No. 8639

Supreme Court of Illinois

John C.Holliday et al

vs.

Henrietta Burgess,
Executors,

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN C. HOLLEDAY AND
HIRAM REED,

vs.

JAMES W. BURGESS.

ABSTRACT OF RECORD.

3 Action of Replevin, brought by Appellants *vs.* Appellees, March 13, 1861, to recover a quantity of corn, containing about 1200 bushels, more or less, in crib upon the Ingham farm, in said County.

4 Plaint in usual form.

5 Pleas:—

1st, General issue.
2d. Property in George H. Ingham.
6 3d. " " Augustus Ingham.
4th. " " Thomas P. Bonfield.
7 5th. Not property of the Plaintiffs.

7 A Justification. That, at April term of Kankakee Circuit Court, 1859, William Butten recovered judgment *vs.* Samuel S. Ingham and Geo. H. Ingham, for $197.00 and costs of suit. A writ of *fieri facias*, issued upon said judgment on the 14th day of January, A. D. 1861, directed to sheriff of Kankakee County. That the defendant, as such sheriff, levied upon said corn as the property of said George H. Ingham.

9 7th Justification similar to 6th plea.

[illegible]

10 Replications to 1st, 2d, 3d, 4th, 5th and 6th pleas simply traverse the facts therein alleged. that property was Inghams also

11 Replication to 7th plea denies the existence of such judgment and execution. Issues joined upon all the replications, and conclude to the County.

13 January term, 1863, trial by jury.

18 Bill of exceptions.

Plaintiff read in evidence deposition of Augustus T. Ingham, of Kankakee City.

19 In the fall and winter of 1860 and 1861, he owned 5 or 6000 bushels of corn, which he had raised on the Ingham farm. Sold 2900 bushels to plaintiff, in December, 1860, and January or February, 1861.

When sold, a part of the corn was in plaintiffs' warehouse, part in crib by the barn, a part unharvested. About 1200 bushels was in crib, upon which defendant levied an execution, after he sold it to Holliday & Reed.

20 The Ingham farm is in Kankakee County. He delivered part of the corn to plaintiffs, at their warehouse, and part of in the crib.

20 *Cross Examined.* George H. Ingham was not a partner in raising the corn. He and Truman Huling owned the land, from whom he leased it; he paid, as rent, $650 in money

20–21 He made a chattel mortgage of about 80 acres of the corn during the year 1861, to Thomas P. Bonfield, for the consideration of $600; it was that part belonging to Ingham.

21 I made the mortgage to accommodate George, who wanted to secure Mr. Bonfield for a certain amount of money. Don't know what George Ingham was owing Mr. Bonfield for.

Mr. Bonfield was doing some law business with George Ingham.

George Ingham united with me in the execution of the mortgage, and
22 was present and consented to it. Saw no money pass between Bonfield and George. I think the date of this mortgage was sometime in the Spring of 1860.

My contract with Holliday & Reed was made the first days of December, and was verbal, and made at Holliday & Reed's warehouse. I had sold some before.

23, 51 Holliday & Reed did not pay any money at that time, but paid me $312.50 on the first day of March, 1861, and were to pay me the market price on the first of June, 1861. I sold them all I would have to spare; delivered them the first in December, about 2300 bushels, delivered the last the first of March, 1861; I think it was as late as the 8th day of
24 March. They paid me more than the $312.50 for the corn; they paid some subsequent to December, 1860.

25 During the year 1860, I raised 5 or 6000 bushels of corn. George H. Ingham raised about 250 bushels, the most of which he fed. Never

sold Huling & Matteson any corn. I fed my stock out of the crib in 1860
26 and 1861. I traded George H. Ingham about 350 bushels of corn for oats in the latter part of winter, or early in the Spring of 1861. It was corn raised on that place, but not out of that crib. The plaintiffs did not
26 give their consent. The corn, when husked, was put in rail pens west of the house; some in barn, and in crib between barn and river, which is the crib before mentioned; some in log house, known as Selvy house. Holli-
27 day & Reed had several hundred bushels out of that house; about three
28 hundred bushels out of barn. Holliday received corn when delivered at warehouse. I delivered them the corn as soon as husked, at the warehouse, between the 1st and 15th of March, 1861.

