No. 105

Supreme Court of Illinois

Henry Curtis

vs.

Daniel S. Swarengin

(379) 7

Pleas before the Hon. Sam. McRoberts Judge of the second Judicial Circuit of the State of Illinois at a Circuit Court begun and held at Carlyle within and for the County of Clinton at the Court house thereof on the first Thursday after the second Monday in September in the year of our Lord Eighteen hundred and twenty six, and of the Independence of the United States the fifty first.

Be it remembered that heretofore, to wit, on the fifteenth day of August in the year of our Lord eighteen hundred and twenty six, Daniel Shwearingen (by his Attorney) filed in the Clerks Office his declaration, against Henry Curtis, of a plea of trespass, which is in the words and figures following (to wit

Daniel Shwearingen complains of Henry Curtis of a plea of trespass for that the said Henry on the twenty sixth day of December in the year of our Lord eighteen hundred and twenty five, and at divers other days and times between that day and the day of filing this declaration, at the County of Clinton aforesaid with force and arms broke and entered a certain close of the said plaintiff, situate lying and being in the said County of Clinton, and being the south East quarter of section No Eleven in township No two North of Range No four West of the third principal Meredian, and the acres from the North West corner of the South West quarter of section No twelve, thereunto adjoining and then and there took possession of, used and occupied a certain grist and saw Mill thereon standing, and forced and broke open the fore bay gate to the said Mill belonging and a certain chain of great value, to wit, of the value of twenty dollars, to the said gate affixed, and with which the same was fastened,

[205-1]

2

and severed, and also then and there cast down prostrated and destroyed the timber trees and underwood upon the said close standing and growing, to wit, Oak, Cherry, Walnut, ash, Hickory, Maple, Elm, Lynn and Sycamore, of great value, to wit, of the value of three hundred dollars and took and carried away and converted and disposed of the same to his, the said defendants own use, and held and continued in the possession and use of the said close from the time first above mentioned to the day of the filing of this declaration without the leave or license and against the will of the said Plaintiff and thereby during all the time aforesaid greatly incumbered the said close and injured damaged and destroyed the same and hindered and prevented the said plaintiff from having the use benefit and enjoyment thereof — And other wrongs and injuries to the said plaintiff then and there did against the peace and dignity of the people of the State of Illinois to the damage of the said plaintiff, the sum of One thousand dollars, and therefore he brings this suit.

D. Mills Atty. for

And thereupon, to wit, on the fifteenth day of August in the year of our Lord Eighteen hundred and twenty six, a summons issued from the Clerks Office of the Circuit Court of Clinton County directed to the Sheriff of said County, which is in the words and figures following to wit

State of Illinois
Clinton County } ss. The people of the State of Illinois

To the Sheriff of said county Greeting;

We command you that you summon Henry Curtis if he be found in your bailiwick to be and appear before the Judge of our Clinton county Circuit Court on the first Thursday after

3 the second monday in September next at the Court house in Carlyle to answer Danl. Shearinger of a plea of trespass damages one thousand dollars and have you then there this writ.

"Witness the Honl Saml. McRoberts Judge of the said court – Given under my hand and private seal (there being no official seal provided) at Carlyle this 15th. day of August 1826.

James H. Berry Clerk

and afterwards, to wit, on the fifteenth day of September in the year of our Lord Eighteen hundred and twenty six

On motion of the plaintiffs attorney, It is ordered that the Defendant file his plea in this cause by twelve oclock to day.

And thereupon came the Defendant and filed his plea which is in the words and figures following to wit

And the Defendant comes and defends the ~~force~~ and injury when &c and for plea says he is not guilty in manner and form as the plaintiff hath thereof alledged against him, and of this he puts himself upon the Country.

It is agreed that defendant may give Illegal evidence

Blackwell for Deft.

