Young, harvey v. Cleveland, G W 1862 483/3

621/16 33/124

JG Beal L (P)

Young - execution (A)
of James Thomas (P)

v

with Cleveland (R) (D)

Note mad by Cleveland 205.37½

- payments made so wont to Justice appear

- property more held & returned

St Genevieve
Oct 1862
Oct 1862

Reversed / Remanded

Dryden Concur

Harvey Young adm^r of
James Thomas dec^d plff
against
George W. Cleveland Aft

In the Circuit Court of the Genevieve County State of Missouri —
Appeal to the Supreme Court of the State of Missouri —

To George W. Cleveland Aft in the above Cause —

You are hereby notified that the above Cause which was appealed from the judgment of the Circuit Court of said County at the November Term thereof for the year 1860 will be set for trial in the Supreme Court of the State of Missouri at the October Term for the year 1862

Synthus G. Beal atty
for plff —

I served the within notice on George W Cleveland by delivering to him a copy the same on the 30th September 1862 at St Genevieve County State of Missouri

Sworn to and subscribed before me this 1st October 1862 - W R Taylor Clerk

his
Hardy x Wiggins
mark

State of Missouri
County of Ste Genevieve } ext

Pleas & proceedings in the Circuit Court. in & for the County of Ste Genevieve in the Ninth Judicial Circuit of the State of Missouri, at the May & November Terms of said Court A.D. 1860 before the Honorable John H Stone Judge of said Court

Among other proceedings the following were had viz:=

Harvey Young Executor of the Estate of James Thomas decd } Appeal from Justice of the peace
vs
G W Cleveland deft }

Be it remembered that on the 10th day of August 1859. the following Transcript was filed in the, Office of the Clerk of the Circuit Court of Ste Genevieve County which is in words & figures as follows viz:=

Harvey Young Executor of the estate of James Thomas decd }
vs
G W Cleveland, }

Transcript

Demand a note proceß a Summons Issued July 6th 1859. Returnable 6 day of August 1859 David M Anderson J.P.

August 6th 1859 The parties met and after hearing the alegations and proof on both sides it is considered by the Justice that the plaintiff have Judgment for

$81 and 71c [illegible] and $2.48 cents damages and costs of suit.

David McAnderson J. Peace

Afterwards to wit: on the 4th day of the May Term of said Court being the 10th day of May 1880 the following was had viz:

Harvey Young Extr. pltff
vs
G W Cleveland deft.
} On appeal

Now at this day comes the defendant and files his motion to dismiss appeal which

Which said motion is in words and figures as follows viz:—

Harvey Young pltff
against
G W Cleveland deft

Motion to dismiss

The plaintiff comes and moves the Court to dismiss the appeal in the above case for the following reasons to wit

The Justice before whom the above cause was tried never granted an appeal. The transcript as filed does not appear to be certified but does show that no appeal was granted

2d No affidavit as required by law was filed before the Justice — No appeal was taken as required by law. & no appeal was in fact granted — J. G. Beal

Atty for pltff

Motion to dismiss overruled

Harvey Young pltff
against
G W Cleveland deft
} Civil Action on appeal

Now at this day again come the parties aforesaid by their attornies and the Court being fully advised herein overules the motion to dismiss this suit

Afterwards to wit on Saturday the ~~second day~~ sixth day of the said Term of said Court the following was had viz:

Harvey Young pltff
against
G W Cleveland deft

Now at this day come the parties aforesaid by their attornies by consent of parties this case is continued to our next term. —

Afterward to wit on Thursday being the fourth day of the November Term of said Court 1860 the following was had viz:-

Harvey Young Extr of the estate of James Thomas dec pltff
against
G W Cleveland deft
} On Appeal

Judgment

Now at this day come the parties aforesaid by their attornies and the cause coming on to be heard and the same being submitted to the Court neither party requiring a Jury and after hearing the allegations of the parties the evidence and

arguments of Counsel and being sufficiently advised herein the Court finds for the defendant. It is therefor considered by the Court that the said defendant have and recover from the plaintiff his costs & charges in this suit laid out and expended and that he have execution therefor

Harvey Young Exctr. pltff
vs
G W Cleveland deft
} On appeal

Now again comes the plaintiff by his Attorney and files his motion for a new trial

Motion for new trial

Which said motion is in words and figures as follows viz:—

Harvey Young admr
vs
George W Cleveland
} Nov. Term of the Circuit AD 1860

The plaintiff moves the Court for a new trial for the following reasons to wit.

1st The Court committed error in declaring the law

2d The verdict is against the evidence. The evidence clearly shows that the debt was not paid

J G Beal atty for pltff.

