

No. 14693

Supreme Court of Illinois

Scammon et al.

vs.

Swartwout

71641  7

STATE OF ILLINOIS,

Sept 7, 1864
SUPREME COURT,

THIRD GRAND DIVISION.

(Middleten)
No.

262

191

J. W. Middleten & Co., Stationers, 196 Lake St.

Scammon
vs
1864
Swarthwell
vs

To Supreme Court.
& Land Division
April 5 1864

J. J. Scammon & Co.
v. S.
Ornelius Swatowick

Stipulation

The Record in this case, by mistake fails to shew, what was the amount of the judgment in favor of Scammon against Perkins, rendered April 17, 1838 and it is agreed by and between the parties, that the record of that case shews that it was for the sum of Eight hundred & twenty five Dollars and cents. The record also fails to shew the date of the Sheriff's deed to the Off. Swatowick, and it is agreed, that it was dated and delivered Oct. 27, 1840

Sam. W. Fuller
For Perkins
Wm. M. M. M.
For Deft's execs

May 16, 1864

262 191
Scammell's

15.
Swaetwout

Stipulation

Filed May 18. 1864
J. L. S. S. S. S.

In Supreme Court of Illinois
Third Grand Division
April Term A.D. 1864.

J. Young Scammon
Thomas Kehoe and
Mary Daily
Plaintiffs in Error

v.

Cornelius Swartwout
Defendant in Error.

I, Samuel W. Fuller on oath say,
that the matters litigated in the above entitled
case, and presented by the record, were and
are litigated in good faith about a matter in
actual controversy between the parties, and
that the opinion of this Court is not sought
with any other design than to adjudicate and
settle the law relative to the matter in actual
controversy between the said parties to the
record.

Sam. W. Fuller

Sworn to and subscribed
before me. This thirteenth
day of May A.D. 1864.

L.eland C.R.

Supreme Court of Illinois

J. Young Scammon et al.
Pffs. in error

v.

Cornelius Swartwout
Def. in error.

Affidavit.

Filed May 10, 1864.
L. Island
Clk.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable E. J. Williams Judge of the Seventh
Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of
Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House
in the City of Chicago, in said County, on the Second Monday, (being the
Eleventh day) of April in the year
of our Lord One Thousand Eight Hundred and sixty-four and of the
Independence of the said United States the Eighty-eighth

Present, Honorable E. J. Williams Judge of the 7th Judicial Circuit }
of the State of Illinois. }

Joseph Knox States Attorney.

W. B. Hammond Sheriff of Cook County.

Attest, W. L. Church Clerk.

Cornelius Swartwout } in agreement
vs. } for Lot 6 Block
Young Scammon } 129 School Sec.
Mrs. Rhoda Mary Gentry } addition to Chicago
Widow }

Be it Remembered that heretofore
to-wit: on the 18 day of April in the year
last aforesaid there was filed in the Court
aforesaid in said Cause an agreed Statement
of facts in the words and figures following
to-wit:

In Cook County Circuit Court
of March Term A D 1864.

State of Illinois }
Cook County } L

Cornelius Swartwout	} an Applicant for Lot 6. Block 129 School Sec addition to Chicago
W.S.	
Young Scammon	
Thomas Kehoe & Mary Cathy Widow	

Agreed State of facts.

It is agreed that both parties derive title to the demanded premises from Thomas Jenkins who was the owner in fee of the premises in 1857 and remained such owner until his death August 2 1852. That Jenkins died intestate and left two heirs Ellen Jenkins and Maria Jenkins but who were not residents of this State and that no administrator of his estate has been appointed in this State -

It is further admitted that the plaintiff Cornelius Swartwout recovered a judgment against said Jenkins in the Circuit Court of Cook County March 17 AD 1858 for the sum of \$609.95. that execution issued upon this judgment March 19 1858 and was returned unsatisfied that on the 16th of March 1858 the plaintiff caused to be issued out of said Court the following writ of *Scire facias* to revive said judgment.