I lived in one of the houses on the farm, and George Ingham in the other, in 1860 and 1861. In 1860 and 1861 George Ingham had, in his possession, one span of horses. After March, 1861, there was a span of gray horses on that place. I owned them. In January, George traded a
28 piece of land at twelve mile grove for a stud horse. George said if I would take care of the horse for a year, I might have the use of him. I agreed to it. I did not like the horse, and found that, by investing a little I could trade him for a team, that I had rather have than to have the stud horse. I kept the horses until last December. I had the privilege of
29 paying $300, or returning the stud horse to George. I sold the horses and turned the pay over to George. Up to April, 1861, I had on the place a span of large sorrel horses, two cows and one yearling. There was other stock on the place, belonging to Trueman Huling. I took care of the stock, and was to have $5 per month; never received any money; had use of the stock. Huling bought it from an execution or mortgage sale *vs.* George H. Ingham. Cobb got it when he purchased the farm.
30 A part of the stock, and sometimes all, for a portion of the time, were kept in a barn by George Ingham, which is less than one-half mile from my house. The boys who took care of the horses boarded with me.

31 I don't think George Ingham had any business in April or May, 1860; he was living on the place. I saw him often in the months of April, May, and June, 1860. Eugene Bell was driving his team most of the time while with me. The team helped do the work on the Ingham
32 farm during that year. George Ingham did not direct, but assisted some in planting the crop. He dropped corn in April and May; he helped in
33 threshing in July; helped harvest once in a while. Clark and George Ingham purchased the machine that done the harvesting. C. B. & A. T. Ingham formerly owned the plows, harness and wagons used on the place. George Ingham afterwards owned a part of them. I owned one wagon, and two plows, which I got of Sam. Ingham. The wagon was sold to Cobb after he purchased the farm, about the last days of March. Sold
34 articles to Cobb amounting to $500.00. Put check in Harwood's bank; had no deposit account with Adsit, or any Chicago bankers. George Ingham had no account with any Chicago banker, in his own or my name, that I know of. I have no written contract in relation to the purchase of property by Cobb.

35 I have been told by George H. Ingham that Cobb retained from him sufficient to pay the amount of an execution that was levied on the prop-
35 erty now in dispute. Holliday & Reed retained nothing to indemnify them against the execution. I never had any interest in the event of this Suit.

36, 51 Since the commencement of this suit, Holliday & Reed delivered to me a release ; don't know why they done it ; it was delivered to me about a week ago by Mr. Holliday, in front of the Eldred House.

George Ingham helped me shell corn a few days in December, 1860 ; he did not employ men to harvest the crop of corn, and direct in harvesting the same, no further than he was requested by me.

37 Have not paid Truman Huling any money for his place for 1860. I have had no settlement with him ; don't know whether I owe him or not. I had a written lease from him, drawn by Mr. Bonfield, dated in March,
37 1860. I paid George H. Ingham, for rent of his part of the place, in
38 1860, $650.00 ; had no written lease with him. It was 200 acres ; of this I had of George, I had twenty-two acres in wheat, and about one hundred and twenty acres in corn. Made agreement with George sometime in the spring of 1860 ; paid first rent in first days of August, which was $312.50 ; he gave me no receipt for it ; I paid it to Adsit, as his interest money, the
39 first days of August, 1861. I sent it to him through the mail, in a draft which I got of Holliday & Reed. At my request, Cyrus B. Ingham wrote the letter, and I mailed it. Cyrus reported that Adsit said it was all
40 right ; I never received any other reply. Paid George more money as rent on the first days of March, 1861 ; I paid him then $312.50, the same way I paid the other. I obtained drafts from same party, and same party
41 wrote the letter to Adsit. I don't think the lease from Truman Huling was ever in my possession ; I have seen it in Bonfield's office ; never saw it elsewhere. I did not read it.

George Ingham hauled the corn in dispute, from the crib to Holliday
42 & Reed's warehouse. He bought a wagon afterwards. I never saw him deliver it there ; he told me he did. John Harvey Cooly and Sylvanus Williamson helped him ; he used a span of gray horses, which were then mine, and teams belonging to the men that helped him. I did not employ the men, nor pay them for hauling. I don't know how much Holliday & Reed paid me for this crib ; they agreed to pay me the market price the 1st day of June, 1861. I delivered it the first days of March, 1861.
43 When we settled, he paid me sixteen cents per pushel, which netted me eleven cents per bushel. The corn was hauled by different persons, myself for one, but none from the frame crib by the barn ; George and others
44 hauled that. Holliday & Reed never paid me for 1200 bushels separate ; they paid me for about 2900 bushels. Settlement was made in summer of 1861, after their warehouse was burnt down ; there was not any money due me after the warehouse burnt down ; I was owing them about twenty dollars.