And the plaintiff likewise Wm H Brown for Plff

and afterwards, to wit, on the sixteenth day of September and year aforesaid, came the parties by their attorneys and the Jurors of the Jury whereof mention is within made being summoned and called, to wit, John Moore Bennet Short, Georg Bennet, Zachariah Muddux, John Clark, Oliver Maddux, Theophilus Harold, Mark Bare, James Buck, John Hall, Peter Culhouse and

4 Brazie Lowry, also come who to speak the truth of the matters in the said declaration contained, being chosen tried and sworn upon their oaths do say, that the said defendant is guilty of the trespass in said declaration set forth, and they assess the damages of said plaintiff on occasion of the premises, to seventy five dollars— Therefore it is considered by the Court, that the said plaintiff recover against the said defendant his damages by the Jurors aforesaid assessed, besides his costs about his suit in this behalf expended.

4a The Attorney for the defendant moved the Court for a new trial in this cause, which motion upon argument the Court overruled and on the like motion, the Defendant is permitted to file his bill of exceptions, which on being presented to the Court is signed— and that an appeal be allowed to the Supreme Court if the Defendant shall in twenty days file with the Clerk of this Court, a bond in a penalty of one hundred and fifty dollars with Charles Slade his security. which said bill of exceptions is in the words and figures following, to wit,

4b Be it remembered that on the trial of this cause, the plaintiff to prove title read in evidence a Patent dated in 1823 conveying the tract of land on which the Mill mentioned in the declaration, stands, to Slade, Herbets heirs and the plaintiff— the plaintiff proved that he claimed a third part of the locus in quo— and that John Smith claimed two thirds by lease from Slade— that by agreement with plaintiff and Smith they had for some time before the trespass supposed in the declaration occupied the said Mill alternately the said Smith for two weeks and the said plaintiff for one week and so on regularly by agreement of Slade, Smith and plaintiff, that on said plaintiffs week his occupation of the Mill was

4c

always exclusive, and that during said Smiths two weeks his occupation was exclusive - that it was their practice to commence their week or two weeks occupation on Monday morning about the usual time of going to work - And that one of them always used and occupied the mill if he chose through Sunday and up to monday morning until the other would come to commence his week, that the two weeks preceding the twenty sixth day of December 1825, (which was monday) were Smiths weeks for occupying said mill, plaintiffs son on the preceding Sunday night fastened the gate of the mill race with a chain and lock - that it had not been usual to lock said gate. - that said gate was not on the tract mentioned in the patent. that a part and parcel of said mill tract, that they occupied it alternately as they did the mill - The defendant proved that some time in the week preceding the said 26. of December 1825, he applied to said Smith to get possession of said Mill and premises, and that said Smith for a stipulated price let said defendant have all the possession that said Smith had in the mill and premises, and that said defendant entered upon and occupied and used said mill and premises from some time about the middle of the week next preceding said 26. of December, and continued to occupy it during that week - that defendant a little before day on the morning of said twenty sixth (monday and which would have been plaintiffs week by the manner of previously occupying the mill) went to the mill and forced off the chain from the gate threw in the water opened the gate and continued to occupy the mill with Smith alternately, from that day to the commencement

[105-3]

of this suit. The defendant offered in evidence to prove a right of entry the following Certificate.

(State of Illinois
Clinton County } I do certify that by virtue of writs of executions to me directed by the Clerk of the Circuit Court of Washington County wherein Beverly Watkins and others was plaintiff and Daniel Swearingen defendant. I did expose to public sale on the tenth day of this Inst the one undivided third part of one saw mill and grist mill and the land thereunto belonging being the third part of the north East quarter of sec Eleven Town 2 North of Range 4 West also the third part of ten acres of land adjoining the same where the race is opened for the said mills, the said property being exposed to the highest bidder was bought by Henry Curtis who had control of the said executions, who bid three hundred dollars it being the highest bid and two thirds of the valuation of the said property, now if the said D. S Swearingen dont redeem the said property within twelve months from the day of the said sale & the next creditor within the limited time by law according to law, then the said Curtis will be entitled to a deed for the same

Given under my hand this tenth day of December 1825

John J Carrigan Sheriff)

from the Sheriff of Clinton County and offered to prove that although the certificate misscalls the quarter section by number, that it was in fact levied upon said mill and mill track - defendant likewise offered in evidence three several executions from the Washington Circuit Court against said plaintiff, and proposed to prove by the Sheriffs return thereon and other evidence that said

