Sweeney Vs. Lomme

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Decided On : 1874

Appeal No. : 89 U.S. 208

Appellant : Sweeney

Respondent : Lomme

Judgement :

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Sweeney v. Lomme

89 U.S. (22 Wall.) 208

ERROR TO THE SUPREME COURT

OF THE TERRITORY OF MONTANA

SYLLABUS

1. In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given, depends upon the code of practice of Montana Territory, this Court will not reverse

the decision of the supreme court of that territory on the question, that being a question on the construction of their own code.

2. In a suit on a replevin bond, the defendants cannot avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or for its value, even if that were an error for which that judgment might be reversed.

3. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability.

4. Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the replevin bond, are the elements of ascertaining the damages in the suit on that bond.

5. When it appears for the first time in the argument of a cause that the

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existence of the judgment appealed from is not stated in the record, the court of its own motion may allow the plaintiff in error a certiorari and time to produce a certified copy of it.

The Civil Practice Act of the Territory of Montana thus enacts:

"Every action shall be prosecuted in the name of the real party in interest."

"In an action to recover possession of personal property judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for the detention of it."

This enactment being in force, Lomme sued B. & C. Kintzing in one of the district courts of the said territory as partners to recover a debt, and in that suit issued an

attachment, under which the sheriff seized certain personal property alleged to belong to the Kintzings as security for the satisfaction of any judgment that might be recovered against them.

In this state of things. one Watson brought replevin against the sheriff to recover possession of this property, and -- two persons, Sweeney and Holter, entering as sureties into a written undertaking to the sheriff, in $5,000, conditioned "for the return of the property to *him,* if return thereof should be adjudged, AND for the payment to him of such sum as might be recovered against Watson" -- the property was delivered to Watson.

In this action of Watson against the sheriff, the jury found a verdict "for the defendant," on which the court entered a judgment to the effect that the sheriff "recover from the plaintiff, Watson, the possession of the property replevied in this action" and his costs.

The jury did not find the value of the property replevied, nor was any alternative judgment entered against Watson, as required by the already quoted section of the Civil Practice

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Act, for the value of the property in case a return could not be had.

No execution was ever issued on this judgment for the return of the property, nor was it ever returned or offered to be returned to the sheriff by either Watson or his sureties.

Going back now to the original suit. In that suit, Lomme obtained, October 27, 1870, judgment against the Kintzings for $4,954, with interest at 10 percent and costs, about $1,300 of which was got on execution.

Thereupon he sued Sweeney and Holter as sureties in the undertaking given to the sheriff in the replevin suit brought against him by Watson for the property attached by the sheriff at the instance of Lomme, as the property of the Kintzings, the object of this suit being to recover from the sureties the value of the property

replevied or so much thereof as might be necessary to satisfy the balance of the amount due upon the judgment obtained by Lomme against the Kintzings.

On the trial, the plaintiff, Lomme, gave no evidence of the assignment or of the delivery of the replevin bond to him by the defendant in the action of *Watson v. The Sheriff,* and was permitted to prove the value of the property attached, at the time it was replevied by Watson, this value being fixed by witnesses at from $7,000 to $10,000.

At the conclusion of the plaintiff's case, the defendant moved for a nonsuit on the ground that Lomme could not sue in his own name on the bond given to the sheriff. The court refused the nonsuit, holding that the bond having been for the use of Lomme, and he being the real party in interest, he could so sue.

The evidence being all in, the defendants requested the court to charge:

That the only interest which the plaintiff could claim in the goods was just the interest which the Kintzings had at the time of the levy of the attachment on them, and that he could recover no greater amount from the defendants than the value of the interest of the Kintzings in them, at the said time, if he recovered at all.

That unless a writ *de retorno habendo* (that is to say, for the return of the property claimed in the complaint) had been issued to the proper officer previous to the commencement of this action, then that the verdict should be for the defendants.

That the undertaking sued on fixed the value of the property replevied at $2500 at the time the same was replevied, and the jury could not fix the value thereof to be any greater sum.

The court refused to give anyone of these charges, though it did charge that the $1,300 which Lomme had recovered on his suit from the Kintzings was to be deducted from what the jury might find.

The court charged that the plaintiff's damages should be assessed at such amount as the jury might find remained unsatisfied upon his judgment against the Kintzings, with interest, and his costs expended in Watson's suit against the sheriff, if they found that the value of the property replevied by and delivered to Watson at the time it was so delivered, and not returned to the sheriff or placed in subjection to the plaintiff's judgment against the Kintzings, was equal to the balance of the judgment and the amount of the costs, and if the property was not equal to the said balance and costs, that the jury should assess the plaintiff's damages at the amount they should find the said property was worth at the time of its delivery to Watson, and the amount of plaintiff's costs in Watson's suit against the sheriff, with interest on such amounts at ten percent. per annum.

