

Thorn Wire Hedge Co. Vs. Fuller

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Appeal No. : 122 U.S. 535

Appellant : Thorn Wire Hedge Co.

Respondent : Fuller

Judgement :

Thorn Wire Hedge Co. v. Fuller - 122 U.S. 535 (1887)

U.S. Supreme Court Thorn Wire Hedge Co. v. Fuller, 122 U.S. 535 (1887)

Thorn Wire Hedge Company v. Fuller

Submitted May 10, 1887

Decided May 27, 1887

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ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF MINNESOTA

SYLLABUS

An Illinois corporation recovered judgment against P., a citizen of Minnesota, in a court of that state. An execution issued thereon was placed in the sheriff's hands with directions to levy on property of P. which had been transferred to F. and was in F.'s possession, the corporation giving the officer a bond with sureties. F. sued the officer in trespass, and he answered, setting up that the goods were the property of the execution debtor. The corporation and the sureties then intervened as defendants and answered, setting up the same ownership of the property and further that the sheriff had acted under their directions, and that they were the parties primarily liable. The plaintiff in that suit replied, and the intervenors then petitioned for the removal of the cause to the circuit court of the United States, setting forth as a reason therefor that the plaintiff and the sheriff were citizens of Minnesota, the intervenors and petitioners citizens of Illinois; that the real controversy was between the plaintiff and the petitioners, and that the petitioners believed that through prejudice and local influence, they could not obtain justice in the state court. The cause was removed on this petition, and a few days later was remanded to the state court on the plaintiff's motion.

Held that, on their own showing, the intervenors were joint trespassers with the sheriff, if any trespass had been committed, and by their own act they had made themselves joint defendants with him, and that on the authority of *Pirie v. Tvedt*, [115 U. S. 41](#) , and *Sloane v. Anderson*, [117 U. S. 275](#) , the cause was not removable from the state court.

This is a writ of error brought under 5 of the Act of March 3, 1875, c. 137, 18 Stat. 470, for the review of an order of the circuit court remanding a suit which had been removed from the District Court of Freeborn County, Minnesota. The facts are these:

Cassius D. Fuller and Burt G. Patrick, citizens of Minnesota, doing business as hardware merchants in the City of Albert Lea, began the suit October 12, 1886, against Jacob Larson, sheriff of the county, for trespass, in taking possession of their stock of goods and destroying their business. The sheriff answered November 13, 1886, to the effect that his taking was under the authority of an execution

issued upon a judgment in the same court in favor of the Thorn Wire Hedge Company, an Illinois corporation, against George A. Patrick, and that the goods were the property of the execution debtor, which had been transferred by him to Fuller & Patrick, the plaintiffs, in fraud of the rights of his creditors.

On the same day, the Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, intervened as defendants in the action and filed an answer, substantially the same in all respects as that of the sheriff, with the following in addition:

"That in making the levy of said execution, and in selling the said property under the same, the said sheriff [Larson] acted under the express direction of said intervenor, the Thorn Wire Hedge Company, and upon indemnity furnished him by said Thorn Wire Hedge Company, with said intervenors, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as sureties and bondsmen, according to the statute in such case made and provided, and in that behalf said intervenors acted, . . . without any malice or want of probable cause or intent to wrong anybody, and solely with intent to obtain payment of a just debt due from said George A. Patrick, and out of the property which he owned and had attempted to cover up, but which really belonged to him; . . . that by reason of said facts, said intervenors, the Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, acting under the statute in such case made and provided, are the parties primarily liable for the acts and doings of said defendant Jacob Larson, and as such are interested in the matters in litigation in this action and in the success of the defendant therein and in resisting the claim of the plaintiffs therein. Wherefore said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins intervene in this action, and pray that said plaintiffs take nothing by this action."

To these answers the plaintiffs replied, and on the 22d of November, the intervenors presented to the district court their petition for the removal of the suit to the circuit court

of the United States, in which they state that the plaintiffs and the defendant Larson were citizens of Minnesota, and the intervenors and petitioners citizens of Illinois, and --

"5. That such taking, detention, and ultimate sale . . . were all done by said Jacob Larson in his official capacity as such sheriff, and at the request of your petitioners, and by virtue of a writ of execution duly allowed and issued out of the District Court of the Tenth Judicial District of the State of Minnesota, for the County of Freeborn, in an action therein pending in that court between said petitioner, the Thorn Wire Hedge Company, as plaintiff, and one George A. Patrick as defendant, and under indemnity furnished by said Thorn Wire Hedge Company, with said petitioners, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins as bondsmen and sureties therein to such sheriff, pursuant to the statute in such case made and provided, and to save him harmless from all damages and costs for and on account of so doing, and accordingly said sheriff has duly notified said petitioners to defend this said action, and accordingly said petitioners, pursuant to the statute in such case made and provided, have duly intervened in said action as parties defendant thereto and have duly made and filed in said action their pleading as such intervening parties defendant."

