No. 13085

Supreme Court of Illinois

Knott

---

vs.

Seguin & Barns

71641

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

KNOTT,
vs.
SEGUIN & BYRNS. } *Appeal from Kankakee.*

ABSTRACT OF THE RECORD.

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And to the 1st and 2d avowries plaintiff pleaded,—

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2d. Release of the levy by taking bond from R. K. Brush.

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42 that in case the property should be levied on, mortgagee may take possession, and was duly acknowledged and recorded on the day of its date.

43 George Longfellow, witness for plaintiff, proved a demand of the property from Byrns in the fall, just before the commencement of the replevin suit.

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46 Plaintiff objected to the execution and return, and excepted to the ruling of the court admitting the same.

Defendants then gave in evidence the record of a judgment in favor
47 of Godfrey, and against R. K. Brush and said Ingham, in the circuit court of this county, which record is without date.

Defendant then proved that the property in question was the same property levied upon by virtue of the execution in evidence, and that Seguin acted as sheriff of Kankakee county and Byrns as deputy.

Defendants offered evidence tending to show that the mortgage to plaintiff was fraudulent as against the creditors of R. K. Brush.

48 Plaintiff then called R. K. Brush, who testified that at the time of the levy, in May, 1858, Byrns proposed to let him have the property back if he would give a forthcoming bond. Byrns drew such bond as he wanted, and witness and Barrick, as his security, executed it and handed it to Byrns who then said, "The property is released, take it and go home;" that witness gave the bond as a release of the property.

On cross-examination, witness stated that he never re-delivered the property to Byrns; that before the sale witness obtained an injunction restraining further proceedings under the judgment and execution.

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Plaintiff then produced the bond spoken of by Brush and gave it in
50 evidence, which was a bond executed by R. K. Brush and Wm. Barrick to F. Seguin, sheriff for "county of K. K. K.," of Illinois, dated May 20, 1858, and reciting a judgment in the circuit court of said county in favor of Godfrey and against R. K. Brush and Ingham, and an execution issued upon said judgment, dated April 12, 1858, and a levy under the execution upon the horses in question and conditioned for the return of the property to the sheriff, July 12, 1858, and against the sale or injury of the same in the meantime.

51 The plaintiff moved the court to give to the jury each of the following instructions, viz:

"That if the jury find that James Byrns undertook to draft the forthcoming bond in evidence, and that R. K. Brush relied upon the skill and knowledge of said Byrns and gave to said Byrns said bond in good faith, then the defendants are estopped from taking advantage of any insufficiency in said bond, which was owing to or caused by Byrns' improper drafting; and that it is a rule of law that a party cannot take advantage of his own wrong."

Also—"that if the jury believe that said bond was given in good faith and received by Byrns as a good and sufficient bond, it must be considered as such for the purposes of this trial."

Also—"That a mortgagee in, or owner of, a *bona fide* chattel mortgage is in law a purchaser, and if the jury find that plaintiff took a *bona fide* chattel mortgage on the property in dispute in good faith, securing an indebtedness from R. K. Brush to him, he would be deemed a purchaser."

Also, that "if the jury find that the forthcoming bond in evidence
59 was given for the release of the property in dispute, though it may not describe the execution in evidence, it will be a release of the property levied upon, and law is, on this point, for plaintiff.

Also—"that it is not sufficient in this case to prove that defendants acted as sheriff, &c., but they must show that said sheriff was duly commissioned and qualified, and that said Byrns was duly appointed deputy, &c." Each of which instructions the court refused to give. Plaintiff excepted to each of said decisions.

And the court on behalf of defendants instructed the jury, "that if the jury believe that defendants levied on said horses as sheriff, &c., on or before May 20, 1858, by virtue of the execution in evidence, and left said horses in possession of R. K. Brush, then Byrns had a right to take said property by virtue of said levy and execution after the return day of said execution and sell the same to satisfy said execution, and the legal
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And the court instructed the jury, that an execution coming to hands of sheriff is a lien on all property of defendants in execution; and if jury believe from evidence that the execution in evidence came into hands

Page of Rec. of defendants as sheriff, &c., on April 22, 1858, and the time of receipt endorsed thereon by Byrns as deputy, then the execution was a lien on the property of witness, Brush, from the time of the endorsement, and the time of the receipt is shown by such endorsement. To which plaintiff excepted.

