the affirmance of the sale by Whitelock certainly cuts off all objection to it, as he was the only person then having the right to complain.

WILLIAM W. ORME,

for Appellee.

175

Dooley vs. Crist

Brief & Argument
of appellee

Filed Apr. 30 - 1861
L. Leland
Clerk

State of Illinois

Supreme court 3rd Grand division

Ottawa April term 1861

William Dooley } Appellant

vs

David L. Crist } Appellee

Appeal from McLean.

The appellant assigns the following Errors upon the Record.

1st The court Erred to the preudice of Appellant in permitting the witness Whitelock to testify for Defendant below.

2nd The court Erred to the preudice of Appellant in excluding evidence offered by Defendant below.

3rd The court Erred to the preudice of Appellant in giving instruction for Plff below

4th The court Erred to the preudice of Appellant in refusing to give instructions for Defendant below.

5th The court Erred to the preudice of appellant in overruling motion for new trial.

For all which and other errors apparent upon the face of the record the Judgement should be reversed and the ~~Cause~~ remanded

E. Williams

for Appellant

And now comes the said David L. Crist and says that there are no such Errors in the Record and proceedings aforesaid as is above supposed —

W. W. Orme
Appellee's Atty —

William Dooley
vs
David L. Crist
Assignment of Error

R. E. Williams

1 Sess continued and held at the Court House in Bloomington in and for the County of McLean in the Eighth Judicial Circuit of the State of Illinois before the Hon David Davis Judge of the Circuit Court of said Eighth Judicial Circuit in a certain cause therein pending wherein David L Crist was plaintiff and William Dooley was defendant

State of Illinois } ss. Be it remembered that heretofore
McLean County } to wit on the 19th day of November AD 1859 came
David L Crist by Swett & Orme his attorneys & filed
in the office of the Clerk of the Circuit Court of said County
a praecipe in words and figures as follows to wit

State of Illinois } McLean Circuit Court Illinois
McLean County } December Term 1859

David L Crist
vs
William Dooley } In Trover
Damages $ 300.=
The Clerk will issue process

&c

Swett & Orme Attys =

And thereupon there issued out of said Clerks Office a writ of Summons in words and figures as follows to wit =

2

State of Illinois } The people of the State of Illinois
McLean County } To the Sheriff of said County Greeting = We command you to summon William Dooley if found in your County personally to appear before the Circuit Court of said County of McLean on the first day of the next term thereof to be holden at the Court House in Bloomington on the second Monday in the month of December next to answer unto David L. Ferret in a plea of Trover to his damage Three hundred dollars as he says = And have you then and there this writ and make return thereon in what manner you execute the same - Witness Wm McCullough

(L.S.) Clerk of said Circuit Court and the seal thereof hereto affixed at Bloomington this 21st day of November AD 1859

Wm McCullough Clerk
By L. Burr Depty

which said writ of Summons was by the Sheriff of said County returned into said Clerks Office endorsed as follows to wit=

"Executed this writ by reading it to the within named William Dooley
Nov. 22. 1859 - Fees S & Ret 60

mileage 25
85

W. P. Withers Shff
By L. E. Rucker Depty

5 and chattels or any or either of them to the said plaintiff although often requested so to do and hath hitherto wholly refused so to do And afterwards to wit on the day and year aforesaid at the County and State aforesaid converted and disposed of the said wooden frame dwelling house the said wooden frame building the said wooden building and the said wooden dwelling goods and chattels to his own use To the damage of the said plaintiff of $300- and he therefore brings suit &c

Swett & Orme Attys =

And thereupon this cause was continued by said Court until the December Term 1860= And afterwards to wit on the 28th day of August A.D. 1860 came the said Defendant by his attorney and filed his plea to the said Plaintiff Declaration in words and figures as follows to wit=

State of Illinois

McLean Circuit Court September Term 1860

William Dooley

vs

David L. Leist

And the said defendants by Williams & Williams his Attys defends the wrong and injury when &c and say that he is not

guilty of the said supposed grievances above laid to his charge or any or either of them or any part thereof in manner and form as the said plaintiff hath above thereof complained against him and of this the said defendant puts himself upon the Country

Williams & Williams
Attys for Deft –

And at the regular December Term of said Circuit Court to wit on the 12th day of January A.D. 1856 = Present

Hon. David Davis Presiding Judge
Wm McCullough Clerk
John L. Routt Sheriff

On said 12th day of December in the year ~~of our Lord~~ last aforesaid this cause came on for trial and the following proceedings were had before said Court as appears of record to wit =

