Stewart to the use of Sibley, George et al v. Garvin, Alexander 1860 St. Charles 446/7

610/22
60/060
31 MO 36

plaintiffs/apps
10+ more names
Stewart Elias
Sibley, Mary E
Sibley, George
Gamble, Archibald
Gamble, Louisa

sheriff trying to recover
1st 2 installments of ~~purchase~~ payments
for lands sold to def
Deputy recorded on a memorandum
says fraud occurred - deed was
entitled before last payment was made

def/resp
Garvin, Alexander

demurs
no sufficient cause
of action

Ewing R & R - Sheriffs are agents for both buyer & seller

The State of Missouri, ss.

The State of Missouri, to the Honorable the Circuit Court in the Third Judicial Circuit **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court held in and for the County of Saint Charles

wherein Elias C. Stewart for the use of George C. Sibley and wife, Archibald Gamble & others, were plaintiffs, and Alexander Garvin were defendants

in a Civil Action manifest error hath intervened, to the great damage of said plaintiffs as by their complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the City of Saint Louis, the 29th day of September in the year of our Lord one thousand eight hundred and ~~fifty~~ Sixty.

Wm S. Glanville,
CLERK.

State of Missouri
County of St. Charles } I. Pew. Emmons Jr. Clerk of the Circuit Court of St. Charles County Certify that I have transmitted to the Clerk of the Supreme Court at St Louis a transcript of the record and proceeding in the within named cause. In Witness whereof I hereto set my hand and affix the seal of said Court

October 5th 1860.

Pew. Emmons Jr Clk

Clks fee 50 cts

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E. C. Stewart, use &c
v. } Writ of Error
Alex. Garvin.

Page 1

State of Missouri }
County of St. Charles } Be it remembered that heretofore to wit on the fourteenth day of May Eighteen hundred and fifty Nine there was filed in the Office of the Clerk of the Circuit Court of St. Charles County a petition in the words and figures following to wit:

Petition

Elias C. Stewart, for the use of George C. Sibley and Mary E. Sibley his wife in right of his wife, Archibald Gamble and Louisa B. Gamble his wife in right of his wife, James S. Watson and Alby. E. Watson his wife in right of his wife, Samuel D. South and Sarah E South his wife in right of his wife, Abner Baitlett and Medora L. Bartlett his wife in right of his wife James T. Small and Maria C. Small his wife in right of his wife, James C. Norris and Harriet G. Norris his wife in right of his wife, John P. Tunstall, Prior D. Tunstall and Mary J. Tunstall by Charles R. Hall Curator of their Estates, William R. Anderson, Samuel S. Anderson, Rufus E. Anderson, Alton R. Easton, Henry C. Easton, Langdon C. Easton, Henry P. Geyer and Edward H. Geyer. Plaintiff

against } In St. Charles Circuit Court June term 1858.

Alexander Garvin Defendant.

Plaintiff states that heretofore the said George C. Sibley and the other persons for whose use this suit is brought as above specified instituted a suit in this Court against Joseph G. Easton for the purpose of obtaining partition of Lots Nos. six, seven, eight and fifteen of

Page 2

Block No. Four in Evans Survey of the St. Charles Commons, in which suit such proceedings were had as that on the 14th day of June 1856 an order was made by this Court requiring Plaintiff, who was at the last mentioned date and still is the Sheriff of the County of St. Charles in the State of Missouri, to sell the said lots Nos 6. 7. 8 and 15 according to law, on the following terms viz. One third of the purchase money to be paid in Cash on the day of sale, one third in twelve months and one third in two years from the day of Sale; and before the Sale thereof, the said lots were surveyed and the lots numbered six, seven and eight were divided into two tracts or lots, one tract which is numbered on the Plat Lot 1, containing fifty one 62/100 acres, and the other which is numbered on the plat Lot II, containing sixty eight 68/100 acres, which plat is now here to the Court shown; and in pursuance of the said Order of Sale and according to the law in such case made and provided, Plaintiff being Sheriff as aforesaid advertised the said lands for sale according to law, and on the 23rd day of October 1856 whilst the Court was in Session, Plaintiff being Sheriff as aforesaid and acting under the Order of this Court aforesaid, offered for Sale to the highest bidder at the Court house door of the said County all the right, title and interest of the parties to the said suit for partition - to wit, the parties herein above named for whose use this Suit is brought, the Defendant therein having been adjudged to have no interest in the said lands in the said lots Nos. One, Two and Three as numb-