Thereupon the court gave the following instructions: If the jury believe from evidence that Byrns, as deputy, &c., levied on said horses, he had a right to leave them in possession of witness Brush, and such
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And the court instructed the jury, that if the jury believe from the evidence that plaintiff's only right to said property is acquired under said mortgage, his right of possession is not equal to that of defendants by virtue of levy, &c., unless jury find property *released*, and the law is for Byrns. To the giving of which instructions plaintiff excepted.

And the court instructed the jury, that if the jury believe from evidence that said bond described a different execution from that in evidence,
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Thereupon the court instructed, that if the jury believe from evidence that said mortage was entered into by Brush and Knott to delay Godfrey in collecting said money, or to defraud creditor, such mortgage is void as against such execution, and for the purpose of determing this question jury may consider all the attendant circumstances. To which plaintiff excepted.

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And the court refused to give any further instructions, to which pl'tff excepted.

The jury then brought in a verdict against plaintiff. Whereupon plaintiff moved to set aside the verdict and for a new trial.

But the court overruled said motion, and gave judgment upon said verdict. Whereupon plaintiff excepted, and the court certified that said bill of exceptions contains all the evidence given in the case.

POINTS AND AUTHORITIES FOR APPELLANT.

1st. The court had no power at the April Term, 1859, to set aside the final judgment upon the demurrer rendered at the former term. A court at a subsequent term may amend its record of a former term, if incorrect, but cannot alter the judgment.

2d. The evidence admitted for def'ts ought to have been excluded.

3d. Although an officer may not be required by law to release his levy upon personal property on receiving a forthcoming bond; yet if he, by express agreement, accepts such bond or any other bond or thing, and in consideration thereof releases and discharges the levy, his interest in the property acquired by the levy is gone.

4th. There is no proof in the case that defendant, Seguin, was sheriff and Byrns deputy, but merely that they acted as such. The instructions, therefore, given for defendant and printed in the abstract, are each erroneous and a new trial ought to have been granted.

The bill of exceptions contains all the evidence in the case.

DICKEY, WALLACE & BOAL,
For Appellant.

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J. Knott vs. Squire

Abstt & Points of appeal

Filed May 3, 1860

L Leland
Clerk

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4th. There is no proof in the case that defendant, Seguin, was sheriff and Byrns deputy, but merely that they acted as such. The instructions, therefore, given for defendant and printed in the abstract, are each erroneous and a new trial ought to have been granted.

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DICKEY, WALLACE & BOAL,
For Appellant.

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Knott vs Seymour

Abstract & Points
of Appeld.

Filed May 8. 1860
L Lehman
Clerk

STATE OF ILLINOIS, SUPREME COURT,

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CHR. W. KNOTT
vs.
FRANCIS SEGUIN and
JAMES BYRNES.
} *Appeal from Kankakee.*

BRIEF AND POINTS FOR DEFENDANTS.

THE points and authorities furnished by appellant, and the points of objection, are so vague and equivocal, that it is very difficult to understand what is meant by them, or how to answer them.

1st. *Of the first point made questioning the power of the Circuit Court to allow a demurrer to be withdrawn (after it has been overruled,) and give the party leave to plead over while the case is still pending.*

By an examination of the record, at pages 28, 29 & 30, (*see Abst.*) the pleadings will be found to be sufficient. The defendants, in open Court, asked and obtained leave to withdraw their demurrer to plaintiff's pleas to defendant's avowries, and for leave to file their replications thereto. The judgment complained of by appellant, which was vacated by the Circuit Court on allowing the defendants to plead over, was but an interlocutory judgment, which establishes nothing but the inadequacy of the defence set up by the plea, or that the party shall answer over; see 1st Gilman R. 395; 5th Blackford's R. 167; 24 Pick. R. 49; and 16 Conn. 436. This Court held in a case in the 1st Scammon R. 472, that, as the defendants in the Circuit Court must have asked leave to withdraw their demurrer and reply to the plaintiff's plea, the correctness of the decision of the Court below on the demurrer cannot now be inquired into. In 3d Gilman R. 349, this Court held that "the Circuit Courts may, in their discretion, allow or "refuse an application to file additional pleas, or amend the "pleadings, or allow the withdrawal of pleas, and the exercise "of that discretion cannot be reviewed in the Supreme Court."

