

No. 13324

Supreme Court of Illinois

Lance et al

vs.

Hall et al

SUPREME COURT,

SECOND GRAND DIVISION,

JANUARY TERM, 1861.

ROBERT P. HALL & EUSTACE H. SMITH,
Plffs in Error,
VS.
JOHN LANCE & JOHN HARRIS, Jr.,
Defrs 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 June term 1859.

4-5 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 his interests in this suit; that said Harris held a mortgage for \$1500 upon the premises sued
10-11 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.

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

16 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 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.

17-18 The defendants, on their part, offered in evidence a mortgage dated June 28, 1856, from 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.

- 19 The officer taking the acknowledgement certifies that personally appeared before him, &c.,
 "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.
- 20 The plaintiffs objected to the reception of evidence of said mortgage and certificates, but
 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:
- 20 "John Harris, Jr., vs. Charles Howard and Susan Howard.—Foreclosure by *scire facias*.
 "This day this cause coming on for a hearing, and the plaintiff appearing herein by his attor-
 ney, 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 sol-
 emnly 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 objec-
 tion 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."
- 28 But the Court refused to give the same as asked, but modified and gave the same by adding
 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 as-
 signment 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 defend-
 ant Harris.
 3d. The Circuit Court erred in admitting improper evidence on the part of the defend-
 ants 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 giv-
 ing 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.

88 - 6
Hall & Smith,
vs.
Lance & Harris,
Abstract

Filed Jan 7, 6
Wm. C. Curney
Chy

SUPREME COURT—JANUARY TERM, A. D. 1861.

JOHN LANCE, et al ,
 ads.
ROBERT P. HALL, et al. } Error to Fulton.

BRIEF FOR DEFENDANTS IN ERROR.

1. A mortgagee will be let in to defend an action of ejectment, against the tenant of the mortgagor.
3 Gilman. 600, and cases cited :

2. It is not necessary that a certificate of record of a deed be under seal, but if it were, the objection must be specially made in the court below, and cannot be raised here in the first instance.
Merrick v. Wallace, 19 Ills., 486.

3. The judgment on *sci. fa.* is sufficient, by its description of the premises, &c., to warrant the jury in finding that it was rendered on the mortgage in evidence.

4. The judgment of the court below will not be disturbed, though there may have been errors in the proceedings, if it appears from the record that substantial justice has been done between the parties.
Plan v. Badger, 23 Ills., 498.

M. S. KIMBALL,
Attorney for Defendants in Error.

Vance et al
ads
Hall et al

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98

Filed June 18-1861
L. L. Lund
Clark

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