ered on the Plat here to the Court shown being the said Lots Nos 6, 7, 8 and 15 in the said Block No 4 above mentioned, on the terms set forth in the said Order of Sale and hereinabove specified; and at the said Sale the Defendant being the highest bidder therefor became the purchaser of Lot No. I. as numbered on the Plat here to the Court shown, containing fifty one 62/100 acres at the sum and for the price of forty four Dollars per acre, making the sum of twenty two hundred and seventy one 28/100 dollars, and of Lot II as designated on the Plat here to the Court shown, containing sixty eight 60/100 acres for the price of thirty six 50/100 dollars per acre, making the sum of twenty five hundred and three 90/100 dollars, making for both of the said lots the sum of forty seven hundred and seventy five 18/100 dollars, and the said two lots or tracts of land, containing in the aggregate the quantity of one hundred and twenty 22/100 acres, were sold at the said sale to the Defendant for the aggregate sum, as above stated, of forty seven hundred and seventy five 18/100 dollars of which sale Plaintiff by his Deputy then and there made a memorandum in a book kept by him for that purpose and according to the terms of the said Sale, Defendant should have paid Plaintiff on the day of the said sale viz the 23rd day of October 1856, the sum of fifteen hundred and ninety one $\frac{72\frac{2}{3}}{100}$ dollars and executed to Plaintiff his two notes each for a like sum due in one and two years respectively, with approved

Page 4

security; but Defendant has wholly failed and refused and still wholly fails and refuses to the pay the said sum of fifteen hundred and ninety one 72 2/3/100 dollars due as aforesaid on the 23rd day of October 1856, the day of the said Sale, as also the like sum of fifteen hundred and ninety one 72 2/3/100 dollars, on the 23rd day of October 1857, the said two payments being the Cash payment on the said purchase and the payment due thereon one year from the date of the Sale. Plaintiff asks judgment against Defendant for the sum of fifteen hundred and ninety one 72 2/3/100 dollars and interest thereon from the 23rd day of October 1856, and also for the sum of fifteen hundred and ninety one 72 2/3/100 dollars and interest thereon from the 23rd day of October 1857, and for such further judgment as justice requires.

Lewis & Alexander.
Attorneys for Plaintiff.

Affidavit

State of Missouri
County of St. Charles } Joseph H. Alexander, Attorney for Plaintiff, makes oath and says he believes the above petition and the matters therein as stated are true.

Jos. H. Alexander.

Subscribed and sworn to before me this 14th day of May 1858.

Ben Emmons Jr. Clk.

And thereupon the Clerk issued a summons in the words and figures following to wit:

Summons

The State of Missouri, to the Coroner of St. Charles County-Greeting: We command you to sum-

mon the defendant Alexander Garvin to appear in the Circuit Court of St. Charles County, at the Court house in the City and County of St. Charles, on the second Monday of June eighteen hundred and fifty eight and answer the annexed petition of Chas. C. Stewart for the use of George C. Sibley and Mary E. Sibley his wife Archibald Gamble and Louisa B. Gamble his wife James S. Watson and Alby E. Watson his wife Samuel D. South and Sarah E South his wife Abner Bartlett and Medora L Bartlett his wife James F. Small and Maria C. Small his wife James C. Norris and Harriet G. Norris his wife John P. Turnstall, Prior L. Turnstall and Mary J. Turnstall by Charles R. Hall Curator of their Estates William R. Anderson, Samuel S. Anderson, Rufus E. Anderson, Alton R. Easton Henry C Easton Langdon C. Easton, Henry P. Geyer and Edward F. Geyer Plaintiff, and have you then and there this writ. Witness, Ben Emmons Jr Clerk of said Court, with the seal of said Court hereto affixed, this 18th day of May 1858. Ben Emmons Jr Clerk.

L.S.

Coroner's Return

And the Coroner made return of said Summons in the words and figures following to wit:

Executed the writ and petition on the within named Defendant Alexander Garvin by delivering to him a copy of the within writ and petition in Saint Charles County Mo on the 24th day of May 1858.