2*d Point:* As to the evidence admitted for defendants, no reason is given why it should have been excluded, and it is not believed that there was any irregularity in that regard.

3*d Point:* As to the release of the property levied upon by the officer, (one of the defendants,) it is only necessary to refer to the record, pages 50, 51 & 52, where it will appear that the bond or instrument executed by witness, *Brush*, and delivered to the officer, was not a statutory forthcoming bond; it described an execution bearing date April 12th, when the execution levied and justified under by the defendants bore date April 22d, and was, in other respects, so defective as to render it void as a security to the officer, yet was allowed by the Court to go to the jury, under the objections of the defendants. I will now call the attention of the Court to pages 47, 48 & 49 of the record, to the evidence of the witness *Brush*, (defendant in execution.) His evidence fully shows that the officer (the defendant Byrns) did not agree or intend to release the levy or lien on the property, when he received from *Brush* the instrument called a forthcoming bond; but that it was the intention of the officer to leave the property with the witness *Brush* only until the day of sale, to wit: the 12th day of July following; and the witness *Brush* so understood the arrangement, and did not understand or pretend that the property was actually released from the levy by the mere giving of the instrument offered in evidence, for, by reference to dates in the record, it will appear that the levy was made May 20th, and this pretended bond executed same day, and day of sale fixed by officer July 12th. Mortgage executed to plaintiff by *Brush*, the witness, May 31st; sale of the property adjourned on the request of witness *Brush* for 10 days, July 12th; four or five days afterwards, witness *Brush* presents his bill for an injunction, staying the sale until the further order of the Circuit Court. Prayer granted by Judge Norton. When it is recollected that an injunction or stay of the sale of property is only granted on the oath of the defendant in the execution, in the face of all these facts, will it be contended that *Brush* thought that the officer had in fact released the levy on the day that he made it, without receiving anything valuable for such release? The mortgage under which this plaintiff claims, see Record page 41, in 3d & 5th line from bottom, provides for the publication of a notice in some newspaper in the city of Chicago for the sale of the property, without fixing any place *where* the sale should be made, and was therefore void as to mortgagor's creditors. The pleading formed an issue on this question of release for the jury to try; and the proofs in the

case, see pages 38 to 53 inclusive, show plainly that there was not any release of the levy intended by the officer or the witness *Brush*; at least, the jury was satisfied with the proofs on that issue, and by their verdict found for the defendants.

4th Point: As to the fact whether the defendants were Sheriff and Deputy Sheriff, and acting in that capacity, it is believed that an examination of the proofs on the pages above referred to will fully show to this Court that they were such officers; at least the jury so found by their verdict. And as to the instructions given to the jury, we think they fairly presented the law of the case to the jury, and did not influence their minds wrongfully, against the rights of the plaintiff. Again, if they were not officers, they could not take any such forthcoming bond as the appellants pretend they gave. A forthcoming bond does not satisfy the execution or release the levy, but merely authorizes the defendant in execution to retain the property until the day of sale.

The Assignment of Errors presents the simple question whether the mortgage of Brush was *bona fide*, and for a valuable consideration, or merely colorable, and given to defraud, hinder and delay creditors. The jury have found, under the proofs and instructions, that the mortgage was not *bona fide*, but given merely to delay creditors. There was evidence in the case tending to prove that the mortgage was fraudulent, and this Court, in the case of *Powers* vs. *Green*, 14 Ills. R. 391, held that "though "they might have differed in opinion with the jury as to the "transaction, sitting as tryers in the first instance, they would not "disturb the verdict of the jury in such a case."

