

No. 12443

Supreme Court of Illinois

Armsby

vs.

People, ex. rel.

36
Charles L. Armstrong

The People ex. rel. vs.

71

1770

12443

1858

X

Repaired

Pleas before the Hon. Nazariah W. Ward
Judge of the tenth Judicial Circuit of
the State of Illinois, At a Circuit Court
began and held at the Court house in
Moonmouth, within and for the County of
Warren, and State of Illinois, on the third
Monday in the month of October, in the
year of our Lord, one thousand eight hundred
and fifty four, It being the sixteenth day
of said month aforesaid

Present Hon. W. W. Ward, Judge

William L. Gould, State Attorney

Charles L. Ames, Sheriff

William Billings Clerk

And afterwards to wit, on the 21st day
of said month of October, on the 6th
day of the term thereof, the following pro-
ceedings was had in said Court.

The People of the State of Illinois	{	adoption for
Ex Relations of Cleazer A Paine		absolute writ
as		of Mandamus
Charles L. Ames, Sheriff of	{	on Petition &
Warren County		agreement

The Petitioner comes by his
attorney and enters his motion for an absolute
writ of Mandamus in accordance with
the Prayer of the petition, And it is agreed

by the parties that the same be submitted to
the Court, and decided in vacation

Pleas before the Hon. Hezekiah W.
Read, Judge of the tenth Judicial
District of the State of Illinois.
At a Circuit Court begun and
held at the Court House in
Monmouth, within and for the
County of Warren and State of
Illinois. On the second Monday in
the month of April, in the year
of our Lord one thousand eight
hundred and fifty five, it being
the ninth day of said month

Present Hon. Wm. Read Judge

William L. Gouldy, State Atty

James McCoy Sheriff

Wm. Ballings Clerk

And afterwards to wit, on the tenth
day of said month of April A D 1855
the following proceedings was had in said
Court,

The People of the State of Illinois }
Ex rel. James A. Paine }
by }
Charles L. Amory, Sheriff }
of Warren County } Petition for
Mandamus

This Cause coming on, and the Court, having at the last term of this Court, taken this Cause under advisement on the petition and agreement herein, and being now sufficiently advised in the premises, it is adjudged and ordered by the Court now here, that a peremptory ^{with} writ of Mandamus issue herein, to the said defendant, commanding him to execute, acknowledge, and deliver to the relator herein a sufficient deed as required by law in this State in cases of sales by Sheriff under Execution, conveying the tract of land mentioned in the petition in this Cause, upon the certificate set forth therein as given by the defendant to the relator herein. And it is further adjudged and ordered by the Court, that the said relator, have and recover of and from the said defendant his costs in this behalf expended, and that he have execution therefor.

And afterwards on the 14th day of said month of April A D 1855, the following proceedings were had in the above entitled Cause to wit

The People of the State of Illinois
on the relation of Eliager A Paine

vs
Charles L. Ambs, Sheriff
of Warren County

} Petition for
} Warrant

This day came the
defendant, and moves the Court, for an
appeal to the Supreme Court, It is therefore ordered
by the Court, that the said defendant be permitted
to appeal upon filing a sufficient bond with
George F. Harding as security, within thirty
days from this date to be approved by the
clerk

The following is a true copy of the petition
filed in the above entitled cause

State of Illinois - County of Warren
The People of the State of Illinois }
Ex Relation of }
Eliazer A Paine } Circuit Court
vs } October term A D 1854
Charles L Ambsy }