State of Illinois

2.
Cook County, I.L.

To the Sheriff of said County
Greeting: Whereas Cornelius Swartwout
twit on the Seventeenth day of March A.D.
1838 in our Circuit Court of Cook County within
and for the County of Cook by the judgment of
the same Court recovered against Thomas
Jenkins the sum of Six hundred Nine dollars
and ninety five Cents for his damages which
he had sustained by reason of the non perform-
ing certain promises and undertakings then
lately made by the said Thomas Jenkins to
the said Cornelius Swartwout and also Seven
dollars and ninety three Cents for his Costs
and Charges by him about his Suit in
that behalf expended. Whereof the said Thomas
Jenkins is convicted as appears to us of
Record and although judgment be thereupon
given yet Execution of the damages & Costs still
remaining to be made to the said Cornelius
Swartwout and after the giving of the said
Judgment to wit on the second day of August
A.D. 1832. the said Thomas Jenkins died intestate
Seized in fee simple of certain Lands and
Tenements to wit: Lot Number fifty Seven (57)
in the subdivision made by Peter Temple of Block
Seventy Six and Seventy Seven in School Section
addition to Chicago according to the recorded plat.

thereof filed for record in the Recorders office of Cook County September 27th A.D. 1835 in Book 4 Page 149 & 150 including all the right title and interest of the said Thomas Jenkins in and to said Blocks Seventy six and Seventy seven whereof he the said Thomas died seized as aforesaid.

Whereof James H. Pers is now tenant and also Lot six in Block one Hundred Twenty nine School Section addition to Chicago. Whereof J. M. Seamon is tenant also the South East quarter of the North East quarter of Section four teen township thirty eight Range thirteen East in the County of Cook State of Illinois and leaving Maria Jenkins and Helen Jenkins his heirs at law and to whom the said Lands and tenements aforesaid descended and whereas there are no personal representatives of the said Thomas Jenkins deceased and the said judgment still remains in full force and effect in no wise set aside reversed paid off or satisfied as we have received information of the said Cornelius Swartwout in our Court aforesaid.

Whereof the said Cornelius Swartwout hath besought us to provide him a proper remedy in this behalf and we being willing that what is just in this behalf should be done, Command you that you make known to the said heirs at

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law of the said Thomas Jenkins and also to
the said tenant of the tenements aforesaid
that they be before our said Court on the
second Monday of April next to show if
they have or know why the damages and
costs aforesaid ought not to be levied of
those lands and tenements according to the
force form and effects of the recovery aforesaid
if it shall seem expedient for him so to do
and further to do and receive what our said
Court shall then and there consider of him
in this behalf and have you then and there
this writ.

Witness William L. Church Clerk of our said
Court and the Seal thereof at Chicago in said
County this 16th day of March A.D. 1858.

Wm L Church Clerk.

which was served on James H. Rees the defendant
therein named on the 18th of March 1858 and
returned not found as to J. Young Scammon
Maria Jenkins & Helen Jenkins that an alias
writ of Sci. facias was issued out of said
Court and returned not found as to said J.
Young Scammon Maria Jenkins & Helen Jenkins
and that subsequently and on the 7th day of March
A.D. 1859 the following judgments of proval
was entered in said Cause.

March 7. 1859. Jenkins Swartwout.

U.S.
Maria Jenkins & Helen
Jenkins heirs of Thomas
Jenkins deceased and James
St. Rie's and Young Seamon
Cautnants of Thomas Jenkins
Deceased.

Sci. fa. to receive Judgment

This day Comes the said
Plaintiff by Roger Miller Lewis his Attorney &
it appearing to the Court that on the 17th of March
A.D. 1838 (of) in the Circuit Court of Cook County
Illinois the said plaintiff by the Consideration
and Judgment of said Court recorded against
the said Thomas Jenkins the Sum of Six hundred
and Nine Dollars and Ninety five Cents for his
damages which he had sustained by reason of
the not performing of Certain promises and
undertakings then lately made by the said
Thomas Jenkins to the said Plaintiff, and also
Seven Dollars and Ninety three Cents for his
Costs and Charges by him about his suit in
that behalf expended whereof the said Thomas
Jenkins is convicted as appears of Record in
said Court.

