

SUPREME COURT OF GEORGIA

Fitzgerald v. Adams

9 Ga. 471 (Ga. 1851) · Decided February 15, 1851

OPINION

LUMPKIN, J.

*473 By the Court. -Lumpkin, J. delivering the opinion. At the April Term, 1842, of the Justice's Court in and for the 549th Militia District of this State, Philip Fitzgerald recovered nine judgments against Bennet Youngblood 'and Sandford Adams.

On the 30th day of the same month, executions were issued upon these judgments by John Lunmas, a Magistrate of the District. On the 31st day of March, 1849, these fi. fas. were levied, by the Constable, on the property of Adams, one of the defendants, who made oath, that the same were proceeding illegally against him, upon the ground that he was never summoned to appear and defend said suits, nor had he any notice of the pendency thereof; that no warrants were ever issued or copies served in the cases, or service acknowledged, or judgments confessed, either by himself or any other person duly authorized by him for this purpose..

On the trial of the illegality, Archibald McEaehern was introduced, who testified that he was Constable of the 549th District in 1842, and that he had no recollection of serving Adams with copies of the summonses in these cases; that there were frequently two Constables acting in the district at the same time, but his impression was, that there was but one in 1842.

To this 'testimony the plaintiff objected, as secondary and inferior — no search having been made for the original papers in the cases; but the objection was overruled, and a verdict rendered for defendant. A certiorari was applied for and obtained, but dismissed upon the hearing, and the decision of the Justice's Court, setting aside the fi. fas. sustained.

Was the parol proof admissible on the original trial? [1.] The law requires the production of the best evidence of which the case, in its nature,, is susceptible, for the obvious reason,,that if this is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that if offered, his design would be frustrated.

The rule, say the text books, thus becomes essential to the true administration of justice. *474[2.] The cases which most frequently call for the application of this rule, are those which relate to the substitution of oral for written evidence; and these Mr. Greenleaf arranges into three classes — including in the first, those instruments which the law requires should be in writing, such as records, public documents, &c.

[3.] In all such cases, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, as long as the writing exists, and is in the power of the party.

Thus, where oaths are required to be taken in open Court, where a record of the oath is made, or before a particular officer whose duty it is to certify it, or where an appointment to an additional office is required to be made and certified on the back of the party's former commission, the written evidence must be produced. Treatise on Evidence, vol. 1, §§82, 85, 86.

[4.] By an amendatory Act to the Judiciary, passed in 1811, [Prince, 501,) Justices of the Peace are empowered to hear and determine all suits, on any liquidated demand or account not exceeding thirty dollars, by summons or warrant, a copy of which it is made the duty of the Constable to serve personally on the defendant, or leave at his usual and notorious place of abode.

[5.] And the Statute expressly declares, that “ It shall be the duty of the Constable serving the summons or warrant, to make an entry of service thereon, in uniting, and sign such return. Prince, 502. [6.] Here, then, is an Act, to wit: the service of these summonses or warrants, which the law requires to be in writing; and the rule, therefore, is imperative, that no secondary proof can be substituted until it is ascertained by the proper search, that these original documents do not exist, or are not in the power of the party.

Until the contrary is shown, we are bound to presume that these documents have been preserved, and are of file in the proper repository for the official papers of this Militia District; and until a suitable effort is made to elicit the truth from these primary and original sources of information, it would be dangerous, in the extreme, to permit the solemn judgments of a Court *475of competent jurisdiction to be set aside by the vague and uncertain recollection of the Constable.

We are all of the opinion, that the judgment must be reversed, and the certiorari sustained.