45 The crib of corn hauled by George was included in the settlement ; they allowed me 16 cents per bushel for it. After Cobb purchased the Ingham farm, he purchased about 300 bushels of corn of me, which was in the barn, some time in March, 1861.

46 Witness produced release from Holliday & Reed.

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47 Direct examination resumed.

George H. Ingham signed the mortgage because Bonfield insisted upon it. I paid George H. Ingham for all work done for me in 1860. I delivered the corn in dispute to the plaintiff before the commencement of this suit, and before the taking by defendant. The crib measured six or seven hundred bushels when hauled away by Holliday & Reed to their
51 warehouse; the whole account was burnt. There was no corn in the crib sold by me or any other person to Cobb. In my lease with George Ingham, I was to have the use of all the tools, and used them.

Holliday & Reed employed George H. Ingham to haul the corn in
48 dispute to their warehouse. The corn in dispute was all raised upon the land I leased from Truman Huling.

Re-Cross Examination.

George Ingham's account against me for 1860, was $112.00; a part was for work, and a part for money. I cannot answer any other way.
49 That was his account against me. I paid him as much as $40 for work on the farm for 1860; paid him the last in March, 1861; have no means of knowing the exact amount then paid him.

Know nothing about a contract between Holliday & Reed and Ing-
50 ham, by which Ingham was to haul the corn.

The last piece of 40 or 50 acres of corn, raised on the Ingham land, was kept separate.

52 Writ of Replevin and return read in evidence, and plaintiff rested.

54 Defendant introduced in evidence an execution in due form, issued by the Clerk of the Circuit Court of Kankakee County, dated January 14, 1861, directed to sheriff of said county to execute, which was levied upon the corn in dispute.

Plaintiff objected, overruled, and exception taken.

56 Defendant offered in evidence a chattel mortgage, dated May 21, 1860, made by Geo. H. Ingham and A. T. Ingham to Thomas P. Bonfield, being the same chattel mortgage spoken of by said Augustus T. Ingham, in his deposition.

Plaintiff objected, overruled, exception taken.

57 *Thomas P. Bonfield* testified that he was the person who took said
58 mortgage. Plaintiff objected to his testifying to the consideration of said mortgage; overruled, and exception taken. Witness states that said consideration was $100 and upwards, owing him by George H. Ingham, and to cover any loan of money for which he should go security for Augustus T. Ingham; that said Augustus afterwards borrowed from $100 to $200 of Holiiday & Reed, for which witness went his security; that George Ingham's name was on the note with Augustus; that witness transferred said mortgage to Holliday & Reed, Nov. 30, 1859, before which time the note, which witness signed to Holliday & Reed, was taken up and canceled. Assignment was made at request of both of said Inghams; witness received no pay for what George H Ingham owed him when he assigned the mortgage; he promised to pay him when he sold his farm, of which he

59 then had a prospect. George objected to executing the mortgage, but witness insisted upon it. Holliday & Reed had no notice of the consideration of the mortgage.

59 Sylvanus Williamsom was hired by George H. Ingham to haul corn in crib back of barn, on the Ingham place, to Geo. Huling's warehouse. Huling paid me $10, which I paid to George Ingham Augustus Ingham did not help. The bags had H. & R. on them. George H. Ingham told me if Holliday & Reed came across me when hauling the corn, to tell them I was hauling for myself; it was some I had traded tomb stones for. Holliday stopped me with one load I told him it was some I got for tomb stones; that seemed to satisfy him.

James W. Selvy was requested by George Ingham to help in threshing. George afterwards promised to pay me. Augustus Ingham's son paid me $5.00, and my brother-in-law paid me the balance. I don't know whether Augustus or George sont the money to me.

Defendant's instructions:

No. 2.—The Court instructs the jury, on the part of the defendant, that if they believe, from the evidence, that Augustus T. Ingham agreed with Holliday & Reed to sell them all the corn he raised on his place in 1860, more or less, at a stipulated price, and that the corn in dispute was the corn raised in 1860 on said place, yet that, of itself, does not give Holliday & Reed the property in the corn in question, and the jury should find for the defendant.

