No. 13311

Supreme Court of Illinois

Hall, et al

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vs.

Lance et al

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SUPREME COURT,

SECOND GRAND DIVISION,

JANUARY TERM, 1861.

ROBERT P. HALL & EUSTACE H. SMITH,
Plffs in Error,
VS.
JOHN LANCE & JOHN HARRIS, Jr.,
Defts in Error.

} ERROR TO FULTON.

ABSTRACT.

P. Rec. This was an ejectment commenced in the Fulton Circuit Court by the plaintiffs in error against the defendant John Lance, 7th June, 1859, for S. W. 17, 6 N. 1 E. 4th P. M. The declaration was filed, the rule to plead entered, and the general issue pleaded by Lance at the
4–5 June term 1859.

At the Febr'y term 1860 the plaintiff moved for a rule on M. S. KIMBALL, esq., (who was the attorney appearing for Lance,) to produce authority for appearing for said Lance, and
7–9 filed in support thereof the affidavit of W. C. GOUDY that as he (said GOUDY) was informed and believed and therefore stated, said KIMBALL had no authority to appear for said defendant. The Court sustained the motion and entered the rule on KIMBALL to show authority; whereupon said KIMBALL as attorney, &c., moved the Court for leave to make John Harris,
7–10 Jr. a party defendant, and that he be permitted to defend this suit, and filed in support of such motion his own affidavit that he was said Harris' attorney and authorized to attend to
10–11 his interests in this suit; that said Harris held a mortgage for $1500 upon the premises sued for, executed 28th June 1856 by Charles Howard then the owner in fee of said premises and in possession thereof, which mortgage was recorded the 30th June 1856 in the county of Fulton; that the mortgage and note it was given to secure remaining unpaid, and having become due Harris foreclosed the mortgage Febr'y term 1858, of the Fulton Circuit Court, and the premises were sold pursuant to order of Court by the sheriff of Fulton county and bid in by said Harris for $1545 43, upon which sale he (said Harris) got a deed from said sheriff on the 28th September 1859, at about which time (as deponent was informed) Howard surrendered possession of the premises to said Harris, who ever since has remained in such possession under all the title according to deponent's belief ever possessed by said Howard; and that John Lance, the defendant, was according to deponent's information and belief, tenant of said Howard before and at the time of the commencement of this suit.

To the allowance of this motion the plaintiffs objected, but the Court overruled the objec-
7–12 tion and sustained the motion and admitted said Harris to defend as a co-defendant on admitting possession and service of the declartion; to which ruling and decision the plaintiffs excepted.

The trial was had at the September term 1860 before Judge BAILEY and a jury. On the trial the defendants admitted that Charles Howard was seized in fee of the premises by title
16 derived from the United States; and the plaintiffs proved on their part a valid judgment rendered by the Circuit Court of Fulton County, Illinois, on the 1st day of June, 1857, in favor of plaintiffs and against the said Charles Howard for $1130 47 and plff's costs, and an execution issued thereon June 27th, 1857, to the sheriff of Fulton county, received by him on the day of its date. and a levy on the premises described in the declaration as the property of Charles Howard on August 3, 1857, together with a return on said execution showing a sale of the premises so levied upon on the 23d December, 1857 for $130, and also a deed executed by the sheriff of Fulton county to plaintiffs dated 30th March, 1859, conveying the premises aforesaid, and founded on said judgment, execution, levy and sale. The plaintiff further proved that the defendant Lance was in possession of the premises described in the declaration, at the time the declaration was served, by residence and occupation, and that when the declaration was served the defendant Lance admitted to the officer who made the service that he was a tenant of said Charles Howard. Here the plaintiff rested.

The defendants, on their part, offered in evidence a mortgage dated June 28, 1856, from
17–18 Charles Howard and wife to John Harris, Jr., in consideration of $1500, upon the premises described in the declaration, conditioned that if the party of the first part should pay his note bearing even date with the mortgage, given to said Harris for $1500 becoming due 18 months after date, then the mortgage to be void. The defendant offered in connection with said mortgage a certificate of acknowledgement and a certificate of record appended to the same.

The officer taking the acknowledgement certifies that personally appeared before him, &c.,
19 "Charles Howard and Susan his wife to me (him) personally known to be the real persons "whose names are subscribed to the foregoing conveyance, and severally acknowledged that "they executed the same."

The certificate of record is that the said instrument was duly recorded on the land records of Fulton County, Illinois, the 30th June, 1856, &c. No seal appears to this certificate.

The plaintiffs objected to the reception of evidence of said mortgage and certificates, but
20 the Court overruled the objections and allowed the same to be read in evidence, to which the plaintiffs excepted.

