No. 13476

Supreme Court of Illinois

Odell, et al.

vs.

Hole, for use

SUPREME COURT.

JANUARY TERM, 1860.

Miles P. Odell, et al.,
vs.
James H. Holes, Adm'r. } Error to Mason.

Points and Briefs for Plaintiff in Error,
By GOUDY & WAITE.

I. The declaration counts on a penal replevin bond for $750, and avers the making of an affidavit, issue and return of writ, the declaration, pleas of *non detinet*, property in the defendant, and statute of limitations, and the proceedings of the court so that judgement for a return of the property and costs was rendered against the plaintiff, and further avers a breach of the bond by a failure to return the property.

Upon trial the only proof offered and read by plaintiff in the replevin suit was the affidavit, writ and return, the order and judgment of the Circuit Court and some parol evidence as to the value of the property and the worth of its use. There was entire failure to offer the declaration and pleas to support the averments of the declaration, and still more, a failure to offer the bond sued on, the very foundation of the action.

Hence the proof that was offered ought to have been excluded on the objection of the plaintiff in error, because it was irrelevant. There would then be no evidence whatever to support the declaration.

II. The only breach alleged was a failure to return the property; yet the court permitted evidence to go to the jury as the worth of the use of one of the mares that was returned go to the jury and depreciation in value of one that was returned.

The court instructed the jury that unless the defendants proved to the satisfaction of the jury (the burden being on them,) that they returned the property, then the jury should find for the Plaintiff and assess the damages, without regard to whether the Plaintiff had proved any cause of action.

The plaintiff's 1st, 2d and 4th instructions are obnoxious to this objection.

This reverses the rule, and if adopted, would require a man indicted for crime to prove himself innocent, and in default the jury to find himself guilty.

The 3d instruction directs the jury to allow damages for depreciation in value of the mare returned, although not claimed in the declaration.

The defendant's instruction was the law as it was asked; the modification was senseless and destroyed all its force to the jury.

The new trial ought to have been granted, because

1st, There was an entire failure to prove the material averments in the declaration

2d, The evidence offered by Plaintiff ought all to have been excluded from the jury, because it was irrelevant without the bond on which suit was brought.

3d, The instructions to the jury were manifestly against the law.

4th. The Plaintiff proved no breach of the bond.

The suit was upon a penal bond for damages arising from a breach of the condition. The gist of the action was the damages.

The judgment ought to have been for $750 debt to be satisfied on payment of $175 damages.

The judgment for $175, part of the debt, was clearly erroneous.

Frazier & al vs Laughlin 1 Gil. 358. Guild vs Johnson 1 Scam 405. Heyl vs Stapp, 3 Ib 96. Wilcoxen vs Roby, 3 Gill 476. March vs Wright, 14 Ill 248. Toles vs Cole, 11 Ill 563,

The judgment was rendered vs all the defendants when two only was served and appeared.

For these reasons we insist that the judgment below should be reversed and the cause remanded.

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Odell vs

vs

Hole, adm'r

Pl'ffs brief

Filed Jan 14. 60
Wm A Turney
Clk

In Supreme Court,

Second Grand Division, January Term, 1860.

MILES P. ODELL, MATHEW TOMLIN and JAMES J. PELHAM,
vs.
JAMES H. HOLE, for use of ABRAHAM VIRGIN,
} *Error from Mason County.*

This was an action of debt, commenced in the Mason County Circuit Court by summons re-
1 turnable to the Circuit Court of Mason County, at the October Term, 1857, wherein the debt was claimed to be $750 and damages $750, which said summons was returned served on Mathew Tomlin and James J. Pelham, two of the defendants.

