

U. S. Rep.]

MAYFIELD V. MOORE.

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We also find that the authorities have still gone farther, and held, that where a person has usurped an office belonging to another, and received the accustomed fees of the office, money had and received will be at the suit of the person entitled to the office against the intruder. *Avis v. Stukely*, 2 Mod., 380—1 Sel. Nisi Prius, 68. And the same rule was announced and enforced in the case of *Crosbie v. Hurley*, 1 Alcock and Napier 431. In this last case there was a contest as to the title to the office, and the person recovering the title to it, sued the other who had acted, and recovered the fees and emoluments received whilst in possession and exercising the duties of the place. The same rule has been adopted in this country, and seems to be based in common law rules.

It is said by Blackstone in his commentaries, vol. 2, p. 35, that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, and are also incorporeal hereditaments; whether public, as those of magistrates, or private, as bailiffs, receivers, or the like. For a man may have an estate in them, either to him and his heirs, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice; for then they perhaps might vest in executors or administrators." Thus it is seen that the right to the fees and emoluments are stated to be co-extensive with the office. And this is undoubtedly correct, as it is analogous to every other thing capable of ownership. No principle of law can be clearer than the owners of lands and chattels is entitled to the products, increase, or fruits flowing from them, and the fees of an office are incident to it as fully as are the rents and profits of lands, the increase of cattle, or the interest on bonds or other securities.

A person owning any of those things, is by virtue of such ownership equally entitled to the issues and profits thereof, as to the thing itself. If then appellant was the owner of and held the title to the office of sheriff, he was as clearly invested with the right to receive the fees and emoluments. They were incident to and as clearly connected with the office, as are rents and profits to real estate, or interest to bonds, and such like securities. See *Gluscock v. Lyons*, 20 Ind., 1; *Petit v. Rousseau*, 15 Louisiana, 289; *Dorsey v. Smith*, 28 Cal., 21, and *The People v. Tieman*, 80 Barb., 193. We think that on both reason and authority appellant is entitled to recover the fees and emoluments arising from the office, whilst it was held by appellee.

It is, however, urged that appellee surrendered the office as soon as it was finally judicially determined that appellant was entitled to it, and is therefore not liable to account for any fees but those received after the Circuit Court decided the case on appeal from the three Justices of the Peace. This is not a question of intention, but a question of legal title to the sum in dispute. Under the law, so soon as a majority of the votes were cast for appellant at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the place. The

commission was evidence of the title, but not the title. The title was conferred by the people, and the evidence of the right by the law.

Nor can it be successfully claimed that appellee was not in the wrong. He was bound before entering upon the discharge of the duties of the office and the receipt of the emoluments, to know whether he had title. His position was the same as a person who, having a defective title to a tract of land, and enters into possession and the receipts of rents and profits. He entered at his peril. Nor do we perceive any hardship. After the vote was canvassed by the clerk and a Justice of the Peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprised of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated upon another. He has entered into appellant's office without right, and has received the profits of the office, and like the person entering into the land of another with a defective title, he must answer for the profits.

Inasmuch, however, as appellee obtained the certificate of election, and a commission was issued to him, he was acting in apparent right, and so far as this record discloses, he resorted to no fraudulent or improper means to produce that result, he does not occupy the position he would, had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses incurring them. This being an equitable action, it should be governed in this respect by the same rules that obtain, had this bill for an account, instead of an action for money had and received. He should only have a reasonable allowance for the necessary expense in earning the fees and emoluments. Had he intruded without pretence of legal right then a different rule would no doubt have been applied.

In adopting the time when the Circuit Court decided that appellant was entitled to the office, as the period from which he was entitled to have the fees and emoluments of the office, the Circuit Court erred. That decision was no more potent to confer the right to the office, than was the decision of the three Justices of the Peace. It, as we have seen, was not the decision, but the vote of the majority of the electors of the county that conferred the right. The Court on the evidence found and declared the title, but did not confer it. We have seen that appellant was entitled to the office and its emoluments, from the time appellee entered into it, and became liable to account for them from that date, until he ceased to act and receive the fees and perquisites of the office.

The judgment of the Court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

—Chicago Legal News.