David L. Loyst
vs
William Dooley

In Trover

And now at this day come the parties hereto by their attorneys and this cause now coming on for trial upon the issue joined

7 thereupon comes a Jury twelve good and lawful men to wit= John Casey, John C. Verden, Robert Boyd. Wm G. Thompson John Coffman, Geo W. Roberts, Thomas Garman, P. C. W. Lyman William Gillespie, John B. Shough, E. J. Will + Stephen K. Noble= who being duly examined and sworn to well and truly try the issue herein joined and a true verdict render And having heard the evidence produced before them and the arguments of Counsel and the instructions of the Court upon their oaths do say that they find the issue for the plaintiff and they assess his damage at One hundred and Seventy five dollars And now comes the said defendant by his attorney and moves the Court to set aside the verdict of the Jury aforesaid and to grant a new trial in this cause

And thereupon afterwards at said December Term to wit on the 30th day of January AD 1861 final Judgment was rendered by said Court in this cause in words and figures as follows to wit=

David L. Crist
vs
William Dooley

Ju Grover

And now at this

day again come the parties hereto by their attorneys And this cause now coming to be heard on the motion for a new trial herein before entered by said defendant is argued by Counsel And the Court having heard said motion and being duly advised in the premises doth consider that the same be overruled It is therefore considered by the Court that said Plaintiff recover of and from the said William Dooley the sum of One hundred and twenty five dollars his damages so assessed by the Jury as aforesaid and also his costs herein expended and that he have execution therefor

And now comes the said defendant and prays an appeal to the Supreme Court of this State and the same is granted And by agreement of the parties said defendant is allowed thirty days in which to file his bill of exceptions in this cause And his appeal Bond which appeal Bond shall be in the penal sum of Five hundred dollars conditioned as the law directs and to be signed by William A Dooley as security =

And thereupon on said 30th day of January in the year last aforesaid came the said defendant by his attorneys and filed herein his

9 Bill of Exceptions to the ruling of the Court in this cause which said Bill of Exceptions was signed & sealed by the Court and ordered to be made a part of the record of this cause and was in words and figures as follows to wit

State of Illinois
McLean Circuit Court
December Term 1860

David L. Crist
vs
William Dooley } In Error

Be it remembered that this cause came on to be tried and the plff introduced S R Brown as a witness who testified that he was an acting Justice of the peace of said County and produced his docket and read the entry of the two judgments upon which the two following executions were issued and then introduced the two following executions which executions with their returns were then given in evidence by plff as follows =

No. 1 - State of Illinois } The people of the State of Illinois
McLean County } To any constable of said County
Greeting - We command you that of the Goods and Chattels of Buford Phillips in your County you make the sum of Thirty Eight dollars

10. and Eighty Seven cents debt and — dollars and — cents cost which David L. Leist lately recovered before me in a certain plea against the said Buford Phillips and hereof make due return to me within Seventy days from this date Given under my hand and seal this 19th day of July 1858

J. B. Brown J.P. (D.)

Came to hand this 19th day of July 1858 at 4 O'clock P.M. = John H. Percy Constable

By virtue of the within I have this 22th day of July 1858 levied on the following property in possession of Buford Phillips to wit One dwelling house in possession of G. C. Whitlock = Rec'd Twenty dollars on this ex Sept 23d 1858 = by purchase of above house - D L. Leist = John H. Percy

Leist

By virtue of the within execution on the 22d day of September 1858 I sold the said dwelling House (and also by virtue of another execution in favor of said Leist against G. C. Whitelock) for the sum of $60. to David L. Leist & applied the proceeds of sale pro rata on both said Executions And I return this execution $21.30 made the balance unsatisfied And no other property of said defend and found in my County = John H. Percy Constable

No 11 Ex returned money made by sale of horse in part $21.30 paid plaintiff $20. retained my fees no property to make ballance of Execution in my County - Sept 22nd 1858 -

John H Percy Const -

No 2 State of Illinois } The people of the State of Illinois McLean County } To any Constable of said County Greeting - We command you that of the Goods and Chattels of G C Whitelock in your County you make the sum of Fifty dollars and fifty cents debt and Two dollars and Sixty six 1/4 cents cost which David L. Evist lately recovered before me in a certain plea of against the said G. C. Whitelock and hereof make due return to me within seventy days from this date Given under my hand and seal this 9th day of August 1858 =

