1879
*June 4.

RODERICK McLEAN.....APPELLANT;

AND

MICHAEL HANNON.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trover, action of, against Sheriff—Transfer of property by execution debtor—Misdirection of Jury.

In an action of trover or conversion against appellant, High Sheriff of the County of *Cumberland, N.S.*, to recover damages for an alleged conversion by the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of excution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."

Held: That the sheriff was entitled under his pleas to have it left to the Jury to say whether the plaintiff had shewn title or right of

*PRESENT.—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

possession to the goods in question, and therefore there was misdirection.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* to set aside the verdict for the plaintiff.

This was an action of trover or conversion brought in the Supreme Court of *Nova Scotia*, by the respondent against the appellant, High Sheriff of the County of *Cumberland*, to recover damages for alleged conversion by the appellant of certain personal property claimed by the respondent.

The pleas were a denial of the conversion, no property in the plaintiff, no possession, or right of possession in the plaintiff, and a justification under the writ of execution. The cause was tried before *Smith*, J., and a jury at *Amherst*.

There was no evidence tendered on behalf of the defendant, and the evidence of the plaintiff's witnesses showed that part of the personal property, viz: one mare and one two year old colt, belonged to the execution debtor and was in his possession when the seizure took place. That the balance, viz: a waggon, was left with the execution debtor in exchange for another waggon. That the plaintiff was the son of the execution debtor and claimed the mare and foal, as having purchased it from his brother; and the waggon from one *Wilmot*.

The learned Judge delivered the following charge to the Jury:

"I told the Jury I thought it was incumbent on the Defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."

1879

McLEAN v. HANNON.

The Jury found a verdict for the plaintiff.

A rule *nisi* to set aside said verdict was taken out by the appellant, and argued before the Supreme Court of *Nova Scotia* in *banco*, which gave judgment discharging said rule *nisi* with costs, from which judgment this appeal was taken.

Mr. *Gormully* for appellant was not called upon.

Mr. *Haliburton* for respondent:

The appellant was bound to prove the judgment on which the execution issued. See *White* v. *Morris* (1), and he should have pleaded that the sale was fraudulent or void against creditors.

In *Adams et al* v. *Kingsmill* (2), " where a Sheriff justified under an execution, and alleged that the goods had been fraudulently sold and delivered to the plaintiffs by the debtor to defeat the execution, the plea was held bad, because it did not show the judgment upon which the execution issued."

[THE CHIEF JUSTICE :—The Sheriff was not a wrongdoer as against this third party, and the Judge should have left the Jury to decide whether there was any title in this third party, but instead of this the learned Judge says it was incumbent on the defendant to make out his case.]

There was proof of a sale, and even if the transaction was colorable, it was good between themselves, and the Sheriff must show he represented a creditor. *White* v. *Morris* is relied on in *Atkinson's* Law of Sheriffs (3); and it has also been accepted as the leading case on this point by the *Ontario* Courts.

[THE CHIEF JUSTICE :—Your authorities are all good law, but not applicable to this case.]

THE CHIEF JUSTICE:

The sheriff seized under an execution goods which

(1) 11 C. B. 1015. (2) 1 U. C. Q. B. 355.
(3) Ed. 1878 p p. 297, 301.

1879

McLEAN v. HANNON.

he found in the execution debtor's possession. A third party sues the sheriff, claiming the property as his under an alleged transfer from the execution debtor. The sheriff pleads several pleas, *inter alia* no property, or right of possession in plaintiff, also a justification under a judgment and execution. The plaintiff gives evidence of a transfer from the judgment debtor, and the sheriff gives evidence which, he contends, shows that such transfer was a mere sham, and that the property and possession never passed, nor was ever intended to pass out of the judgment debtor to the plaintiff. Unless the plaintiff could make out that he had the right of possession, by showing that he had a valid title, how could he recover the property which was not taken from his possession? And if he had no title, even against the execution debtor, what right of action could he possibly have against the sheriff or anybody else, who might have taken the goods from the judgment debtor. But the Judge, instead of submitting the question of the plaintiff's title to the jury, ruled that the defendant could not succeed, because he did not prove the judgment, as well as the execution under which he seized the goods. If this action had been brought by the judgment debtor for improperly seizing his property, this would be all well enough, but what right has a third party to sue the sheriff and recover against him for taking goods under an execution out of the execution debtor's possession, unless he is able to establish that the goods are his, or that the transfer under which he claims is, as against the judgment debtor, valid; in which case it might be necessary for the sheriff to shew the judgment, if he contested the validity of the transfer as against creditors.

