J. C. LOWRIE, Appellant, Us. CRUSOE, BROTHER & COMPANY, Appellees.
LRSC 3; 1 LLR 123 (1879)

[January A. D. 1879]

Appeal from the Court of Quarter Sessions and Common Pleas, Sinoe County.

The admission of secondary evidence when the best cannot be produced, is established; and for obvious principles of reason and justice a stronger foundation could not have been laid for the introduction of this class of evidence.

Where a writ or other writing is alleged to be lost it is error to reject evidence to prove this fact; a party cannot be held responsible for the loss of a writ or other process over which he did not have custody.

This case of replevin from the Court of Quarter Sessions and Common Pleas, Sinoe County, brought by the now appellees to recover certain property from the appellant and one R. S. Jones, appears from the record to have had a hearing at the May term, 1878, of said court; and a verdict having been brought in for the latter, on motion of the plaintiffs, now. appellees, a new trial was had at the August term of the court. A verdict and judgment having been obtained on this trial in their favor, the case comes up on an appeal by the appellant for reasons, as is to be legally supposed, contained in the bill of exceptions.

We find from the record that during the course of this new trial exceptions were then taken by the then defendant to certain rulings of the court, and notice given that in due time a bill of exceptions embracing these points would be tendered; but as these do not appear in any way or form in the bill of exceptions upon which the appeal was taken, it is to be presumed that said exceptions were waived or withdrawn.

We observed, however, that counsel attempted to introduce in his brief matters foreign to that contained in the bill of exceptions; and here we deem it proper to state that the party who brings an appeal to this court, and neglects to set out in his bill of exceptions every 124 point upon which it is intended to rely, creates by every such failure complications the unraveling of which must unnecessarily tax and burden the court; and it is not to be expected that courts of justice can in every instance make amends for the unskillful management of a case. And further, we would call attention to the rule of this court making it the duty of the party appealing to it

"to state in his bill of exceptions the questions of law to be especially relied on in support of the appeal."

Notwithstanding the entangled state in which this case was brought up to this court, after a careful review of the same we have been enabled to come to such conclusions upon the questions involved in the bill of exceptions as in our opinion law and equity demands; to the consideration of which we now proceed.

The first exception is thus stated: "The defendant is of opinion that under the statute laws authentic copies of an original document alone could be used to substitute or supply the place of a lost original writ in a pending suit."

Now it is shown by the records of the May term of the court, that the writ of replevin was duly returned to the court as prescribed by law; that at the following term said writ being called for, and upon search and investigation could not be found, secondary evidence was admitted.

Our law gives to the court the right "to decide on the competency and admissibility of oral testimony," (which is defined to be the detail given on oath by living witnesses of their knowledge of facts,) and to the jury the province to judge "of its credibility and effect." It allows the admission of all oral testimony "which is delivered by a competent witness, and from which the human mind can properly draw any inference having a bearing on the case." This document '(had a bearing on the case," and it was competent for the court to allow evidence to prove its loss; our statute (1st Book, 125 p. 36, sec. 4) providing how this may be done, ' 'by oath of a party to the cause, or other interested witness."

The admission of secondary evidence when the best cannot be produced, is established, and for obvious principles of reason and justice; we do not think a stronger foundation could have been laid for the introduction of secondary proof.

The custody of the writ or preservation of it was clearly not the duty of plaintiff, for we see it had been duly returned to the court on the first trial, and there is nothing to show that they had or could have had any control over its loss; or rather, if this was brought about by any default of theirs, it would not have been just to deprive them of the effect of that document to avail for whatever it might be worth. Again, it should be considered that the court had already acquired jurisdiction over the parties on the first return of the writ, and the law gave it jurisdiction over the action. Upon the whole, under all the circumstances of the case, we are of the opinion that the court did not err in admitting said secondary evidence.

The second exception is to the ruling of the court in accordance with, as stated therein, a rule of said court. On this point the court will simply repeat its opinion given at the last term of court in the case of Roberts against Roberts, that ' 'the practice of the court is the law of the court" is a legal maxim; and "every court is the guardian of its own records and master of its own practice."

As to the third exception, we are of the opinion that the court below did not err as to the law cited by the appellant in his bill of exceptions. Lib. Stat. Book 1, p. 47, sec. 5, says the provisions thereof "shall not extend to actions for personal injuries, nor to cases in which by the death of one of several co-partners his interest in the matter in dispute in the cause passes to his co-partners." The court therefore orders the judgment of the court from which the appeal was taken to be affirmed, and rules the appellant to pay costs.