S. B. Brown J. P. (L.S.)

Come to hand this 9th day of August 1858 at 12 O Clock M. - John H Percy Constable -

By virtue of the within ex I have this day levied on the following property to wit One dwelling house in possession of G. C. Whitelock this 22nd day of July 1858 - Rec'd on this Ex from sale of House by Const Percy thirty three

+ 54/100 Dollars = Sept 22d 1858

D. L. Crist -

Ex returned money made thirty Eight 76/100 paid plaintiff pr Rept 33 54 paid J. P. his fees & re- ~~turned~~ tained mine no other property to make bal- ance execution Sept 22/58

John H. Percy Const -

By virtue of the within execution on the 22d day of September AD 1858 I sold the above described dwelling house as the property of G. C. Whitelock to David L. Crist for the sum of $60 - said sale being also made under one other execution in favor of said Crist and against Buford Philips I applied the proceeds of sale pro rata on both said executions And this execution is return ed $38.76 made and the balance unsatisfied and no other property of said Whitelock found in my County -

John H. Percy

Constable

Pltff then ~~had~~ called and had sworn John H Percy who testified that he was the consta ble who had the two foregoing executions that he went with the executions where the house in con troversy was and inquired for Whitelock - He was not at home and then in sight of the house

indorsed the levy on the executions that he did not see Whitelock there Whitelocks family were at the time living in the house did not recollect that at that time he said anything to the family about the levy either the same day or a day or two afterwards saw Whitelock at a School House where he Whitelock was teaching and told him that he had levied upon the house advertised the same in the usual manner and on the day of sale went with Kleff and one or two others to the house within a rood of the house and offered it for sale and sold it as per the return Whitelocks family were still living in the house at the time of sale did not see Whitelock did not recollect that he was in the house on the day of sale nor that he said any thing to the family about it then gave Kleff a writing authorizing Kleff to take possession of the house or showing that Kleff had bought the house this is all that witness had to do with the house On cross examination testified that the only possession of the house he had was as above stated that the family of Whitelock was living in it at the time of the levy from some time before and up to the sale and from some time after the sale — Kleff then called and had sworn William Stitt who testified that he

was a carpenter that he built the house in question for G. C. Whitelock that it was a good frame house of the kind. 20 feet long 16 feet wide one story high built of good lumber and well built that it was set on from 8 to 12 blocks partly in the ground and partly above ground The house was about two feet from the ground in front & a foot or Eighteen inches in the rear the ground being sloping - blocks of from 8 to 12 inches in diameter of Oak timber that the sills rested on these blocks that the house is is about $225-00 there was nothing to prevent the house from being lifted off the Blocks and moved - on cross examination said the house would have been moved just as easily if it had rested on a brick or stone wall in the manner that framed houses do that are built upon brick or stone foundations Deft on cross examination of this witness offered to prove that the house in controversy was built on the same kind of foundation that many houses are built in this country by the owners of the land on their own land for their own use. This was objected to by Plff - objection sustained to which deft. then and there excepted

Plff then called and had sworn

15 ~~to~~

James Mitchell who testified that about 18 months after date of the constables sale he removed the house at the request of and for the defendant from one corner of the 40 acre tract of land on which it stood to the opposite corner diagonally across the 40 acre tract and across a ravine about as wide as the length of the house that the house was then attached as an ell to another house of Deft there standing and it was placed on the same blocks on which it originally stood - Plff then called and had sworn M. T. Hawks who testified that a few days before the commencement of this suit the head Plff demand of deft to deliver to him Plff the house and that deft refused to do so Plff then called and had sworn G. C. Whitelock - Deft objected to his being sworn on the ground that witness had an interest in sustaining the constables sale as he got the proceeds of the sale the said witness being the deft in the execution, that is one of the executions) which objection was sustained by the Court Plff then executed and delivered to the witness the following release

Whereas G. C. Whitelock was this day offered by me as a witness on my behalf in the trial of a certain cause in the

16

McLean Circuit Court of Illinois in a cause wherein I was plaintiff and Wm H Dooley was defendant and said witness was rejected by the Court as incompetent on account of interest Now therefore in order to restore the said witness to his competency I hereby release the said Whitelock from any liability to me in any event on account of a judgment in my favor and against said Whitelock for $50.50 of date May 8 1858 on S. B. Brown's Docket as a Justice of the Peace in McLean County Illinois and also all costs in said judgment ~~and also all costs on said judgment~~ and I hereby declare the said judgment fully satisfied and forever discharged In Witness Whereof I have hereunto set my hand and seal this 12th day of January A D 1858

