

13737

No. _____

Supreme Court of Illinois

Day

vs.

Hackney et al

Drakey

1 Return of Sherr. a such motion cannot be
controversial - see "Practice Act" (D.S.) § 44
Must be action for false return

STATE OF ILLINOIS, SUPREME COURT.

APRIL TERM, A. D. 1857.

HENRY M. DAY vs. BENJAMIN HACKNEY et al.

Appeal from Cook County Court of Common Pleas.

ABSTRACT OF THE RECORD.

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motion under
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This was a summary proceeding by motion by appellees against appel-
lant.

RECORD.
Page 2. The bill of exceptions shows that, at the hearing of the motion, July
Page 3. 10, 1856, appellees read in evidence an execution, under seal of said
Page 4. Court, dated March 14, 1855, in favor of appellees, and against Alford &
Chapman, for \$593.09, directed to Sheriff of Kendall County, with said
Sheriff's return and endorsements thereon, on which was a receipt signed
by J. J. Cole. The endorsements were as follows:

Page 4. "Rec. this writ, March 15, 1855, at one P. M., from J. J. Cole, agent
for plaintiff.
H. M. DAY, Sheriff of Kendall County."

Page 5. "March 15th, 1855.—By virtue of the within execution, levied on the
following real estate, (here follows description of divers tracts of land;)
also the following personal property, (here follows list of horses, &c.)
"H. M. DAY, Sheriff of Kendall County."

Page 7. "The above real estate was by me advertised, &c., before the 25th of
June, 1855, at one o'clock P. M., when the said real estate was by me
sold, and the same was struck off to Jeremiah J. Cole, agent for plain-
tiffs, for \$619.09, he, the said Cole, being the highest bidder, but no
money was paid to me, the land being bid off as aforesaid by said Cole,
and this execution is returned in this manner by his direction.
"HENRY M. DAY, Sheriff Kendall County."

"Rec'd of H. M. Day, Shf. of Kendall Co the amt of debt and costs
on the within Ex for Hackney Jenks & Co JEREMIAH J. COLE"

Page 9. Appellees then read in evidence the affidavit of Barr, of 7th July,
1856, that on 14th March, 1855, appellees recovered judgment in said
Common Pleas Court vs. Alford & Chapman, for \$593.09 and costs, that
execution was issued directed to Sheriff of Kendall.

That on 15th March, 1855, execution and fee bill was by him forward-
ed to Kendall Co., to be delivered to Sheriff.

That on 16th March, 1855, Barr saw Sheriff Day, who said he had re-
ceived the execution and had levied on Alford's real estate.

That Barr consulted and directed in regard to same.

That on 25th June, 1855, Barr went to Oswego to attend the sale of
said lands by Sheriff.

That he then learned that said Sheriff had two other executions levied
upon the same property, and that if the same was sold it would be sold
upon all the executions, (one of which affiant believes was in favor of
Jeremiah J. Cole.)

That he understood that Cole, perhaps with others, was trying to buy
the lands of Alford, and negotiations were pending when this affiant had
to leave.

That Cole informed Barr, that if lands were sold upon the executions,
he intended to bid off the same for enough to cover all of said judgment.

3 Notice under
Circuit in a case
alleged Sherr. had
collected the
money - see notice -
4 to prop. in
evidence -
Must show a
return -
K. J. Cole. not
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red print.

That with *that understanding* Barr left before the sale was made.

That said Sheriff knew at that time that Barr was at Oswego *attending to the same* as attorney of the plaintiff.

That Barr afterwards *learned* that said premises were sold and bid off by said Cole, and went to Oswego to get the money thereon.

That Cole being enquired of for the Sheriff, said to Barr that the Sheriff was out of town, but that *he* could pay a part of the money going to the plaintiffs, and Barr received of Cole \$400 to apply on the same.

That Barr *understood* "that the Sheriff kept his official papers at Oswego, in the office of Cole, and that when property was bid off or redeemed by Cole, the money was not paid over at the time, but credit given on the deal between the parties, as a deposit or otherwise."

That from Barr's recollection of the *contents* of the *record* of the certificate of sale, as recorded in the Recording Office of Kendall County, the premises were sold upon all of said executions together, and but one certificate of sale, and that to said J. J. Cole.