To the Honorable Jeremiah McMead
Judge of the Tenth Judicial Circuit in and
for the State of Illinois, your petitioners, the
People of the State of Illinois, upon the relation
of Eliazer A Paine, of the County of Warren
unto your honor would respectfully represent
that at the term of the Circuit Court, begun
and holden in the County aforesaid on the
third Monday of April A D 1851 a judgment
order and decree was rendered, in a certain suit
then and there pending, wherein Jesse Spencer was
petitioner, and Jeremiah Bailly was defendant
to enforce a mechanics lien, by which order
and decree, the defendant therein was ordered
to pay said petitioner therein the sum of
one hundred and thirty five dollars and costs
of suit, and in default of payment within
six months, that certain premises, to wit:
The South East quarter of section Nine, eleven
North of range two west of the fourth principal
Meridian, be levied upon and sold upon delivery
to the Sheriff of said County, of a certified copy
of said order and decree; and that afterwards
default having been made in such payment

a certified copy of said order and decree was delivered to Radliff & Allen then Sheriff of said County, and by virtue thereof said Sheriff on the 2nd day of October A D 1852 levied on said premises, and afterwards, namely on the 23rd day of October A D 1852, after having given notice as required, said Sheriff sold the premises before described to the said Jesse Spencer, for the sum of one hundred and sixty dollars, and forty three cents, and thereupon executed and delivered a certificate of purchase therefor to said Jesse Spencer, which was subsequently assigned by said Jesse Spencer to George F. Harding - Your petitioners further represent that on the 22nd day of September A D 1852 at a term of the Circuit Court, begun and holden on the third Monday of September A D 1852, a certain judgment was rendered in a certain suit therein then pending wherein Luzerne Bartholomew assignee of R. Paine was Plaintiff, and said Jeremiah Bailey was defendant, in favor of said plaintiff for the sum of six hundred and forty dollars and sixty three cents and his costs in said suit, on which said judgment an execution was issued on the 13th day of December A D 1852, and returned with nothing made on the 7th day of February A D 1853, and afterwards, to wit, on the 7th day of October A D 1853, a second execution issued on said judgment and was on the same day delivered to Charles L. Amesby, then and now Sheriff of said County of Warren, and on the same day said Sheriff levied by the direction

of the Plaintiff in said Execution on the
real Estate herein before described, and on the
same day, said Plaintiff in the last named
Execution as a Judgment creditor redeemed
from the Sale made as aforesaid, to Jesse
Spencer, by paying to the Sheriff Eastman
the sum of one hundred and eighty three dollars
and fifty four Cents, for the use of the said
Jesse Spencer as purchaser aforesaid, or his
assign, and thereupon said Sheriff Charles L. Amshy,
filed in the office of the Clerk of the Circuit
Court and Office Recorder of said County, of
Warren a Certificate of redemption thereof as afore-
said, and after having duly advertised said
premises for sale under and by virtue of the
levy under the last levy as aforesaid, as required
by the Statute, did afterward, to wit, on the 12th
day of December A D 1853. offer said premises at
Sheriff's Sale in pursuance of the notices given
and thereupon sold the said premises to the relator
for the sum of five hundred dollars, he being
the highest bidder therefor, and then and there exe-
cuted and delivered a Sheriff's Certificate of
purchase to said relator setting forth the fact
of said sale, and that said relator would
be entitled to a deed for said premises on the
first day of February A D 1854 unless redeemed
according to law - Given petitioner furth-
er represents that no other attempt to redeem, or
redemption was ever made by the said Jeremiah
Bailey, or any other person, than the redemption
herein before described by said relator, that a
period of two years has now elapsed since the
time of the sale to the said Jesse Spencer.

and that more than nine months have elapsed since the expiration of the period of redemption from the sale aforesaid to the relator, and that no redemption or attempt at redemption has ever been made from the sale to the relator - Your petitioners further represent, that afternoon, to-wit, on the 15th day of June A.D. 1854, said relator presented his said certificate of purchase to the said Charles L. Amesty, Sheriff as aforesaid, and tendered and paid to said Sheriff the sum of one dollar and twenty five cents as his fee for making and acknowledging a deed to said relator, which sum was sufficient for that purpose, and said relator thereupon demanded a deed in pursuance of and accordance with his said Certificate of purchase, but said Sheriff then ever since and now refused and refuses to make and deliver said deed.

Whereupon your petitioners pray that a writ of Mandamus may issue against the said Charles L. Amesty, Sheriff of the County aforesaid, requiring him to make, acknowledge and deliver a deed of conveyance to said relator in manner and form as required by the statute of this State in cases of Sales under Execution by Sheriffs, and as in duty bound.