And it further appearing to the Court
that after the rendition of said Judgment
to wit: on the second day of August A.D.
1852. the said Thomas Jenkins died intestate

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and that he did die seized in fee simple of the following described land and tenements to-wit: Lot number fifty seven (37) in the subdivision made by Peter Grapple of Blocks Seventy six and Seventy seven in School Section addition to Chicago according to the recorded plat thereof filed for record in Recorder's office of Cook County September 27 A.D. 1835 in Book 4 Page 149. and 150. including all the right title and interest of the said Thomas Jenkins in and to said Blocks Seventy six and Seventy seven whereof the said James H. Rees is now tenant. And that he did die seized of Lot six in Block One hundred and twenty nine School Section addition to Chicago whereof the said J. V. Seamon is now tenant and also the South East quarter of the North East quarter of Section fourteen Township thirty eight Range thirteen East in the County of Cook aforesaid and the said Maria Jenkins and Helen Jenkins are the Children heirs at law of the said Thomas Jenkins deceased & to whom the lands and tenements aforesaid descended and that there are no personal representatives of the said Thomas Jenkins deceased and the said plaintiff having complained to this Court that he has received no satisfaction for his said damages and costs. And it appearing

to the Court that the said Judgment still remains in full force and effect and in no wise set aside proved paid off or satisfied. And in further appearing to the Court that due personal service of process of *Scire facias* issued in this Cause having been had on the said Defendants and they being now three times severally solemnly called in open Court come not nor does any person for them but herein they severally make default which on Motion of said Plaintiffs Attorneys is ordered to be and the same hereby is taken and entered of Record.

Therefore it is Ordered by the Court that the said Judgment be and the same hereby is revived as to the aforesaid Lands and Tenements and that an Execution issue on the same to the Sheriff of Cook County Commanding him to levy of and sell the aforesaid Lands and Tenements or so much thereof as may be necessary to satisfy the said Plaintiffs aforesaid Judgment interest and Costs as also accruing interest and Costs thereon. That Execution issued upon said Judgment May 2 1859 and was levied upon said demanded premises May 25 1859 and said premises were sold under said Execution to the Plaintiff June 16 1859. and a Certificate of such Sale duly filed in the Record Office of Cook County. and that Subsequently

And on the day of A.D. 18 a
Sheriff's deed of said premises was duly executed
to the plaintiff.

Drummond

It is also agreed that Martin H. Drummond
recovered a judgment against in the Municipal
Court of the City of Chicago against said Thomas
Jenkins impleaded with Reynolds & Gilbert
April 17 ¹⁸³⁸ (1855), that an Execution issued upon
that judgment dated January 14 1839 that
Drummond died in Will County Illinois July
18 1854 and his widow Sophia Drummond
was duly appointed Executrix of his last will
and testament August 17. 1854. that she assigned
the judgment in favor of her husband to James
H. Rees April 2 1858 who issued made affidavits
of Jenkins death that he died intestate leaving
no heirs in this State and had no Executors
or administrators of his Estate in this State and
prayed for a special Execution to issue against
the Lot in Controversy. That Execution issued
as prayed for April 7. 1858. was levied on the
premises in question April 8 1858 sold May
5 1858. and a Sheriff's deed made of them
to Rees August 9 1859.

That defendant Scammon was in posses-
sion of the premises at the Commencement of
this suit and sets up the deed to Rees as an
outstanding title to defeat a recovery by

the Plaintiff - All the foregoing facts
appear of record in the Circuit Court of
Cook County & Municipal Court Records
No 1017 -

Hyne Miller & Lewis plffs Attys
Sammon McCagg & Miller
for Defs.

And afterwards to wit at the April Term
of said Court to wit: on the 18th day of April
A.D. 1864. the following proceedings were
had and entered of Record. to wit:

Cornelius Swartwout
v.
Young Sammon Throckmole
and Widow Mary Dailey

Ejectment.

This day again come
the said parties by their Attorneys and this
Cause having been heretofore submitted to the
Court for trial and the Court having heard
all the evidence and arguments of Counsel
adduced by said parties and being now
fully advised of and Concerning the premises
doth find that the said plaintiff is the
owner in fee and entitled to the possession
of the premises in his declaration mentioned
To wit: Lot number Six (6) in Block Number
One Hundred & Twentynine (129) in the School

Section addition to Chicago in the County
of Cook and State of Illinois: and that
said defendants are guilty of unlawfully
withholding from the plaintiff the possession
thereof. Whereupon the Defendants
by their Counsel move the Court for a
new trial of said Cause which motion the
Court upon due Consideration thereof, over-
rules, to which ruling of the Court in over-
ruling said motion for a new trial the
Defendants by their Counsel now here, excepts.
Therefore it is ordered and Considered by
the Court that said Plaintiff do have and
recover of the said Defendants the possession
of the premises aforesaid and that he have
a writ of Restitution therefor.

