No. 14804

Supreme Court of Illinois

Collister

vs.

Losee

71641

Supreme Court of Illinois
Third Grand Division
April Term AD 1865-

Samuel Collister
Appellant-
vs
Benevia Lozier
Appellee
} Error to Livingston

Points cited for Appellee

From the evidence in this case it appears that Collister the appellant never claimed the mare in question until after the trial of the Right of property had decided the ownership in his son. Having asserted then the ownership to be in another person he is ~~deem~~ estopped from asserting that this claim now. Had the mare been actually his, he should have claimed her on the trial. See 12 Ills 93
This fact is prima facie sufficient to authorize the jury in disregarding his claim for damages under the statute (ibid) also 2 Mass Rep 509. also 24 Pickering 25 = also 14 Pickering 427

J M Barnet-
Atty for Appellee

185—

Samuel Collister
Appellant

vs

Burwin Lozier
Appellee

Written Argument for Appellee

Filed Apl 6. 1865—
L Selover Clk.

J M Bandy Atty for Appellee

United States of America }
State of Illinois }
Livingston County } ss

Pleas had at a regular term of the County Court of Livingston County at a regular term of said Court, began and held at the Court House in Pontiac on Monday March 2d. A.D. 1863, the same being the first monday of March 1863.

Present, Hon. Jon.a Huff, County Judge
Robert B. Warrington Clk
Job E. Dyer Shff.

Sam.l Collister
vs
Burwin Losee

Be it remembered that on the 19th day of February 1863, a certain summons was issued out of the County Court of said County in above entitled cause, which summons is in words and figures as follows:

"State of Illinois } The People of the State of Illinois,
Livingston County } ss. To the Sheriff of said County, greeting:

We command you, that you summon Burwin Losee, if to be found in your County, to appear before the County Court of Livingston County, on the first day of the next term thereof, to be holden at the Court House in Pontiac in said county, on the first monday in the month of March next, to answer Samuel Collister, in a plea of trespass on personal property on promises to the damage of Samuel Collister, the said plaintiff in the sum of $150.00, as he saith, and have you make due return to our said Court as the law directs.

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U. S. Int. Rev. Stamp canceled by A. B. Oct. 19th 1863

(Seal)

Witness, R. B. Harrington, clerk of said court, and the Judicial seal thereof, at Pontiac, this 19th day of February A.D. 1863.

R. B. Harrington Clerk

per C. B. Alford, Depty."

Upon said summons, was endorsed the following:

"State of Illinois }ss.
Livingston County }

I have executed this writ by reading to the within defendant, Burwin Losee, on this 19th day of February A.D. 1863.

J. E. Dye, Sheriff."

and also,

"Filed this 20th day of February 1863

R. B. Harrington Clerk"

And afterwards, towit, on the 26th day of ~~May~~ 1863. the plaintiff filed his declaration in the aforesaid entitled cause, in said court, which is in words and figures following:

"State of Illinois } In the County Court of said
Livingston County } ss. County, March Term, A.D. 1863,

Summit Collister, plaintiff, complains of Burwin Losee, defendant, in a plea of Trespass, for that the said Burwin Losee, on the second day of March 1863, was an officer, towit, a Constable, within and for said County of Livingston & State of Illinois, and acting and performing duties as such constable, that said Losee, then and there on the day aforesaid, and at and in said County,

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acting as constable as aforesaid, by virtue of an execution, in favor of Henry Eldridge, issued by W. H. Snyder, a justice of the peace, within and for said County, on a judgment rendered by said Justice Jany 25th 1862, against the property of said plaintiff, with force and arms, levied on, seized, carried away and sold the goods and chattels to wit: one mare of the plaintiffs there and then found, and being of great value to wit, fifty dollars, to satisfy said Execution.

And Plaintiff avers that the said mare was not worth to exceed sixty dollars, at the time of the said levy and sale, and that he was not then the owner of any other property, save such articles as are and were specially exempt from levy and sale on Execution by the Statutes of the State, and Plaintiff further avers, that said mare was an article of property suitable to the condition and occupation of the said plaintiff, to wit, a farmer, and the said plaintiff avers that he was then and there a householder, and the head of a family, and resided with the same, and that said mare was then and there by virtue of the statute exempt from levy and sale on said Execution, all of which the said Defts. well knew, at the time of said levy and sale, And the plaintiff further avers, that the said plaintiff, a debtor to said execution, duly selected said mare as being exempt as aforesaid, before the sale thereof, and the plaintiff by reason of the premises, claims of the defendant, three times the value

of the said property, so illegally levied on and sold, as provided by sections 83+85, of chap. 57, of the revised Statutes of Illinois to the damage of the said Plaintiff, one hundred and fifty dollars, and thereupon he sues &c

Sam'l. L. Fleming
Atty. for Plff."

And afterwards to wit on the 7th day of March A.D. 1864. the following plea Gen Issue and replication, in aforesaid entitled cause, was filed in said Court which is in words and figures following:

"Samuel Collister
Vs
Burwin Losee } Trespass } In County Court of Livingston County, Illinois, March term A.D. 1864.