Sheriff had levied said writs on said plaintiffs interest in said Mills and mill tract and the race tract and had sold the same as mentioned in said Certificate to the said defendant, to all of which evidence the said plaintiff objected, and the Court sustained said objection and rejected the proposed evidence. When plaintiffs son put the chain and lock on the race gate on Sunday night one of the witnesses was with him. they did not into the mill but went past it, and did not see any person in it, one witness said he believed that no person was in the mill on Sunday, as the water was scarce - another witness said he went past the mill on said Sunday and believed that defendant or some of his family was in it, but was not certain of it, he knew defendant occupied it through saturday the 24. This was all the evidence.

The defendant moved the Court to instruct the Jury that if they believed from the evidence that plaintiffs possession was not continuous, he could not recover in this action but for the first entry and first weeks occupation of the premises by defendant; that if they believed from the evidence that defendant entered under Smith by contract the week preceding the said 26 of December, and occupied for that week as Smith had a right to do, that his entry was lawful and that the retaining of possession by defendant on Monday said 26 and thence forward did not make him a trespasser and they should find for the defendant.

The Court refused to give the instruction asked for; but instructed the Jury that the plaintiff had a right to the possession of the premises on said Monday the 26 December in pursuance to their agreement, and that if the defendant held the possession against plaintiff on that day, he was.

[05-41]

a trespasser and the action will lay. To all which opinion and decissions of the Court the defendant excepts &c. The defendant moved for a new trial on the ground that the Judge misdirected the Jury, which motion is overruled, to which decision the defendant likewise excepts, and prays this his exception may be signed sealed &c which is done &c.

Saml. McRoberts

Judge of said Court Seal

Pd I instructed the Jury that they must disregard the claim for cutting timber which was proved; that the cutting timber was an injury to the freehold, not to the possession of the mills &c &c and that one of the joint owners of the land could not maintain trespass for an injury to the freehold without joining the others — that this action could only be maintained for an injury to possession.

Saml McRoberts

Judge of said Court

And afterwards, to wit, on the fourth day of October in the year Eighteen hundred and twenty six came the aforesaid Henry Cenlis and filed his bond, with Charles Slade his security, which said bond is herewith transmitted

State of Illinois }
Clinton County } I James H Berry Clerk of the Circuit Court of said County of Clinton, do hereby certify that the foregoing is a true transcript of the proceedings of said suit as appears on the Records of said Court, and the several documents therein mentioned to be a true transcript of the originals on file.

In testimony whereof I have hereunto set my hand and private seal (there being no official seal as yet provided) at Carlyle this twenty first day of December in the year of our Lord Eighteen hun

- died and twenty six.

James H. Berry clk.

[005-5]

Henry Curtis

13 Wms Appeal

Daniel S Swaringen

Filed Dec 29. 1826

J M Duncan

105

Henry Curtis
vs
Danl Swearingen } Appeal from Clinton Court

This was an action of trespass for breaking and entering the Close of said Swearingen who was plaintiff. Defendant pleaded not guilty with leave to give title in evidence. Verdict for plaintiff below and motion for new trial and overruled - Opinion of the Court excepted to - The principal grounds in bill of exceptions are That the plaintiff below at the time of trespass had possession of the locus in quo one week out of three weeks alternately - That during one of the terms of two weeks whilst Swearingen was not in possession but whilst Smith was in possession and had right to possession Curtis entered under said Smith and ejected & delivered possession to Swearingen when his time of one week arrived which was, if any, the only trespass entry. The defendant offered to give in evidence three executions against said Swearingen which were levied on the locus in quo and sold and Curtis became the purchaser Court rejected the evidence — Defendant moved the Court to instruct the jury that if they believed from the evidence that said Swearingen's possession was not continuous they could only find for the original entry and first week's possession of the locus in quo and further that if the jury believed from the evidence that when Curtis first entered, he entered under & by authority of Smith his entry was lawful and his subsequently holding over and refusing to give possession to Swearingen did not make him a trespasser and the action would not lie The Court refused to give the instructions prayed for but instructed the jury that the plaintiff below had a right to the possession of the premises on monday the 26 Dec. and that if Dft below held the possession against Plf below on that day he was a trespasser and the action well lay