The date of the mortgage will show, if it is to have any validity, that it was executed after the execution was in the hands of the officer, and its lien fixed.

The judgment in this case was for costs only, and an appeal does not lie. 4 Gil. R. 353.

R. N. MURRAY,
For Appellees.

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Knott
vs
Seguin & Byrnes

Points & Brief
of Appellees

Filed May 9. 1870
L. Leland
Clerk

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By an examination of the record, at pages 28, 29 & 30, (*see Abst.*) the pleadings will be found to be sufficient. The defendants, in open Court, asked and obtained leave to withdraw their demurrer to plaintiff's pleas to defendant's avowries, and for leave to file their replications thereto. The judgment complained of by appellant, which was vacated by the Circuit Court on allowing the defendants to plead over, was but an interlocutory judgment, which establishes nothing but the inadequacy of the defence set up by the plea, or that the party shall answer over; see 1st Gilman R. 395; 5th Blackford's R. 167; 24 Pick. R. 49; and 16 Conn. 436. This Court held in a case in the 1st Scammon R. 472, that, as the defendants in the Circuit Court must have asked leave to withdraw their demurrer and reply to the plaintiff's plea, the correctness of the decision of the Court below on the demurrer cannot now be inquired into. In 3d Gilman R. 349, this Court held that "the Circuit Courts may, in their discretion, allow or "refuse an application to file additional pleas, or amend the "pleadings, or allow the withdrawal of pleas, and the exercise "of that discretion cannot be reviewed in the Supreme Court."

2*d Point:* As to the evidence admitted for defendants, no reason is given why it should have been excluded, and it is not believed that there was any irregularity in that regard.

3*d Point:* As to the release of the property levied upon by the officer, (one of the defendants,) it is only necessary to refer to the record, pages 50, 51 & 52, where it will appear that the bond or instrument executed by witness, *Brush*, and delivered to the officer, was not a statutory forthcoming bond; it described an execution bearing date April 12th, when the execution levied and justified under by the defendants bore date April 22d, and was, in other respects, so defective as to render it void as a security to the officer, yet was allowed by the Court to go to the jury, under the objections of the defendants. I will now call the attention of the Court to pages 47, 48 & 49 of the record, to the evidence of the witness *Brush*, (defendant in execution.) His evidence fully shows that the officer (the defendant Byrns) did not agree or intend to release the levy or lien on the property, when he received from *Brush* the instrument called a forthcoming bond; but that it was the intention of the officer to leave the property with the witness *Brush* only until the day of sale, to wit: the 12th day of July following; and the witness *Brush* so understood the arrangement, and did not understand or pretend that the property was actually released from the levy by the mere giving of the instrument offered in evidence, for, by reference to dates in the record, it will appear that the levy was made May 20th, and this pretended bond executed same day, and day of sale fixed by officer July 12th. Mortgage executed to plaintiff by *Brush*, the witness, May 31st; sale of the property adjourned on the request of witness *Brush* for 10 days, July 12th; four or five days afterwards, witness *Brush* presents his bill for an injunction, staying the sale until the further order of the Circuit Court. Prayer granted by Judge Norton. When it is recollected that an injunction or stay of the sale of property is only granted on the oath of the defendant in the execution, in the face of all these facts, will it be contended that *Brush* thought that the officer had in fact released the levy on the day that he made it, without receiving anything valuable for such release? The mortgage under which this plaintiff claims, see Record page 41, in 3d & 5th line from bottom, provides for the publication of a notice in some newspaper in the city of Chicago for the sale of the property, without fixing any place *where* the sale should be made, and was therefore void as to mortgagor's creditors. The pleading formed an issue on this question of release for the jury to try; and the proofs in the

case, see pages 38 to 53 inclusive, show plainly that there was not any release of the levy intended by the officer or the witness *Brush*; at least, the jury was satisfied with the proofs on that issue, and by their verdict found for the defendants.