And now comes the said Defendant, Burwin Losee, by Collins and Whitmore, his attorneys, and defends the wrong and injury, where &c. and says that he is not guilty of the said trespasses above complained of against him or any or either of them, in manner and form as Plaintiff hath above thereof set forth, and of this he puts himself upon the Country.

Collins & Whitmore

And the said Plaintiff doth the like

S. L. Fleming, Plffs. atty."

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And now be it remembered, that on Monday, the second day of March A.D. 1863, the same being the first day of the regular March Term of the County Court of Livingston County Illinois begun and held at the Court House in Pontiac in said County, on said day, the following proceedings were had and entered of record in aforesaid entitled cause, as follows, to wit:

Present, Hon. Jon^a. Ruff, County Judge
R. B. Harrington Clerk
Job E. Dye Sheriff.

Court opened with public proclamation.

Samuel Collister
Vs
Burwin Lozier

No. 344 Trespass on Personal Property.

On this day comes the Plaintiff, by S. L. Fleming, his attorney, and also comes the defendant by W. E. Collins his attorney. By mutual agreement of counsel, it is ordered by the Court that this cause be continued to the next term of this Court, and it is further ordered that the plaintiff have leave to amend his declaration filed herein."

And afterwards, to wit on the 7th day of Sept^r A.D. 1863, the same being the first day of the regular September Term of the County Court of Livingston County, Illinois, began and held at Pontiac, in said County on said day, the following proceedings were had and entered of record in aforesaid entitled cause as follows, to wit:

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" Present, Hon. Jos. Bluff, County Judge,
R. B. Harrington Sen. Clk.
Job. E. Dye, Sheriff.
Court opened by public proclamation.

No 347. "Samuel Collister
vs
Burwin Losee } Trespass on Personal Property.

And now at this day comes the said defendant, by M. E. Sellins his attorney, and enters his motion to dismiss this cause for want of bond for costs. "

And again at said term of this County Court of Livingston County as aforesaid, began and held as aforesaid in Pontiac on the 7th day of September A.D. 1863, , on Tuesday the 8th day of said month the following proceedings were had and entered of record in aforesaid entitled cause as follows, to-wit:

Samuel Collister
347 vs
Burwin Losee } Trespass on Personal Property.

This day come the said parties by their respective attorneys, and this cause coming on to be heard, on the defendants motion made herein at a former day of the present term of this Court, to dismiss this cause for want of bond for cost; and after hearing said motion, it is considered and ordered by the Court, that the said

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motion be, and is hereby overruled, whereupon by agreement of the parties herein in presence of the Court, this cause is continued till the next term of this Court. It is further agreed, that pleas be filed herein, two days before the first day of the next term of this Court, Upon motion, it is ordered that depositions taken in this cause be opened."

And afterwards, to wit, on the 4th day of December A.D. 1863, the same being the first day of the regular December Term of the County Court of Livingston County, begun and held thereof at Pontiac, on the said day, the following proceeding were had and entered of record in aforesaid entitled cause, as follows, to wit:

Present, Hon. Jon. Duff, County Judge
R. B. Harrington, Clk
Job E. Hyde, Sheriff

Court opened by public proclamation.

Samuel Collister
vs
Turvin Lasee

No. 327

Trespass on personal property.

On this day comes the Plaintiff by, L. L. Fleming, his attorney, also comes the defendant by Collins & Whitmore his attorneys. Defendant files his demurrer & Plaintiffs Stat. herein filed.

and afterwards, to wit, on the 8th day of December 1863

the same being one of the days of the regular ~~Term~~ November term of the County Court of Livingston County, Illinois, began and held as aforesaid, the following proceedings were had and entered of record in aforesaid entitled cause, as follows, towit;

"Samuel Collister
Vs
Burwin Losee

Trespass on Personal Property

And now this cause coming on to be heard on Defendants demurrer to the Narratine of Plaintiff, it is considered by the Court that said Demurrer be sustained, and the said plaintiff have leave to amend declaration; whereupon, it is ordied by the Court, that said cause be continued tith the next term of this Court."

And afterwards, towit on the 7th day of March A.D. 1864, the same being the first day of the regular March Term 1864, of the County Court of Livingston County Illinois, begun and held at the Court House in Pontiac, in said County, on said 7th day of March 1864, the following proceedings were had and entered of record in aforesaid entitled cause as follows, towit:

Present, Hon. Jon. Bluff, County Judge
R. B. Mavington, Clerk
J. E. Hyde Sheriff

Court opined by public proclamation.

No 3147 "Saml. Collister
Burwin Losee vs

Trespass on Personal Property.

On this day comes the plaintiff

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herein, by S. L. Fleming his attorney, and also comes the defendant, by Collins and Whitmore, his attorneys, Defendant files his demurrer to Plaintiff's amended Narrative, which being considered by the Court, is overruled, whereupon defendant enters his exceptions to the ruling of the Court."