And it is further Considered that said
Plaintiff do have and recover of the said
Defendants his Costs and Charges by him
about his Suit in this behalf expended and
have Execution therefor.

I, William L Church Clerk of the Circuit Court of
Cook County in the State of Illinois do hereby certify
that the above and foregoing is a true
copy of an agreed statement of facts and
the Record of judgment in the case
wherein Cornelius Smarttroat was plaintiff
and J Young Cammon Thomas Kehoe

and Widow Mary Daitey were defendants
 In Testimony Whereof I have
 hereunto set my hand and affixed the seal of
 said Court this 20th day of April 1864
 Wm^l Church
 Clerk



1862 191
 J. Young Scammum
 vs
 Amelius Swartwout
 Record & Court case

Filed Apr. 21. 1864
 J. A. Coleman
 Clk.

And now come the said J. Young Scammum, Thomas Kehoe, and Mary Daitey and say that in the foregoing record and proceedings there is manifest error in this -

1. That the Court used in finding the issues and rendering judgment for the said Amelius Swartwout

2. That the Court used in not finding the issues and rendering judgment for the said Scammum, Kehoe & Daitey

By their counsel
 Scammum, Kehoe & Fullin
 Minder in error

And the

Hope will bring
 all to due water

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Supreme Court of the State of Illinois,

THIRD GRAND DIVISION,

April Term, 1864.

J. YOUNG SCAMMON, THOMAS KEHOE, AND MARY DAILY,
WIDOW, *Plaintiffs in Error.*

v.

CORNELIUS SWARTWOUT, *Defendant in Error.*

BRIEF AND ARGUMENT

FOR PLAINTIFFS IN ERROR.

THIS was an action of ejectment, brought by Swartwout against Scammon, Kehoe and Mary Daily, to recover Lot 6, Block 129, School Section Addition to Chicago. The action was commenced in January, 1862, and after being continued from time to time, was at the April term, 1864, submitted to the court for trial upon the following agreed state of facts:

That Thomas Jenkins owned the demanded premises in fee in 1837, and until his death, August 2d, 1852. That he died intestate, and left no heirs resident in this State, and that no administrator of his estate has ever been appointed in this State.

Filed May 16
1864

S. L. Ward Clerk

Both the plaintiff and defendants claim title to the demanded premises under judgments against Jenkins, and the case will turn upon questions relating to the validity and regularity of the proceedings had to enforce those judgments.

Those proceedings, for convenience, are stated as follows :

PLAINTIFF'S TITLE.

Swartwout v. Jenkins.

Judgment, Cook Circuit Court, March 17, 1838, for \$609.95.

Execution issued March 19, 1838, which was duly returned unsatisfied.

Sci. fa. sued out March 16, 1858, against, *inter alia*, Scammon as terre tenant of Lot 6, Block 129, etc.

Served on Rees, one of the defendants, and returned not served on the others.

Alias Sci. fa. issued, but was not served on any of the defendants.

Judgment of Revivor, March 7, 1859.

Execution issued May 2, 1859.

Levied on demanded premises, May 25, 1859.

Sold by sheriff to plaintiff, June 16, 1859.

Sheriff's deed to plaintiff, 1860.

DEFENDANTS' TITLE.

Demmond v. Jenkins.

Judgment, Municipal Court of Chicago, April 17, 1838, for \$—.

Execution issued January 14, 1839.

Demmond died in Will county, Illinois, July 1854.

Sale was bad, if the Depts was good, as decided in
Bostwick
Melby
Bostwick
13. Sells. 4 12,

Sophia Demmond duly appointed executrix of his will, August 17, 1854.

She assigned the judgment in favor of her husband, to Rees, April 2, 1858.

Rees made affidavit of Jenkins' death; that he died intestate; that he left no heirs in this State; and that there was no administration of his estate in this State.