4th Point: As to the fact whether the defendants were Sheriff and Deputy Sheriff, and acting in that capacity, it is believed that an examination of the proofs on the pages above referred to will fully show to this Court that they were such officers; at least the jury so found by their verdict. And as to the instructions given to the jury, we think they fairly presented the law of the case to the jury, and did not influence their minds wrongfully, against the rights of the plaintiff. Again, if they were not officers, they could not take any such forthcoming bond as the appellants pretend they gave. A forthcoming bond does not satisfy the execution or release the levy, but merely authorizes the defendant in execution to retain the property until the day of sale.

The Assignment of Errors presents the simple question whether the mortgage of Brush was *bona fide*, and for a valuable consideration, or merely colorable, and given to defraud, hinder and delay creditors. The jury have found, under the proofs and instructions, that the mortgage was not *bona fide*, but given merely to delay creditors. There was evidence in the case tending to prove that the mortgage was fraudulent, and this Court, in the case of *Powers* vs. *Green*, 14 Ills. R. 391, held that "though "they might have differed in opinion with the jury as to the "transaction, sitting as tryers in the first instance, they would not "disturb the verdict of the jury in such a case."

The date of the mortgage will show, if it is to have any validity, that it was executed after the execution was in the hands of the officer, and its lien fixed.

The judgment in this case was for costs only, and an appeal does not lie. 4 Gil. R. 353.

R. N. MURRAY,
For Appellees.

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Knott

vs

Sayre & Bynes

Points & Brief

of Appellees.

Filed May 9. 1866

L. Leland

Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

KNOTT,
vs.
SEGUIN & BYRNS. } *Appeal from Kankakee.*

ABSTRACT OF THE RECORD.

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3 Action: Replevin by Knott against Seguin & Byrns for two black horses and one sorrel horse—value $75—taken Nov. 1, 1858.

Def'ts Seguin & Byrns pleaded seven pleas:

6 1st. *Non cepit et non detinuit.*

7 2d. Property in defendants and not in plaintiff.

3d. Property in Robert K. Brush and not in plaintiff.

8 4th. (Called in Record 1st avowry.) Judgment for one Wm. Godfrey against Robert K. Brush and one Ingham for $346 and costs, and an execution to sheriff of Kankakee county, dated April 22, 1858, and that defendant, Seguin, being such sheriff, by his deputy, one Byrns, levied said execution on said property on May 20, 1858, and that said property was then the property of Robert K. Brush.

11 5th. (Called in Record 2d avowry.) Like 4th plea, except it omits the judgment and pleads only the writ.

13 6th. (Called in Record 4th plea.) Right of possession in Byrns as deputy sheriff.

14 9th. (Called in Record 5th plea.) Denies the allegation of property and right of possession in plaintiff.

16, 17 At same time issue was joined on all the pleas except 4th and 5th, (called 1st and 2d avowries.)

And to the 1st and 2d avowries plaintiff pleaded,—

1st. Property in defendants and not in R. K. Brush.

2d. Release of the levy by taking bond from R. K. Brush.

19 3d. Same as second, and that the property became plaintiff's while in possession of R. K. Brush.

21 4th. Release and discharge of the levy by Byrns and delivery of the property to R. K. Brush, who retained possession during the life of the execution.

22 Defendants demurred to 2d and 3d above pleas and issue was joined on the 1st and 4th.

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24 Defendants' demurrer overruled and court and defendants abided.

25, 26 At the same term a trial by jury was had; verdict for plaintiff; motion for new trial, and cause continued.

29 April term, 1859, new trial granted and the court allowed the defendants to withdraw their demurrer to plaintiff's pleas and to reply thereto, and plaintiff excepted.

30 At Sept. term, 1859, defendants replied to said pleas that said levy was not released and discharged as alleged.

31, 33, 35 At Jan. term, trial and verdict for defendants; motion for new trial overruled; motion in arrest of judgment overruled, and judgment.