7 And on the 9th day of April, A.D., 1858, the defendant in error filed his amended declaration, containing two counts. The first claims debt of $750, and is in substance as follows:

That on the 26th of February, 1856, at Mason County, Illinois, Miles P. Odell caused a writ of replevin to issue from the Mason County Circuit Court against Abraham Virgin, to re-
8 cover the possession of one chesnut-sorrel mare, about eleven years old, worth $75; one chesnut-brown mare, about five years old, star in the forehead and hind feet white, of the value of $150; and a sorrel mare, four years old, worth about $130; and delivered the said writ to defendent in error, he being Sheriff of said County, and that the said defendant in error thereupon took a bond, as provided by statute, from the said Miles P. Odell, principal, and James J. Pellham and Mathew Tomlin, securities, in double value of the said goods and chattels, under their hands and seals, dated Feb. 26th, 1856, whereby they bound themselves to defendant in error in the sum of $750, to be paid when requested, conditioned that the said Miles P. Odell should "prosecute his suit vs. said A. Virgin to effect, and without delay, and make return of said property, so about to be replivied if return hereof should be awarded, and save, and
9 keep harmless the said Sheriff in replevying the said property; then the obligation was to be void, otherwise to remain in full force;" and that, on the said 26th of Feb., 1856, the said Sheriff replevied from the said Virgin, and delivered to the said Miles P. Odell, a chesnut-sorrel mare, 11 years old, and a chesnut-brown mare, 5 years old—part of property above described. And that at the Oct. term, 1856, of said County, to which time the cause had been continued, said Miles P. Odell, by his declaration, declared against the said Abraham Virgin in a plea, wherefore he unjustly detained the said goods and chattels, and by the said decla-
10 ration, the said Miles P. Odell complains that the said Abraham Virgin, at Big Grove, on the 1st day of Jan., 1856, in said County, unlawfully detained the cattle of said Miles P. Odell, (cattle is above described,) and unjustly detained the same to the damage of $100. And that, at the same, Oct., 1856, the said Abraham Virgin came and plead: 1st. Non detinet. 2d. That the mares were not the property of the then plaintiff, Miles P. Odell. 3d. Property
21 in himself. 4th. That the unlawful detention complained of, was committed more than five years before the commencement of the then pending suit, and that such proceedings were had thereon, that at the same term, the court awarded a return and gave judgment against the then plaintiff for costs; and that the said Miles P. Odell fai'ed to return the mares replevied—whereby, &c., an action accrued to demand $750 above demanded.

11, 12, 13, 14. The second count is just like the first except in the second, the defendant in error
15 pretends to set out the alleged bond in *haec verba;* and declaration concludes, demanding
16 $750 debt, and $750 damages.

Two of the plaintiffs in error, (April 20, 1858,) J. J. Pelham and Mathew Tomlin by their
17 attorneys, Walker & Lacey, pleaded that the said writing obligatory was not their deed. 2nd

Nul tiel Record on both which pleas, issue was joined. 3d. That they returned the property to which 3d plea, defendant in error joined issue. 4th. The said Tomlin & Pelham, as to the
18 young mare, 5 years old, pleaded, that after the execution of the bond, and before return was ordered, sickened and died, without fault or negligence on the part of Odell, on which issue
19 was joined.

A jury was empanneled to try the cause, and being sworn, and hearing the testimomony, brought in a verdict in following form: "We, the jury, find for the plaintiff (defendant in error) the sum of $175, part of the debt in the declaration mentioned;" it was "therefore or-
22 dered by the court that the said plaintiff (defendant in error) recover of the said defendants the sum aforesaid, and also his cost in this behalf expended. Motion made for a new trial and overruled, the defendant excepting, prayed an appeal to Supreme Court.

24 On the trial that the plaintiff offered in evidence affidavit in the replevin suit, summons in the replevin suit, and return of the Sheriff replevying and delivering the chesnut-sorrel mare and chesnut-brown mare to Miles P. Odell, 26th Feb., 1856; and the record showing the following order of the court, Oct. 28, 1856:

26 "Now, on this day comes the parties herein, and the plaintiff by his attorney files his demurrer to plea number 4, filed herein, the same being heard by the court the demurrer is overruled, and the plaintiff saying nothing more the court doth consider that the defendant have return of the property and judgment for costs. The plaintiff then proved by two witnesses that the old mare at the time of replevying, the same was worth $100; that the young mare at time of replevying was worth from $150 to $200; that the use of the old mare was worth 25c. a day from time of the judgment in the replevin suit until the same was
27 returned, and that the old mare was in better condition when replevied than when returned; that the old mare from the time she was replevied to the time she was returned deteriorated in value $25, all of which was objected to by the defendants and deft., objection overruled and the def't excepted. The defendant proved by Spencer Dady that, in the summer of 1856, he went to Havana and returned the next day; that the young mare was sick on the way home; that they drove slow; that it was 16 or 17 miles to Havana from Odell House; that the young mare had a colt at the time, does not know what the mare was fed on at Havana. That Odell worked said mare occasionally through the summer of 1856; that said mare run on the prairie a part of the time; that Odell moved to Delevan in August of the same year.