Daniel O'Brin Coroner

And afterwards in the Circuit Court of St. Charles

Page 6

County Missouri in the thirteenth day of August Eighteen Hundred and fifty eight the following proceedings were had in said Cause to wit:

Demurer filed

Elias C. Stewart to the use of George C. Sibley et al Plf v. Alexander Garvin Deft.	Suit for Amt bid at Sheriff's Sale Demurrer filed

And the said Demurrer is in the words and figures following to wit:

Demurrer

Stuart to the use of Sibley et al vs. Alexander Garvin	St. Charles Circuit Court

And now at this day comes the defendant, and demurs to the petition, on the ground that, the said petition, and the facts as stated therein, do not constitute a sufficient ground of action. The petition does not State that any Contract in writing was made by the said Garvin, the Defendant, to purchase the land described in the petition. It is not averred that any Deed for the Land was ever tendered to said Defendant or any refusal to pay upon such tender.

King & Coalter
for Defendant

And afterwards in Said Court on the seventh day of February 1859 the following proceedings were had in said Cause

Elias C. Stewart for the use of
George C. Sibley et al Plaintiff

Page 7

v Suit for amount of bid at Sheriffs Sale

Alexander Garvin Defendant.

Now at this day appear the said parties by their respective attorneys and the demurrer of the defendant to plaintiffs petition coming on to be heard it is considered by the Court that the Same be sustained and that said Defendant have and recover against said George O. Sibley and Mary E. Sibley Archibald Gamble Louisa B. Gamble James S. Watson and Alby E. Watson Samuel D. South and Sarah E. South Abner Bartlett and Medora L. Bartlett James P. Small and Maria C. Small James C. Norris and Harriet G. Norris John P. Funstall, Prior L. Funstall and Mary S. Funstall William R. Anderson Samuel S Anderson Rufus E Anderson Alton R. Easton Henry C. Easton Langdon C Easton Henry P. Geyer and Edward P. Geyer his costs in this behalf incurred and that he have thereof Execution.

Demurrer Sustained

State of Missouri }
County of St. Charles } I Ben Emmons Jr Clerk of the Circuit Court within and for St. Charles County certify the foregoing to be a full and true transcript of the record and proceedings in the above entitled Cause as the Same remain of Record in my office.

In Witness whereof I hereto set my hand and affix the seal of said Court at Office this 29th day of February 1860.

Ben. Emmons Jr. Clk

(27) 20

October Term 1860

E. C. Stewart to the use &c
Pltffs. in Error

v.

Alexander Garvin
Deptt. in Error

Error to St. Charles Cir. Court.

Filed 29 Sept. 1860.
W. S. Glanville
Clk.

$10.00 P. G. N. C. Easton are of appellants/ assigt of errors/
postage/ do/
Pltffs. Cff./

Reversed & remanded 15 Dec. 1860, C. p. 107

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Elias C. Stewart, to use &c
Plaintiff in Error
vs
Alexander Garvin
Defendant in Error

Error to St Charles Circuit Court.

Plaintiff in Error comes and says that in the Record and proceedings in this cause, there are manifest errors and irregularities, and he here specifically assigns the following, to wit:

1. The Court erred in sustaining the Demurrer, when the said Demurrer ought to have been overruled.

2. The Court erred in giving judgment for the Defendant, when judgment ought to have been rendered for the Plaintiff

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Stewart, to use &c

vs } Assignment of Errors.

Garvin

Assignment of Errors.

Filed Oct. 16. 1860.

Wm S. Glanville
clk.

Elias C. Stewart, to use &c Plff in Error } Error to St.
vs } Charles Circuit
Alexander Garvin, Deft in Error } Court.

Statement by Plff in Error.