Wm. Gandy, attorney
for relator

It is hereby agreed, that the foregoing petition
contain all the facts with relation to the
matter therein stated, and the said Charles
L Amsey, sheriff as aforesaid, enters his
appearance and waives the service of the
alternative writ of Mandamus, and that the
facts therein stated may be taken as his
return to such alternative writ, and that
proceedings may be had upon said petition
as fully as if the return had been made
and issues formed, October 21st 1854

{ W L Gandy, attorney for relator
{ G F Harding, attorney for defendant

The following is a true copy of the bond filed
in this cause, in accordance with the order
of this court

"Know all men by these presents, that we
Charles L Amsey and George F Harding
of the county of Warren and State of Illinois,
are held and firmly bound unto the People of
the State of Illinois, the relations of Charles
A Paine of Warren County in said State in
the penal sum of two hundred dollar current
money of the United States, for the payment
of which well and truly to be made we
bind ourselves our heirs, executors, and
administrators, jointly, severally, and firmly
by these presents. Witness our hands and
seals at the Clerk's office in Mo. month
this 16th day of April A D 1855,

The Condition of the above Obligation is such
that Whereas the said "The People of the State
of Illinois, ex relatione of Eliezer A Paine
did on the tenth day of April A D 1855—
in the Circuit Court in and for said county
of Warren & State of Illinois, recover an order
& obtain a Judgment, that a peremptory
writ of mandamus issue to the said Charles
L Armsby Sheriff of Warren County, defend
ant in said case commanding him to execute
a knowledge & deliver to the said relator
a certain deed for certain land described in
said petition for mandamus in this case
filed, and two dollars cost, from which
said Judgment of the said Circuit Court
the said Charles L Armsby has prayed for
& obtained an appeal to the Supreme Court
of said State, now if the said Charles L
Armsby shall duly prosecute his said appeal
with effect, and ~~there~~^{shall} moreover pay the
amount of the Judgment, cost interest & damage
rendered and to be rendered against him in
case the said Judgment shall be affirmed
in the said Supreme Court, then the above
obligation to be void, otherwise to remain
in full force and virtue

Taken & Entered into

Charles L Armsby *C.L.A.*

before me at my office

George F Harding *G.F.H.*

in Moosmouth this 19th

day of April A D 1855 &

by me approved the same

day & year

Attest —

Wm Bellings Clerk

State of Illinois }
Warren County } S.S.

I Jm Billings clerk of the circuit
court for Warren County, Illinois, do hereby certify
that the above ~~and~~ transcript, containing a full
true and perfect copy of all the judgments
orders and decrees made in the above petition cause
and also of all the papers filed in said cause
as appeared from the files and records, now in
my office -

In Witness where of I have hereunto
set my hand & seal of said court
at Albionmouth this 3rd day of
May A D 1855-

Jm Billings clerk

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Charles L. Armstrong²⁶
The People of. N. H. or.
Record

Folio June 6. 1855.
L. Seland Cth.

State of Illinois
Northern Division

Supreme court
April Term 1857

Charles L. Armstrong

ad. vs.

Appeal from Writ.

The people of the State

Of Illinois vs. Jas. E. Haine

And the said appellant
Comes and assigns for error the
following causes, which caused his injury
herein - 1. The court erred in rendering judgment against defendant.
2. The court erred in commanding defendant to make deed to Relator.
3. The court erred in not dismissing Defendant's petition & rendering judgment for the defendant.
Wherefore he prays Judgment may be reversed &
George H. Harding
Attorney for appellant

And the said appellee by their
attorneys come and say there is no
such error as above alleged &
Gordon & Judd
Attys for appellee

Armsby
adv. app. women
The People &c.

Asymmetry of cross.

Filed April 6, 1887
S. Leland
Clerk

Charles L. Amory Appellant
v. Mandamus.
The People for the Appellee
use of Eleazer A. Paine

Brief of Appellant

1. There is no redemption from a sale made under a decree in a proceeding to enforce a Mechanic's Lien except as provided in the decree.