(Signed) D. L. Crist (seal)

and again offered the witness - Deft again objected - that the witness still had an interest because plaintiff could not release the costs of the execution and part of the proceeds was applied on the other execution to which witness was entitled — Witness had a direct interest in sustaining the sale which objection was overruled by the Court and the

D 17 witness permitted to testify to a ruling of the Court the Defts by his counsel at the time the same was made then and there in open Court excepted - Whitelock then testified that he built the house in controversy on a 40 acre tract of land that Phillips was in possession of & claimed to own That he had Phillips permission to build the ~~same~~ house there that when he built it he expected if he was able to pay for his land adjoining it he would keep it there if not that he would sell it or remove it That he heard of the constables sale a few days after it was made and that an opinion prevailed that a constable could sell a house and that he supposed the sale was good - That about a week after the sale he came to Bloomington where Kelly ~~Deft~~ lived and met Kelly that he told Kelly he had used ~~used~~ him badly that Kelly said all he wanted was his debt that Kelly then told witness if he could sell the house for more than enough to pay Kellys debt that he witness might do so pay Kellys debt and keep the balance and that witness then agreed with Kelly that the house should be plaintiffs & witness would try to sell it and pay Kellys debt and agreed if he could not sell it to - it was agreed he should pay Kelly a

a reasonable rent for the house - Witness made several attempts to sell the house but did not succeed but finally after being in it for 12 or 15 months after the constables sale abandoned the house ~~of land~~ and his land and moved to ~~Missouri~~ Missouri without giving Crist any notice of his leaving on cross examination stated that he had ~~contracted~~ by a written contract with deft to buy 40 acres of land and Phillips had also contracted with deft for ~~another~~ another 40 adjoining = that witness was the ~~connected~~ son in law of Phillips that witness commenced improving his 40 acre tract that where the house was built there was not as good building ground on witnesses 40 as there was just across the line on the Phillips 40 and that Phillips and witness had made a verbal agreement to ~~trade~~ swap an acre Witness got an acre of Phillips on which the house was built And gave Phillips an acre of witnesses 40 in another place that witness took possession of his acre and built the house upon it just on the line of his witnesses 40 and that Phillips took possession of the acre of witness 40 in an other place and that witness and Phillips each mutually occupied their several acres for

about three years and up to the time that witness left the land and the County that he occupied the house in connection with his 40 acres of land that he occupied the land about three years and never paid Defts anything on it = admitted that long after the constables sale and his arrangement with Jeff he witness had tried to sell his interest in the land including the house, to William H Dooley a son of Defts that witness asked him Dooley $300.00 for his interest in the land including the house and said that he witness could take One hundred Dollars of it and Dooley might pay his Dooley's father the Deft $200- for the use of the land admitted that at the time he did not tell W H Dooley that Jeff had any right to the house but said his witness intention was if he made the sale to pay Jeff- claim out of the proceeds. Jeff here closed his case it was then agreed by Counsel that the 40 acre tract upon which the house stood was the SE¼ of the NE¼ of Section (21) Town 23 N.R. 3 E 3d P.M. and that it had been entered by John Hendrix And that defendant had the legal title to said land Deft then proved the execution of and gave in evidence the following contract

20 Article of Agreement made and entered into this 9th day of February A.D. 1857 between Wm Dooley of the County of McLean and State of Illinois of the first part and Lucy Phillips wife of Buford Phillips of the County and State aforesaid of the second part Witnesseth that the said party of the first part for and in consideration of the hereinafter-mentioned doth hereby agree to make execute and deliver unto said Lucy Phillips a good & sufficient Warranty Deed for the South East qr of the North East quarter of Section Twenty one (21) in Township Twenty Three (23) North of Range Three (3) East and ten acres of timber out of the N E & N E¼ Sec 29 in Township & range aforesaid said ten acres to be selected and chosen out of that part of said 40 acres tract as remains unsold & to be taken in a square form & by the legal subdivisions In consideration of the above said party of the second part covenants that she will upon the execution of said deed aforesaid deliver to said party of the first part a good & sufficient Deed for Lot No Six (6) and the East half of Lot No four (4) in Block No Eight (8) in N. B. Wells Second addition to Bloomington—