And afterwards, to wit, on the 9th day of March 1867, the same being one of the days of the regular March Term of the County Court of Livingston County, Illinois, begun and held as aforesaid, the following proceedings in aforesaid mentioned cause were had and entered of record as follows, to wit:

Samuel Collister

vs

Simmons Lossee

No. 847. Trespass on personal property.

And now come the said parties to this cause, and the issue being joined between them, and for trial thereof, put themselves upon the Country, whereupon came a Jury of twelve good and lawful men to wit: James Gordon, Joseph Kine, E. L. Wheeler, William Perry, L. P. Hunter, A. Simmons, Thomas Wiss W. L. Murdock, Frank Clark, Wm Kine, Robert Ault, and A. Defenbaugh, who being duly sworn to well and truly try the issue joined, and a true verdict according to the evidence, heard the evidence and argument of counsel and then retired in charge of an officer of Court, to consider of their verdict,

And now on this ~~xxx~~ day returned the Jury in this

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cause into open court, and delivered their verdict to the following effect; "we, the Jury, find the defendant guilty and assess the Plaintiffs damages at the sum of one Hundred and five dollars. It is therefore ordered by the Court that the said Samuel Collister have and recover of the said defendant, Burwin Losee, the sum of One Hundred and five dollars, the damages assessed as aforesaid, and also his costs about his suit in this behalf expended, and that he have execution therefor.

And now comes the defendant and enters his motion for a new trial in this cause, which after being duly considered by the Court, it is ordered that a new trial be given."

And afterwards, to-wit on the 6th day of June A.D. 1860 the same being the first day of the regular June Term of the County Court of Livingston County, Illinois, begun and held at the Court House in Pontiac in said County on said day, the followings proceedings in aforesaid cause were had and entered of record as follows, to wit:

"Present, Hon. Jonas Bluff, County Judge
A. P. Harrington Clerk
J. E. Dye Sheff.

Court opened by public proclamation.

3d Day

Samuel Collister } Trespass on Personal Property.
Burwin Losee }

On this day comes the plaintiff

11 by S. L. Fleming, his attorney, and also comes the defendant by Whitmore & Collins, his attorneys, and by agreement of counsel, it is ordered by the Court that this cause be set for trial tomorrow at Two O'clock."

And again at said term of Court, on Tuesday, the same being one of the regular days of aforesaid Term begun and held as aforesaid, the following proceedings were had and entered of record in said mentioned cause as follows, to wit:

"Samuel Collister

Vs

Byron Losee

Trespass on Personal Property.

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On this day comes the parties to this cause by their respective attorneys, and on motion of the attorney for Plaintiff, it is ordered by the Court that the clerk issue an attachment for Hiram Cornell, returnable to the next term of this Court for contempt as witness on the part of Plaintiff, said witness having been duly and regularly served with process, and the issue between the parties to this cause being joined, and for the trial thereof put themselves upon the country, whereupon came a jury of twelve good and lawful men, to wit; D. D. Taylor, H. Fisher, Andrew Leavitt, E. H. Mathis, John Kelley, Henry Roberts, P. W. Gray, David Wolfkill, L. A. Coe, T. J. Pennock, S. S. Capron and Samuel Blake, who being tried and duly sworn to well and truly try the

12 the issue joined, and a true verdict render according to the evidence, who after hearing the evidence adduced, and the argument of counsel, retired in charge of an officer of the Court to consider of their verdict."

And afterwards to wit on the 8th day of June A.D. 1864, the same being one of the ~~regular~~ days of the regular June Term of the County Court of Livingston County, Illinois, begun and held at the Court House in Pontiac on Monday, June 6th A.D. 1864, the following proceedings were had and entered of record in the aforesaid entitled cause as follows, to-wit:

Present, Hon. Jon^a Bluff. ~~County~~ Judge
A. P. Harrington, " Clerk
J. E. Hyde " Sheff.

Samuel Collister
Vs.
Burwin Lodee

Trespass on Personal Property.

Now on this day came the Jury in this cause into open court and delivered the following verdict, as follows, to-wit: "We the Jury find the defendant not guilty." It is thereupon ordered by the Court that the verdict of the Jury be entered of record. Plaintiff enters his motion for a new trial in this cause

13 and afterwards to wit, on the 15th day of June A. D. 1864, the same being one of the days of the regular June Term of the County Court of Livingston County, Illinois, began and held at the Court House in Pontiac on Monday, June 6th 1864, the following proceeding were had and entered of record in aforesaid entitled cause as follows, to wit;

Present, Hon. Jon. Duff County Judge.
A. P. Harrington County Clerk.
J. E. Hyde Sheriff

Court opened with public proclamation.