That Barr afterwards *saw* said Execution, with a return thereon, (which he *believes* was in handwriting of said Sheriff,) in substance as follows:

"I return this execution satisfied—money paid to plaintiffs."

That this was on said Execution the 13th of June, 1856, and before, but is now erased.

That the return now on the execution was *not* then on the same.

That Barr believes the same is not in the handwriting of said Sheriff.

That said return does not state to whom the certificate of sale was made.

That the receipt signed by Cole was not on the Execution when Barr saw the same, until this 7th day of July, 1856.

Nor were the words, "from J. J. Cole, agent for plaintiff," in the endorsement of the receipt thereof.

That Barr did not know of any pretence by said Sheriff, or Cole, that Cole was plaintiffs' agent for a year after the Sheriff received the execution.

That Barr believes said *pretence* and said *return* have been got up between Cole and said Sheriff, to delay said plaintiffs.

That the *execution* was sent by Barr to Cole, as a friend, with a request that he would hand it to the Sheriff, and not with the idea that he was or should be the agent of plaintiffs.

That Barr believes the return is untrue, as far as it states any agency of Cole.

That Barr has twice made demand upon said Sheriff, (H. M. Day,) in writing, to pay over the balance due to plaintiffs upon said writs to plaintiffs, or their attorney, and also to return said writs.

That the Sheriff has neglected to pay.

That the present returns on said Execution have been made since such demand.

That Barr was attorney of plaintiffs.

That he believes he was the only attorney.

That so far as he knows, Cole is no lawyer.

That on 13th of June, a written notice, attached to the affidavit, was served on Day.

The written notice referred to, notifies Day that \$243.33, or thereabouts, to the plaintiffs, on an Execution in your hands, wherein Benjamin Hackney, and Levi Jenks, and Albert Jenks, were plaintiffs, and John W. Chapman and Clark B. Alford were defendants; and also on a fee bill in the same case, which execution and fee bill issues, &c.

And demand is hereby made upon you for the money due thereon, (said fee bill and execution,) and you are notified, that unless you return said execution and fee bill, and pay over said money to said plaintiffs, or their attorney, within ten days from date hereof, that at next term of said Court, &c., plaintiffs will apply to said Court for a judgment against you for the amount due them, with 20 per cent. damages, according to statute.

Appellees also read the affidavit of Levi Jenks,—that he does not recollect of ever authorising Cole to act as their agent in collecting said judgment, or bidding off said property.

That after the sale, Cole called on affiant and said he was to pay plaintiffs' demand.

That affiant believes he was the only one of the firm that ever had any correspondence with said Cole about said matter in any way.

This was all of plaintiffs' evidence.

Defendant then read in evidence an extract from a letter dated March 9, 1855, and written by appellees to said Cole, as follows:

"Can that demand against Alford & Chapman be collected, if sent to you?"

Also, another letter from plaintiffs to Cole, as follows:

"Can you get at that old matter of John Chapman & Alford, but due Hackney, Jenks & Co., and send it to me on receipt of this? If not, can you give us a statement of the balance due, and how we must proceed to get it?"

This was all the evidence.

The Court, reciting on the record that the Sheriff had returned the execution, and "it appearing from his return thereon endorsed, he sold the property of said defendant on said execution, on the 25th day of June, 1855; and that the same was struck off to Cole (who is stated in the return to have been agent of plaintiffs) for \$619.09;"

And it further appearing to the Court that Cole was not the agent of plaintiffs;

And that said Sheriff *collected* on said execution the money due thereon, June 25, 1855;

And that plaintiffs have received thereon \$400;

That the amount due thereon now from said Sheriff is \$219.09, besides the penalty imposed by statute;

Ordered, that Day pay over to plaintiffs the \$219.09, with 20 per cent. thereon from 25th June, 1855, till paid; and further, that he pay the cost of this proceeding.

To this decision defendant excepted; then moved for new trial, which was overruled, and he excepted.

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Day vs
Hachuz

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Agreed May 17
& 18th —

Filed Apr 28. 1837
L. Ireland
Clerk

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