West vs Fleming.

April Term 1857

18th Dec. 248

12 Ill. 487; 1 Gal. 433; 3 Gil. 513.

17 Ill. 261.

2. This Sale was not made under an execution, but under the order & decree, a ^{certified} copy of which order & decree, constituted Sheriff's authority to sell.

3. Six Months was given, ^{by the Decree} in which to pay the amount of the Lien; a provision which precludes the idea that a redemption was intended to be given of 15 months after sale.

4. It is apparent from the Petition that the decree is not set out, and the Court will rather presume that the proper order was made appointing the Sheriff a special commissioner which is consistent with so much of the decree as is set out in the record, than to presume that the process was intended to be an execution with rights of redemption.

5. This is a petition for a writ of mandamus and the petitioner must establish a clear right to a deed or her prayer will be denied. Any obscurity or uncertainty in the facts is chargeable to the petitioner.

It must be clear that the officer has omitted a manifest duty; and the petition must aver that the facts which would justify the omission do not exist. The Petition does not show that

the sale was made on an execution; but clearly the contrary, nor that redemption was a lien, or was in any Court in this State.

25 Maine 333
6. The redemption was attempted

before the expiration of a year from
the sale. The Statute only gives the
right to the judgment ~~and~~ debtor to
redeem within said period, and limits
a judgment creditor to the ensuing three
months. Purples Stat. P. 644. Sec. 13
& 14. Redemption of lands ^{Sold} under ex-
ecution is a creature of the Statute, unknown
to the Common Law; ~~the~~ provisions of
the Statute determine the party's rights claiming
under it. 2 O. Wend. 558; 4 Connst.
" 179 559. 560; nor can the Sheriff waive the
6 Wend. 524 Error, 19 Wend. 88; 3 Tex 88-91; 41 B.L. 578;
the judgment debtor's right to redeem
cannot be defeated by the attempt of
the judgment creditor to redeem, as it cannot
by selling on second execution, 13 Ill. 398;
the right of the judgment creditor to redeem
does not commence as the right of the judgment
debtor does not cease till the expiration
of 12 months from sale. See Stat. Purp. Stat. P. 644
Sec. 13 & 14; and 11 Ill. 522.

7. Mandamus is not the appropriate
remedy to compel a sheriff to make a
deed. 14 Ark. 118. There is a remedy
by another action on the officer's bond; or
by an action on the case, as the Statute
makes it the officer's duty to make deed.

And where there is another remedy
 the writ will not lie. 8 Rich 47; 10 John
 R. 484; 1 Wend. 318; and particularly when
 the rights of third parties may be affected, as to
 admit a man to an office occupied by another
 2 T.R. 259; 4 T.R. 700; 3 Johns Cas. 19;
 it is not res judicata, & will not affect any
 man's right in future litigation. 1 Leow 512;
 id. 495; possession of a chancery
 remedy will not absolutely bar the writ,
 but should influence the Court in awarding
 the writ. 2 Leow 244; 10 Wend. 398; the
 right must be clear or the writ will not lie;
 5 Barr. 87; 4 Bal. Ab. Tit. Man; 1 Wend.
 318; 2 Bin. 362.

Answering for Appellant

Answer by
 The People, &c.

Brief of
 Appellant

Filed Apr 26. 1858
 D. Ireland
 Clerk

It does not appear that the money
 remained with the Sheriff.

Amshy

or

The people &c

Reply -

This is a question not between persons or their rights as affected by estoppels between themselves, but whether the facts on the face of the petition show a clear right to enforce the making of a deed to the relation by the Sheriff, a question between the relation & the facts themselves unaffected by the question whether any party has the right to deny them.

19 Wend. 374. 88-91. Therefore it is immaterial to the consideration & determination of this question to enquire whether the Sheriff has done any act, &c. by treating the process as an execution, by giving a certificate of redemption, by receiving the redemption money or the fees for a deed, by giving notice as in cases of sales on execution, which estops him from denying the relator's prayer. How third persons have treated or

Considered the process by receiving
or assigning certificates of purchase
is equally immaterial.