The defendants then offered in evidence a judgment, rendered by the Fulton Circuit Court at the February term, 1858, against Charles Howard and Susan Howard, as follows:

"John Harris, Jr., vs. Charles Howard and Susan Howard.—Foreclosure by *scire facias.*
20 "This day this cause coming on for a hearing, and the plaintiff appearing herein by his attorney, and the defendants having been legally served with *scire facias* as by the statute in such case made and provided, to appear and show cause if any they have why judgment should not be rendered against them for such sum of money as may be due on a certain mortgage and note in the said *scire facias* mentioned, and the said defendants having been three times solemnly called came not but made default—It is considered by the Court that the said plaintiff have and recover of and from the said defendants the amount of damages due on a certain note accompanying said mortgage mentioned in said *scire facias.* And because the amount is unknown to the Court it is ordered by the Court that the Clerk assess the same, whereupon the Clerk reported and assessed the same at the sum of fifteen hundred and fifteen dollars and twenty-five cents, which report is accepted by the Court. It is thereupon ordered by the Court that the plaintiff have and recover of and from the said defendants the aforesaid sum of fifteen hundred and fifteen dollars and twenty-five cents, for his damages together with his costs in this behalf expended. And it is further ordered by the Court that special execution issue therefor against the real estate mentioned in the said mortgage, to-wit, the south-west quarter of section seventeen in township six north of range one east in the county of Fulton and State of Illinois." To which the plaintiffs objected, but the Court overruled the objection and permitted the same to be read in evidence, and the plaintiffs excepted.

21–27 The defendants then offered and read in evidence an execution, return and Sheriff's deed to John Harris Jr., based upon the said judgment, (all covering the premises in controversy) and thereupon rested his case.

This was all the evidence in the case.

27 The plaintiffs then prayed the follow among other instructions to the jury:

"2. The jury are instructed that the plaintiffs have proved by the evidence that Charles Howard was seized in fee simple of the premises, and a valid judgment, execution and sale thereunder to the plaintiffs of the title of Howard, and a sheriff's deed founded on such sale to the plaintiffs; and if the jury believe from the evidence that the defendant Lance was in possession of the premises at the time of the commencement of the suit, that makes out a *prima facie* right in the plaintiffs to recover against the defendant Lance."

But the Court refused to give the same as asked, but modified and gave the same by adding
28 the words "unless they believe from the evidence that Lance was in as the tenant of Howard."

To which decision in modifying and giving the said instruction as modified the plaintiffs excepted.

29 And the Court gave the following instruction to the jury on the prayer of defendants:

"The Court instructs the jury that if they believe from the evidence in the case that Charles Howard, the common source of the title, executed the mortgage which is in evidence to John Harris Jr., upon the premises in question, and that said mortgage was duly recorded upon the land records of Fulton county prior to the rendition of the judgment offered in evidence by the plaintiffs, that then the plaintiffs cannot recover in this suit, if they believe that Lance was the tenant of Howard."

To the giving of which the plaintiffs objected and excepted.

14 The jury found a verdict that the defendants were "not guilty of withholding the premises" &c.

15–27 The plaintiffs moved for a new trial, which the court overruled and plaintiffs excepted.

15–27 The Court then rendered judgment upon the verdict against the plaintiffs in favor of the defendants for costs.

The plaintiffs bring this case to this Court by writ of error, and make the following assignment of errors:

31 1st. The Court below erred in admitting John Harris Jr. to defend.

2d. The Court below erred in permitting evidence to go to the jury on behalf of defendant Harris.

3d. The Circuit Court erred in admitting improper evidence on the part of the defendants below.

4th. The Court below erred in refusing proper instructions asked by the plaintiff.

5th. The Court below erred in modifying instructions asked by the plaintiffs, and in giving the same as modified.

6th. The Circuit Court erred in giving to the jury improper instructions on behalf of the defendants.

7th. The verdict was against the law and the evidence.

8th. The Circuit Court erred in overruling the motion for a new trial, and in rendering judgment against the plaintiffs below.

GOUDY, JUDD & BOYD,
Attys for Plffs in Error.

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Hall & Smith
v.
Lance & Harris

Abstract

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SUPREME COURT.

Second Division.

JANUARY TERM, 1861.

ROBERT P. HALL, ET AL.,
vs.
JOHN LANCE, ET AL.
} ERROR TO FULTON.

POINTS AND BRIEF FOR PLAINTIFFS IN ERROR.

I.

The instruction given by the Circuit Court for the defendants was erroneous.