An execution issued in the name of Sophia Demmond, executrix, against the lot in controversy, among others as the property of Jenkins, deceased, dated April 7, 1858,—levied on the lot, April 8, 1858, sold by the sheriff, May 5th, 1858; and a sheriff's deed of it was made to Rees August 9, 1859, and the defendants below set up the title thus acquired by Rees, as outstanding title in him, to defeat a recovery of Swartwout.

Both judgments were rendered in 1838, and an execution was issued on each of them, within one year after its rendition.

An execution was issued on the judgment under which Scammon *et al.* claim title, twenty years, wanting ten days, after the date of the judgment, and nineteen years, two months and twenty-three days after the date of the first execution that was issued.

Where an execution has been issued within a year and a day after date of a judgment, another execution may issue at any time, without reviving the judgment by *scire facias*.

Lampsett v. Whitney, 2 Scam., 441.

Jackson dem. Thompson v. Stiles, 9 John. 391.

2 Tidd's Practice, 1104 and 994 in note.

Aires v. Hardress, 1 Strange, 100.

Thorpe v. Fowler, 5 Cowen, 446

Bank of Mississippi v. Catlett's Executors. 5

How. Miss. 176.

Payne v. Payne's Executors, 8 B. Mon. 391.

In this case the execution had issued more than twenty years after the last one, and was sustained.

Dowsman v. Potter, 1 Miss. 368. *Mo*

Jordan v. Petty 5 Florida, 326.

Demmond having died, an execution was properly issued in the name of the executrix of his will.

Revised Statutes, 1845, 307, sec. 40.

Being the act of February 19th, 1841.

Purple's Real Estate Statutes, 338.

Durham et al. v. Heaton, 28 Ills. 264.

As Jenkins died intestate, and there was no administrator of his estate, the execution in favor of Demmond, executrix, etc., was properly issued against the lot in controversy, as the property of Jenkins.

Revised Laws, 1845, 307, sec. 37.

Being the act of February 25th, 1843.

Purple's Real Estate Statutes, 348-9.

From these premises we conclude, that the execution under which Rees acquired title to the demanded premises, was regularly issued and levied upon the demanded premises.

The levy was made just eleven months before the judgment of revivor was entered in the proceedings, by Swartwout, to revive his judgment against Jenkins, and a sale was made on the Demmond execution, almost ten months before that judgment of revivor; the levy under the Demmond execution was made thirteen months and seventeen days before the levy of the Swartwout execution; and the sale under the Demmond execution was made thirteen months and eleven days before the sale under the Swartwout execution; and the deed to Rees was made more than a year before the deed to Swartwout; so that all the several proceedings had by the parties to the Demmond judgment, were prior, in point of time, to those under the Swartwout

judgment; and, we insist, ~~thus~~ gave Rees the paramount title to the demanded premises, and that Scammon and his co-defendants, may defend their possession under that outstanding title.

Rupert v. Mark, 15 Ill. 541.

The parties to these proceedings acquired their respective interests in the premises, by virtue of the levies of their executions. Neither of their judgments were liens on the premises, as against each other, "or *bona fide* purchasers, "or incumbrances by mortgage, judgments, or otherwise," after the lapse of seven years from the last day of the terms at which they were respectively rendered.

Revised Laws 1845, 300, sec. 1, which is the act of Jan. 17, 1825.

Purple's Real Estate Stat., 328.

If these views are correct, then the title acquired by Rees was paramount to that acquired by Swartwout, and the court below erred in finding the issues for Swartwout and rendering the judgment in his favor.

The judgment of revivor, it is hardly necessary to say, became a lien on the premises only from the date of its entry, and not from the time of suing out the *sci. fa.*, or serving it, and further, that neither of the writs of *sci. fa.* sued out by Swartwout were served on Scammon, who was described as the tenant in possession of the premises in controversy.

It was served on Rees, but he was not the terre tenant of this lot, but of some other property described in the *sci. fa.*, and not in question in this suit, and he was not, therefore, disabled in any degree from buying the demanded premises at the sheriff's sale under the ~~demanded~~ judgment, as he had no interest in them, or the proceedings against them. *demanded*

SCAMMON, McCAGG & FULLER,

For Plaintiffs in Error.

OTTAWA, May 13, 1864.