#21

Mutual possesion of each of said premises to be given on the 1st day of March next And in case said second party shall not be able to give a clear title to said property last mentioned then she is to surrender all claim & possession acquired by this agreement to the land above specified & described and said first party will also give up his claim & possession to the property last described Witness our hands & seals the day and year first above written

William Dooley (Seal)
Lucy Phillips
Buford Phillips (Seal)

Deft then called and had sworn William H Dooley who testified that the above contract was by mutual agreement abandoned and cancelled except that Phillips retained possesion of the house he lived in until Spring and Dooley retained possesion of the house in Bloomington on the lot named in said contract until Spring and that Phillips gave back to & left the possesion of the land herein described about the time or shortly after the Whitelock left the county that deft then went into possesion of both the Phillips and Whitelock H.O.' and moved

~~222~~ the house in controversy up to and the house that stood upon the Phillips 40 and made of it an ell or addition to the house already there and deft moved into it in the Spring and Stite lives in it that it was placed upon the same blocks that it had originally stood upon and that they were good sized Block of sound white or Run oak and that the house stands on the same blocks yet except that a cellar has been dug under a part of it and ~~some~~ some of the blocks have been removed to make way for the cellar wall - Witness testified that Whitelock nearly a year after the Constables sale had tried to sell to him witness his Whitelocks interest in the 40 acres of land including the house and held out as the principal inducement to the purchase the value of the house in controversy

Deft here closed - the above was all the Evidence in the case and thereupon the Court at the request of the plff gave the Jury the following instructions =

P.C. 1

The Court instructs the jury that if they believe from the evidence that the house in controversy was sold by

1 11

23

~~24~~ Whitelock to Leist or on an execution vs Whitelock but by Leist and the house was personal estate and that after the sale was made Dooley took the same and converted it to his own use then the Jury will find for Plaintiff the amount of the value of the property at the time of conversion—

no. 2 That if Whitelock assented to the levy and sale of the house and surrendered possession of the house to Leist under said levy and sale then such levy and sale is valid against any person having no right to the house as creditor or purchaser of Whitelock unless they find that the house was a part of the Real Estate—

no. 3 That if they believe from the evidence that Whitelock held possession of the house as tenant of Leist or under any agreement with Leist to hold the same and pay him for the use of the same then in contemplation of law Leist was in possession of the house and the possession of Whitelock was the possession of Leist =

no. 4 That the possession of the personal property in controversy (if personal property) by Whitelock as tenant of Leist

if the jury so find the facts from the evidence is sufficient in the absence of other proof to support title in Levi

no. 5 That the law presumes the person in possession of personal property to be the owner thereof And if the jury believe from the evidence that the property in controversy is personal property and at the time of the taking of the same was held by Whitelock as tenant or under agreement with Levi then such possession is sufficient prima facie title in Levi in the absence of all other proof to entitle him to maintain this action

no. 6. That if the jury believe from the evidence that Whitelock built the property in controversy on the premises occupied and claimed by Phillips by the leave and consent of Phillips with the privilege of removing or doing as he pleased with the same and Whitelock did so build his said house and set the same on blocks without in any manner fastening the house to the blocks or the soil so that the same could be easily removed then such house was personal property =

no. 7 The Court instructs the Jury

25

That in ~~the~~ this case the question whether the house ~~that~~ is ~~this case~~ real or personal ~~property~~ estate is a mixed question of law & fact That if the Jury believe from the evidence that Whitelock built the house on Phillips land with Phillips consent with the intention of removing the same if he saw fit then the house is personal property & subject to levy by execution =

no. 8 That in judging of the intention of Whitelock it is proper for them to take into consideration all that Whitelock said or done about about the property while he occupied it & before the contest came up. -

To the giving of all which instructions the defendant at the time the same were given in open Court excepted And the Court then gave for Defft the following instructions =

no. 1. If the Jury believe from the evidence that Whitelock claimed the 40 acres of land as a purchase of the same under Dooley and that he contracted with Phillips for the one acre on which to build the house for the purpose of getting a better site on which to build the house than was on his own land and gave Phillips one acre of -

of his Whitelocks land in exchange and that Whitelock and Phillips each mutually took possession of and occupied their several acres of land and if they further believe from the evidence that Whitelock Built the house with the intention of occupying it as a permanent residence in connection with his land then the house became a part of the land and was not liable to the levy and sale and they should find for the defendant -

no. 2 In order to make a valid levy on personal property the officer making the same must take such possession of the property as the nature of the property will admit of - ~~will admit of~~ and in order to make a valid sale of personal property by an officer on execution it must be in the power of the officer at the time of the sale to put the purchaser into possession of the property that is such possession ~~of the property~~ as the nature of the property admits of -

no. 3 If the house was Real Estate at the time it was built no subsequent change of intention on the part of Whitelock would convert it into personal property