If the process was a decree
the court will so hold and this
they will determine from the
language of the petition de-
scribing it. The defendant cannot
stop the court from examining into the
truth. The Petition describes a
chancery proceeding and by apt
words describes the process as
a "copy of the decree", the property
to be sold and on which the lien
attached is described in the decree;
the language levy & sell is exactly
synonymous with sell; the process
is confined to the land on which
the lien attached, and the direction
to levy is the same as if the decree
commanded the officer to take
& sell; the words levy & take being
in each instance surplusage. but
the natural words to use ~~in such case~~
in such case. Where the language is to
levy ^{on} and sell ~~on~~ a lot of land, the
operation of the writ, ^{if writ it is} is as much
restricted as a decree could be and

Language
of
Petition

No inference can be drawn from that fact that the process was an execution, as in this point there is no substantial difference between this process & a decretal order.

An execution is a writ with powers conferred by our Statute concerning the powers of several Common law writs. E.g. is a lien on all his ~~land~~, good & chattels when in hands of officer, ~~and~~ upon it his real Estate may be sold, ~~must~~ returnable in 40 days, requires 20 days advertising for sale, ~~must be under seal of court &c~~ Etc.

This process has not one of these powers assigned it by the petition. In what is ^{to be} Command done with it alone, is it argued that there is the slightest variation from an ordinary writ. The language is a decree shall be levied; if 'to levy' is language consecrated to Ex. writs, the natural inference would be that the wrong word had been used; the inference ^{in fact} would not be that the ~~decree~~ was intended to be an Ex. Contrary to the letter of the decree & contrary to the ordinary process to enforce chancery orders. Six months being given before sale is a strong circumstance against the intention of the Court being to allow redemption from sale.

It does not appear that
no deed was made; nor that a
certificate of purchase was ever in
Execution.

It does not appear that he
desired the certificate of purchase
nor waived his right to redeem.

It does not appear that the money
was in the hands of the Sheriff at
the expiration of the twelve months.

It is immaterial whether the
 first sale was preceded by
 a public advertisement. The
 Relator claims under the re-
 demption if at all. If as a
 purchaser of a valid sale, his right to a deed
 had not matured in October
 1854 when the petition was filed,
 as ~~the sale~~ a 15 months from
 Decemr. 1853 not having
 expired. Hence it does not appear that ad-
 vertisement was required by decree, nor it deemed that
 a complete sale was made in Brown 11 M. 26.

Sec. 45. Prop. Stat. 1844. chap. Chanc. gives a
 lien to the decree.

1st Prop. 144 Chap. Chancery Sec. 46 provides
 only for certain Omitted cases.
 The petitioner does not aver that
 this is such case. Contra. it appears
 that the kind of process & the Com-
 missioner is fixed. There is no
 redemption from a sale in
 a mechanics lien.

18 M. 248
 17 261
 12 M. 487
 The sheriff is a special Com-
 missioner; he has all the powers
 & the decree may so name him, if all set out.
 Judgment creditor cannot redeem
 within the year after the sale.

20 Wend. 558 6 Wend. 526
 4 Leamst. 559. 560 13 M. 398
 7 Hill 161
 " 179

Amity
"
People &c

Appellants
Brief -

No. 1

Charles L. Arnsey Supreme Court

vs

April 21 1858

The People ex. rel. } appeal from Warrant
E. A. Paine

Brief

H. M. Wood & E. A. Paine

for appellee

1st The Statute provides "that where there is no master &c the Sheriff shall sell on execution & such execution shall have the same operation & force as similar writs issued at law - Purples Statute Page 1144, Sec. 46

In this case the sale was an execution see abstract -

2^d The Statute (Purples) Page 644 Sec. 13, provides "that any person whose lands shall be sold by virtue of any execution may redeem &c. And Sec. 14, that any judgment creditor may redeem &c

See also Sec. 14 Ill R. 410

Saucy v Chandler 11 Ill. 445-

The Paper

Bury of
upright

No. 1

Charles L. Combs Supreme Court

April 2, 1858

The People ex. rel. (Appel from Warren
E. A. Paine

Brief H. M. Mead & E. A. Paine
for appellee

1st The Statute provides "that where there
is no master &c. An Sheriff shall sell
on execution & such execution shall have
the same operation & force as similar
writs issued at law - Purple Statute Page
144 sec. 4 b.