[05-67]

Points

1 Judgment ought to have been given for the Plaintiff

2 Court should have told the jury that Lucas upon could only recover for the original entry and first week possession

3 Court should have told the jury that if they believed from the evidence that Curtis entered under both his entry was lawful and holding over did not make him a trespasser

4 Court erred in instructing the jury that the holding over of Curtis made him a trespasser

5 Court erred in refusing the evidence and granting a new trial

Blackwell for Plff

1154 Sel. N. P.

103

State of Illinois, Supreme Court Sept. Term 1820

Henry Curtis
vs
David Swarengin } appeal from Clinton Circuit Court

And now at this term, to wit, the September term of the Supreme Court of the State of Illinois, came the appellant Henry Curtis, by D. Blackwell his attorney, and says, that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error, in this, to wit.

That in the record and proceedings aforesaid, the Court below rendered judgment for the said Swarengin against the said Curtis, when by the law of the land, the said Court ought to have rendered judgment in favor of the said Curtis, and against the said Swarengin.

2nd The Court below erred in ~~sustaining~~ rejecting the evidence offered by said Curtis, as mentioned in the bill of exception.

3rd The Court below erred in refusing to give the instruction to the jury prayed for by said Curtis as stated in said bill of exception.

4th The Court below erred in giving the instruction to the jury which was given, as stated in said bill of exception.

5th The Court below erred in refusing to grant a new trial, and in rejecting the evidence

Wherefore, for the errors aforesaid, and for other errors manifestly appearing on the record and

[105-7]

proceedings aforesaid, as in the rendition of the judgment aforesaid, the said appellant prays that the said judgment may be set aside, reversed and for nothing esteemed, and ~~[illegible]~~ that he be restored to all things of which he has been divested by said judgment.

L. G. Blackwell
atto for appellant

And the said Daniel S. Swearingen by B Mills his attorney comes says that in the record & proceeding aforesaid & in rendering the judgment aforesaid there is no error.

B Mills atty

Henry Curtis
vs Sci fa & c
Dan S Swearingen

Filed Dec 29/38
J M Duncan

Know all men by these presents that we Henry Curtis and Charles Slade are held and firmly bound unto Daniel L Swarengin in the penal sum of one hundred and fifty dollars to the and faithful payment of which sum we bind ourselves and our Executors and Administrators jointly and severally and firmly by these presents Signed Sealed and delivered this fourth day of October 1852

The condition of this obligation is such that whereas the said Henry Curtis has this day appealed from a judgment of the Circuit Court of Clinton County in certain action of trespass wherein said Daniel L Swarengin was plaintiff and said Curtis was Defendant now if the said Henry Curtis shall duly prosecute said appeal with effect and shall pay all the costs & charges and condemnation of the Court in case said judgment shall be affirmed then this obligation to be void otherwise to remain in full force and effect.

Witness
Harry Wilton

Henry Curtis [Seal]

Charles Slade [Seal]

[105-8]

Appeal Bond

H Curtis and
Elias Slade

approved and
filed this 4th
day Oct. 1826
James Berry
Clk

Filed Dec 29. 1826
D McDuncan

Curtis
et
Swearingen

Appeal from Clinton County

This was an action of Trespass for
breaking and entering the close of the P
This case presents for consideration the
question, whether persons may exercise
a subdivision of time for the possession
occupancy of the whole of a tract
of real Estate? Joint Tenants may
make subdivisions of premises and of
the occupancy thereof, [illegible]
and may maintain several actions
according to this decision, it is thought
that the subdivision of time for the occupancy
is analagous and may be legally done
The premises in question were alternately
occupied by Swearingen & another person
of the name of Smith a joint owner of 2/3
of the premises with Swearingen. Smith
occupied for two weeks & Swearingen for
one in succession. From the evidence
it appears, that Swearingen came into
his possession by the locking of the gate of
the Mill on the last Evening of Smith's
two weeks by his agent. The contention