Afterwards to wit on Friday being the 5th day of the November Term of said Court 1860 the following was had viz:—

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Harvey Yound Exctr plff
vs
G W Cleveland deft

Motion for new trial overruled

Now again come the parties aforesaid by their attorneys and the Court being fully advised herein overules the motion for a new trial filed in this case to which overruling of said motion the plaintiff objects & excepts and files his bill of exceptions which was signed by the Court and ordered to be made a part of the record in this case

Bill of exceptions

Harvey Young admr of the estate of James Thomas decd against George W Cleveland

In the Circuit Court of Ste Genevieve County State of Missouri on appeal from Justice of the peace

November Term 1860

Be it remembered that on the trial of this cause coming on to be heard at this Term of the Court neither party requiring a Jury the same was submitted to the Court sitting as a Jury for trial. The plaintiff in order to sustain his cause read in evidence a note in words & figures as follows to wit:

note

Twelve months after date we or either of us promise to pay to James Cleveland Executor of the estate of James Thomas Decd Two hundred & five dollars 37½ cents for value received of him as witness our hands this 16th day of December 1860

Wm Cleveland

Estate

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Feby 7th 1844 Dudley Storm (Seal)

I confess Judgement on G. W. Cleveland (Seal)
the above note for balance
Wm Cleveland

Endorsements on said note are as follows viz:

Recd. of G W Cleveland Seventy three dollars and seventy five cents } this 16th of December 1841
on the within note }

Recd of W Cleveland one dollar on the within note
J Cleveland

Recd on the within note two dollars & forty cents =

It was then proven by the plaintiff by parol testimony that at the time the note was given the plaintiff resided in the State of Missouri and that the defendant resided in the State of Kentucky and has continued to reside there till within two years next before the bringing of this suit at which time he moved into this state:

It was further proven that William Cleveland was the principal debtor, Defendant and Dudley Storm were securities in the note. That in the fall of the year 1849 or 50 Dudley Storm paid seventeen dollars on the note to plaintiff and took a receipt of which the following is a copy to wit:

Plaintiff then read in evidence his letters of administration and rested his case

of which the following is a copy —
"State of Missouri Washington County ss.
I Samuel Harrison Clerk of the County Court within and for the County of Washington and and State of Missouri, To all to whom these presents shall come Greeting —
Whereas James Thomas late of the County of Washington deceased — died leaving his last will and testament appointing Mary Thomas and James Cleveland his executors, and Mary Thomas refusing to act and James Cleveland having resigned his executorship on the second day of August in the year of our Lord one thousand eight hundred and forty two — and you Harvey Young having given sufficient security I do therefore give and grant unto you the said Harvey Young full power and authority to administer with the Will annexed all and singular the moneys, goods, chattles, rights and credits of the said deceased and to demand collect and in a legal manner require and receive all and all manner of debt or debts due and owing to the said deceased, and well and faithfully to dispose of the same according to law — and lastly I do hereby constitute and appoint you the said Harvey Young administrator with the will annexed of all and singular the goods chattles rights and credits of the deceased. In Testimony whereof I have hereunto set my hand & official seal at office in Potosi this second day of August one thousand eight hundred and forty two Saml Harrison Clerk

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State of Missouri }
Washington County } ss.

I Samuel Harrison Clerk of the County Court in and for the County aforesaid hereby certify that the foregoing contains a true copy of the Letters of administration of Harvey Young Administration of Harvey Young administrator with the Will annexed of James Thomas ~~late~~ deceased as the same is of record in my office

Witness my hand and seal of office in the Town of Potosi this 28th day of July 1859. Sam Harrison Clerk

Defendant then proved that sometime in the year 1844 the plaintiff obtained Judgment before a Justice of the peace in Washington County in this State against William Cleveland the principal debtor. caused executions to be issued against Wm Cleveland who gave up two cows and a horse to be levied on + said if that was not enough the officer might come into his house and take his household and kitchen furniture the property so given up was worth about 90$ This was all the property William Cleveland had except his household property consisting of furniture and bedding — The property was not sold. but after the property was levied on an arrangement was made between the plaintiff and ~~defendant~~ Wm Cleveland to the effect that the property so given up and levied on ~~[illegible]~~ should be given back to William Cleveland + released from the levy and an order in lieu of it to be taken by the plaintiff by

from William Cleveland for his wife's interest in the estate of one Obediah Scott then deceased and that the execution was returned not satisfied. The order was given & on it there was afterwards received from Ble. Amareux admr of said Scott the sum of one hundred dollars sometime in the year 1850, and this was all the Testimony given in the cause

Thereupon the Court declared the law to be that the release of the property from the execution given up to ~~tax~~ be levied on by William Cleveland's wife's interest in the estate of Obediah Scott as and taking by pltff of the order for his William Cleveland's in evidence operated as a release and discharge of the security in the note to the amount and value of the property released, which amount with the other credits being found to liquidate the note, the the Court adjudge and ~~declare~~ decided that the plaintiff could not recover it to which decision and law as declared by the Court the plaintiff objects and excepts.