62

62 1st. If the jury believe from the evidence that the corn in dispute was owned in partnership, by George H. Ingham and Augustus, at the time the defendant received the execution against Samuel S. Ingham and George H. Ingham, then the said defendant had a right to levy upon and seize the whole of said corn, by virtue of said execution against George H. Ingham and Samuel S. Ingham, and sell the interest of the said George H. Ingham therein to satisfy said execution, and a sale of the said corn by Augustus Ingham to the plaintiffs, after the defendant received said execution, would not convey the property in said corn.

2d. The court instructs the jury on the part of the defendant that if they believe the witness, Augustus T. Ingham, has intentionally sworn falsely in any particular they have a right to disregard his testimony wholly.

63 4th. The court instructs the jury on the part of the defendant that if they believe from the evidence that the plaintiffs purchased 2,900 bushels of corn from A. T. Ingham, raised on the farm known as the Ingham farm, and that A. T. Ingham delivered to the plaintiff 2,900 bushels of corn, which the plaintiff accepted out of other corn than the 1,200 bushels in dispute, then that contract was filled, and the plaintiff would have no right under that contract to hold the corn in dispute, and in that case the jury should find for the defendant.

63 5th. If the jury believe from the evidence that the plaintiff purchased 2,900 bushels from A. T. Ingham, and that the crib of corn in dispute was contained in said sale and purchase, and that afterwards the plaintiffs received other to the amount of 2,900 in the place of the corn in controversy, then the plaintiff, under such contract, would have no right to hold the corn in controversy, and the jury should find for the defendant.

63 6th. The court instructs the jury on the part of the defendant, that in the sale of personal property, where anything remains to be done to complete the contract such as ascertaining quality, or delivering possession, or measuring o weighing the property, the title does not pass till the contract is thus completed, and if the jury believe from the evidence in this cause that Holliday & Reed purchased what corn was raised on the Ingham farm in 1860, or so much thereof as the said Ingham would have to spare, and that the corn in dispute was raised on the Ingham farm, 1860, and that the corn was yet to be hauled to the warehouse of the plaintiff, or was to be weighed or measured there, the title to the corn did not pass to the plaintiff, and the law is for the defendant.

64 7th. That if the plaintiffs in this suit, Holliday & Reed, recover at all they must recover upon the strength of their own title to the property in controversy, and if they have failed to prove to the jury that the corn was their corn, sold and delivered to them, they cannot recover, and it matters not whose corn it is.

8th. If the jury believe that George H. Ingham had an interest in the said corn, as a partner or otherwise, at the time it was levied upon by the defendant, then the defendant had a right to levy upon and hold the whole property in dispute, by virtue of a writ of execution against the said George H. Ingham, and a sale by the other parties made after the writ of execution came into the defendant's hands, would not convey the property, and in that case they should find for the defendant.

64 9th. That the execution in evidence became, and was a lien upon the property of George H. Ingham, from the date the defendant received it, and the plaintiffs were bound in law to take notice of it.

10th. That all sales of personal property made with the intent and purpose to defraud and delay creditors in the collection of debts, are void.

65 No. 9.—The Court instructs the jury that if, from the evidence, they believe that the witness, A. T. Ingham, and George H. Ingham were joint owners of the corn in dispute, subsequent to the defendant having received an execution against George H. Ingham and Samuel Ingham. and also that Augustus T. Ingham sold the corn to the plaintiff while the defendant had the execution in his hands, and that the sale was made for the purpose of hindering and delaying the defendant in the collection of the execution, and that either of the plaintiffs were knowing to the fraud and the purpose of the sale, then the sale is absolutely void, and the jury should find for the defendant.

62 & 65 To the giving of said instructions, plaintiff then and there excepted.

65 Verdict, not guilty.

Motion to set aside verdict, and for new trial, overruled. Plaintiff

66 excepted.

Judgment for defendant. Writ *De Retorno* ordered.

ERRORS ASSIGNED.

1st. Admitting incompetent evidence.

2d. Excluding competent evidence.

3d. Giving improper instructions.

4th. Overruling motion for new trial, and to set aside verdict.

5th. Entering judgment for defendant, and awarding a writ of *De Retorno*.

LELAND & BLANCHARD,

For Appellants.

[81-39-8]

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J. C. Holladay

vs

J. W. Burgess

Abstract

Filed May 6 1864

L Leland Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

JOHN C. HOLLIDAY, AND HIRAM REED,
vs.
HENRIETTA BURGESS, Executrix of JAMES BURGESS.

APPEAL FROM KANKAKEE.

POINTS.

I.