38 Bill of exceptions taken at the trial shows: That plaintiff offered in evidence a chattel mortgage from R. K. Brush to plaintiff, dated May 31, 1858, on the property in question, and other property, to secure the payment of a certain note and to secure plaintiff from any loss by reason
39 of signing a certain other note with Brush. Which mortgage provided
42 that in case the property should be levied on, mortgagee may take possession, and was duly acknowledged and recorded on the day of its date.

43 George Longfellow, witness for plaintiff, proved a demand of the property from Byrns in the fall, just before the commencement of the replevin suit.

45 Defendant then gave in evidence an execution, dated April 22, 1858, from the circuit court of Kankakee against R. K. Brush and Ingham and in favor of Wm. Godfrey, purporting to be upon a judgment for $346 28 recovered April term, 1858, by confession against "said defendant," and for costs, and the return upon said execution showing a levy on May 20, 1858, on two span of horses.

46 Plaintiff objected to the execution and return, and excepted to the ruling of the court admitting the same.

Defendants then gave in evidence the record of a judgment in favor
47 of Godfrey, and against R. K. Brush and said Ingham, in the circuit court of this county, which record is without date.

Defendant then proved that the property in question was the same property levied upon by virtue of the execution in evidence, and that Seguin acted as sheriff of Kankakee county and Byrns as deputy.

Defendants offered evidence tending to show that the mortgage to plaintiff was fraudulent as against the creditors of R. K. Brush.

48 Plaintiff then called R. K. Brush, who testified that at the time of the levy, in May, 1858, Byrns proposed to let him have the property back if he would give a forthcoming bond. Byrns drew such bond as he wanted, and witness and Barrick, as his security, executed it and handed it to Byrns who then said, "The property is released, take it and go home;" that witness gave the bond as a release of the property.

On cross-examination, witness stated that he never re-delivered the property to Byrns; that before the sale witness obtained an injunction restraining further proceedings under the judgment and execution.

Page of Rec. Plaintiff then produced the bond spoken of by Brush and gave it in
50 evidence, which was a bond executed by R. K. Brush and Wm. Barrick to F. Seguin, sheriff for "county of K. K. K.," of Illinois, dated May 20, 1858, and reciting a judgment in the circuit court of said county in favor of Godfrey and against R. K. Brush and Ingham, and an execution issued upon said judgment, dated April 12, 1858, and a levy under the execution upon the horses in question and conditioned for the return of the property to the sheriff, July 12, 1858, and against the sale or injury of the same in the meantime.

51 The plaintiff moved the court to give to the jury each of the following instructions, viz:

"That if the jury find that James Byrns undertook to draft the forthcoming bond in evidence, and that R. K. Brush relied upon the skill and knowledge of said Byrns and gave to said Byrns said bond in good faith, then the defendants are estopped from taking advantage of any insufficiency in said bond, which was owing to or caused by Byrns' improper drafting; and that it is a rule of law that a party cannot take advantage of his own wrong."

Also—"that if the jury believe that said bond was given in good faith and received by Byrns as a good and sufficient bond, it must be considered as such for the purposes of this trial."

Also—"That a mortgagee in, or owner of, a *bona fide* chattel mortgage is in law a purchaser, and if the jury find that plaintiff took a *bona fide* chattel mortgage on the property in dispute in good faith, securing an indebtedness from R. K. Brush to him, he would be deemed a purchaser."

Also, that "if the jury find that the forthcoming bond in evidence
59 was given for the release of the property in dispute, though it may not describe the execution in evidence, it will be a release of the property levied upon, and law is, on this point, for plaintiff.

Also—"that it is not sufficient in this case to prove that defendants acted as sheriff, &c., but they must show that said sheriff was duly commissioned and qualified, and that said Byrns was duly appointed deputy, &c." Each of which instructions the court refused to give. Plaintiff excepted to each of said decisions.

And the court on behalf of defendants instructed the jury, "that if the jury believe that defendants levied on said horses as sheriff, &c., on or before May 20, 1858, by virtue of the execution in evidence, and left said horses in possession of R. K. Brush, then Byrns had a right to take said property by virtue of said levy and execution after the return day of said execution and sell the same to satisfy said execution, and the legal
60 possession was in defendants by virtue of levy, unless jury find from the evidence that the levy was released. To which plaintiff excepted.