347 Samuel Collister
Burwin Vs Losee Trespass on Personal Property.

On this day come the parties to this cause, by their respective attorneys. And this cause coming on to be heard on the motion for a new trial, entered at a former day of this term. And the Court after due consideration, overruled said motion. It is therefore ordered by the Court that the said Defendant, Burwin Losee, have and recover of the said plaintiff, Samuel Collister, his costs about his matter in this behalf expended, and that he have Execution therefor. The said Plaintiff enters his exceptions to the rendering of Judgment, and prays an appeal to the Supreme Court of the State of Illinois, which appeal is granted by the Court, the Plaintiff to give good and sufficient bond, in the sum of Seventy Five dollars, to be approved by the Clerk of this Court, and with the bill of exceptions, to be agreed

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State of Illinois } In County Court to June
Livingston County } ss Term A.D. 1862

Samuel Collister } Bill of exceptions
vs
Byron Lasee }

Be it remembered that on the trial of this cause at the June Term of the said County Court on the Empanneling of a jury to try said cause, G.W. Brydick being called as a juror and sworn to answer questions as to his competency, answered, that he had set on a Grand Jury within one year, Term last past in said County thereupon for that reason Plaintiff objected to said Brydick as a juror for cause— But the court overruled the objection and the Plaintiff then and there excepted a jury being empanneled & sworn, the Plaintiff to maintain the issue on his part gave in evidence to the jury the following evidence, C.H. Snyder, witness for Plaintiff sworn says, he was Justice of the Peace, in said county for the year 1862, That judgment was obtained in favor of Henry Eldridge against Plaintiff on which process issued & executions and delivered the same to Defendant, Lasee,- witness was then shown ~~sworn~~ a record a judgment Docket Book and identified the same as his own and said that the said judgment was recovered on Page 61, of said Docket, Plaintiff read to the jury the judgment recovered of said case so recorded—

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The Plaintiff then claimed, and the Defendant admitted that the execution issued on said judgment, and delivered to Defendant was lost and not in the power of the Plaintiff to produce,— That the return on the said execution showed that the same was ~~served~~ returned by Defendant as constituted and that he levied on and sold the mare in controversy on said execution as the property of the Plaintiff in ~~February~~ Febuary or March A D 1862—

was called and sworn Samuel Cartlere witness for ~~Defendant~~ Plff was called and sworn testifies as follows— Live in the Town of Dwight in said County know the parties to this suit, know the mare in controversy saw her at the sale, The mare was old, in her Teens, over twelve years old, Do not know that the mare was with foal, think her worth fifty Dollars, Sold in early Spring or winter of 1862, Hyram Cornell bought her, Would not be a good judge of her value, Plaintiff at time of levy & sale was farming hoeing, coal, and digging wells, Plaintiffs family consisted of five persons, Son John at home occationally or part of the time Plaintiff had no property of any account (except the mare) and house hold goods aside from beds, his furniture ~~&~~ were mear trifles, Broken Chairs, Table, cook Stove and an old Bureau

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Barlite Witness for Plaintiff called sworn and testified as follows Knew the more in controversy, recolect seeing her the day of the levy, Live within one mile of Plaintiff been at Plaintiffs often, Plaintiff had no property except house hold goods no extra beds one Stove aside from from stove and Beds, the other furniture and utensils in Plaintiffs house, might sell for something and might not, Worth but very little if any thing, Seen the more often, the more was then worth from $40,00 to 45=$ She was an old more over 12 years any how. Plaintiffs business was that of farming and at times worked at other things, Plaintiff lived in Nevada Town in said County 5 or 6 miles from Dwight. Was at Plaintiffs often — If Plaintiff had had other property Witness would have been likly to have known it, Plaintiff was the Head of a family and living with it.

Badger, Called for Plaintiff sworn and testifies as follows, Reside in Nevada Township Know the Plaintiff well, Have seen the Defendant Plaintiff had but little property, Lived in same house with him, in winter before the levy and sale of the more, Plaintiff owned nothing of importance, Had one Stove a bed or two and an old Bureau of not much value, Plaintiff have four in family and lived with them, More was used on the place and kept there, Had seen the more often there, Plaintiff was a farmer John B. Ballite lived with his father

E. B. C. Coleman called for Plaintiff, sworn and testified, Know Plaintiff lived within

A mile and a half of him I have seen the mare while Plaintiff had her. The mare was worth from 35 to 40 dollars. Went to Plaintiffs frequently, on one occation Plaintiff drove the mare to Odell. I rode with him. Plaintiff was then hauling a load of corn to Odell. Plaintiff then proposed to prove by witness that Plaintiff while hauling the said corn to Town, x said he was hauling the corn to Odell to get money to pay boot between the mare and the one traded for her. And thereupon Defendant objected to the same. Court sustained the objection and the Plaintiff then and there excepted.

Henry Eldridge called for Plaintiff sworn and Defendant sworn and testified as follows. Was present at the sale of the mare by defendant. She sold for $216,50 forty six dollars and fifty cents. Quite a number of persons present at the sale— Was the Plaintiff in the execution on which the mare was sold. All the bidders but myself and Cornell left off bidding when the mare was up to 30 dollars and went up to 308 The Plaintiff then to further maintain the issue on his part offered in evidence a written notice from Plaintiff to Defendant demanding the money as exempt from levy and sale, on execution accompanied with proof of the service of said notice after the levy and before the sale— Defendant objected thereto but the Court overruled the objection, and the Plaintiff then called the former witness Spitler, who testified that he served the copy of the said notice on the next morning after the trial of the Rights of property, and before the sale of the mare a day, or within a day or two of its date on Defendant Lowe, Pltff, there read said notice to the jury.