This is an action of replevin, brought by Holliday and Reed *vs.* James Burgess, Sheriff of Kankakee, to recover the possession of some 1,200 bushels of corn, in a crib on the Ingham ferm, which corn they claimed to be the owners of.

Defendant plead—

1st. The General Issue.

2d. That the corn belonged to Geo. H. Ingham.

3d. That it belonged to Augustus Ingham.

4th. That it belonged to Thomas P. Bonfield.

5th. That 'twas not the property of plaintiff's.

6th. That deft, as Sheriff, took it on Execution *vs.* Samuel S. and Geo. H. Ingham, issued on a judgment recovered against them, &c., in favor of Wm. Butler.

7th Plea avows the taking by deft, as Sheriff, ffic., upon the execution, ffic., without pleading the recovery specifically.

The replications to 2d, 3d, 4th and 5th pleas traverse the pleas.

There is but one replication to 6th plea, and that is, that the corn was at the time the property of plaintiff's, and not of Geo. H. Ingham. [See Record, pages 10 and 11.]

So that under that plea the judgment in favor of Butler *vs.* S. S. and Geo. H. Ingham is admitted; also the execution and the taking, and only the qustion of previous property at issue.

The Abstract states that the replication to the 6th plea traverses the facts of it, but this is only correct so far as the fact of the previous previous property is concerned, it does not deny the fact of the recovery of the judgment, or the issuing and levying of the execution.

Replications to 7th plea deny both the judgment and execution, and deny that the corn belonged to Geo. H. Ingham.

Under the issues then, the only question that can come upon the facts is, were the jury warranted in finding from the evidence that the corn was not the property of the plaintiff's, or that it was the property of Geo. H. Ingham.

We say they were fully warranted in their finding, and in the light of all the evidence could not have reasonably found otherwise.

But appellants, by their brief, seem to insist that the defendants are bound to make out a good title to the property, to take the burden of proof upon himself, although the plaintiff may not have made a *prima facie* case, simply because the defendant was Sheriff of Kankakee.

And in support of this position, the *assume* one of the very points in controversy, i. e., that the plaintiff was in possession of the property when the Sheriff took it.

We fully admit that possession of personal property is *prema facie* proof of ownership, but insist that no such possession has been shown by plaintiffs in this case.

All of the authorities cited by appellants are in cases where plaintiff had been in possession of the property levied upon by the Sheriff, and have no bearing upon this case, where such is not the fact, or at any rate where the fact was in controversy, and the jury have found in favor of defendant.

By reference to the Record, page 2, it will appear that the affidavit of of plaintiff's sets out that the corn was, at the time of suing out the writ, in a crib upon the farm of the Inghams.

This was March 13th, 1861.

The chattel mortgage set out, on pages 56 and 57 of Record, executed by Geo. H. Ingham, (the deft in execution,) and Augustus T. Ingham, (plff's only witness,) under seal, shows that the corn then (May 21, 1860,) growing on the George H. Ingham farm, was owned by them, and that they were both (George H. and Augustus T.) to have possession of it, &c.

The testimony of complainant's own and only witness, Augustus Ingham, shows (if it can be relied upon at all) that the 1,200 bushels of corn remained in a crib by the barn until June or July, 1861, and that then Geo. H. Ingham hauled most of it to the warehouse of plaintiff. See Record, page 42.

And the testimony of Williamson shows that George H. Ingham sold the balance of the 1,200 bushels to one Huling. See Record, page 59.

So that Geo. H. Ingham is the person in the *actual* possession of the 1,200 bushels of corn in controversy, from May 21st, 1860, to June, 1861, long after the replevin suit was brought.

And if any inferen·e is to be drawn from the fact of possession, it must be that George H. Ingham was the owner of the corn.

The only proof in the case, on the part of p laintiff's, is, the evidence of Augustus T, Ingham, contained in his deposition, and on this evidence they base their case.

I freely admit that this witness has done swearing enough and has sworn strong enough in his effort to make out a case for plffs, but I submit that a careful perusal of his examination and cross-examination will show conclusively that he lied wilfully and knowingly, both by perverting and suppressing the truth, and stating what he knew to be false, so that the jury were fully warranted if they chose to reject all of his testimony that was not supported by other evidence, This I presume they did, and I have no doubt this Court will sustain them in it.