"6. That in virtue of said facts, said defendant Jacob Larson was at all such times and in all said matters, so far as said plaintiffs are concerned, the mere agent of said petitioners provided for them by law in such cases, and there can be a final determination of the controversy in said action, so far as concerns said petitioners, without the presence of such agent, said defendant Jacob Larson, and in fact the real controversy in said action is wholly between said plaintiffs on the one side and said petitioners on the other side, and the same can be fully determined as between them."

"7. That your petitioners have reason to believe and do believe that, from prejudice as well as from local influence, they will not be able to obtain justice in said action in said state court."

"Wherefore said petitioners pray that said action be removed

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into the United States Circuit Court to be held within and for the District of Minnesota, and herewith present the bond and surety as in such cases required."

Upon this petition, an order of removal was made and the suit entered in the circuit court December 11, 1886, and on the 21st of the same month it was remanded on motion of Fuller and Patrick. To reverse that order this writ of error was brought.

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MR. CHIEF JUSTICE WAITE, after stating the case as above reported, delivered the opinion of the Court.

We have been referred by the parties to the following sections of chapter 66 of the General Statutes (1878) of Minnesota as authority for the intervention of the execution creditor, and his sureties in the action:

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"SECTION 131. *Intervention.* Any person who has an interest in the matter at litigation, in the success of either of the parties to the action or against either or both, may become a party to any action or proceeding between other persons either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause and before the trial commences. The court shall determine the issues made by the intervention at the same time that the issue in the main action is decided, and the intervenor has no right to delay, and if the claim of the intervenor is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be

governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto."

"SECTION 154. *Claim of Property by Third Person -- Affidavit -- Indemnity by Plaintiff.* If any property levied upon or taken by a sheriff by virtue of a writ of execution, attachment, or other process is claimed by any other person than the defendant or his agent, and such person, his agent or attorney, makes affidavit of his title thereto or right to the possession thereof, stating the value thereof and the ground of such title or right, the sheriff may release such levy or taking unless the plaintiff, on demand, indemnify the sheriff against such claim by bond executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county, and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made; and notwithstanding such claim when so made, he may retain such property under levy a reasonable time to demand such indemnity.
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"SECTION 155. *Plaintiff to be Impleaded with Sheriff in Action against Him.* If in such case the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section and the plaintiff in such execution, attachment, or other process shall, on motion of such sheriff, be impleaded with him in such action. When in such case a judgment is rendered against the sheriff and his codefendants, an execution shall be immediately issued thereon and the property of such codefendants shall be first exhausted before that of the sheriff is sold to satisfy such execution."

The record does not state in direct terms which of the forms of proceeding provided for in these sections was adopted. The intervenors claim they went into the suit under 154 and 155, and the plaintiffs that it was under 131. In the view we

take of the case, this question is quite immaterial. The intervenors, in their answer, state in positive terms that Larson, in all that he did, acted under the express direction of the Thorn Wire Hedge Company and upon the indemnity furnished him for that purpose, and that they are the parties primarily liable for his acts and doings. In their petition for removal, they are even more explicit, and say that he "was at all such times, and in all such matters so far as said plaintiffs are concerned, the mere agent for the petitioners provided for them by law." In other words, they have by their pleadings placed themselves on record as joint actors with the sheriff in all that he has done, and as promoters of his trespass if it be one. The suit therefore stood at the time of the removal precisely as it would if it had been begun originally against all the defendants upon an allegation of a joint trespass. By coming into the suit the intervenors did not deprive the plaintiffs of their right of action against the sheriff. He is still, so far as they are concerned, a necessary party to the suit. The intervenors may unite with him to resist the claim of the plaintiffs, but by their doing so, the nature of the action is in no way changed. The cause of action is still the original alleged trespass. At first the suit was against him who actually committed

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the trespass alone. Now it is against him and his aiders and abettors, who concede upon the face of the record that they are liable if he is. As the case stood, therefore, when it was removed, it was by citizens of Minnesota against another citizen of Minnesota and citizens of Illinois for an alleged trespass committed by all the defendants acting together and in concert. If one is liable, all are liable. The judgment, if in favor of the plaintiffs, will be a joint judgment against all the defendants.

That such a suit is not removable was decided in *Pirie v. Tvedt*, [115 U. S. 41](#) , and *Sloane v. Anderson*, [117 U. S. 275](#) . The fact that if the intervention was had under 154 and 155, the property of the intervenors must first be exhausted on execution before that of the sheriff is sold does not alter the case. The liability of all the defendants upon the cause of action is still joint so far as the plaintiffs are concerned. By getting the intervenors in, the sheriff will be able to establish his

right of indemnity from them, but that does not in any way change the rights of the plaintiffs. The intervenors do not seek to relieve themselves from liability to the sheriff if he is bound, but to show that neither he nor they are liable to the plaintiffs.

It follows that the order to remand was properly made, and it is consequently

Affirmed.

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