Dwight Illinois February 25th 1862 Mr. Burwin Sower.
I hereby notify you that I claim a certain brown mare
seized by you on execution against me on the 21st inst of February
as property exempt from execution under the statute which
provides that I may select sixty dollars worth of property
suitable to my condition in life

Samuel Bollister

The Plaintiff then rested

The Defendant then offered the following evidence to
sustain the issue on his part.

C. H. Snyder sworn called
for Defendant sworn and testified that the Justice
Judgment Docket shown him was his Docket as
Justice in 1862 the same produced on part of Plaintiff the
Defendant then offered to read to the Jury from said Docket
the record of a trial of the right of property and page 68 & 69=

7 the 19

of said Docket (put) for the purpose of proving that said mare was not the property of Plaintiff Dec'd That the verdict of the jury found the property in the mare to be in nobody W.E. to rebutt the presumption that the mare in question was the property of the Plaintiff, And thereupon Plaintiff objected to the same and all other evidence denying said property in the mare to be in Plaintiff for the reason that under the pleadings the property in question is admitted to be Plaintiffs but the Court overruled the objection and alowed the same to be read to the jury for the purpose of showing that the mare did not belong to Plaintiff, Plaintiff then and there excepted

E. H. Snyder being further interrogated by Defendant answered, that Pltff was present during most of the trial of the right of property Pltff did not as I recollect claim said mare as his own during the progress of said trial, think I would of heard him if he had, After the trial heard Pltff say, that the jury had said the mare belong to him and he present to have her, The mare was worth if not older than represented, that is about Eight years, 70 to 80 Dollars, Was present at the sale, Collister at the sale said she was worth 30 or 40 Dollars, Cross Examined Am a farmer who bought her worth at the time allowance as follows A good many persons present at said trial, think Pltff was out and in during said trial might of been out one third of the time John Q. Collister appeared by his next friend Samuel Butler, never saw the mare before the sale, Abram Bonnell bought her at the sale

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Did deals in horses. Did sold her to Eldridge Defendant at and during the time of the sale. Did not represent that the mare was with foal. There was fair competition at the sale. Defendant lead her about while selling her. Pff might of claimed her during said trial, and witness not of knowen it. Collister was talking with the said Fowler during the trial. Dont know whether he was talking about the cattle or the mare, or what they were talking of. Might of been talking of the mare. Pff was with Brower and John A Collister during the trial. Brower was pettafoging the case for J. A. Collister.

Isaac Carter Called for Defendant sworn and testified. Was called for a juror on the trial of Right of Property and objected to. Was there during the trial. Pff was there. Brown was there. Pff was rounded about during the trial. With John A Collister most of the time. Dident hear Plaintiff lay any claim to the mare, if he had dont know as I was in position all the time to hear him. The Room in which the trial was, was about 14 by 16 ft. The mare in my opinion was worth from 65 to 70 Dollars. Cross Examined. I am a Carpenter never bought or sold horses dont know the age of the mare. Saw her but once. From the looks of her she might be a pretty good animal. Pff might of claimed the mare during said trial and I not of known it. Dont know but he was talking about the cattle. Plaintiff then ask the question to said witness. Did you at the time of said trial, or at any other time hear, Defendant say that the mare belonged to Pff, which question was objected to by Defendant

~~Def~~ P
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And the objection sustained by the Court, P"ff excepted thereto

S L Q x Ramsey Being called and sworn as a witness for Defendant testified as follows, I was juror on the trial of Right of property P"ff was there most of the time did not hear P"ff lay any claim to the mare, P"ff was sitting with Brown and talking with him ~~Cross Examination~~ Trial commenced in the forenoon I think and got through after night, there was considerable talking in the room during the trial P"ff might have claimed the mare and I not of heard it—

Wm Clarkson, being called, and sworn for Defendant testified as follows I was a juror on the trial of the right of property P"ff was there I think, The Defendant here asked witness if P"ff claimed the mare, at the trial, P"ff objected to the question the Court overruled the objection and x ordered x the question to be asked, P"ff excepted, The answer to said question was as follows Did not hear P"ff claim the mare, at the trial,— P"ff was sitting at the table a talked to John C, Collier and Mr Brown, I saw the mare twice,- I keep x horses, Have dealt in horses have bought & sold this winter Dont know the age of the mare, If the mare was as good as she looked to be she was worth 70 to 80 dollars, If I remember right saw her on the day of sale,——

Cross examination

Cross Examination

10th
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I lived in the Village of Dwight at that time, I have almost forgotten that I sat on the jury, My impression is that the trial came after dinner, Cant say that P.Iff was there all the time, Dont know what he said to Brown, Think the jurors all went out Doors once during the trial, Dont know what was said while they were out, In my estimate of the Value of the mare I considered her from 9 to 10, Years of age