The Court thereupon gave judgment for the defendant and the plaintiff filed a motion for a new trial in words & figures as follows to wit:

Harvy Young admr
vs
George W. Cleveland deft } Nov - Term of the Circuit Court A.D. 1860

The plaintiff moved the Court for a new trial for the following reasons to wit

1st The Court committed error in declaring the law

2d The verdict is against the evidence - The evidence clearly shows that the debt was not paid J. G. Beal atty for pltff

which the Court overruled & refused to grant a new trial to which decision the plaintiff objects & excepts and prays that this his bill of exceptions may be signed sealed by the Court and made a part of the record which is done accordingly

John H Stone (seal)

Affidavit for appeal.

Harvey Young pltff
against
George W Cleveland deft
} Circuit Court November Term 1860

J G Beal agent for the plaintiff in the above cause being duly sworn states that the appeal of the plaintiff in the above cause is not made for vexation or delay but because the affiant believes that the appellant is aggrieved by the judgment and decision of the Court in said cause

J G Beal

Sworn to & subscribed before me this 9th day of November 1860

W W Rozier Clk
By Emile P. Vogt D.C.

Harvey Young Exr pltff
vs
G W Cleveland Deft
} On appeal

Now again comes the plaintiff by his attorney & files his affidavit for an appeal which is granted & the Court do order that the records pleas & proceedings

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in this case be sent up to the Supreme Court in of this State

State of Missouri }
County of Ste Genevieve } ss.

I Charles Rozier, Clerk of the Circuit Court, in and for the County State aforesaid do certify that the above transcript No. from page 1 to 11 inclusive, is a true full and correct transcript of the Plens Proceedings and record in the case of Harvey Young Executor of the Estate of James Thomas decd vs G.W. Cleveland as the same remain on file and of Record in my office —

In Testimony whereof I hereto set my hand and affix the seal of said Court at office this 5th day of January 1861

Charles Rozier Clerk
By Emile J. Vogt D.C.

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(16) 19.

October Term 1862

Harvey Young exer. of the Estate of James Thomas decd appellant.

vs.

G. W. Cleveland. respondent.

appeal from St. Genevieve Circuit Court.

M. E.

J. G. Beal.
atty for appellant.

Filed October 3d 1862
A. W. Mead
Clk

$15.00 Paid by Rozier
1865 due

1862 Oct 27 Apt & appts brief filed argued & sub by appt
1862 Oct 31 Reversed & Remanded. Opn filed
Dp 93

5.00 paid by Appt
6.50 Mead Costs
1.50 Copies
25 Kick
13.75

Harvey Jamy Executor of
James Cleveland Acc^d — appellant
against
G. W. Cleveland respondent

In the ~~circuit~~ — Supreme Court of the State of Missouri
October Term 1862

Statement of the case by appellant Atty —

William Cleveland as principal, and Audley Horn and George W Cleveland as securities give their note to James Thomas for two hundred & five $\frac{37\frac{1}{2}}{100}$ dollars dated 16th Dec 1840 & due twelve months after date

At the time of executing this note George W Cleveland resided in the State of Kentucky & continued to reside there till within two years next before bringing this suit — The other parties resided in the State of Missouri.

In 1844 James Thomas, being dead and the appellant being Executor of his will, a suit was brought by the Executor against William Cleveland & judgment obtained against him alone. Execution issued from the Docket of the justice & property to the value of $90. was levied on as the property of Wm Cleveland. The Executors and Wm Cleveland made an arrangement by which the property so levied on was given up to William Cleveland and an order from him for his wife's interest in the estate of Obediah Scott Acc^d taken in lieu. On this order there was one hundred dollars received as payment on the note — The execution was returned not satisfied.

G. W. Cleveland paid 73\frac{75}{100}$ on this note 16th December AD 1841 and one dollar and two dollars are endorsed as credits — no date to the same — & in 1849 or 1850 Audley Horn paid the further sum of $17.

On the 6th July 1859 suit was brought against the present respondent to recover the balance of the note. Judgment was rendered against the respondent before the justice. The case without appeal was brought before the Circuit Court of Ste Genevieve County. Motion to dismiss for this reason sustained.

A trial was then had before the Circuit Court at the November Term 1860 and judgment rendered for the defendant — (respondent)

The Court held and declared the law to be that the arrangement between the Executor and Wm Cleveland by which the property of Wm Cleveland valued at $90. was given back to him after the levy, and the order taken in line, operated as a release of so much of the debt as the value of the property — & that with it & the other credits the debt was considered discharged. The Appellant objected & excepted to this decision & opinion of the Court.