The Plaintiff in Error, who was at that time Sheriff of St. Charles County, on the 23d October 1856, under an order of the St Charles Circuit Court made in a proceeding for Partition between George C. Sibley et al, offered certain lands for sale, by auction. At the sale, the Defendant in Error made the highest bids for two tracts of the land and he was declared the purchaser. The Plaintiff's Deputy, at the time of the sale, made a memorandum of the sale in a book kept by the Sheriff for that purpose, stating terms &c. The aggregate amount of the Defendants bids was $4775.18, and by the terms of the sale he was required to pay one third of the purchase money in cash and execute his notes due in one and two years for the balance. He having failed and refused to do so, Plaintiff in Error, on the 14th May 1859 (Record, page 1) instituted this suit for the recovery of the Cash payment and interest from the day of sale and for a like amount due one year thereafter with interest from that time

The Defendant demurred to the Petition (Record, page 6.) which Demurrer was sustained (Record, page 7.) and for the error committed by the Circuit Court in sustaining

the Demurrer, the Plaintiff in Error brings the case to this Court by Writ of Error.

Points and authorities.

1. The memorandum or entry made by the Sheriff's deputy at the sale was a sufficient compliance with the statute of frauds.

Wiley vs. Robert – 27 Mo. R. 388.

2. No tender of a deed by the Sheriff was necessary, because defendant would not be entitled to a deed until payment of the last instalment of purchase money. This suit was for failure as to the first and second payments only.

Lewis & Alexander
for Plff. in Error.

E. C. Stewart
vs. } Plff's Brief
Alex. Garvin

Filed 18 Oct. 1860.
W. S. Glanville
Clk

James Judge, Appellant
vs.
Francis Leclaire, Respondent

IN SUPREME COURT,
October TERM, 1860
Appeal from
St. Charles Circuit Court

AND now comes the said Appellant and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by Appellant
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 Appellant.
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 defendant below, when it should have been rendered for the plaintiff below
10. That said Court overruled the motion for a new trial, made by Appellant

E. A. Lewis,
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 .....

17

Jas. Judge, Appt

vs. } Assignment of Error

J. Leclaire, Respt

Filed 18 Oct. 1860.
W. S. Glanville
Cl.

E. C. Stewart use &c plaintiff in error
vs. Error to St. Charles Circuit Court
Alexander Gavin defendant in error

This was an action by the Sheriff to recover the two first instalments of the purchase money for lands sold by him to the defendant at a partition sale. There was a demurrer to the petition which was sustained and the plaintiff sued out his writ of error. The question arising on the demurrer is, whether the memorandum alleged in the petition satisfies the statute of frauds.

The petition pursuing the usual form, alleges an order ~~of~~ for the sale of the real estate, and the terms thereof; an actual sale by the Sheriff to the defendant pursuant to the order, of certain lots which are referred to by their number as designated on a plat filed; the price and quantity of acres, and ~~p~~ then proceeds thus: "of which sale plaintiff by his deputy then and there made a memorandum in a book kept by him for that purpose, and according to the terms of said sale the defendant should have paid plaintiff on the day of said

Sale namely October 23 1856, the sum of $1591.72 and executed to the plaintiff his two notes each for a like sum due in one and two years respectively with approved security"

Every sale & ri termini ~~po~~ imports, a seller, buyer a price, and a subject-matter; but as this term is here employed, it has a more comprehensive meaning and evidently includes in addition to these particulars, also the terms of the sale, as it respects the payments, and therefore, every requisite to a valid contract under the statute of frauds. The allegation of the petition refers directly to the sale as previously set out, all the particulars of which are there stated; and of this sale, the plaintiff avers he made a memorandum in writing. The contents of the memorandum must therefore consist of ~~the~~ all the essential elements of such sale: this would not more clearly appear ~~wi~~ had ~~the~~ all the terms of the contract been expressly ~~alleged~~ set forth in the petition, as constituting a part of the memorandum. It may be remarked that any appropriate caption or entry by the Sheriff in his sales book ~~may~~ connects the papers in the partition case with his memorandum and makes them part thereof, ~~when~~ whenever the sufficiency of the memorandum is involved

It is well settled that the

Sheriff in transactions like this, is the agent of both parties: that when the property is bid off he becomes the agent of the ~~seller~~ buyer as he was previously of the seller; and as it is the office and not the individual, who is clothed with this authority, the acts of his deputy are equally binding with his own.

Judgment reversed and the cause remanded. The other Judges concurring

E. B. Ewing

Stewart use &c.
2
Garvin

Opinion of the
Court

Rev & Kendall

Ewing

Filed 15 Dec. 1860.
W L Glanville
Ck.

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