J.B. Drawise, Called and sworn as a witness for Def.t testified as follows, I was a juror on said trial, And a Plaster and a Bricklayer, And now Justice of the Peace, Was not there— P.Iff was there at the trial D. dont hear P.Iff Claim the mare, P.Iff was talking with John D Bollister and Brower The mare was worth $75, according to the statements made to me, I am not a Judge of horses, my opinion was formed from the statements made to me and her looks P.Iff asked me to get the Court to wait until Brower came and I did it, Cross examination

Lozier the Def.t came to me to get me to appraise the mare and he went to Eldridges stable and opened the door, and showed me the mare, and told me she was 7 to 8 years old, Kind gentle and sound, with foal, This was soon after the trial and before the sale We went upon the representation of the Def.t in estimating the worth of the mare, Never made it a business to trade in horses, Dont profess to be a judge of horses, Lozier said that Bollister, Claimed the mare, as exempt, and that he had levied upon her as the property of Bollister P.Iff might of claimed the mare during the trial and I not of have known it, I think the Court adjourned for Dinner

~~H~~ th
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A. West Called and sworn as witness for Deft. testified as follows I was one of the apprisers, If the mare was as represented and as good as she looked she was worth 70 dollars

Cross Examined

The representation about the mare was made by Lozee the Deft. Lozee said she was 8 or 9 years old sound and with foal ~~at~~ Did not go into the stable, Did not see the mare, she might have been blind and I not have known it Do not know that she was sound except from what Lozee said I am a day laborer never owned but one span of horses and that was ~~about~~ 7 or 8 years ago Am no great judge of horses If she was in her teens and not with foal, she would be worth from 40 to 45 dollars,

Lewis Kendrick being called and sworn as a witness for Deft testified as follows, I was present at the trial of the right of property Samuel Callister was there the most of the time The time of trial was 9 o'clock A.M. but was not called till ten John A Callister answered to the writ, but I challenged him as being a minor and not having the right to bring the writ without giving bail for costs Samuel Callister said to John, go up and get Mr Cutler to go your bail They returned in a short time, — During the trial Samuel Callister sat there with Brower Cutler and Johns but left an hour or so ~~before~~ the trial was through. He was whispering with Brower, Cutler & Johns, I went at the request of Eldredge with Lozee to Residence of Plaintiff

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for the purpose of securing the debt, or to find property on which to make a levy I saw Mr Bollister and Mr Loosee out side of Bollisters house and they hood a good deal of conversation there I then stooped to Bollister thort I come as agent of Eldridge to get security for the debt or to find property on which to make a levy, I proposed to give him one two or three years time if would secure the debt He said he hood no property on which to secure the debt and he should not attempt to give security, I told Deft. to notify Plff of his ~~ex~~ execution, might & under the statute which he did, I then directed Loose to serve his execution and he read it to Bollister I then ~~Commenced~~ commenced pointing out different pieces of property and directed the Constable to levy upon them The first Article was a braking plow and Mr Bollister claimed it exempt, and it was not levied upon, I then pointed out some old iron, and steel in a pile, some old wagon tire and pieces of plowes which were not levied on, I then noticed some piles of dirt which I thought to be potatoes, I dont know as they contained potatoes but they were not levied on We then proceeded to the barn and found there some 8 or 10 head of young Cattle, and asked Mr Bollister whose they were and if I remember right he said they belonged to John and Clara and they were not levied upon at that time, I then went into the stable and found some six or eight head there I asked Mr Bollister whose they were and he said Mr Jenks owned three of them, and two of them belong to a man over on the Vermilion river I then enquired of him, which was the mare John bought or traded for near Odell he replied that was for me to find out if I could

79th
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Getting no satisfaction we returned to Dwight and made no levy and I was not with the Constable when he did make the levy on the mare in controversy, I saw the mare in controversy in the stable that day but did not know the mare at that time Defendant then asked witness the following questions Did you at any time heard Pl'ff say any thing about the ownership of the mare? If so state it Answer, I heard something said by him But can not give the ~~words~~ essence or substance of what was said From my best recolection now Bollister told me that I had bought or traded for the mare and paid for her Bollister did not lay any claim to the mare, the mare was worth in my opinion $65 to 70 dollars, I examined the mare the day after the sale when I proposed to buy the mare of Eldrige, Looked in her mouth and called her 8 to 10 years old, Gross Examination— I live in Dwight have since 1857, I hold myself out as an Atty, I was acting as Atty for Eldrige in collecting the claims against Bollister, on which the mare was sold, I was acting as his (Eldriges) Attorney in the trial of the right of property Pl'ff might of claimed the mare during the trial and I not of known it Instructed Lozier that the mare was liable to pay Bollisters debts and might of told him that the mare was Bollisters, do not recolect what I testified to on the first trial of this case intended to swear the truth and do so now, The foregoing is all the evidence on the part of the Def't Pl'ff then called H. H. Brower, who was duly sworn to testify as a witness for the Pl'ff in the case, Pl'ff then asked the witness this question, Did Bollister during the progress of the trial of the right of property consult you as an Attorney