That the only question for the jury to determine was whether possession of the property delivered to Watson was ever returned to Roberts, and to determine the value of the property so delivered to Watson and not so returned.

The jury found, November 10, 1871, in favor of the plaintiff for $5,000. The record as it came up to the court omitted to show, by the usual sort of entry, that judgment had been entered accordingly. However, there was in the record a notice by the defendant's counsel to the counsel of the plaintiffs, "that the defendants appealed to the supreme

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court of the territory from the judgment made and entered in the district court of the territory in favor of the plaintiff and against the defendants." And also an order by the supreme court of the territory that the cause of *Lomme v. Sweeney,* "coming on for judgment on the appeal herein," it was ordered "that the judgment entered herein by order of the court below be affirmed with costs."

This the counsel of the plaintiffs in error had regarded as a sufficient evidence of the entry of a judgment for $5,000 in the district court, and an affirmance of it in the supreme court, and so brought the case here. The errors assigned were:

1. That Lomme was allowed to sue in his own name.

2. That the verdict in the replevin suit was in violation of the provision in the Civil Practice Act, since it did not find the value of the property, and there was no alternative judgment for that value, OR the return of the property.

3. That proper instruction had been refused.

4. That wrong ones had been given.

MR. JUSTICE MILLER delivered the opinion of the Court.

1. The first error assigned and mainly relied on is that the bond on which the suit is brought having been given to the

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sheriff, this action cannot be maintained by Lomme, the party for whose benefit it was really given.

This question has been decided differently by different state courts under precisely the same code of practice.

In several of these it has been held that the real party in interest is always the proper plaintiff, while in others it is held that the suit must be brought by the obligor in the bond for the use of the party in interest.

Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own code of practice, we should, in this conflict of authority, adopt the ruling of the Supreme Court of Montana in the consideration of it. This assignment of error is therefore not well taken.

2. The next objection is that the verdict in the replevin suit did not find the value of the property, and that there was no alternative judgment for that value or the return of the property.

On this question also, conflicting authorities are produced as to what judgment should have been rendered under codes precisely similar to the Montana code in regard to actions of replevin. And in the case of *Boley v. Griswold,* [Footnote 1]

in a direct appeal, we have held that a judgment in replevin may be good though the alternatives are not expressed. But we are not now considering whether that judgment was erroneous or not. No writ of error to that judgment is pending in this Court. As the jury found for the defendant, the sheriff, and the court rendered judgment for a return of the property to him in a suit in which it had jurisdiction to render that judgment, it is not void because it did not add something else which it might have added.

The undertaking of the plaintiffs in error was

"for the prosecution of said action [of replevin], for the return of said property, if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against said plaintiffs."

The judgment, therefore,

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which is valid until reversed, established one of the conditions on which the plaintiffs in error agreed to be liable, and as the property was not returned either by them or by Watson, they are liable to an action on their contract.

3. Nor do we think the court erred in refusing to instruct the jury that Lomme could only recover the value of the interest of the Kintzings in the property. This would have been to try the action of replevin over again. If Watson had no right to the property he had no business to interfere, and if he thought some person not yet before the court had a paramount interest in it, he should have returned the property and left such person to assert his own rights. Having replevied the property and failed to establish his own right to it in the suit thus provoked by him, he is but a trespasser in holding possession afterwards.

4. Nor do we think that it was necessary that an execution should have been issued to retake the property under the judgment in the action of replevin before the liability of the plaintiffs in error in the replevin bond accrued. They undertook, themselves, in express terms, that they would be liable if a judgment for return of

the property was had, and not on condition that it could not be had on execution. This question was before us in the recent case of *Douglas v. Douglas,* [Footnote 2] in which it was held that the judgment of *de retorno habendo* rendered the party liable on a replevin bond.

5. The bill of exceptions shows that the goods, at the time they were replevied, were worth from $7,000 to $10,000. The verdict of the jury was for $5,000, the penalty of the bond. As there is nothing in the record to show that there was not due to Lomme on his judgment against the Kintzings, including interest and costs, and for the costs and expenses of defending the replevin suit, the sum of $5,000, all these elements of damages being before the jury, we cannot say that the verdict was for too much or that the judgment rendered on it was erroneous.

6. A point was made in the defendant's brief that there

was no judgment found in the record, and an inspection of it showed that while the judgment of the supreme court of the territory merely in terms affirmed the judgment of the district court, the judgment of the district court was not in the record, and in fact no judgment was to be found in the record which we could either reverse or affirm.

Under these circumstances, as the defendants in error had made no objection, by motion to dismiss the writ or otherwise before the hearing, the court heard the argument, and of its own motion gave the plaintiffs time to perfect the record by certiorari, if it could be done. The proper judgment has since been certified to this Court, and it is now

Affirmed.

[Footnote 1]

87 U. S. 20 Wall. 486.

[Footnote 2]

88 U. S. 21 Wall. 98.