And the court instructed the jury, that an execution coming to hands of sheriff is a lien on all property of defendants in execution; and if jury believe from evidence that the execution in evidence came into hands

Page of Rec. of defendants as sheriff, &c., on April 22, 1858, and the time of receipt endorsed thereon by Byrns as deputy, then the execution was a lien on the property of witness, Brush, from the time of the endorsement, and the time of the receipt is shown by such endorsement. To which plaintiff excepted.

Thereupon the court gave the following instructions: If the jury believe from evidence that Byrns, as deputy, &c., levied on said horses, he had a right to leave them in possession of witness Brush, and such
61 leaving did not of itself release said levy, and law on this point is for defendant. To which plaintiff excepted.

And the court instructed the jury, that if the jury believe from the evidence that plaintiff's only right to said property is acquired under said mortgage, his right of possession is not equal to that of defendants by virtue of levy, &c., unless jury find property *released*, and the law is for Byrns. To the giving of which instructions plaintiff excepted.

And the court instructed the jury, that if the jury believe from evidence that said bond described a different execution from that in evidence,
62 then such bond is not a release of the levy, &c., and the law in that regard is for defendants. To which plaintiff excepted.

Thereupon the court instructed, that if the jury believe from evidence that said mortage was entered into by Brush and Knott to delay Godfrey in collecting said money, or to defraud creditor, such mortgage is void as against such execution, and for the purpose of determing this question jury may consider all the attendant circumstances. To which plaintiff excepted.

63 And the court instructed the jury, that if the jury believe from evidence that plaintiff failed to prove a demand of defendants before commencement of this action, the law is for defendents.

Whereupon plaintiff excepted.

And the court instructed the jury that the execution in evidence is full and perfect enough, and the clerk's omitting the letter "s" from the word "defendant" did not invalidate it.

Whereupon plaintiff excepted.

Thereupon the court instructed the jury that the defendants have a right to prove that they were sheriff, &c., by their having acted as such and if the evidence shows that they have so acted, the law in that particular is for defendants.

Whereupon plaintiff excepted to the giving of such instruction.

Thereupon the jury retired.

Upon the jury coming in for further instructions, plaintiff moved the court to instruct the jury, that if the jury, find that an injunction was issued restraining proceedings at law, and the evidence does not show a dissolution, the presumption is that it is still in force, and the burden of showing its dissolution is on defendants; and which the court refused and

caused the jury to retire without writing "refused" upon the margin thereof, to which the plaintiff excepted.

And the court refused to give any further instructions, to which pl'tff excepted.

The jury then brought in a verdict against plaintiff. Whereupon plaintiff moved to set aside the verdict and for a new trial.

But the court overruled said motion, and gave judgment upon said verdict. Whereupon plaintiff excepted, and the court certified that said bill of exceptions contains all the evidence given in the case.

POINTS AND AUTHORITIES FOR APPELLANT.

1st. The court had no power at the April Term, 1859, to set aside the final judgment upon the demurrer rendered at the former term. A court at a subsequent term may amend its record of a former term, if incorrect, but cannot alter the judgment.

2d. The evidence admitted for def'ts ought to have been excluded.

3d. Although an officer may not be required by law to release his levy upon personal property on receiving a forthcoming bond; yet if he, by express agreement, accepts such bond or any other bond or thing, and in consideration thereof releases and discharges the levy, his interest in the property acquired by the levy is gone.

4th. There is no proof in the case that defendant, Seguin, was sheriff and Byrns deputy, but merely that they acted as such. The instructions, therefore, given for defendant and printed in the abstract, are each erroneous and a new trial ought to have been granted.

The bill of exceptions contains all the evidence in the case.

DICKEY, WALLACE & BOAL,
For Appellant.

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Knight vs Seguin

Abst & Points of Applts

Filed May 3. 1860
L. Leland
Clerk

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