4th
" 26

As whether he should make a claim for the mare Defendant objected to witness answering the question Plaintiff Atty) then explained to the Court that Plff proposed to prove by the answer to said question and others to follow it that during the progress of said trial, Plaintiff consulted witness as an Atty, whether it was proper or necessary for him to claim the mare as his then and that witness ~~corroborated~~ counselled him as his ~~witness~~ Atty, That it was not necessary to make any claim for the property then= But the Court sustained the objection to the question and ruled that the proposed evidence was not competent and excluded the same and to the ruling of the Court thereon Plff there and then excepted Plff then proposed to call witness to prove the value of the old plow and breaking plow mentioned by witness Kenyon,= Defendant then admitted that the same was valueless and did not claim that Plff had any other property (except the mare) The foregoing is all the evidence offered by ~~the witness~~ either of said parties The said Plff then moved the Court upon the evidence aforesaid to instruct the jury as follows

1st "

Samuel Collister
vs
Berwin Lowe
} Instructions offered by Plaintiff

" "

If the jury believe from the evidence that the Plff Collister at the time of the levy and sale of the mare in question was the head of a family and residing with the same then the jury are instructed that the following property belonging

~~154~~ 155 ||

27.

to him was exempt from levy and sale on execution against him to wit, First necessary beds, bedsteads and bedding—the necessary utensils for cooking, Necessary household furniture, not exceeding in value fifteen dollars One pair of cards, two spining wheels One weaving loom, and appendages; one stove and the necessary pipe therefore being in use or put up for ready use in any house occupied by such family Second one milch cow and calf, two sheep for each member of the family and the fleece taken there from (or from the same) or the fleece of two sheep for each member of the family, which may have been purchased by any debtor not owning a sheep, And the yarn and cloth that may be manufactured from the same and sixty dollars worth of property suited to his condition or occupation in life, to be selected by the debtor Third necessary provisions and fuel for the use of the family for three months and necessary food for the stock heretofore exempted from sale, or that may be held under the provisions of this Chapter ||

Sworn

28 (16th) 11

Second Given

If the Jury believe from the evidence that the Plaintiff at the time of the levy and sale of the more by Deft. was not the owner of more than sixty dollars worth of property except the articles specifically exempt, then the Law did not require the Plaintiff to make a selection of the sixty dollars worth or give notice thereof to the Defendant who made the levy

Third Given

If the Jury believe from the evidence that the Defendant in making the said levy and sale of the more was acting as a Constable or other Officer then he is liable as an Officer though the Plff. have not proved that he was duly ~~elected~~ elected and qualified as such Officer

Fourth, Given

All statements or declarations of ownership of the more made by John Callister not in the presence of the Plaintiff, are excluded from the consideration of the Jury

Given Fifth

If the Jury believe from the evidence that at the time of the levy on and sale of the more by Defendant, the Plaintiff was the head of a family and living with the same that the Deft. in making the levy and sale was acting as a constable and that Plff at time was not the owner of more than sixty dollars worth of property except the articles specifically exempt and that the more in question was a part of said sixty dollars worth and ~~they~~ then belonged to Plaintiff and that the Defendant levied on and sold the more on execution then the Jury will find for the Plaintiff.

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Sixth Given

If the jury should believe that the Plaintiff at the time of said levy and sale was the owner of more than twenty dollars worth of property not specifically exempt and if they further believe that the more in question was worth not to exceed twenty dollars That the more was suitable to Plaintiffs condition or occupation in life and that he selected the same as exempt and notified the Defendant thereof, before the sale, then the jury will find for the Plff.

Seventh Given

If the jury believe that John Collister was the son of Plff, that he was a minor at the time of said levy and sale then the jury are instructed that he could not be the owner of personal property as against his father unless his father had given him his time, and allowed him to hold property in his own right

Eight Given

If the jury find for the Plaintiff they will assess the damages at three times the value of the more.

9th Given

The Court instruct that the silence of the jury of the Plff Saml Collister during the progress of the trial of the right of Property before Esq Snyder and his not publicly claiming the more in question at that time is no evidence that the more did not belong to the Plff and no inference can be drawn from said facts against such ownership and all evidence on that point is withdrawn from before the jury

Tenth Given

The return of the Defendant Rose on the execution showing the levy and Sale of the more as Samuel Collister is prima facia evidence that the more was the property of the Defendant in the execution towit said Saml Collister

No 30

Given 11th " The Court instructs the Jury that the father may reclaim property given to an infant child against such childs consent at any time before such child arives to the age of Twenty One Years,

Given 12th " The Court instructs the Jury that possession of personal property is prima facia evidence of ownership of such property

Given 13th " The Jury are instructed that the verbal admission of a party should be received with great caution, and when hastily and inadvertently made are not binding

Given 14th " The Court instructs the Jury that the sale at Auction by the Constable Lessee, affords a fair test of the cash value of the mare, A public sale ordinarly furnishes satisfactory proof of the value of the thing sold it is however not ~~conclusive~~ considered conclusive and other evidence may be resorted to

Given 15th " The Truth of any controverted fact in this case need not be proved beyond all doubt but the Jury may find the existence of such fact from a preponderence of evidence