The mortgage from Howard to Harris, although recorded prior to the rendition of the judgment in favor of the plaintiffs, against Howard, did not show any title in Harris, *except* evidence was also introduced that there was default in the mortgage. There was no evidence whatever of default, by the production of the note or otherwise, unless the judgment on the proceedings by *sci. fa.* to foreclose be evidence of that fact.

Jackson ex dem Curtis v. Bronson, 19 J.R. 325.
Dickinson v. Jackson, 6 Cowen 149.
Knapp et al v. Price 24 Ills
decided April term 1863 – Ottawa.
Jackson v. Willard, 4 J.R. 42

II.

There was no evidence that the mortgage read to the jury by the defendants was foreclosed, or that default was made in the payment secured thereby, because,

1. There is nothing to identify and show that *the* mortgage in evidence was *the same* mortgage foreclosed by the judgment read in evidence. The writ of *sci. fa.*, if produced, would have described and set forth a copy of the mortgage, but the defendants only introduced a judgment in a proceeding by *sci. fa.* to foreclose *some* mortgage given by Howard and wife to Harris, on the same premises. The jury were directed to *presume* that the mortgage foreclosed was *the one prior in date and time of record* to the plaintiff's judgment. The evidence was in their power, and as they did not offer it, the *presumption* is that if produced, it would be against the defendants. It was the defendants' duty to prove that the mortgage foreclosed was filed for record before the plaintiffs' judgment was rendered.

Jones v. Guthrie, 23 *Ills.*, 421.

2. Even if the identity of the mortgage read, with that foreclosed, be admitted, the record of the judgment is not evidence against the plaintiffs, because,

[A.] The plaintiffs had a lien upon the premises by their judgment of June 1, 1857, subsequent to the mortgage of Harris.

[B.] The plaintiffs being subsequent incumbrancers, were necessary parties to a proceeding to foreclose.

[C.] The plaintiffs being necessary parties, and having a right to redeem, the proceedings by *sci. fa.* are not evidence against them, and they have still a right to redeem, and the mortgage as to them is to be treated as NOT FORECLOSED.

Haines et al. vs. Beach, 1 *J. Ch. R.*, 459.

III.

If it be said that the judgment upon the *sci. fa.* is a proceeding *in rem*, and therefore it was not necessary to make the subsequent incumbrancers parties, and the judgment is evidence against all the world, we insist that the proceeding cannot be sustained under the strict rule applied to proceedings *in rem*, and we point out the following objections:

1. There was no evidence of the service of the writ on the mortgagor and his wife, except the recital in the judgment that "the defendants having been legally served with *scire facias* as by the statute in such case made and provided," but whether such service was made on the persons, or there were two *nihils*, does not appear.

2. It does not appear that the Court had jurisdiction of the subject matter, or the special facts existed that authorized the Court to proceed. The writ which should show these facts was not offered. If offered, it might have been void, and it devolved on the defendant Harris to prove a regular proceeding strictly according to the statute, before he could cut off the rights of the plaintiffs.

Blackwell on Tax Titles, 81, 82, 86.
Smith v. Hileman, 1 Scam 323.
Young v Lorain 11 Ills 636.
Thatcher v. Powell, 6 Wheat 119.

3. The judgment was void because not against the property. The judgment was *in personam*, with an award of a special execution. This court holds a foreclosure by sci fa to be a proceeding in rem.

Menard v. Marks, 1 *Scam.*, 25.
Marshall v. Maury, 1 *Scam.*, 232.
White v Watkins 23 Ills 482.
Woodbury v Manlove 14 Ills. 216.

A judgment in rem is usually conclusive, or wholly inoperative.
1 Stark. Ev. 250.

IV.

The plaintiffs' second instruction, as prayed, was the law strictly. The modification of the Court could not destroy the *prima facie* right to recover made by the plaintiffs. The plaintiffs proved a judgment, execution, levy, sale and deed of the premises, as the property of Howard, the common source of title, and that the original sale defendant, Lance, was in possession at the commencement of the suit. That made a *prima facie* right to recover. The fact that Lance was tenant of Howard, could and would not alone rebut that *prima facie* case.

The judgment should be reversed for this error alone, because all of the facts embraced in the instruction modified and given were proven beyond controversy, and the jury were directed upon that state of facts to find against the plaintiffs.

V.

The certificate of acknowledgement to the mortgage from Howard and wife to Harris is insufficient, and therefore the mortgage was improperly admitted as evidence.

VI.

The certificate of record was insufficient to prove the time the deed was recorded, because it had no seal. The clerk is required to keep a seal of office, and that is required to make his certificate evidence.

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Hall & Smith

vs.

Lance & Harris

Pouts &c.

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