Defendant proved by John Keef, that Odell moved to Delevan the latter part of August, 1856; that he was acquainted with the animals in Odell's possession; that one was an old mare 11 or 12 years old, blind chesnut sorrel, and worth about $50; that the young mare was
28 a dark chesnut-sorrel or brown, called 5 or 6 years old; that in the latter part of August or 1st of Sept., 1856, the mare was driven to Pekin and back to Delevan the same day, a distance of 18 miles. That the young mare started about sun-down in the evening; that the mare appeared well on the return, sweating a little under the harness, and was in good condition. And that about 1 or 2 hours after the (return) of the mare, she took sick, that medicine was given her; that she was worked with till witness went to bed about 11 or 12 o'clock; that Odell offered $5, $10, $15 or $20 to any one that would cure the mare; that the mare died during the night. That witness thinks that mare died of collick.

28 W. F. Auxier testified: That he went about 22d Nov., 1856, with Mathew Tomlin, one of the defendants who delivered the old mare and a mule, called at the residence of Virgin, and
29 that one of Virgin's sons took the mare and turned her into a lot.

The evidence closed, this being all the testimony.

The plaintiff (defendant in error) asked the following instructions:

1st. "The plaintiff asks the court to instruct the jury, that unless the defendants have established and proved to the satisfaction of the jury, that the said mares described in the de-
29 claration was returned to the said plaintiff, or that the said defendants have established by a preponderance of evidence of evidence, that they died without the fault, neglgence or carelessness of the defendants, they will find for the plaintiff, and assess his damages at the value of said mares."

2d. "That the burthen of proof in this case rests upon the defendants to prove to the satisfaction of the jury, that the mare died without any carelessness, negligence or remissness on
29 the part of the defendants or any other person entrusted by them with said preperty; and that unless the said defendants have made such proof, or that they have returned said mare, then
29 the said plaintiff is entitled to recover in this action the value of said mare."

3d. "That in relation to the old mare which was returned, the plaintiff is entitled to re-
29-30 cover in this kind of an action, such damage as he may have sustained by the depreciation in value which has taken place, while the said mare was in the possession of Odell."

4th. "That the Circuit Court having heard and rendered judgment in the replevin suit, and ordered the return of said property, the said defendants are by the judgment of the court, precluded from setting up any claim to the property in this suit, thus ordered to be returned. But for the purposes of this suit the said plaintiff is to be esteemed as the true owner of said
30 mare, and entitled to have them returned, unless the said defendant that one of the said mares was returned, and that the other died witeout any fault or negligence of the said Odell, or any other person entrusted by him with the mare, they will find for the plaintiff the value of said mare, which instructions were excepted to by the defendants.

The defendants then asked the following instruction:

That the jury in this case are not to regard the defendants as wrong doers, but that their liability depends upon the conditions of the bond, and the issue is made by the pleadings—
30 modified by the court—"in as good order and condition as when replevied." Modification excepted to by the defendants.

The defendants in the court below now bring the case to this court by writ of error to this court, and assign the following errors, to-wit:

1st- The Circuit Court erred in admitting evidence on the part of plaintiff below.

2d. The Circuit Court erred in giving the plaintiffs instructions.

3d. The Circuit Court erred in modifying the the defendants instruction.

4th. The Circuit Court erred in refusing a new trial.

5th. The Circuit Court erred in rendering judgment against all the defendants, when but two were served and had appeared.

6th. The Circuit Court erred in rendering judgment on the verdict without specifying that the same was for damages.

7th. The judgment is erroneous.

8th. The proceedings are otherwise informal and erroneous.

LYMAN LACEY,
GOUDY & WAITE,
Atty's. for Pl'ff. in Error.

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Tomlin. Et. al.

vs

Virgin

Abstract

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L. Leland
Clk

Filed Jan 11: 69

Wm Kinney
Clk

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