I do not care to argue this question, and indeed could not present an argument so convincing as the simple perusal of the deposition of said witness, which I think shows conclusively that all of the Inghams were sharpers, and were endeavoring to defraud their creditors by a show of transfers and sales, which had no foundation in fact, and that in truth and fact Geo. H. Ingham owned this corn, either wholly or in part

The Abstract only sets out those parts of the deposition favorable to the plaintiff, and I request the Court to examine the record itself.

I insist that the plaintiff did not show even a *prima facia* case, and under all of the authorities the burden of proof is upon him.

Anderson v. *Talcote*, 1 Gilm, 371.
Vose v. *Hart*, 12 Ill., 378.

II.

It is insisted by appellant that the defendant was not entitled to recover because he did put in evidence the judgment mentioned in the 6th plea.

The conclusive answer to this point is that the existence of the judgment, the execution under it and the levy of the same upon the corn in question is admitted by the pleadings, so that 'twas not necessary to prove it.

The only replication to the 6th plea being that the corn was the property of plaintiffs, and not of Geo. H. Ingham.

Dana v. *Bryant*, 1 Gilm 107.
15 Ill. 336.

III.

The remaining errors assigned are to the instructions given on the part of defendant below.

We insist that all of the instructions were proper.

The 2d is objected to on account of the omission of mere formal words, but the jury evidently did not mistake the legal import of the instruction and were not misled thereby.

The 3d Instruction is the law, for although A. T. Ingham may have agreed to sell to Holliday and Reed all the corn raised on on Ingham's farm in 1860, and this corn in controversy was raised there, that did not make the corn the property of H. & R., especially when the evidence shows as in this case that the corn was not A. T. Ingham's to sell, but on the contrary was the property of Geo. H. Ingham; and when 'tis admitted by the pleadings that the Sheriff held an execution against him under which he had seized the corn.

The 4th and 5th instructions are law. There was no evidence tending to show that A. T. Ingham sold plffs more than 2900 bushels in all, so that the jury could not have been misled.

Plaintiffs say the 6th instruction was wrong because the whole crop of corn was sold, &c. The evidence of A. T. Ingham, plffs only witness, shows that he only agreed to sell *what he could spare of the crop*, so that there did remain something to be done before title could pass to plffs. And if as we say the corn belonged to Geo. H. Ingham, (the deft in execution,) it could not be corn to be spared by Augustus T. Ingham, and if it really belonged to A. T. Ingham, the very fact that it had not been hauled to warehouse of plffs and delivered to them would tend to show that he could'nt spare it especially in the entire absence of proof. We say the principle of the instruction is fully sustained in

Jennings v. *Gage*, 13 Ill. 611.
Low v. *Freeman*, 12 Ill. 496.
Chitty on Cont 375.
Okeefe Kellogg, 15 Ill. 352.
Updike v *Hunry*, 14 Ill. 372.

The 7th instruction does not come within the case cited by plffs, there the property was taken by the Sheriff from the possession of the plaintff without show of authority under execution, &c.

Here the corn is taken from a 3d person, one Geo. H. Ingham, under due execution, &c., and these facts are admitted by the pleadings. (See ante.)

The objection raised by plff to the 1st and 8th is, that there is no proof that Geo. H. Ingham and Augustus T. Ingham owned the corn together. We say there is.

The chattel mortgage shows it.

The possession of George H. shows it.

The hauling of it by George H. shows it.

And we insist that a thorough sifting of the deposition of plffs' witness, Augustus T. Ingham, will satisfy any one that such was the fact.

At any rate there was sufficient proof tending to show it, so that it became proper to submit it to the jury.

The 10th and 11th instructions are said not to be applicable because Butler was not a creditor.

The fact that Butler was a judgment creditor of Geo. H. Ingham was fully asserted by defts 6th plea, and not denied by plaintiff, and thus became an admitted fact. [See argument ante.]

IV.

This court has repeatedly decided that it will not disturb a verdict by which substantial justice has been done, on account of instructions having been incorrectly given or refused, nor because the jury have disregarded them.

Elam v. *Badger*, 23 Ill. 498.
Schwartz v *Schwarz*, 26 Ill. 81.

And in this case we submit that full and complete justice has been done, and the craftily contrived scheme of a set of sharpers, frustrated.

GLOVER, COOK & CAMBELL:

For Appellant:

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Holliday et al

vs

H. Burgess ex'x

Appees Points

Filed May 9. 1864

L Leland Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN C. HOLLIDAY AND HIRAM REED,

vs.

HENRIETTA BURGESS, EXECUTORS OF JAMES BURGESS,

APPEAL FROM KANKAKEE.