In this case the sale was on execu-
tion - see abstract.

2nd The Statute (Purple) Page 644 sec. 13. provides
"that any person whose lands shall be sold
by virtue of any execution may redeem &c
and sec. 14. that any judgment Creditor
may redeem &c

See also sec. 22 page 646

Philips vs. Drimoss	14 U. R.	440
Sauzy vs. Chandler	11 Do	445-

C. L. Amory
The People

Print of
Appelle

No 1.

Charles L. Arnsby / Supreme Court
The People ex. rel. (April Term 1858)
E. A. Paine (Appeal from Warrant)
Brief J. M. Brad & E. A. Paine
for appellee

1st The Statute provides "that where there is no Master &c the Sheriff shall sell on Execution & such execution shall have the same operation & force as similar writs issued at law. Purpus Stat, p. 144, sec. 13

In this case the sale was on Execution & Ser. Abstract

2 The Statute (Purpus) page 644 sec. 13, provides "that any person whose lands shall be sold by virtue of any Execution may redeem &c And sec. 14 that any judgment creditor may redeem &c and sec. 22. p. 646

Phillips vs. Smoots	14 MR.	410
Arnsby vs. Chandler	11 do	415

C. L. Amisby

The Keeper

Brief of
Appellee

Charles L. Amesty }
Sheriff Warren County }
vs } Appeal from Warren,
The People ex Rel. Paine }

Brief.

The sale under execution may be redeemed from by the judgment debtor within 12 months from the sale and after the expiration of twelve months & within 15 months by the judgment creditor.

Rev. Stat. 1845. Judgments & Ex. §§ 13, 14.

The money was paid by the judgment creditor 16 days before the expiration of twelve months, execution issued & was levied at the same time & it is insisted that for this reason the proceedings in the redemption were unauthorized & void.

The further fact appears that enough money was paid to make the sum due at the end of 12 months & that it was in the hands of the Sheriff for the first purchaser at that time

II.

The Appellee answers this objection as follows.

The law providing for the redemption is remedial, the object is to save the debtor's estate and pay as much of his debt as possible, and the purchaser under the first execution has only a claim for the money due him.

Such construction will be given as will effect the object of the law and advance the remedy.

Rev. Stat. Judgments c. § 15

Pollard vs Taylor 13 Ala. 607

Van Rensselaer vs Sheriff, 1 Cowen 501

Swazey vs Chandler 11 Mc. 445, 449.

Philips vs Demoss 14 Mc. 410

II. It is insisted by Appellant that the sale to Spencer was under a decree for mechanics lien & hence there was no redemption allowed by law.

The Appellee answers say,

1st The Sale was not under the decree by the Master or Commissioners, but by the Sheriff, who received a certified copy of the decree, made a levy, advertised, sold, & gave a certificate of purchase, and was in substance and effect a sale under execution, or a final process having the like effect.

In such case the right of redemption exists.

Rev Stat. ^{Chancery} Judgments. § 46.

If an execution by virtue of §§ 13, 14, Rev. Stat. 1845, Ch. Judgments; if a final process in Chancery, by virtue of § 46, Ch. Chancery.

III. The Sheriff received the execution in favor of the judgment creditor attempting to redeem, levied, filed a certificate, received the money, advertised, sold to the Relator, took the purchase money from him & gave a certificate of purchase to him.

He is now stopped by these acts & cannot refuse to complete the transaction by the execution of a deed,

The rights of the first purchaser
will not be affected by the execution
of the deed.

Gandy & Judd
Attys for Appellees.

Charles L. Amory
Sherry Morris Co.

Mr. Peoples & Co.
E. A. Davis.

Brief.

Gandy & Judd
Attys for Appellees.