105-97

The holding of possession therefore under colour of the previous entry under Smith whose right expired with the two weeks was tortious. and the Court below properly instructed the Jury, that Curtis was a Trespasser. — The offer to give in evidence the three executions against Swearingen were we think properly rejected. — There was no offer to show a Judgment, & the regularity of the Sale; and it is not pretended that any deed was ever executed by the Sheriff to Curtis as the purchaser of the premises in question. — I am of opinion the Judgment should be affirmed —

Curtis
vs
Swearingen

Opinion

Filed Feb 13. 1837
Jm Duncan
Clk

Entered

1057

Kenny Curtis
vs
Doe ex dem
Daniel L. Swearingen

This was an action of Ejectment brought to recover the undivided moiety of a tract of Land in the County of Washington A number of errors have been assigned, but from the view we have taken of the case, it will be unnecessary to decide more than the following question, to wit. the Sheriffs Deed to the premises was sufficient to convey Ryan's interest in the premises? The objection taken to the Deed is that the Sheriff below did not prove by parol that it does not appear from the Deed, that the premises were appraised & then sold for 2/3 of the valuation. This question is one of great importance to the interests of community & deserves the most serious & attentive consideration of the Court. The decision will form a highly important rule in the transfer of real estate, that will may affect the rights of great numbers of individuals. The transfer of real property by a judicial sale is unknown to the Common law, but is only authorised by the Statutes of this State. The Legislature in subjecting real estate to sale on execution have clearly the right to prescribe the terms on which such sale may be made. Any material departure from the rules prescribed by the Statute will render the sale void. What are the rules prescribed by the Statutes in relation to sales on Executions? It must be confessed that the Court would find some difficulty in reconciling the 2d & 8th & 22d Sections of the act entitled "An act subjecting real estate to execution for debt & for other purposes" passed 22 March 1819 But what ever uncertainty might grow out of the attempt to reconcile

[005-10]

the conflicting provisions of these sections, yet the Court have no doubt, that the Legislature intended by the 22nd Section to require that all real estate should be valued before sale - This section is as follows "That all real estate that shall be ordered to be sold under the provisions of this Act, shall be valued by three disinterested freeholders of the County in which the same may be situated, who shall be appointed by the Sheriff or other Officer sworn to take into consideration the true value of such estate in cash & the said Sheriff or other Officer shall then proceed to sell the same - Provided, That the said land or freehold shall bring the amount of its valuation as aforesaid, or at least two thirds thereof; but in case the said land or freehold shall not bring the amount of its valuation or two thirds thereof then the said Sheriff or other Officer shall continue the sale until the same shall have been offered on three different days, allowing the space of 20 days between each day of sale giving due notice thereof as heretofore directed, unless the person in whose favour the execution shall agree to take the same at the valuation made as aforesaid."

This Statute was amended by an Act passed the 15 Feby 1821 which seems to have escaped the notice of the Counsel on both sides - By the 3d & 4th Sec. of the amended Act the Legislature enacted that real estate cannot be sold on execution unless it will bring 2/3 of its valuation. The 3rd Sec. is intended to authorise lands that have been already valued & not sold for want of bidders to 2/3 of the valuation, to be sold for 1/2 of the valuation. The 4th Sec. of the amended Act is, That when any real estate shall hereafter be levied upon by virtue of any execution hereafter to be issued & shall have been twice offered for sale under the provisions of the act to which this is an amendment & may not brought the amount of its valuation or two thirds thereof, upon the third or any subsequent offering, the Sheriff or other Officer shall

proceed to sell it to the highest bidder for what it will bring in ready money, having first given the 15 days notice as aforesaid".

My conclusion is that the Sheriff was bound to proceed on the execution mentioned in this case according to the directions of the 22nd section of the original act, as modified by the 4th section of the amending act. From which it will result, that the Sheriff was bound to have had the premises valued by 3 disinterested persons on oath, advertised for twenty days, when not sold, he should again have advertised for 20 days more & if not sold he could according to the above recited 4th section sell them for what they would bring in ready money having first given 15 days notice of the sale.