POINTS AND AUTHORITIES

FOR

APPELLANT.

This was an action of replevin by appellants against James W. Burgess, Sheriff of Kankakee county; the appellants claimed the corn in controversy, as the vendees of Augustus T. Ingham. The Sheriff claimed it by virtue of a judgment in favor of William Butler against George H. Ingham and Samuel T. Ingham, an execution issued on the judgment, and a levy upon the property as that of George H. Ingham; the pleas justifying the taking allege that it was the property of George H. Ingham, and that the Sheriff thereupon took it as he lawfully might.

The replications to these pleas of justification deny that it was the property of George H. Ingham, and also deny that there was any such judgment and

execution. The execution was introduced in evidence on the trial. The theory of the defence, as near as we can judge of it, from the instructions, and from the cross examination of the witness Ingham, appears to have been an inconsistent one. First, that the vendor of the plaintiffs was the fraudulent grantee of the defendants in execution, or of one of them, for the purpose of hindering or defrauding the creditors of the defendants in execution, and that plaintiffs had notice af the fraud, and, secondly, that George H. Ingham and Augustus T. Ingham were the owners of the corn, as partners, and that the lien of the execution attached to the interest of George H. Ingham before the sale of the corn by Augustus T. Ingham, to the plaintiffs below.

We claim that in any point of view that may be taken of this case, it was necessary for the defendant below to have introduced the judgment in evidence, although, generally, in trespass against a sheriff an execution alone, without proof of a judgment, will protect him, yet in replevin, when the Sheriff claims title to the property; or, as stated in the books, when he is an actor, claiming a return of the property replevied, he must show, in an action by a stranger, from whose possession he has taken the property by virtue of his process; 1st. Title in the defendant in execution. 2d. A judgment against him. 3d. An execution and levy. The possession of the plaintiffs below, therefore, is enough for them till the Sheriff has shown a better right to the property, and the judgment is we claim a necessary link in the chain of title to maintain the position that the plaintiffs are fraudulent grantees, to hinder and delay creditors. The judgment should have been introduced, otherwise Butler has not shown himself a creditor so that he can question the bona fide character of the conveyance, if any from defendants in execution to plaintiff's vendor, as to this branch of the subject the Sheriff is merely a nominal party, the real party in interest being Butler. Even in trespass against the Sheriff the judgment should be produced where there is a supposed fraudulent conveyance by defendants in execution to the plaintiff who sues the officer.

Martyn v. *Podgen, et al.*, ~~4 Burrows, 29.~~ 5 Burr 2631

But at any rate the Sheriff must produce his judgment, in order to show title as against one in possession, suing him in replevin, who does not claim under the defendant in execution.

Heath v. *Westervelt*. 2 *Sandf.*, 110.

In support of the foregoing views see, also.

Brown v. *Bissett*, 1 *Zabriskie*, (*N. J.*,) 46.
Goodman v. *Aylin*, *Yelverton*, 52.
Mathews v. *Caren*, 1 *Salkelds*, 107.
Starbridge v. *Unislow*, 21 *Pick.*, 86.
Stephens v. *Houghton*, 2*d Strange*, 847.
1 *Saund R.* 347, *note* 3.

[8439-42]

The case of *Wheeler* v. *McCorristen*, 24 *Ill.*, 40, and the case next following it, are authority to the effect that unless the Sheriff has shown a right to disturb the plaintiff below in their possession of the corn, the finding should have been for them, although they were not really the owners of the corn.

It seems, therefore, clear that the defendants below should, in order to have justified the taking the corn from the plaintiffs below, have shown title in some one other than the plaintiffs in possession of the corn, and have connected himself with such other title. In short the possession of the corn delivered to him by their vendor, is prima facie enough for plaintiffs below, and a good title till a better right in some one else is shown. If there is any evidence that George H. Ingham, or George H. Ingham and plaintiffs' vendor, as partners, were the owners of the corn at the time the execution went into the Sheriff's, we do not see it in the record. We insist, therefore, that the prima facie case of possession by the grantees of the witness, Ingham, is not at all interfered with. There does not seem to be any thing in the case to charge the plaintiffs below even with a suspicion that they did not purchase the corn in good faith, and the evidence is too vague, uncertain, and insufficient to create a belief that there was any covering up of the property of defendant in execution, by the vendor of the plaintiffs below. It is absurd to insist that the plaintiff's vendor was a fraudulent grantee of George H. Ingham, and that he was also a partner and tenant, in common with him. The witness, Ingham, says distinctly that he raised the corn as a tenant, for a cash rent, that it was solely his, that he and George were not partners, and that he sold and delivered the corn to the plaintiffs before the levy by the Sheriff. We think, therefore, that the plaintiffs below made a clear case by the evidence entitling them to a ~~record~~ recovery, and that the defendant below has entirely failed to rebut it.