And the Court at the instance of the defendants instructs the Jury as follows

First Given The Plaintiff in order to recover in this Action must prove to the entire satisfaction of the Jury that he was the owner of the property alleged to have been seized under the execution

Refused The declarations of Samuel Bollister in relation to the Ownership of the mare are to be taken against him and if the Jury, believe from the evidence that Sam'l Bollister claimed that the mare belonged to his son John there the law is for the Defendant

3rd Given

The Court instructs the jury that the finding of the jury in the trial of the right of Property does not fix the ownership of the moore in question in the Defendant in the execution who in this case was Samuel Collister the Plaintiff in their suit, The Plff in order to recover in this action must prove to the entire satisfaction of the jury that he was the owner of the property in controversy

4 Given

The Court instructs the jury that Lessee is not estopped from denying property in the Plaintiff Collister by reason of his levy under the execution but he may do so, and put Plaintiff on his proof of ownership —

5th " Given

The Court instructs the Jury that under Section 33 and 35, of Chapter 57 of Revised Statutes the Plaintiff cannot recover in any action of Trespass if the property seized and sold was over the value of 60,00

6th " " Given

The Court instructs the jury that the acts of Collister during the trial of the right of property are evidence and if the Jury believe from the evidence that he asked the Court to wait for Brower to come and sent for bail that these facts had no claim to the moore

7th " Given

The Court instructed the Jury that a minor may hold property as his own and if Samuel Collister so conducted himself as to hold out to the world that the moore belonged to his son John that then Plff Collister can take no advantage of his own minority in this suit

8th "

The Jury are instructed that the Docket of Esq Snyder, showing the trial of the right of property is only admissable

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Govrs 8th

to show presumtively property in John P. Sallister and the fact of the Jury in thos case not finding property in John P. Sallister of its self standing alone is not evidence of ownership, in Plff Saml. Sallister To The Giving of said instructions of the Defendants the Plaintiff then and there excepted and thereupon the said Jury gave the verdict against the Plaintiff whereupon the council for Plaintiff filed the following motion for a new trial

Samuel Sallister

vs

Berind Lozee

The said Plaintiff by his Attys. L.L. Fleming and Pillsbury comes and moves the court for a new trial in the above entitled cause for the following reasons towit

1st The court admitted improper and illegal evidence on the part of the defence.

2d The Court refused to allow to go to the Jury proper and competent evidence offered by ~~the~~ Plaintiff

3d The instruction given by the Court to the Jury for the Defendant were not law,

4th The verdict was against the law and evidence and the

5th Plaintiff was surprised at the ~~instructions~~ introductions of evidence on part of Defendant to show the ~~read~~ worth over $60

Fleming & Pillsbury

Plaintiffs Attys.

But the Court overruled the said motion and proceeded to enter judgment on said verdict to which Plff excepted but the Court entered judgment thereon and the Plff then & there ~~proved~~ prayed ~~and appealed to the Supreme Court which was allowed on the Plaintiff filing a bond in the sum of Seventy five dollars conditioned as required by law~~ Bill of exceptions for the first day of the next term of the Court and the Plaintiff asked the Court to sign and seal this his bill of exceptions. [illegible]

prayed an appeal to the Supreme Court which was allowed on the Plaintiff filing a bond in the sum of Seventy five dollars security to be approved by the Clerk and Bill of exceptions by the first day of next term of the Court, and the plaintiff asked the Court to sign and seal this his Bill of exceptions.

Jonathan Duff (L.S.)
County Judge
Liv. Co. Ill.

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State of Illinois
Livingston County } ss.

I, A. B. Harrington, Clerk of the County Court of Livingston County, Illinois, do hereby certify that the foregoing is a true, full and correct copy of the Summons, declaration, Plea, Gen Issue, Replication, Proceedings had and entered of record and the bill of Exceptions, in the case of Samuel Collister Vs. Burwin Losee, tried in the County Court of said County, as the same appears from the papers on file in said case and records in my office.

Witness my hand and Official seal at Pontiac in said County this 3d day of April A.D. 1865.

A. B. Harrington Clerk
Hayes Dep'y

State of Illinois } Third Grand Division.
Supreme Court. } In April Term A.D. 1865.

Samuel. Collins. appellant.
v
Burwin Dow. appellee
} appeal from Livingston Co.

And now comes the said appellant. by Fleming & Pillsbury & L. E. Payson his attys & say that in the within record are manifest errors. in this. to wit

1st. The court erred in admitting incompetent testimony.
2d The court erred in excluding competent evidence
3d. The court erred in instructing the jury as asked by Defendant.
4" The court erred in allowing G. M. Bridin to act as a juror
5" The court erred in overruling the plffs. motion for a new trial & in arrest of judgment.
6" The court erred in giving judgment for appellee.

And asks that said judgment be reversed. &c. &c.

Fleming & Pillsbury
& L. E. Payson attys for
appellant

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Dennis, Collector
appellant
vs
Benjamin Loose,
appellee.

Appeal from
Livingston Co

1857

Filed Apl. 5. 1865
Stuart
Clk.

1865

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