27
~~28~~

In Trover the plaintiff must show title in himself and it is not material whether defend-

no. 4 ant is the owner or not the plaintiff cannot recover without showing the title in himself

That if the

no. 5 Jury believe from the evidence that Whitelock built the house on his own land or land that he contracted for with the intention of not removing the same then the house is Real Estate & passed with the land -

no. 6. If the Chain of title introduced by Dooley show that Dooley was the owner of the fee of the land upon which the house stood and if the Jury believe from the evidence that Phillips and Dooley cancelled the contract under which Phillips claimed the land then if the Jury find that the house was built under a State of ~~affairs~~ facts making it a part of the Real Estate it became Dooleys upon the cancellation of the contract between Dooley & Phillips about the land =

~~Which the Court refused to give to the Jury to which refusal of the Court the Deft then and there excepted And thereupon the Jury retired & [illegible] afterwards brought~~

28

Deft Then requests the Court to give on his behalf to the Jury the following instructions submitted in writing to the Court

no. 1 If the Jury believe from the evidence that Whitelock built the house as the owner or as claiming to be the owner of the soil the house as soon as it was built became a part of the Real Estate and no subsequent change of intention on the part of Whitelock will change the character of the property from Real ~~Estate~~ to personal property =

no. 2 If the Jury believe from the evidence that the constable never had possession of the house and if they further believe from the evidence that at the time of the sale the constable did not have it in his power to deliver possession of the house to the purchaser then the levy and sale are void and they should find for the defendant

no. 3 If the Jury believe from the evidence that during the whole time from the levy until the sale and for some time after the sale the house was in the actual possession of Whitelock who claimed the same as his own adversely to the officer making the levy

thew the levy and sale were void

Which the Court refused to give to the Jury to which refusal of the Court the Deft thew and thew excepted and thereupon the Jury retired and afterwards brought into Court the following verdict

We the Jury find for Plaintiff Damages Assessed At $175.00—

P. C. W. Lyman
Wm Gillespie
Wm G. Thompson
J. B. Shough
G. W. Roberts
E. J. Wells
J. F. Farman
S. K. Noble
John Leasey
J. C. Virden
John Leffman

And thereupon Deft moved the Court to set aside the verdict and grant him a new trial on the ground that the Court erred in permitting the witness Whitelock who was interested in the case to testify and on the ground that the Court admitted improper evidence for plff and rejected proper

executors and administrators jointly and severally and firmly by these presents sealed with our seals and dated at Bloomington this 31st day of January Anno Domini One Thousand Eight hundred and Sixty one.

The condition of the above obligation is such that whereas the above named David L. Leist did on the 30th day of January One Thousand Eight hundred and Sixty one at a term of the Circuit Court then being holden within and for the County of McLean and State of Illinois obtain a Judgement against the above bound one William Dooley for the sum of One hundred & Seventy five dollars and ~~costs~~ and costs of suit from which Judgement the said William Dooley has prayed for and obtained an appeal to the Supreme Court of said State Now if the said William Dooley shall duly prosecute said appeal and shall moreover pay the amount of the Judgements costs interest and damages rendered and to be rendered against him the said William Dooley in case the said Judgement shall be affirmed in the said Supreme Court then the above obligation to be null and void otherwise to remain

52

in full force and effect —

Taken and entered into before me and acknowledged this 19 day of Feby A.D. 1861

William Dooley (L.S.)
W. H. Dooley (L.S.)

Wm McCullough Clerk
By L. Burr Dpty

State of Illinois
McLean County } ss I Wm McCullough Clerk of the Circuit Court in and for said County do hereby certify that the foregoing is a true and complete transcript of the records and files of my office pertaining to a certain cause wherein David Dolt was plaintiff and William Dooley was Defendant as the same now remains in my office

Witness my hand & seal of Office at Bloomington this 14th day of March A.D. 1861

Wm McCullough Clerk
By Lemuel Burr D. Clk.

175

William Dooley. Appellant.

vs

David L. Crist. Appellee

Transcript

Filed Apl. 9. 1861.
L. Leland
Clk.

$6.75 fees pd by Dooley.