Let us briefly examine the instructions given for the defendants below. The first objection to the first instruction is that there is no evidence at all that George H. Ingham and Augustus T. Ingham were partners, owning the corn as tenants in common, when the execution went into the hands of the officers, the witness, Ingham, says they were not, and no one says they were.

The fact that George H. Ingham and the witness, Augustus T. Ingham, joined in a chattle mortgage to Bonfield, is as explained, not at all inconsistent with ownership of the corn by Augustus, and all the acts of George in relation to the corn, do not seem to be inconsistent with the fact that Augustus alone raised and owned it as stated by him. Another objection to this instruction is that it is not alleged that the Sheriff levied upon the partnership interest of George H. Ingham, in the corn, nor that George and Augustis owned it as partners. The evidenco, if offered, would not, we insist, have been admisable, under the issues.

The second instruction should have contained the words: "from the evidence," after the word believe, and there is the same objection to the 6th instruction.

Ewing v. *Rankle*, 20 *Ill.*, 464.

[illegible]

We think, also, that it should have contained the word material before the word particular. The evidence, though knowingly untrue, about a collateral immaterial matter, ought not to authorize the jury to wholly disregard his testimony.

The third instruction was calculated to mislead the jury. If the defendant meant that these facts, without a delivery, were not enough, it should have been so stated clearly. The jury may have thought that a sale of all the corn raised, more or less, for a stipulated price, was not enough, without an ascertaining of the quality. Such a sale would be good as between the parties; one may sell his whole crop of corn in Deer Park, for instance, being unharvested, part in a crib and part in a warehouse, and a verbal delivery, without an actual handling or manucaption by the vendee, would change the property between the parties. Indeed, as between the parties the title to a chattle passes by the bargain without an actual delivery. If A should receive the price for a horse, then in another county or State the vendee would obtain title as between him and his vendor, without seeing the horse at all, as to third persons claiming through the same vendor, a delivery is necessary. The jury must have understood that the corn did not become Holliday & Reed's till hauled to the warehouse.

The fourth instruction should have been, if Holliday & Reed purchased only 2,900 bushels. The 2,900 may have been the supposed amount, and yet the real amount may have been more. If they purchased only 2,900, any that was left after that was delivered would belong to the vendor of the 2,900; but suppose the 1,200 bushels in the crib was not sold by the witness to the plaintiff, that is no reason why the verdict should be for the defendant. The case in the 20th Illinois cited alone would seem to settle it, that it does not follow that the verdict should be for defendants, because the witness, Ingham, owned the corn. These objections to the 4th apply with equal, if not more, force to the fifth instructions.

The sixth instruction is wrong. If the whole corn raised was actually sold, and the measurement was merely a means of ascertaining how much was to be paid, the title would pass before the amount to be paid was thus ascertained. If the corn was not to become vendee's till the measuring was done, of course it was not a complete sale till it was done.

But there may have been a complete sale of the crop, so as to change the title, though there was afterwards to be measurement in order to ascertain how much was to be paid.

The 7th instruction, we think, conflicts with the case cited from the 20th unless the Sheriff has shown some right to deprive the plaintiffs of their corn in their possession, again the instruction requires the plaintiffs to show that the corn sold and delivered to them was theirs, that it requires them to show that these grantees had a title to it; the fact that it was sold to them, and in their possession, was enough till the Sheriff proved his lawful authority to take it away.

The 8th instruction is substantially like the first, the expression, as a partner, or otherwise, is too loose. George H. Ingham may have had some interest which could not be taken on execution at all. The objections made to the first instruction apply also to this.

The 10th is not applicable because there is no proof that Butler was a creditor, and the Sheriff was a nominal party and the relation of debtor and creditor, should have been established by proof of the judgment. See this case cited from Burrows alone.

The same objection applies to the 11th. Other objections applicable to this have heretofore been pointed out to other similar instructions.

LORRAINE & BONFIELD, AND
LELAND & BLANCHARD,
For Appellants.

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Holliday & Reed Etal

vs

H. Burgess

Appellants Brief

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S. Sclater Clk

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