

C. L. Ch.]

HOOPER v. BURLEY.

[C. L. Ch.]

California, but where is not ascertained, that the premises in question are now, *i. e.*, on 28th Feb., 1865, vacant and were so from the 18th of that month; that various ineffectual attempts were made to serve defendants's wife who usually resides in Ernestown.

Affidavit of plaintiff's attorney, that on 7th March he searched for an appearance, but none was filed.

On this a judge's order, dated 13th March, 1865, was made, under which plaintiff on 14th of March, entered judgment for want of an appearance.

On 24th March, Eliza Burley made affidavit, that she is wife of defendant; that defendant has been absent ten years from the Province, and is as she believes residing in British Columbia; that she has been in possession of the premises since defendant's departure from the Province; that her husband is the owner and has never to her knowledge disposed of the premises; that about a year ago, Patrick Hatch and John Waddell, took forcible possession of the premises in her absence, and put plaintiff in possession; that Hatch and Waddell were indicted and convicted for forcible entry and detainer (not saying of what premises); that on 3rd March, 1865, she took possession of the premises and moved her furniture into the dwelling house, and going to Kingston left her sister and daughter in possession, and during her absence plaintiff took possession; that she did not endeavour to avoid service of the writ, and verily believes service might have been made on her.

Her attorney made oath verifying copies of the affidavits filed on the application for leave to enter judgment. One was an affidavit of the plaintiff, stating among other things his title, according to the notice of title, and that George Hinch, the mortgagee of defendant, died unmarried and intestate, leaving him surviving, his mother, his brothers Edward and Nicholas and three sisters; that all his next of kin and heirs at law assigned their interest in the mortgage to Nicholas, who assigned to plaintiff, and that the mortgage is registered; that the mortgage with interest exceeds \$1,000, and is long due and unpaid. In a second affidavit the attorney verifies a copy of the indictment against Hatch and Waddell, which charged the offence as committed against the defendant, Agnes Burley.

On these affidavits a summons was granted to set aside the judgment, alleging the possession was not vacant, and therefore the judge's order of the 13th March was wrongfully obtained.

In reply, the execution by defendant of the mortgage to plaintiff, was proved by the affidavits of a subscribing witness. Nicholas Hinch also made affidavit, that he saw defendant execute that mortgage in California which was sent to to Canada and registered, and that the memorial is a true copy of the mortgage. That after the mortgagee's death, his mother and other brothers and the sisters of the mortgagee assigned to Nicholas, who placed the mortgage and a note therein mentioned in his attorney's hands, with instructions to eject one Storms and Eliza Burley, defendant's wife; and an ejectment was brought in 1863, but the mortgage and note were mislaid and have not been found and that ejectment has not been proceeded with.

The plaintiff on the 11th April, 1865, made an affidavit, stating among other things, that the person last residing on the premises before issuing of the ejectment summons (which was tested 14th February last) abandoned the possession, and the keys were about 1st February last sent to the father of defendant's wife for her, and her attorney was immediately thereafter notified (not saying by whom or on whose behalf) that the keys were sent to her, but said attorney on her behalf refused to accept possession of the premises.

In another affidavit he swore the judgment was entered on the 14th March last, and a *hab. fac. pos.* issued on that day, at which date he supposed the premises were vacant, and had no knowledge that the defendant's wife was in possession.

In a third affidavit he swore that the premises were vacant when he bought the mortgage, and sent two of his men, Hatch and Waddell, to take possession, who found the back door open and took possession and were convicted on an indictment for forcible entry and detainer in so doing. That when Nicholas Hinch brought his ejectment the tenant under defendant's wife vacated the premises, and they remained vacant until Hatch and Waddell entered.

Alexander Dulmage in a second affidavit, swore that he was present on the 28th December, 1864, when Abraham Snider (presumably the tenant under defendant's wife) left these premises, and that Snider was the last person who resided thereon, before the bringing of this action; that he resided there about eight months, and after he left the possession was vacant until defendant's wife entered, about the third of March last.

Defendant's wife made a further affidavit, swearing that until the sheriff's officer under the writ of *venditioni exponas*, (probably an error in the affidavit for *habere facias possessionem*) dispossessed her, she was not aware an action of ejectment had been commenced, and that till such dispossession she had no knowledge of any paper, summons or copy thereof, or of any paper whatever being stuck on the door of said dwelling house. She also swore that on the second of March she was informed "that one tenant of the plaintiff's, formerly in possession of the premises for which this action was brought, had left, and that the dwelling house was vacant," and that she took possession the next day, and that she "was only in possession of the said dwelling house twelve days, when she was put out of possession by a sheriff's officer."

DRAPER, C. J. — I conclude from these affidavits, 1. That Cyrus Burley was owner in fee of these premises. 2. That he mortgaged them in fee. 3. That the plaintiff became and now is assignee of that mortgage. 4. That the mortgage is over due and that the plaintiff (no other adverse right or title being shown) has a right in law to the possession. 5. That the defendant Cyrus Burley left this Province ten years ago, and has not since returned; and that he left his wife Eliza behind him. 6. That she has no special authority from him in relation to these premises, nor any other right or authority, unless such as she may derive from being defendant's wife. 7. That she did occupy the premises (how long not