STRONG, FOURNIER, and TASCHEREAU, J. J., concurred.

HENRY, J.:

The property having remained in the possession of

1879

McLEAN v. HANNON.

the father, there was no transfer of it; and that being the case any body could take it and it would not be for the plaintiff to complain. The first question which should have been put to the jury was, in whose possession was the property; and secondly, who was the owner of it.

GWYNNE, J.:

As the Court below proceeded on *White* v. *Morris* (1), it is only necessary to refer to that case. Now, *White* v. *Morris* has no application to this case. It proceeded upon its being shewn by the plaintiff that he claimed under a *deed* executed by the judgment debtor, conveying to the plaintiff the property and right to immediate possession, and which deed was good, valid and indisputable against the grantor and all the world except his creditors. The *onus* being thus shifted from the plaintiffs to the defendants, it was necessary for them to justify under a judgment. In the case as reported in 11 C. B. *Jervis*, C. J., as the basis upon which the judgment rests, says the first point urged was on the plea of not possessed; it was contended that no possession passed to the plaintiff by the deed of assignment of the 11th October, 1850, sufficient to entitle him to maintain the action, and in support of this view, *Bradley* v. *Copley* (2) and *Wheeler* v. *Montefiore* (3) were cited.

But a comparison of the deeds in those cases with the language of the *deed* here, will shew that they have no application. Here, a right to the possession did pass to the plaintiffs by the *deed*, though it was incumbered with a trust, but which trust is quite consistent with the right to the possession remaining in the plaintiff. In the cases cited, however, instead of a trust, there was a proviso to the effect that until default made the assignors should have possession, and no right to the present possession passed to the assignees.

Then he proceeds:

It must be assumed that the instrument of the 11th October, 1850, *was intended by the parties to operate as a deed;* and, though

(1) 11 C. B. 1015. (2) 1 C. B. 685.
(3) 2 Q. B. 133.

fraudulent and void as against creditors (as the Jury have found), it is a perfectly good deed against all persons except creditors. It is an established rule of law,—never doubted until the case of *Bessey* v. *Windham* (1),—that the mere production of the writ and nothing more, will not enable the Sheriff to show that a *deed*, good as against all except creditors, is fraudulent and void. He must show that he represents a creditor. For this purpose the mere production of the writ is not enough.

And again:

I think, that, to entitle the defendants in this case to dispute the title of the plaintiff, they ought to have produced and proved the judgment.

And *Maule*, J., says (2):

The deed was one under which plaintiff was bound to take possession of the goods assigned for the purpose of enabling him to perform the trusts.

And upon this he bases his judgment, that to avoid the plaintiff's title so shewn, it was necessary to shew a judgment as well as a writ.

Cresswell, J., (3), puts it in like manner:

The assignment was clearly an operative assignment as between the parties; it was intended to convey the legal property in the goods to the plaintiff, subject to the trusts. I can understand that parties may go through the ceremony of executing a thing which it is not intended to operate as a deed, *but it is not suggested that that is the case here.* This assignment can only be disputed by creditors.

The question here is one which a Jury alone can determine, namely: whether there was or not any validity whatever in the transaction set up by the plaintiff as the evidence of his title?

As to the pleading, which Mr. *Haliburton* objects to as insufficient to raise the point, it is well settled that in trover, both writ and judgment can be proved under the plea of not guilty and not possessed, but in reality the case never went so far as to call upon the defendant to show anything.

Appeal allowed with costs.

Solicitors for appellant: *Townshend* and *Dickie.*

Solicitor for respondent: *William M. Fullerton.*

(1) 6 Q. B. 40. (2) Ibid p. 1030.

(3) Ibid p. 1034.