

Prac. Ct.]

EDWARDS ET AL. V. BENNETT.

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seisin in the premises descended to James Erwin and his brothers and sisters, of whom there were several as his heirs at law: that five or six months before the action of ejectment was brought against Henry Bennett, he had deserted Mary Bennett, whom he had married, and had left the premises: that when the action of ejectment was commenced, James Erwin was absent from home and knew nothing of it: that the sheriff who served the writ of ejectment upon Mary Bennett told her that the paper served was of no consequence to her, that it was not intended to disturb her or her children, and that she need give herself no uneasiness about it, and that accordingly she did not. The affidavits further stated that after the eviction by the sheriff, James Erwin, having taken legal advice, and in right of his title as a co-heir of his father, and finding the premises unoccupied and the door of the house unlocked, re-took possession, and took his mother and the rest of the family into the house, claiming title through Thomas Erwin, who, as stated above, died seised thereof.

GWYNNE, J. — From the facts shewn it appears that the parties against whom this application is made assert no claim whatever through the defendant in the writ of ejectment, but wholly independent of him, under right of the father of James Erwin, who as it is said died seised in possession of the premises. Neither the rule nor the affidavits filed in support thereof allege any forcible taking possession of the premises—or any expulsion of any person in possession, on behalf of the plaintiff, nor any actual interference with or disturbance of the officer of the court in the execution of the writ, which has been returned as fully executed.

I find no case which under these circumstances would at all warrant me in making this rule absolute in the whole or in part.

In *Thompson v. Mirehouse*, 2 Dowl. 200, the affidavit upon which the motion, which was for a new writ of *hab. fac. pos.* was made, stated that the sheriff's officer had been turned out of possession of the premises before he could deliver it to the lessor of the plaintiff and that the deponent believed the parties committing the violence were combining with the defendant in order to prevent possession being delivered, but the court held it to be indispensably necessary that the defendant in the ejectment should be connected with the dispossession. In *Pitcher v. Roe*, 9 Dowl. 971, which appears to go further than any other case, it was the defendant in the ejectment against whom the motion was made and who in the night of the same day that he was dispossessed, re-entered and took forcible possession of the premises. In *Lloyd v. Roe*, 2 Dowl. P. C. N. S. 407, the motion was for a fresh writ of *hab. fac. pos.*, upon a judgment obtained against the casual ejector, to eject the tenants in possession, and who if the action had been defended, would have been the defendants, and who, a few days after they had been ejected under the writ of *hab. fac. pos.* obtained upon the judgment against the casual ejector, came again and forcibly expelled the plaintiff's agent, who was in visible occupation and took possession again. In *McDermott v. McDermott*, 4 Prac. Rep. 252, a similar rule to the present was dis-

charged, although it was the defendant in the ejectment who, about three weeks after he had been dispossessed, returned and re-took possession, the door being locked and nailed up as was done here. But the case of *Wilson v. Chanton, et al.*, reported in L. T. N. S. 255, and (as *Wilson v. Chartier*) in 10 W. R. 546, decided by the full court, appears to me to settle the point, and greater weight must be attributed to this decision being that of the full court, than to any of the cases decided by a single judge in the Bail Court. In that case the sheriff had on the 1st February, 1862, given possession of the premises to the plaintiff under a writ of *hab. fac. pos.*, issued upon a judgment obtained against the defendants. The plaintiff so put in possession retained possession until the 7th April following, when, the writ having been returned, two of the defendants in the ejectment forcibly re-took possession from the plaintiff of two cottages from which they had been evicted. Upon an affidavit of these facts, a motion similar to that which has been made in this case, was made upon the 26th of the same month of April. Wilde, B. says—

“After the writ of *habere facias possessionem* was returned, the court as to that suit is *functus officio*.” Pollock, C. B. says—“The application is entirely novel, I never recollect a similar one. Put the case of an action of detinue for a chattel, the plaintiff recovers and the article is delivered up to him, but afterwards the defendant again gets possession, the court could not summarily interfere to enforce its re-delivery.” And Wilde, B. says—“There has been no interference with the sheriff's officer, and consequently no contempt of court—the writ for delivering possession had been executed, and its execution certified to the court and the whole thing completed; the power of the court was then at an end. If the plaintiff has a right to this rule, I do not see why he should not be able to obtain one at the end of twelve months, or even two years after a defendant may have re-entered into possession.” And the rule was refused.

The case before me is even stronger than that, when we see what is contained in the affidavits in reply. According to the plaintiff's own shewing, the writ was fully executed, and returned as executed on the 24th July. There is no allegation of any forcible taking of possession or any expulsion of any person in actual occupation for the plaintiffs, and now by the affidavits in reply, it appears that James Erwin who was in no sense a party to the action of ejectment in which the judgment was obtained whereon the writ of *hab. fac. pos.* issued, and who has no connection in title whatever with the defendant in that action, but utterly repudiating all such connection and all title having ever been in that defendant, and in his own right as heir of his father, who as he says died seised of the premises, enters in assertion of that title, expelling nobody, and takes with him his brothers and sisters, who according to his contention are co-heirs with him, and also his mother who has no estate in the premises except as entitled to dower thereout.

The rule must be discharged with costs.

*Rule discharged with costs.*