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No. _____

Supreme Court of Illinois

People, ex. rel., Keyser

vs.

charles Cugua et al

71641  7

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon --- November Term, A. D., 1861.

THE PEOPLE, &c.
for use of Valentine Keyser
vs.

CHARLES CUQUA, et al.

} Error to Wabash.

A B S T R A C T .

This was an action of debt commenced by plaintiff's against defendant, Cuqua, as principal, and the other defendants as securities, on the official bond of said Cuqua as Sheriff of Wabash County.

5] The declaration sets forth the election of defendant Cuqua, and the
7] execution of the bond in the usual form, and after setting forth that it
8] was the duty of said Cuqua to execute all process, &c., proceeds as follows: "And said plaintiff's further aver, that under and by virtue of the laws of this State it became, and was the duty of said Cuqua, so acting and being such Sheriff as aforesaid, whenever an execution should be placed in his hands to execute and the same should be by him levied upon personal property in his said County, and such property should be claimed by any person or persons other than the defendant or defendants in such executions so levied; that whenever and wherever any such person or persons not defendants in such execution aforesaid should claim such property so by him, Charles Cuqua, levied upon as the property of such person so claiming the same, and should then and there give to him, said Charles Cuqua, notice in
9] writing of his or her claim and intention to prosecute the same, it then and there became his duty, as such Sheriff, forthwith to summon a jury of twelve respectable householders of his County to meet at a place designated by him, the said Charles Cuqua, so acting as such Sheriff as aforesaid, the said time to be before the day appointed for the sale of said property, and then and there proceed to inquire by the oath of said jury whether the right of such property be in such claimant or not. And said plaintiff's aver and charge that heretofore, to wit: on the 13th day of April, 1857, two executions were issued from the office of the Clerk of the Circuit Court of White County,

Illinois, directed to said defendant, Cuqua, so being Sheriff of Wabash County, to execute, the first of said executions numbered 2,196, in favor of Isaac Keen and Cyprian Preston, trading under name, &c., and against Washington Wood and John Albeitz—the record of said executions numbered 2,197, in favor of Charles G. Shaw and others, trading, &c., and also against said Washington Wood and John Albeitz, which said executions came to the 10] hands of said defendant, Charles Cuqua, to execute on the 16th day of April in said year 1857, aforesaid,

And said plaintiff's further aver that afterwards, to wit: on the 21st day of said month of April, 1857, said defendant, Cuqua, so being such Sheriff as aforesaid, unlawfully and wrongfully levied said executions upon a large stock of dry goods, groceries, boots and shoes, hats and caps, hardware, queensware, glassware and woodenware, of great value, to wit: of the value of three thousand dollars, the same then and there belonging to said Valentine Keyser, for whose use the said People sue, of which the said defendant then and there had notice; and said defendant, Cuqua, so being Sheriff of Wabash County, thereupon proceeded to advertise said property of said Valentine Keyser for sale to satisfy said executions against said Wood and Albeitz.

And said plaintiff's further aver that in pursuance of the Statute in such case made and provided, said Keyser, for whom the said People sue, then and there, to wit: on the day and year last aforesaid, and before the day fixed by said Cuqua for the sale of said property, gave to him, the said Cuqua, so being such Sheriff, a notice in writing of the claim of him, the said Keyser, to the property aforesaid, so by him said defendant Cuqua levied on, and said Keyser then and there gave said defendant, Cuqua, a notice in writing of his intention to prosecute such claim to said property according to law.

11] And said plaintiff's further aver that said defendant, Cuqua, so having notice of the claim of said Keyser of his intention to prosecute the same unlawfully and knowingly did then and there refuse to said Keyser a trial of the rights of said property as allowed to said Keyser by law and as it was then and there the duty of said Cuqua to do. Whereby said stock of goods and every part and parcel thereof became, and was wholly lost to said Keyser. By means whereof and by force of the statute made and provided, an action hath accrued to said plaintiff's to demand and have of and from the said defendants the said sum of ten thousand dollars above demanded for the use aforesaid. Yet the said defendants, although often requested so to do, hath not, as yet, paid the same or any part thereof, but have hitherto wholly neglected and refused, and still do neglect and refuse to pay the same for the use aforesaid or any part thereof."

12] The second count of the declaration sets forth the execution of the bond and duties of the Sheriff's substantially as in the first count, and then proceeds as follows:

"And said plaintiff's aver that heretofore, to wit: on the 13th day of April, 1857, two executions were issued from the office of the Clerk of the Circuit Court of White County, Illinois, and placed in the hands of said defendant, Cuqua, first No. 2,196, in favor of Keen and Preston; the second No. 2,197, in favor of Shaw, Buell and Barbour, and both against Washington Wood and John Albeitz, which said executions came to the hands of said defendant, Cuqua on the 16th day of April, 1857, and said plaintiff's further aver that afterwards, on the 21st day of April, 1857, said defendant, Cuqua, without calling on said defendants in execution for real estate, as the law bound him, unlawfully and knowingly levied said executions upon a stock of dry goods, groceries, boots and shoes, hats and caps, then and there belonging to said Keyser, of great value, to-wit, of the value of three

thousand dollars, of the ownership of which said personal property said defendant, Cuqua, then and there had notice. And said plaintiffs further aver, that said defendant, Cuqua, having so levied upon the personal property of said Kyser aforesaid, then and there proceeded to advertise the property so levied upon for sale. And said plaintiffs further aver, that in pursuance of the statute in such case made and provided, said Kyser gave notice to said Cuqua, so being Sheriff as aforesaid, of his claim to said property, and of his intention to prosecute such claim. And said plaintiffs further aver that said Cuqua, so being Sheriff as aforesaid, and having notice of the claim to said property levied on by him, unlawfully and wilfully did then and there refuse to allow said Kyser a trial of the right of property in and to said personal property so by him levied upon as aforesaid, and as by the statute in such case made and provided said Kyser has a right to. Whereby said stock of goods aforesaid, and every part and parcel thereof, were wholly lost to said Kyser. By means whereof," &c., closing with the usual breach.

21] The defendants demurred to the declaration and assigned the following causes: "That the allegations in said 1st and said 2d counts in said declaration are too general. 2d. Said first and second counts do not state when any notice was given of damages of Keyser, for whose use said was brought."

22] The Court sustained the demurrer, and entered judgment against plaintiff's for cost.

The only error assigned is:

"The Court erred in sustaining defendant's demurrer to the declaration of plaintiff's.

BRIEF FOR PLAINTIFFS IN ERROR.

It was contended on the argument below, that the liability of the Sheriff should first be established by an action against him alone, before his securities can be made liable. This may once have been the practice; but if so, is now, we think, changed by our statute. Scates Comp. p. 1125, sec. 15. And in *The People v. Wardlaw et al.*, 24 Ill. Rep. 570, a declaration against the Sheriff and his securities was sustained.

The first special cause of demurrer is, that the declaration is too general. Under this assignment it was urged that the declaration ought to have described *particularly* each article of goods claimed by Kyser. From the very nature of the property in question, that would be almost an impossibility. It could not be expected that Kyser would know every article in a stock of goods amounting to \$3,000. After the levy, the goods were in Cuqua's possession, and Keyser had no means of obtaining any more definite description. Before the levy he could not be expected to know that a levy would be made, and therefore provide himself with a more full description of each article. The declaration describes the property sought to be recovered as fully as he was capable of doing.

As to the second cause of demurrer, its force is not perceived, and we presume it was inserted for form.

JOHN M. CREBS,

EDWIN BEECHER,

For Plaintiffs in Error.

Mr. Peper,
v.
C. Langwa et al.,
Adm't.