The appellant after judgment against him moved for new trial for the following reasons to wit:

The Court committed error in declaring the law of the case —

The verdict is against evidence. The evidence shows that the debt was not paid —

This motion was overruled & plaintiff excepted — & brings the case here by appeal

J. G. Beal

atty for appelt —

Harvey Bonna Exr.
of James Thomas Dec'd
Appellant —

against

George W. Cleveland
Respondent —

C

Statement by atty for
Appellant —

Filed Oct 27. 1862
A W Mead
Cr

Harvey Young Executor of James Thomas dec'd — appellant — } In the ~~Circuit Court~~ Supreme Court State of Mo — October Term 1862

against

G. W. Cleveland respondent

Brief by appellant's atty

The Court below committed error in declaring the law to be that the giving up of the property levied on as Wm. Cleveland's by the Constable operated as a release to this defendant (respondent) to the amount of the value of the donee — The property so levied on was by an arrangement between appellant & said William Cleveland exchanged for the interest of the wife of Cleveland in the estate of her father Obediah Scott — Marshall vs Morris 13 Georgia Repts. p. 185.

The transaction opposed no bar — This defendant resided in Kentucky at the time the note was given & within two years before the bringing of this suit — 2 Vol Statutes, 1049. sec. 12 & authority. 1855

The motion to dismiss the cause from the Circuit Court should have been sustained — It had no jurisdiction of the case

J. M. Beal atty for appellant

Harvey Young Exc^r
of James Thomas and
Appellant

agst

G. W. Cleveland Respt -

C

Brief by atty for
Appellant -

Filed Oct 27, 1862
A. W. McEad
Clk

Harvey Young Executor of the estate of James Thomas dec^d appellant —
vs
G. W. Cleveland Appt. respont

IN SUPREME COURT, Octobre TERM, 1862

AND now come the said appellant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said he assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by
2. That said Court rejected proper and legal testimony offered by
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the respondent Cleveland when it should have been rendered for the appellant Young —
10. That said Court overruled the motion for a new trial, made by appellant —

J. G. Beal
atty for appellant

And now come the and for joinder in error say, that there is no error in the record and proceedings of said in said cause, as assigned by said

Henry Young admr
of Thomas

vs

G. W. Cleveland

assignment of error

Filed Oct 27. 1862
A W Mead
Clk

Young Ex^r. of Thomas appt

vs

George W. Cleveland Respt.

Appeal from the St. Genevieve Cir: Court

This is a suit brought before a Justice of the Peace by Young against George W Cleveland on a note made by the defendant, Wm Cleveland and Dudley Storn for 205 Dollars and 37½ Cents payable to the plaintiff's testator on which several par: tial payments had been made reducing the ~~amount due~~ demand to a sum within the jurisdiction of a Justice of the Peace. The case was tried before the justice and taken to the Circuit Court where upon a trial anew, after the pltff had read the note, the deft. proved that he and Storn were merely the securities of Wm Cleveland; that after the note became due, Wm Cleveland the principal debtor confessed a judgment before a justice of the peace in favor of the pltff for the balance due on the note;

that the pltff took Execution and caused it to be levied on personal property of said William of the value of about 90 dollars; that before the sale of it under the Execution an agreement was made between the parties whereby the said William in lieu gave the pltff an order for his (said William's) wife's interest in the Estate of her father of the value of $100, in lieu of the property levied on, and the pltff thereupon caused the levy to be discharged and the property to be restored to said William

The Circuit Court held that the defendant was entitled in his defence to the benefit as well of the value of the property levied & restored (90 dollars) as to the proceeds of the order, $100 — and the two sums exceeding in amount the unpaid balance on the note, found a verdict for the defendant — Upon what principle the value of the property levied on is, under the circumstances of the case, made to discharge any part of the debt, it is not easy to see —

If it be said a levy on personal property is a satisfaction of the judgment, it is replied, it is so only conditionally: that where the property is restored to the possession of the defendant it is not a satisfaction in law of the judgment - 4 Smedes & Marshall 135 - 10th ib 35. - 13th Georgia R. 187 -

Here the property was returned to the owner -

Nor is there any ground of ~~[illegible]~~ ~~this~~ defence in the assumption that the plff, the creditor, has parted with a security from the principal debtor, to the prejudice of the deft a surety; 1 Story Eq: Juris: p. 322; for the reason that the security was surrendered in lieu of property of greater value which could not have been reached by legal process and which was thus applied in extinguishment of the debt pro tanto - the discharge of the levy was beneficial - not injurious to the deft -

The Circuit Court committed error in

its declaration of the law and
for this cause its judgment
is reversed & the cause
remanded for a new trial.
The other judges concur.

John D. S. Dryden

(32)

Thomas Exr

vs

Cleveland

Opinion of Court
by Dryden

Filed Oct 31. 1862
A.W. Mead
Clk

Reversed & Rem?