Can the Court presume that the Sheriff has complied with these express provisions of the Law? I think not. Would not any Lawyer be startled at the proposition, whether the Court would presume in favor of a Sheriff's deed, that the Sheriff had an execution? that the execution was based on a judgment? Yet there appears as reasonable as the presumption that the Sheriff has obeyed the mandate of the Statute without showing the fact. Every agent, whether public or private, must act within the powers delegated to him & must show that in all essential particulars he has not varied from them. If a party is to be deprived of his property without his consent, the law that authorises him to be dispossed must be obeyed & he has a right to call for proof that he has not been illegally divested of his estate. The argument that good policy requires that public sales shall be supported whether the provisions of the Statute have been substantially complied with or not, does not appear to be entitled to much weight. Whether the Land has been appraised or not, & if so to what point that we can give our attention very readily be ascertained by the bidders - calling for the exhibition of the valuation - We have hitherto considered this case with reference to our Statutes & our general principles

[105-117]

ciples – We are however not without authorities on the very point. In the case of N. Patrick vs Gideon Oostmont 1 Ohio Repts 27, two questions were submitted to the Court 1 was it necessary under a Sheriffs Deed to exhibit the appraisement? 2 Second was the appraisement sufficient. The objection to the appraisement was, that it did not appear to have been made on Oath – The Court consisting of Judges McLean & Burnet, held that a sale without an appraisement was void, & rejected the Sheriffs Deed because it did not appear that the appraisement was ~~not~~ on oath. They refused to presume that the oath had been taken. It has also been decided in Tennessee (1 Yerg's Repts 109) that in order to make out a title to Land by the Levy of an Execution it must be shown that the appraisers were disinterested freeholders & that they were sworn according to Law.

In the Case of Parker vs Rule's Lessee 9 Cranch 64 the Sup. Court of the U.S. decided, that, under the land tax act of the 14th of July 1798. c 92, before the Collector could sell the land of an unknown proprietor for non payment of the tax, it was necessary that he should advertise the Copy of the lists of lands &c & the statement of the amount due for the tax, & the notification to pay for sixty days in four Gazettes of the State, if there were so many printed therein. Again in the case of Stead's executors vs Course 4 Cranch 403 & which arose under the tax laws of Georgia, The Sup Court decided that an Officer selling land for taxes, must act in conformity with the law from which his power is derived & the purchaser is bound to inquire, whether he has so acted.

In the Case of Williams vs Peyton 4 ~~Cranch~~ Wheaton 77. the same Court held, that in the case of a naked power not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it. That the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under ~~it~~ is as much bound to prove the performance of the act, as he would be bound to prove any matter of record, on which the validity of the Deed might depend." And in this last case the Court decided that the Collector's deed was not prima facie evidence.

The Court have examined the cases decided in the Kentucky

Courts, referred to in Plff's argument, but think they have but little application to this case. One of the cases was a sale of personal property which for obvious reasons, are governed by different rules from those of real property. Another of the cases referred to, was the sale of land for taxes. The facts of the case are however so imperfectly stated that it is impossible to extract from the case any rule applicable to the decision of this case.

The [illegible] was a case of the sale of land on execution, the Court are perfectly willing that the case was rightly decided under the Kentucky Statute. This Court cannot however accede to the arguments of the Counsel, as to what true policy dictates on this subject. We cannot regard the question as altogether a question of policy, but more a question of positive law.

In relation to the cases cited from New York, there can be no application to a positive statute, making [illegible] palpable however may be his departure from its provisions.

The Court feel themselves constrained to say that the Sheriff's deed unsupported by any proof that the land had been valued, was insufficient to entitle the lessor to recover. The judgment must be reversed with costs.

[105-12]

[illegible] Spen[illegible]
[illegible]
[illegible]
[illegible] al exdem
[illegible] Swearingen

Filed Dec. 23, 1[illegible]
J. M. Dunca[illegible]

777